

SUMMARY OF CASE

1. Defendant First American Payment Systems, LP (“First American”) provides payment processing services, which markets to small businesses throughout the United States through its sales agents, including Defendant First Management Group, LP and Think Point

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 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 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 fair or deceptive acts or practices in or affecting commerce. The FTC also enforces ROSCA, 15 U.S.C. §§ 801-8405. 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. Negative option is an offer in which the seller treats a consumer's silence—i.e., failure to reject an offer or cancel an agreement—as consent to be charged for

payment processing services to

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

19. Defendants' sales agents also make savings projections to convince consumers to switch from their current providers. Sales agents use various methods for calculating this purported savings. 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 "flat ticket" (maximum per-transaction amount a merchant is likely to submit for processing)—and 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 only to convey to consumers as part of the sales presentation. Alternatively, some sales agents use 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 its 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 as an 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

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

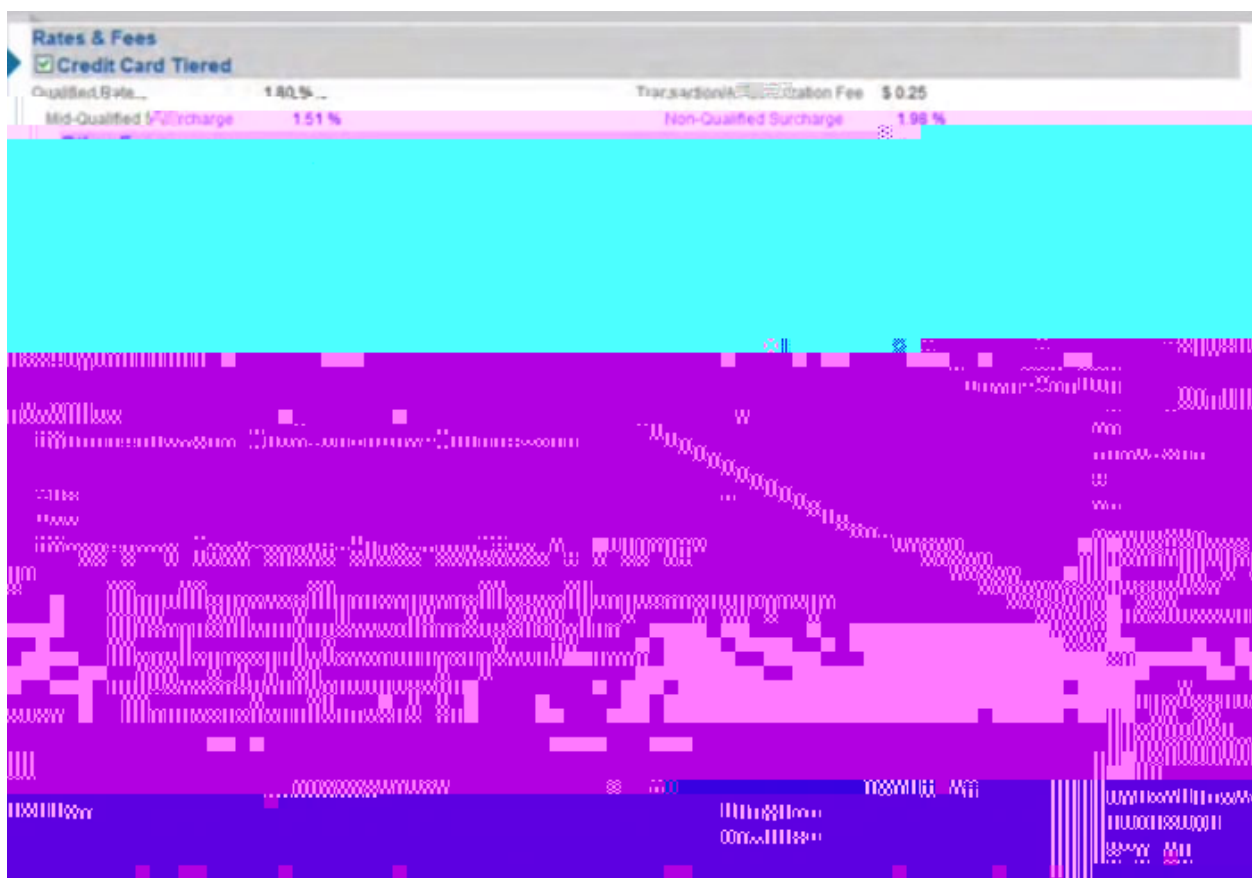
23. Consumers frequently complain that they were misled of the agreement term and early termination fee provisions only when they attempted to cancel Defendants’ services. Moreover, when consumers who were told that they could cancel without penalty contact First American to cancel, they are typically 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 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, an

29. Once the consumer accesses enrollment screens, the system displays some of the editable information the sales agent has created, 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



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 “agrees 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 links 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, termination fee, auto-renewal provision or cancellation requirements. Screenshots are 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 consum

Screenshot 3

35. Some versions of the electronic process put a link to the complete documents on the “accept screen.” A consumer who clicked 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 documents typically down to the third page, to find the agreement term and early termination fee provision. 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) and 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, autorenewal and cancellation provisions for many years.

leasing operation, or vice versa. In some instances, First American has attempted multiple times to debit the same fee, such as a yearly 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, First American 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' 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

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 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 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 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 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 draw 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 that is not outweighed by countervailing benefits to consumers or competition.

58. Therefore, Defendants acts or practices 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 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 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

COUNT V

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

JASON C. MOON
THOMAS B. CARTER
EDWARD HYNES
Federal Trade Commission
1999 Bryan Street, Suite 2150
Dallas, Texas 75201
(214) 979-9378; jmoon@ftc.gov (Moon)
(214) 979-9372; tcarter@ftc.gov (Carter)
(214) 979-9381; ehynes@ftc.gov (Hynes)
(214) 953-3079 (Fax)
ATTORNEYS FOR PLAINTIFF
FEDERAL TRADE COMMISSION