

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

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TEXAS-EASTERN

Federal Trade Commission,)
Plaintiff,)
vs.)
1. Certified Merchant Services, Ltd.,)
a Texas limited partnership, d/b/a)
Certified Merchant Services, TMS,)
CMS, Inc., Transaction Merchant Services,)
Transaction Merchant Services.Com, and)
Electrocheck;)
2. Certified Merchant GP, Inc.,)
a Texas corporation, d/b/a Certified)
Merchant Services, and general partner)
of Certified Merchant Services, Ltd.;)
3. Certified Merchant Services, Inc.,)
a Texas corporation, d/b/a Certified)
Merchant Services, TMS, CMS, Inc.,)
Transaction Merchant Services,)
Transaction Merchant Services.Com, and)
Electrocheck)
4. Jonathan Frankel,)
individually and as an officer of Certified)
Merchant GP, Inc., and Certified Merchant)
Services, Inc.;)
5. Craig Frankel,)
individually and as an officer of Certified)
Merchant GP, Inc., and Certified Merchant)
Services, Inc.;)
6. Randal A. Best,)
individually and as an officer of Certified)
Merchant GP, Inc., and Certified Merchant)
Services, Inc.;)
Defendants.)

BY 4:02 CV 44
Case No.

**COMPLAINT FOR INJUNCTIVE
AND OTHER EQUITABLE
RELIEF**

Plaintiff Federal Trade Commission (“FTC” or “Commission”) for its complaint alleges:

1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to obtain preliminary and permanent injunctive relief, rescission of contracts, consumer redress, and other equitable relief for Defendants’ deceptive and unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

JURISDICTION AND VENUE

2. Subject matter jurisdiction is conferred upon this Court by 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345.
3. Venue in this District is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b), (c), and (d).

PLAINTIFF

4. Plaintiff, the FTC, is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 et seq. The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission may initiate federal district court proceedings to enjoin violations of the FTC Act and to secure appropriate equitable relief in each case, including restitution for injuries and disgorgement. 15 U.S.C. § 53(b).

DEFENDANTS

5. Defendant Certified Merchant Services, Ltd., is a Texas limited partnership with a principal place of business located at 6101 West Plano Parkway, Plano, Texas. Defendants Certified Merchant GP, Inc., and Certified Merchant Services, Inc., are a

Texas corporation and its predecessor with a principal place of business located at 6101 West Plano Parkway, Plano, Texas. Defendant Certified Merchant GP, Inc., is the general partner of Defendant Certified Merchant Services, Ltd. (Certified Merchant Services, Ltd., Certified Merchant GP, Inc., and Certified Merchant Services, Inc., are hereinafter collectively referred to as "Certified Merchant Services" or "corporate defendants"). The corporate defendants transact or have transacted business in this district and throughout the United States. The corporate defendants also do business or have done business as Certified Merchant Services, TMS, CMS, Inc., Transaction Merchant Services, Transaction Merchant Services.Com, and Electrocheck.

6. Defendant Jon Frankel is an officer and director of Defendants Certified Merchant GP, Inc., and Certified Merchant Services, Inc., and has identified himself as President of the corporate defendants and of the other names under which they do business. Mr. Frankel is a resident of Texas. He transacts or has transacted business in this district and throughout the United States. At all times material to this complaint, acting alone or in concert with others, Jon Frankel has formulated, directed, controlled, or participated in the acts and practices set forth in the complaint.
7. Defendant Craig Frankel is an officer and director of Defendants Certified Merchant GP, Inc., and Certified Merchant Services, Inc., and has identified himself as Vice President and Treasurer of the corporate defendants and of the other names under which they do business. Mr. Frankel is a resident of Texas. He transacts or has transacted business in this district and throughout the United States. At all times material to this complaint,

acting alone or in concert with others, Craig Frankel has formulated, directed, controlled, or participated in the acts and practices set forth in the complaint.

8. Defendant Randal A. Best is an officer and director of Defendants Certified Merchant GP, Inc., and Certified Merchant Services, Inc., and has identified himself as the CEO of the corporate defendants and of the other names under which they do business. Mr. Best is a resident of Idaho. He transacts or has transacted business in this district and throughout the United States. At all times material to this complaint, acting alone or in concert with others, Mr. Best has formulated, directed, controlled, or participated in the acts and practices set forth in the complaint.

COMMERCE

9. At all times relevant to this complaint, Certified Merchant Services and the individual defendants have maintained a substantial course of business offering for sale, and selling credit and debit card merchant accounts and other goods and services, in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS PRACTICES

10. Defendants act as an Independent Sales Organization (“ISO”) or a Member Services Provider (“MSP”) in the credit and debit card processing industry. ISOs or MSPs provide support to financial institutions that are members of card associations such as MasterCard and Visa. An ISO or MSP solicits merchants to establish an account to deposit the proceeds of card sales (“merchant accounts”) with financial institutions.
11. Since at least 1999, Defendants, directly or through their sales agents, have initiated contact with small business owners throughout the United States, including in this

district, to induce the purchase of their goods and services, including the establishment of merchant accounts.

12. Defendants, directly or through their sales agents, have marketed, offered for sale, or sold merchant accounts, and other goods and services, including check conversion processing through the Federal Reserve System's Automated Clearing House ("ACH") Network.

The ACH Network is a processing and delivery system for the distribution of electronic credits and debits among financial institutions. Defendants have marketed, offered for sale, or sold these goods and services under the names of Certified Merchant Services, Transaction Merchant Services, Transaction Merchant Services.Com, TMS, CMS, and Electrocheck.

13. Defendants, directly or through their sales agents, also have marketed, offered for lease, or leased credit and debit card processing terminals, also known as card swipe terminals. These leases obligate merchants to pay monthly amounts to leasing corporations.

Defendants are responsible for delivery, repair, replacement, and service of the terminals.

14. To induce merchants to purchase goods and services, Defendants have, expressly or by implication, represented that Defendants can save merchants money on their monthly business expenses by offering lower or no monthly fees, or lower discount rates on card processing, than Defendants' competitors. In some instances, Defendants have, expressly or by implication, represented that merchants can cancel their merchant accounts, return to their prior card processor, or transfer to another card processor at any time without further obligation.

15. In numerous instances, Defendants have misrepresented or failed to disclose adequately material terms associated with their card processing business and merchant accounts, including account maintenance fees, monthly minimum fees, semi-annual fees, equipment repair fees, and cancellation fees.
16. In numerous instances, Defendants have failed to provide merchants with copies of agreements for services and leases for equipment.
17. In numerous instances, Defendants have altered the terms of merchant agreements, including the insertion of pages of fine print never agreed to or shown to the merchants. This fine print contains account maintenance fees, monthly minimum fees, semi-annual fees, equipment repair fees, and cancellation fees.
18. In some instances, Defendants without explanation have withheld deposits of card sales processed from merchants. Defendants have thereby denied merchants the interest they should have earned on those deposits.
19. In numerous instances, Defendants have debited merchants' deposit accounts for semi-annual fees and cancellation fees to which the merchants did not agree. On merchants' deposit account statements, Defendants disguise these ACH debits for semi-annual fees and cancellation fees by using descriptors, such as "H-Semi," and "H-Can."
20. In numerous instances, Defendants have debited merchants' deposit accounts for check conversion processing services which the merchants have not authorized. Defendants do so by debiting the deposit accounts of merchants who either did not sign up for or activate those services.

21. In numerous other instances, Defendants do not provide services in exchange for fees charged to merchants. Defendants do so by debiting merchants' deposit accounts before Defendants have provided the merchants with promised card processing equipment and supplies.
22. When faced with unauthorized debits or fees to which they did not agree, merchants often cannot contact Defendants' sales agents. As a consequence, many merchants contact Defendants through their customer service department. Defendants' customer service department often places merchants' calls on hold, disconnects them, or transfers them to voice mail. When merchants reach Defendants' customer service representatives, they promise return calls which are often not made. Defendants' customer service representatives also promise refunds which are not given or which are delayed for months.
23. In numerous instances, merchants are often left with no choice but to cancel their agreement with Defendants, at which time Defendants debit initially undisclosed cancellation fees up to \$400 from merchants' deposit accounts.
24. In numerous instances, Defendants continue to debit monthly minimum fees and semi-annual fees from merchants who have already cancelled their agreements with Defendants.
25. In numerous instances, merchants incur fees to reverse or stop payment of unauthorized debits by Defendants. Still other merchants are forced to close or change their bank accounts to prevent unauthorized debits by Defendants.

26. In numerous other instances, merchants contact Better Business Bureaus or state Attorneys General for mediation of their complaints with Defendants. In response to these mediation efforts, Defendants routinely deny requests for reimbursement and blame misrepresentations on their sales agents, over whom they claim not to have any control.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

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

COUNT I

Unilateral Modification of Contracts

28. Defendants insert pages containing fees and expenses into contracts after merchants sign applications and without the merchants' knowledge.
29. Defendants use these inserted pages to debit fees or expenses for Defendants' products or services from merchants' deposit accounts without the merchants' agreement to the fees or expenses. Defendants automatically deduct these fees without the merchants' knowledge.
30. Defendants' practices set forth in paragraphs 28 and 29 are not reasonably avoidable, and cause substantial injury to merchants that is not outweighed by countervailing benefits to merchants or competition.
31. Therefore, Defendants' practices, as outlined above, are unfair and violates Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

Unauthorized Debiting

32. Defendants debit merchants' deposit accounts without the merchants' authorizations, including but not limited to:
- A. Debiting fees from merchants' deposit accounts before Defendants have provided the merchants with promised card processing equipment and supplies;
 - B. Debiting fees from merchants' deposit accounts for check conversion processing services before the merchants sign up for or activate the services; and
 - C. Debiting fees from merchants' deposit accounts for services which the merchants have cancelled.
33. Defendants' practices set forth in paragraph 32 are not reasonably avoidable, and cause substantial injury to merchants that is not outweighed by countervailing benefits to merchants or competition.
34. Therefore, Defendants' practices, as outlined above, are unfair and violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III

Deception - Misrepresentation

35. In numerous instances, in connection with the offering of various goods or services to merchants, Defendants make various representations, expressly or by implication, including but not limited to the following:
- A. If merchants purchase Defendants' services, merchants will save money each month on their card processing expenses;

- B. If merchants are dissatisfied with any services or representations made by Defendants, merchants can cancel or transfer to another card processor at any time with no further obligation;
- C. There is no monthly minimum fee or expense associated with merchant accounts or associated services offered by Defendants;
- D. There are no fees or expenses in addition to the discount rate and per transaction fee agreed to by merchants; and
- E. If merchants are charged cancellation fees by prior card processors, Defendants will reimburse the merchants.

36. In truth and in fact:

- A. In numerous instances, Defendants charge more money each month for card processing than their competitors;
- B. If merchants are dissatisfied and cancel Defendants' services, Defendants debit cancellation fees from merchants' accounts;
- C. There are monthly minimum fees or expenses associated with merchant accounts or associated services offered by Defendants;
- D. There are fees and expenses in addition to the discount rate and per transaction fee agreed to by merchants, including account maintenance fees, monthly minimum fees, semi-annual fees, equipment repair fees, and cancellation fees; and
- E. Defendants do not reimburse cancellation fees charged by prior card processors.

37. Therefore, the representations set forth in Paragraph 35 are false and misleading, and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT IV

Deception - Failure to Disclose

38. In numerous instances, Defendants represent, expressly or by implication, that they will charge merchants transaction fees or discount rates.

39. The Defendants have failed to disclose, clearly and conspicuously, material information, including but not limited to:

- A. that Defendants charge a monthly minimum fee of \$25 if a certain level of card sales are not placed;
- B. that Defendants charge a semi-annual fee of amounts between \$33 and \$50; and
- C. that Defendants charge a cancellation fee of amounts between \$300 and \$400 if the merchant cancels his or her agreement with Defendants before three (3) years elapse.

40. The additional information, described in paragraph 39, would be material to merchants in deciding whether to purchase Defendants' goods or services.

41. Defendants' failure to disclose clearly and conspicuously the material information set forth in paragraph 39, in light of the representations made in paragraph 38, constitute deceptive acts and practices, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

INJURY

42. Small business merchants throughout the United States have suffered substantial monetary loss as a result of Defendants' unlawful acts or practices. In addition, Defendants have been unjustly enriched as a result of their unlawful practices. Absent relief by this Court, Defendants are likely to continue to injure merchants, reap unjust enrichment, and harm the public interest.

THE COURT'S POWER TO GRANT RELIEF

43. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary relief, including rescission of contracts, redress, disgorgement, and restitution, to prevent and remedy violations of any provision of law enforced by the Commission.
44. This Court, in the exercise of its equitable jurisdiction, may award other ancillary relief to remedy injury caused by Defendants' law violations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the Federal Trade Commission, 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;
- B. Permanently enjoin the Defendants from violating the FTC Act, as alleged herein;
- C. Award such relief as the Court finds necessary to redress injury to merchants resulting from Defendants' violations of the FTC Act, including, but not limited

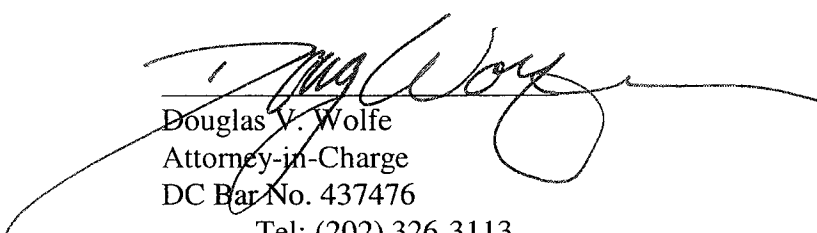
to, rescission of contracts, the refund of monies paid, and the disgorgement of ill-gotten monies; and

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

Date: February 11, 2002

Respectfully Submitted,

William E. Kovacic
General Counsel



Douglas V. Wolfe
Attorney-in-Charge
DC Bar No. 437476

Tel: (202) 326-3113
Fax: (202) 326-3395
e-mail: dwolfe@ftc.gov

Michael J. Davis
Of Counsel

NY Bar No. 3049095
Tel: (202) 326-2458
Fax: (202) 326-3395
e-mail: mdavis@ftc.gov

Federal Trade Commission
600 Pennsylvania Ave., N.W.
Room H-238
Washington, DC 20580

Attorneys for Plaintiff Federal Trade Commission