

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

FIRST AMERICAN PAYMENT SYSTEMS, LP,
a limited partnership, also d/b/a MERIMAC
CAPITAL,

ELIOT MANAGEMENT GROUP, LLC, a
limited liability company, also d/b/a SUNDANCE
PAYMENT SOLUTIONS, and

THINK POINT FINANCIAL, LLC, a limited
liability company, also d/b/a CYPRESS BAY
SOLUTIONS and IMPULSE PAYMENTS,

Defendants.

Case No. _____

**COMPLAINT FOR PERMANENT
INJUNCTION, MONETARY
RELIEF AND OTHER RELIEF**

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

The FTC brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b), 57b, and the Restore Online Shoppers’ Confidence Act (“ROSCA”), 15 U.S.C. § 8404, which authorize the FTC to seek, and the Court to order, permanent injunctive relief, monetary relief, and other relief for Defendants’ acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Section 4 of ROSCA, 15 U.S.C. § 8403.

SUMMARY OF CASE

1. Defendant First American Payment Systems, LP (“First American”) provides payment processing services, which it markets to small businesses throughout the United States through its sales agents, including Defendants Eliot Management Group, LP and Think Point Financial, LP. These agents contact these consumers to pitch First American’s services. During these sales presentations, Defendants, through their sales agents, pitch consumers with false and baseless claims about their processing services to convince consumers to enroll. For example, Defendants often misrepresent that the total monthly fees for payment processing services will not exceed certain amounts and make unsubstantiated claims that consumers will save a significant amount of money by switching to Defendants’ payment processing services. Defendants also often represent that consumers may cancel at any time without penalty, may cancel within an introductory trial period without penalty, or are merely bound to a short-term agreement. In fact, Defendants’ standard agreement for services binds consumers to a three-year agreement with a \$495.00 early termination fee. These representations violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

2. Defendants debit consumers’ bank accounts for a variety of fees, and deposit processing proceeds into those accounts. When consumers dispute debts, instruct Defendants not to debit their accounts, or stop payment through their financial institutions, Defendants, through First American’s collection department, nevertheless routinely attempt to debit consumers’ bank accounts electronically for the claimed debts. First American’s collection department attempts to evade stop-payment efforts by debiting different bank accounts or changing company names

associated with the debits. Defendants' unauthorized ACH practices are unfair in violation of Section 5 of the FTC Act.

3. Defendants enroll consumers who are convinced by their sales pitch primarily through a proprietary web portal known as "FirstOnBoard." Defendants' payment processing agreements renew automatically for another one-year term if consumers do not cancel, and therefore are "negative options" governed by Section 8403 of ROSCA, 15 U.S.C. § 8403, which requires clear and conspicuous disclosure of material terms before charging consumers. Although Defendants control the web-based platform, its appearance, and the terms that are shown to consumers on it, they nevertheless have failed to disclose, clearly and conspicuously, key terms of their agreements, including the length of the agreement, early termination fee, the automatic renewal feature, and the cancellation requirements. Defendants have violated ROSCA by failing to disclose these material terms, by charging consumers without their express informed consent, and by failing to provide a simple mechanism for consumers to cancel the agreements.

4. Defendants' deceptive and unfair practices have likely resulted in millions of dollars of consumer injury.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345.

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

PLAINTIFF

7. The FTC is an independent agency of the United States Government created by the FTC Act, which authorizes the FTC to commence this district court civil action by its own attorneys. 15 U.S.C. §§ 41–58. The FTC 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 FTC also enforces ROSCA, 15 U.S.C. §§ 8401-8405. ROSCA prohibits the sale of goods or services on the Internet through negative option marketing without meeting certain requirements for disclosure, consent, and cancellation to protect consumers. A negative option is an offer in which the seller treats a consumer’s silence—i.e., their failure to reject an offer or cancel an agreement—as consent to be charged for good and services. 16 C.F.R. § 310.2(w).

DEFENDANTS

8. Defendant First American Payment Systems, LP, also doing business as Merimac Capital, is a Texas limited partnership with its principal place of business at 100 Throckmorton, Suite 1800, Fort Worth, Texas 76102. First American transacts or has transacted business in this District and throughout the United States. At all times relevant to this Complaint, acting alone or in concert with others, First American has advertised, marketed, or sold payment processing services to consumers throughout the United States.

9. Defendant Eliot Management Group, LLC (“EMG”), also doing business as Sundance Payment Solutions, is a Utah limited liability company with its principal place of business at 100 Throckmorton Street, Suite 200, Fort Worth, Texas 76102. EMG transacts or has transacted business in this District and throughout the United States. At all times relevant to this Complaint, acting alone or in concert with others, EMG has advertised, marketed, or sold

payment processing services to consumers throughout the United States. EMG is a wholly-owned subsidiary of First American that operates as a sales entity solely to market First American's services.

10. Defendant Think Point Financial, LLC ("Think Point"), also doing business as Cypress Bay Solutions and Impulse Payment, is a Delaware limited liability company with its principal place of business at 5625 West Spring Creek Parkway, Plano, Texas 75024. Think Point transacts or has transacted business in this District and throughout the United States. At all times relevant to this Complaint, acting alone or in concert with others, Think Point has advertised, marketed, or sold payment processing services to consumers throughout the United States. Think Point has common corporate ownership with First American and operates solely as a sales entity for First American.

COMMON ENTERPRISE

11. Defendants First American, EMG, and Think Point have operated as a common enterprise while engaging in the deceptive, unfair, and unlawful acts and practices and other violations of law alleged below. Defendants have conducted the business practices described below through an interrelated network of companies that have common ownership, common officers, common office locations and use common services such as utilities, Internet service providers, and software licenses. Because Defendants have operated as a common enterprise, each of them is liable for the acts and practices alleged below.

COMMERCE

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

DEFENDANTS’ BUSINESS ACTIVITIES

13. First American markets and provides payment processing services, including debit, credit, and check processing and related services, to consumers throughout the United States. These consumers need a convenient and easy way to take payments from their customers, and rely on payment processing companies to establish debit, credit, and check processing services. Many of the consumers to whom First American markets its services are small businesses—including sole proprietorships—such as restaurants, nail salons, or small retail businesses. First American markets its services throughout the country through a variety of strategies, including the use of Defendants EMG and Think Point as well as unaffiliated independent sales organizations (“ISOs”). EMG, Think Point, and the ISOs use their own directly employed or contracted sales representatives (collectively “sales agents”) to market First American’s services.

14. Defendants, through sales agents, solicit consumers through a variety of methods including by telephone, email, and other remote means. Following the initial contact, sales agents often make a presentation to consumers, either in person or remotely, in an effort to obtain consumers’ agreement to use Defendants’ services. In recent years, remote means of contact have become more common.

15. Defendants exert influence and control over contracted sales agents who solicit consumers on their behalf. Defendants EMG and Think Point recruit, train and provides sales leads and closing assistance to their contracted sales agents and have the contractual right to terminate them without cause. First American's contracts with many of its ISOs give it the right to terminate the contract without cause and exclude specific sales agents.

16. Regardless of sales channel, First American handles the actual payment processing for consumers, including crediting consumers for payments and debiting Defendants' fees from consumers' bank accounts. First American provides customer service for all sales channels. Its collection department also pursues consumers for claimed collection balances.

Deception during the sales process

17. Defendants' sales agents use a variety of tactics to convince consumers to switch from their existing payment processors, including by offering purportedly lower prices for payment processing services. Defendants' typical pricing structure includes monthly fees that consumers will pay regardless of processing volume as well as "discount rates"—percentage-based fees that are assessed for each transaction.

18. In numerous instances, Defendants' sales agents represent to consumers that their total monthly fees other than transaction-based fees would not exceed a certain amount per month. For example, sales agents have represented to consumers that their total monthly fees would be \$20.00, \$17.00, \$15.90, \$12.00, or other similarly low amounts, or even zero. Defendants charged the vast majority of consumers in these sales channels more than these amounts.

19. Defendants' sales agents also make savings projections to convince consumers to switch from their current providers. Sales agents' methods for calculating this purported savings vary. Some sales agents use a software known as "Clientvine" to generate savings projections. Agents input certain information about a consumer's existing processing profile—such as the type of business, processing volume, and "high ticket" (maximum per-transaction amount a merchant is likely to submit for processing)—as well as the new pricing structure selected by the representative for the consumer. The program then generates a display of projected monthly and annual savings, which sales agents can show or verbally convey to consumers as part of the sales presentation. Alternatively, some sales agents rely on their supposed personal knowledge of the industry to calculate purported savings based on their comparison of a consumer's current costs for various cards to the costs they would pay under the proposed new structure, along with a comparison of other applicable monthly fees and costs.

20. Defendants' sales agents' savings projections are flawed. Defendants' annual savings claims do not account for the fact that First American typically raises its rates for merchants—including its percentage markups for merchants on cost-plus pricing—at least once a year and sometimes twice a year. Whether the sales agents use a direct-comparison method, Clientvine, or other methods, Defendants' annual savings claims assume that rates will stay constant. Clientvine's display does not qualify its annual savings projection and does not disclose to consumers that their rates will almost always increase during the term of the agreement. Nor do Defendants' sales agents verbally inform consumers that the annual savings is likely to be affected by rate changes. Additionally, some sales agents incorporate inaccurate low monthly

fees as part of their calculation, resulting in inaccurate monthly as well as annual savings projections.

21. When verbally pitching Defendants' services to consumers, in many instances, Defendants' sales agents misrepresent the conditions under which merchants can cancel services without penalty. First American's standard agreement for services, titled "Merchant Application & Agreement" (the "Agreement"), which consumers who enroll electronically are not required to read and may never see, obligates merchants to a three-year term with a \$495.00 early termination fee. Sales agents often promise consumers that they can cancel at any time without penalty, or that they can cancel without penalty within an introductory trial period such as 30 days. Sales agents sometimes represent to consumers that they are bound for only a short time period, such as one year. Sales agents have the ability to alter the standard agreement, but in many instances have made these representations without altering the agreement. Many of the small business owners solicited by Defendants' sales agents have limited English proficiency. Defendants' oral presentations to these consumers often are made in their native languages, including Spanish, Vietnamese and Amharic, but the written agreements are in English with no accompanying translations.

22. In numerous other instances, sales agents do not disclose certain key details of First American's standard agreement for services, including the term of the agreement, the early termination fee, the autorenewal provision, or the cancellation requirements. In fact, some sales managers discourage representatives from getting into detailed discussions with consumers about the early termination fee and other provisions of the agreement and even take the position that it is to the sales representatives' benefit not to understand the agreement, employing phrases like

“stay hungry, stay stupid.” Defendants’ sales agents also engage in tactics to distract or discourage consumers from reading these provisions in the agreement. As a result, many consumers believe that they can cancel the services at any time without penalty.

23. Consumers frequently complain that they learned of the agreement term and early termination fee provisions only when they attempted to cancel Defendants’ services. Moreover, when consumers who were told that they could cancel without penalty contact First American to cancel, they are typically told they are subject to a binding agreement with a specified early termination fee if they cancel before the term has expired. First American’s collections department attempts to collect early termination fees, including by electronic debits of consumers’ bank accounts, even for consumers who were told that they could cancel without penalty.

24. Defendants’ standard agreement also provides that the agreement term will auto-renew for additional one-year terms perpetually if consumers do not take affirmative steps to cancel the agreement within a short 60-day window that begins 90 days before the end of the agreement term, and that consumers must submit a written notice with an authorized signature. Defendants’ sales agents also typically do not discuss the autorenewal provision or cancellation requirements with consumers during the sales process. In many instances, consumers complain that they were unaware of the autorenewal and cancellation provisions and continue to be debited for monthly fees for months or even years after they have stopped using Defendants’ services.

25. Defendants have received numerous complaints about their sales agents misrepresenting pricing, savings, and cancellation for many years.

Online Enrollment

26. After Defendants' sales agents solicit consumers with lengthy sales pitches, in many instances failing to disclose key terms of the processing services or misrepresenting them, they lead consumers through an online enrollment process through FirstOnBoard. Consumers must access and complete the process through an Internet connection. Through FirstOnBoard, Defendants require consumers to click an acknowledgment of the agreement and certain bullet-point acknowledgments, but have not clearly and conspicuously disclosed several material terms. In particular, FirstOnBoard has failed to disclose adequately to consumers the agreement term, the early termination fee, the autorenewal provision, or the detailed cancellation requirements.

27. Prior to April 2020 FirstOnBoard did not mention that consumers were bound to an agreement term with an early termination fee unless consumers clicked on hyperlinks that they were not required to access to execute the agreement. FirstOnBoard still does not disclose the autorenewal or cancellation provisions unless consumers click on optional hyperlinks to the Merchant Processing Terms and Conditions, a dense, single-spaced, fine-print document typically consisting of five pages and more than 20 numbered paragraphs.

28. To generate an electronic agreement through FirstOnBoard, sales agents first fill in editable fields such as specific pricing arrangements and merchant identity information. The FirstOnBoard system then emails the consumer a link that grants access to a series of enrollment screens that the consumer uses to execute the agreement. Alternatively, if the sales agent is present with the consumer, the sales agent can present the enrollment screens on a computer or tablet.

29. Once the consumer accesses the enrollment screens, the system displays some of the editable information the sales agent has entered, including a summary of fees that will apply. The fee summary has never included the early termination fee. A typical variant of the fee summary page is shown in **Screenshot 1**, taken from a training video:

Screenshot 1

Rates & Fees

Credit Card Tiered

Qualified Rate	1.80 %	Transaction/Authorization Fee	\$ 0.25
Mid-Qualified Surcharge	1.51 %	Non-Qualified Surcharge	1.98 %

Other Fees

Annual Fee	\$ 95.00	Monthly Minimum	\$ 25.00
Batch/Settlement Fee	\$ 0.25	Regulatory Compliance Fee	\$ 3.42
Voice Authorization Fee	\$ 0.95	Return Draft Fee	\$ 30.00
Non-Bank Transaction Fee	\$ 0.25	DD/DBA Change Fee	\$ 35.00
Chargeback Fee	\$ 25.00	Retrieval Fee	\$ 10.00
Statement Fee	\$ 7.50		

Equipment Set Up/Order Form SI to train Yes No

Shipping Information

Ship To Merchant's DBA Address Sales Office on record Alternate Address

Alternate Address

City State Zip

Alt Phone

Shipping Method FedEx Overnight FedEx Second Day FedEx Ground FedEx Express Saver

Terminal Profile

Application Retail Retail with Tip Restaurant with Tip Lodging AFD (Automated Fuel Dispenser)

Special Features Reverse PIP Store and Forward Timed Up load 11:00 pm

Clerk/Server Prompts Remove last 4 digits Prompt Other

Multi-Merchant (list DBAs or MIDs in order)

High Speed Connection Yes Email shern.vest@first-american.net

Comments

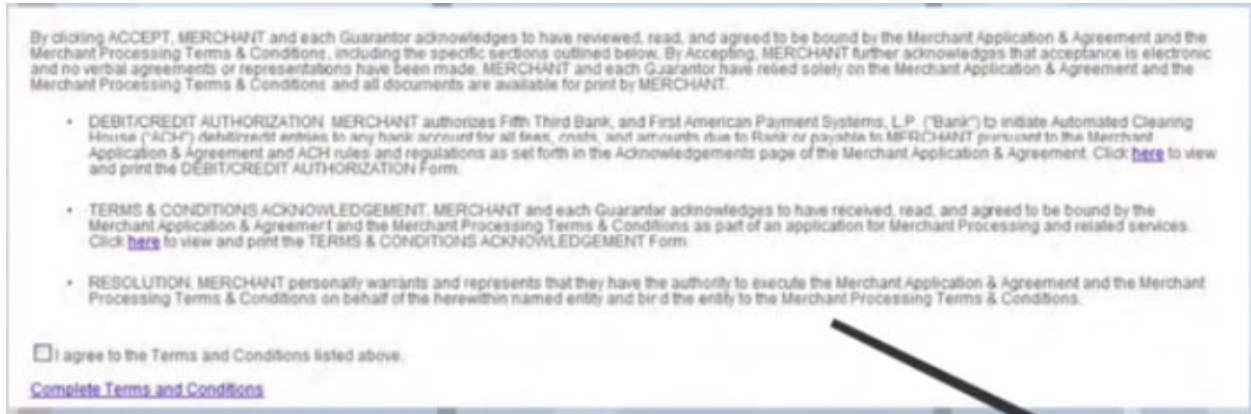
Equipment List

	Terminal Software	Peripherals
Hypercom Optimum 4100 19 Key		Reprogram
SPOS32 2.0 (F)		Credit Card
Comments:		

30. Next, the FirstOnBoard system displays a screen that includes a checkbox that the consumer must click to proceed with enrollment. Next to the checkbox is an acknowledgment that the consumer “agree[s] to the Terms and Conditions listed above.” However, the screen does not display the full agreement. Instead, it displays a bullet-point list

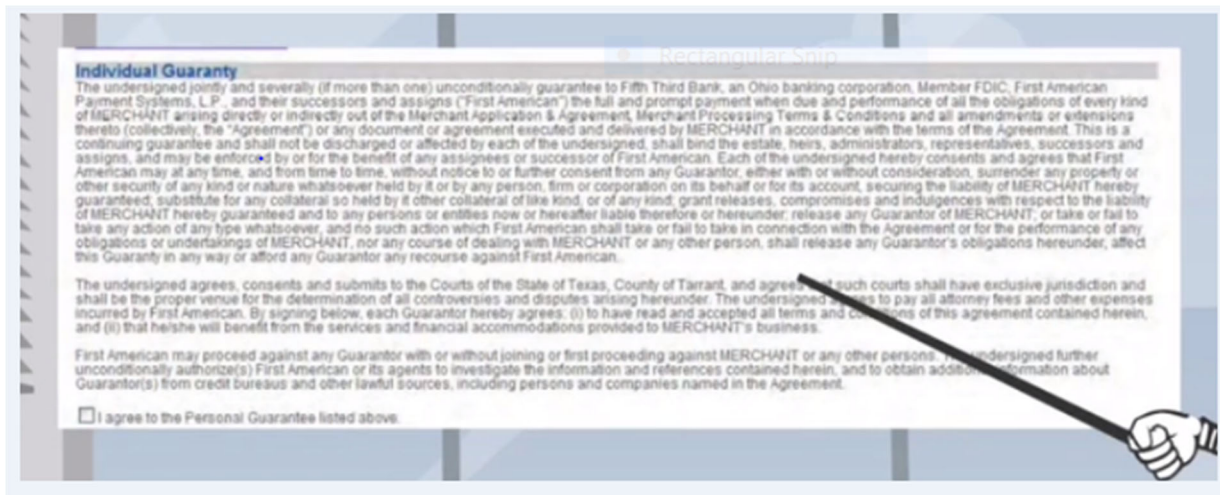
summarizing certain provisions from the agreement. The screen includes hyperlinks to additional documents, but the consumer need not access them to proceed. Prior to April 2020, this summary included no reference to the contract term, early termination fee, auto-renewal provision or cancellation requirements. Screenshot 2 is an example of this summary:

Screenshot 2



31. After the consumer clicks the checkbox on this screen, Defendants, through the FirstOnBoard system, next present a screen in which the consumer agrees to an individual guaranty imposing personal liability under the agreement. This screen has never contained references to the agreement term, early termination fee, autorenewal provision, or cancellation requirements. One variation is shown in **Screenshot 3**:

Screenshot 3



Some variations of the electronic process have also included acknowledgement screens related to payment for equipment or seasonal processing; none of these screens reference the agreement term, early termination fee, autorenewal, or cancellation provisions.

32. Once the consumer has clicked through the acknowledgment screens, Defendants, through the FirstOnBoard system, present a screen with a final “accept” button.

33. A consumer can complete the whole process and execute the agreement without ever viewing the auto-renewal and cancellation provisions, which consumers only access if they click on optional hyperlinks to the Merchant Application & Agreement and Merchant Processing Terms and Conditions or excerpts.

34. Prior to April 2020, a consumer could complete the whole process and execute the agreement without ever encountering the agreement term and early termination fee provisions.

The consumer had to click on optional hyperlinks to the Merchant Application & Agreement and Merchant Processing Terms and Conditions or excerpts.

35. Some versions of the electronic process put a link to the complete documents on the “accept screen.” A consumer who clicked on the link would see an electronically generated Merchant Application & Agreement and Merchant Processing Terms and Conditions, an example of which is depicted in **Exhibit 1**. It is substantially similar to versions of the documents that a minority of consumers execute on paper.

36. Only a consumer who clicked on a link to the full documents would be presented with those documents before being asked to agree to them. Even then, the consumer would have to read through the document, typically down to the third page, to find the agreement term and early termination fee provisions. *See Exhibit 1, p. 3.*

37. In order to view the autorenewal and cancellation provisions, a consumer who clicked on the optional hyperlinks would have to read through multiple pages of dense, single-spaced text in the Merchant Processing Terms and Conditions to find the following paragraph:

Term; Termination. The initial term of this Agreement shall commence upon BANK’s acceptance hereof (as evidenced by BANK’s performance hereunder) and continue in full force and effect for the term set forth in the Acknowledgments section of the Merchant Application & Agreement. Thereafter, the Agreement will automatically renew for additional one-year periods unless MERCHANT gives (and BANK receives) written notice of non-renewal, no less than thirty (30), but no more than ninety (90), days prior to the end of the applicable term. The written notice must contain MERCHANT’s signature as it appears on the Merchant Application & Agreement in order to be accepted.

An example of the paragraph as it appears in context is shown as numbered paragraph 11.

Exhibit 1, p. 9.

38. Defendants have been receiving complaints that consumers were not aware of the early termination fee, agreement term, auto-renewal and cancellation provisions for many years.

Unfair Debiting Practices

39. First American handles all electronic billing and credits on behalf of Defendants. In addition to making it difficult for consumers to cancel the underlying agreements by failing to disclose adequately the autorenewal and cancellation requirements, Defendants, through First American, engage in unfair debiting practices that make it extremely difficult for consumers to stop electronic debits against their bank accounts.

40. First American requires consumers to provide direct access to their bank accounts so that the company may credit payments as well as debit fees or other purported financial obligations of the consumer. First American executes these credits and debits through the Automated Clearinghouse (“ACH”) electronic funds transfer network. Consumers who wish to cancel First American’s services or dispute fees frequently attempt to block withdrawal of fees by requesting a “stop payment” through their financial institutions.

41. If First American receives notice of a stop-payment request, it suspends the consumer’s account and often places the account in collection status. First American’s collection department routinely attempts to initiate further ACH debits in an attempt to collect alleged collection balances, including early termination fees, even for consumers who have stop-payment orders in place. In many instances, this occurs before Defendants attempt to re-contact consumers. In some instances, the collection department evades existing stop-payment orders by debiting different active bank accounts held by the consumer or by changing the company name associated with the ACH debit. For example, after a consumer successfully stops a debit with the company name “First American,” the collection department may initiate a debit under the company name “Merimac Capital,” an assumed name for First American’s in-house equipment

leasing operation, or *vice versa*. In some instances, First American has attempted multiple times to debit the same fee, such as an early termination fee. In some instances, consumers are forced to close their bank accounts to stop continued withdrawals, and some consumers' bank accounts have been overdrawn because of these practices.

42. Similarly, First American does not treat a communication from a consumer disputing a fee or instructing the company not to assess a specific fee as adequate to revoke authorization to debit that fee. Instead, as detailed above, it continues to attempt to debit fees even after a consumer has communicated an authorization revocation.

43. Moreover, First American does not communicate to consumers about how to revoke ACH authority in a way that First American honors. In numerous instances, First American has debited consumers for fees that consumers told First American they did not owe, would not pay, or instructed First American not to charge.

44. Between Defendants' failure to disclose the agreement cancellation requirements or ACH revocation requirements and their affirmative efforts to evade consumers' stop payment orders, consumers face great difficulties in stopping recurring electronic debiting. Defendants have failed to provide a "simple mechanism" for consumers to stop recurring charges. Defendants' procedures continue to permit these unfair practices, and the FTC continues to receive complaints from consumers about these practices.

45. Based on the facts and violations of law alleged in this Complaint, the FTC has reason to believe that Defendants are violating or are about to violate laws enforced by the Commission. Consumers have complained to Defendants about the practices and inadequate disclosures that are the subject of this Complaint for many years. Only after receiving notice of

the FTC's investigation in January 2020 did Defendants modify FirstOnBoard to include references to the agreement term and early termination fee in the mandatory acknowledgments, and implement additional compliance measures. Defendants continue to engage in unfair debiting practices, and FirstOnBoard still does not adequately disclose the autorenewal and cancellation provisions. Further, consumers continue to complain about sales misrepresentations that occurred after Defendants were notified of the FTC investigation.

VIOLATIONS OF THE FTC ACT

46. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.” Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act. Acts or practices are unfair under Section 5 of the FTC Act if they cause or are likely to cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).

Count I Misrepresentation—Cancellation

47. In numerous instances, in connection with the marketing, promotion, offering for sale, or sale of payment processing services, Defendants represent, directly or indirectly, expressly or by implication, that Defendants' services can be cancelled:

- (a) during an initial trial period with no penalty;
- (b) prior to the end of a written agreement term with no penalty; or
- (c) at any time with no penalty.

48. In truth and in fact, in numerous instances in which Defendants make the

representations set forth in Paragraph 47, Defendants' services cannot be cancelled without penalty, and instead Defendants charge consumers an early termination fee for cancellation before the end of their contract term.

49. Therefore, Defendants' representations as set forth in Paragraph 47 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 II
Misrepresentation—Monthly Fees

50. In numerous instances, in connection with the marketing, promotion, offering for sale, or sale of payment processing services, Defendants represent, directly or indirectly, expressly or by implication, that the recurring monthly fees for Defendants' services will not exceed a specified total amount.

51. In truth and in fact, in numerous instances in which Defendants make the representations set forth in Paragraph 50, recurring monthly fees for Defendants' services have exceeded the specified total amount.

52. Therefore, Defendants' representations as set forth in Paragraph 50 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 III
Deceptive Savings Claims

53. In numerous instances, in connection with the marketing, promotion, offering for sale, or sale of payment processing services, Defendants represent, directly or indirectly, expressly or by implication, that consumers will save a significant amount of money by using

Defendants' services.

54. The representation set forth in Paragraph 53 is false or misleading or was not substantiated at the time the representation was made.

55. Therefore, the making of the representation as set forth in Paragraph 53 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Count IV
Unfair Debiting Practices

56. In numerous instances, Defendants withdraw money from consumers' bank accounts without the express authorization of consumers, including by withdrawing money after consumers have revoked authorization.

57. Defendants' actions cause or are likely to cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition.

58. Therefore, Defendants acts or practices as set forth in Paragraph 56 constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a), (n).

VIOLATIONS OF ROSCA

59. In 2010, Congress passed the Restore Online Shoppers' Confidence Act, 15 U.S.C. §§ 8401–05, which became effective on December 29, 2010. Congress passed ROSCA because “[c]onsumer confidence is essential to the growth of online commerce. To continue its development as a marketplace, the Internet must provide consumers with clear, accurate information and give sellers an opportunity to fairly compete with one another for consumers’

business.” Section 2 of ROSCA, 15 U.S.C. § 8401.

60. Section 4 of ROSCA, 15 U.S.C. § 8403, generally prohibits charging consumers for goods or services sold in transactions effected on the Internet through a negative option feature, as that term is defined in the FTC’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. § 310.2(w), unless the seller: (a) clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer’s billing information; (b) obtains the consumer’s express informed consent before making the charge; and (c) provides simple mechanisms to stop recurring charges. *See* 15 U.S.C. § 8403.

61. The TSR defines a negative option feature as: “in an offer or agreement to sell or provide any goods or services, a provision under which the consumer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.” 16 C.F.R. § 310.2(w).

62. As described in Paragraphs 26 through 37, Defendants advertise and sell payment processing services sold in transactions effected on the Internet through a negative option feature as defined by the TSR, 16 C.F.R. § 310.2(w).

63. Pursuant to Section 5 of ROSCA, 15 U.S.C. § 8404(a), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of ROSCA constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT V
Violation of ROSCA

64. In numerous instances, in connection with charging consumers for a good or service sold in a transaction effectuated on the Internet through a negative option feature, Defendants fail to:

- (a) clearly and conspicuously disclose all material terms of the transaction, including the agreement term, early termination fee, autorenewal provision, and cancellation requirements, before obtaining the consumer's billing information;
- (b) obtain the consumer's express informed consent before charging the consumer's credit card, debit card, bank account, or other financial account for the transaction; or
- (c) provide simple mechanisms for a consumer to stop recurring charges for the good or service to the consumer's credit card, debit card, bank account, or other financial account.

65. Defendants' practices as set forth in Paragraphs 26 through 44 are violations of Section 4 of ROSCA, 15 U.S.C. § 8403, and are therefore violations of a rule promulgated under Section 18 of the FTC Act, 15 U.S.C. § 57a, 15 U.S.C. § 8404(a), and therefore constitute an unfair or deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

CONSUMER INJURY

66. Consumers are suffering, have suffered, and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act and ROSCA. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers and harm the public interest.

PRAYER FOR RELIEF

Wherefore, Plaintiff requests that the Court:

- (a) enter a permanent injunction to prevent future violations of the FTC Act and ROSCA by Defendants;
- (b) award monetary and other relief within the Court's power to grant; and
- (c) award any additional relief as the Court determines to be just and proper

Respectfully submitted,

Dated: July 29th, 2022

/s/ Jason C. Moon

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