IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHAMPS SPORTS BAR & GRILL CO., FASHIONADVICE.COM, LLC D/B/A SAM MALOUF, ARCHER'S BARBEQUE, LLC, and WOKCHOW DEVELOPMENT, LLC, individually and on behalf of all others similarly situated, Plaintiffs, v. MERCURY PAYMENT SYSTEMS, LLC and GLOBAL PAYMENTS DIRECT, INC., Defendants.	CIVIL ACTION FILE NO. 1:16-cv-00012-MHC

CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Plaintiffs Champs Sports Bar & Grill Co. ("Champs"), FASHIONADVICE.COM, LLC d/b/a Sam Malouf ("Sam Malouf"), Archer's Barbeque, LLC ("Archer's"), and Wokchow Development, LLC ("Wokchow") (together, "Plaintiffs," unless otherwise identified), individually and on behalf of all others similarly situated (the "Class," as defined below), complain and allege as follows, based on personal knowledge as to themselves and on information and belief as to all other matters, against Defendants Mercury Payment Systems, LLC

("Mercury") and Global Payments Direct, Inc. ("Global") (together, "Defendants," unless otherwise identified):

INTRODUCTION

1. Plaintiffs, individually and on behalf of all others similarly situated, bring this action against Mercury, a nationally-operating merchant acquirer and payment card processor, and Global, a multinational payment technology services firm, for their use of unfair, unlawful, and fraudulent business practices in violation of federal and Georgia state law, and in breach of their agreements with Plaintiffs and the other Class members.

2. Plaintiffs are merchants operating restaurants (Champs, Archer's, and Wokchow) and a retail clothing store (Sam Malouf). To accept credit and debit card payments from customers, Plaintiffs formed business relationships with Mercury and Global.

3. Unknown to Plaintiffs, Mercury (with the knowledge and assistance of Global) has for years carried out a widespread and systematic fraud on its customers. Without notice to merchants, Mercury has been (a) surreptitiously and gradually inflating certain small, per-transaction fees imposed by card associations (e.g., VISA and MasterCard), over which Mercury has no lawful control and which merchants expect to pay at cost, and (b) imposing unauthorized "junk fees,"

reaping tens or hundreds of millions of dollars in ill-gotten gains as a result of these improper charges.

4. The card association fees at issue are of two kinds: (a) access fees (called network access and brand usage ("NABU") fees by MasterCard and acquirer processing fees ("APF") by VISA) and (b) interchange fees.

5. The access fees – also sometimes referred to as "dues and assessments" in the payment card industry – are established and published by the card associations.

6. These fees are paid by merchants and collected by payment card processors like Mercury and Global, and distributed to the card associations.

7. No entity aside from the card associations themselves has the authority to increase or decrease these fees.

8. The interchange fees are also established and published by the card associations, but payment for these fees is distributed to card issuing banks or financial institutions (e.g., Chase or Bank of America) instead of the card associations.

9. Interchange rates vary by card type. For instance, a credit card has a slightly higher interchange rate than a debit card, and a credit card with a rewards

program has a slightly higher interchange rate than a credit card without such a program.

10. However, all interchange rates are standardized, such that all merchant acquirers and processors, like Mercury and Global, must collect these fees at the same rates.

11. No merchant acquirer or processor has the authority to increase or decrease these rates.

12. During the Class Period, Mercury and Global inflated both access fees and interchange fees without notifying Plaintiffs and the other Class members that they had done so.

13. The amount of inflation added to access fees by Mercury and Global may only be a few cents per transaction but, since Plaintiffs often deal with many customers per day, the total amount of improper fees can accrue quickly.

14. The inflated amount of interchange rates varies by card type but may amount to hundreds or thousands of dollars in overcharges per merchant, depending on card type and the number of charges.

15. This unauthorized inflation has wrongfully caused each Plaintiff and Class member to pay monies in excess of what they should have paid and agreed to pay.

16. In addition to inflating access fees and interchange fees, Mercury and Global impose unwarranted junk fees that no Plaintiff or other Class member agreed to pay.

17. Using deceptive language, Mercury and Global describe these fees as having been required by third parties, when, in fact, Mercury and Global alone are responsible for their existence and Mercury and Global alone retain the revenues generated by them.

18. These fees can include monthly maintenance fees, regulatory compliance fees, and "PCI" fees, the latter of which are purportedly required to ensure merchants' compliance with privacy and fraud-prevention standards. These fees can amount to hundreds or thousands of additional dollars per year per merchant, resulting in massive undeserved windfall gains for Mercury and Global.

19. Each Plaintiff was overcharged for both access fees and interchange fees and required to pay additional junk fees by Mercury and Global. Invoices provided by Mercury to the Plaintiffs – several of which are attached as exhibits to this Complaint – demonstrate unequivocally that Mercury and Global charged them inflated access and interchange fees and various junk fees.

20. In particular, the invoices show that Mercury and Global have arbitrarily imposed different levels of inflation on different merchants, as some

Plaintiffs (such as Sam Malouf) were charged NABU and APF fees of $0.0295, or 2.95¢, per transaction, while others (such as Champs, Archer's, and WokChow) were charged as much as $0.0595, or 5.95¢, per transaction.

21. Plaintiffs were also required to pay junk fees, such as monthly maintenance fees ranging from $14.95 to $25.95, a $24.95 PCI fee, and a "Data Security" fee of $169.00, among other unwarranted and unauthorized junk fees.

22. Even an overcharge of 1¢ per transaction has a substantial impact on a merchant's revenues. The Class members may process hundreds or thousands of small-value transactions each month. Their retail prices may reflect the cost of payment card processing services, but not the added cost of artificially inflated fees or junk fees. The amounts by which Mercury and Global have overcharged them constitute a pure loss not offset by merchants' pricing decisions.

23. Moreover, due to the insidious and well-concealed nature of the fraud, merchants are unaware that Mercury and Global have been quietly extracting from them amounts to which they are not entitled under the guise that it is simply passing along standard card association fees and required compliance or maintenance fees.

24. As alleged in detail below, Mercury and Global have deceptively, inequitably, unlawfully, and fraudulently overcharged Plaintiffs and the other Class

members solely in order to maximize their own revenues at the expense of their customers.

25. Plaintiffs, individually and on behalf of the other Class members, assert causes of action for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962, *et seq.* ("RICO"), the Georgia Racketeer Influenced and Corrupt Organizations Act, OCGA §§ 16-14-4, *et seq.* ("Georgia RICO"), common law fraud, breach of contract, breach of the duty of good faith and fair dealing, unconscionability, and unjust enrichment, seeking monetary damages, including return of all monies fraudulently and/or unjustly obtained by Mercury and Global, with interest, as well as punitive damages, declaratory relief, injunctive relief, and attorneys' fees and costs of suit.

JURISDICTION AND VENUE

26. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331.

27. Jurisdiction is also proper in this Court pursuant to 28 U.S.C. § 1332(d)(2) because there are more than 100 Class members and the aggregate amount in controversy exceeds $5 million exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from Defendants. As a limited liability company, Mercury is considered an "unincorporated association"

for purposes of jurisdiction under the Class Action Fairness Act. 28 U.S.C. § 1332(d)(10).

28. This Court has personal jurisdiction over Defendants because Defendants conduct substantial business within the State of Georgia, such that Defendants have significant, continuous, and pervasive contacts with this State.

29. Venue lies within this judicial district under 28 U.S.C. § 1391 because Defendants conduct business in this district, and a substantial portion of the events, omissions, and acts giving rise to the claims herein occurred in this district. Venue is also proper in this district and division because both of Defendants' registered agents reside in this district and division. Moreover, the Card Services Agreement (Exhibit A) specifies this Court as the proper forum for any litigation arising out of or relating to that document or the relationships it creates.

PARTIES

Plaintiffs

30. Champs Sports Bar & Grill Co., doing business as "TJ's on the Avenue," operates a restaurant in Mentor, Ohio. Champs is organized under the laws of the State of Ohio and maintains its principal place of business in the State of Ohio. From at least August 2012 through March 2015, Champs obtained

payment card processing services from Mercury and Global. Champs is a privately held company.

31. FASHIONADVICE.COM, LLC d/b/a Sam Malouf operates a retail clothing store in Burlingame, California. Sam Malouf is organized under the laws of the State of California and maintains its principal place of business in the State of California. From at least October 2010 through May 2015, Sam Malouf obtained payment card processing services from Mercury and Global. Sam Malouf is a privately held company.

32. Archer's Barbeque, LLC is a Tennessee limited liability company. Archer's is a merchant that owns and operates several barbeque food restaurants in Knoxville, Tennessee. From September 2013 through September 2014, Archer's received payment processing services through Mercury and Global.

33. Wokchow Development, LLC is a Tennessee limited liability company. Wokchow is a merchant that owns and operates a restaurant, WokChow Fire Seared Asian, in Knoxville, Tennessee. WokChow previously received payment processing services through Mercury and Global.

Defendants

34. Mercury Payment Systems, LLC, currently known as Vantiv Integrated Payments, LLC, is a registered merchant services provider

headquartered in Durango, Colorado and organized under the laws of the State of Delaware. In 2014, Mercury was purchased by Vantiv, Inc., a publicly-traded technology company headquartered in Cincinnati, Ohio. Mercury processes over $25 billion per year in electronic transactions for approximately 100,000 merchant clients located in all 50 states. Mercury has annual revenues of over $300 million. Mercury is one of the world's largest merchant services providers, as measured by volume of transactions processed. Mercury is subject to the jurisdiction of this Court, registered to do business in Georgia, and was served with process through its registered agent, Corporation Services Company, 40 Technology Parkway, South, #300, Norcross, Georgia 30092.

35. Global Payments Direct, Inc. is a New York corporation that has been authorized to do business in the State of Georgia and which maintains its headquarters in Alpharetta, Georgia. Global is a multinational payment technology services vendor that contracts with multiple merchant acquirer and merchant services providers, such as Mercury, to provide payment technology services to merchant acquirers, merchant service providers, and merchants. Global is subject to the jurisdiction of this Court, registered to do business in Georgia, and was served with process through its registered agent, David Green, 10 Glenlake Parkway, North Tower, Atlanta, Georgia 30328.

FACTUAL ALLEGATIONS

A. *Mercury and Global.*

36. Mercury is a merchant acquirer and payment card processor that, according to its website, "offers small and medium sized business a comprehensive portfolio of integrated payment products and services."

37. During the Class Period, Mercury partnered with Global to deliver payment processing services to merchants.

38. Mercury has grown considerably in recent years. In 2013, it generated net revenue of $237 million, growing by 17% year-over-year, and had adjusted EBITDA of $93 million, growing by 23% year-over-year. Mercury now generates over $300 million in revenue annually.

39. Mercury was formerly majority-owned by the technology investment firm Silver Lake, but in mid-2014, it was sold to Vantiv, Inc. for an aggregate price of $1.65 billion.

40. Global is a "back-end" data processing company that, according to its website, services 1.5 million merchants in 29 countries and processes over $6.5 billion in transactions annually, generating up to $3 billion in revenue per year.

41. On or about August 10, 2003, Mercury and Global entered into a Merchant Services Agreement ("MSA"), wherein Mercury agreed to market

Global's payment processing services to merchants and perform various related tasks, such as obtaining merchant signatures on Global's merchant application and agreement, providing customer service to enrolled merchants, and handling merchant billing and collections.

42. In exchange, Global agreed to pay Mercury specified compensation.[1] *See* MSA, § D ("Global agrees to pay or cause its successors or assigns to pay [Mercury] as full consideration and compensation for all of [Mercury]'s duties and obligations hereunder, the fees set forth in Appendix A . . . .").

43. Pursuant to the MSA, Mercury was bound to provide all merchants it enrolled in Global's services with "the legal terms and conditions and other content of the merchant application and merchant agreement that are provided to [Mercury] by Global and approved by Global and its member bank." *Id.* at § F(5).

44. Mercury is not permitted to modify the merchant application or agreement without Global's written consent and the written consent of Global's member bank. *Id.*

[1] A redacted version of the MSA (and 17 amendments thereto) was filed with the Securities and Exchange Commission in conjunction with an attempt by Mercury to go public. It was, however, heavily redacted. For instance, fee and pricing information, not to mention other relevant facts, were omitted and will need to be investigated in discovery.

45. Despite the fact that Mercury was providing ongoing services to merchants it succeeded in enrolling in Global's payment processing services, the MSA specifically prohibited Mercury from being a party to the merchant application or agreement. *Id.*

46. Both Mercury and Global provide payment processing services to the merchants Mercury acquires. Information reflecting the precise division of labor between Mercury and Global is not publicly available.

47. In the payment processing industry, Mercury is known as an "independent sales organization," or "ISO." An ISO is an organization that is not a credit card association member (*i.e.*, not a VISA or MasterCard member bank) but has a bank card relationship with one or more credit card association members. ISOs can perform a number of functions, including but not limited to processing payment cards using credit card association networks.

48. Mercury is a registered ISO of Wells Fargo Bank, N.A. and Fifth Third Bank and a former registered ISO of HSBC Bank, USA, N.A.

49. Mercury and Global, like all payment card processors, provide services to merchants to ensure that transactions are properly credited to the merchant and charged to the customer through the bank or other financial institution that issued the customer's credit or debit card.

50. Each time a customer's credit or debit card is used to make a payment (*e.g.*, swiped through a point-of-sale terminal at a retail store, restaurant, or other place of business, or entered into an online payment form), information is collected for transmission through the payment processing system operated by the payment card processor, so that the merchant can receive the proceeds of the transaction; the issuing bank or financial institution and the card networks (such as VISA, MasterCard, and Discover Card) can receive their fees; and the customer's account can be correctly charged.

51. Defendants are intermediaries between these parties (*i.e.*, merchants such as Plaintiffs and the other Class members, card issuing banks or financial institutions, and card networks such as VISA and MasterCard).

52. Defendants are responsible for ensuring the fees owed to them and any relevant third parties, including the card issuing banks and card networks, are properly allocated.

53. Defendants earn their revenues primarily through per-transaction fees.

54. For every card transaction submitted by a merchant, Defendants are entitled to a fixed per-transaction fee plus a small percentage of the transaction amount, which percentage has been previously disclosed to the merchant in the

Merchant Application Fee Schedule. These charges are negotiated by Mercury and its merchant clients. They are ***not*** the subject of this litigation.

55. In addition to such legitimate processing fees, merchants are required to pay two additional kinds of fees on a per-transaction basis: (i) interchange fees published by the card associations but owed to the card-issuing bank or financial institution and (ii) access fees (a/k/a "dues" or "assessments") owed to the card associations (i.e., MasterCard's NABU fee for each MasterCard transaction and VISA's APF fee for each VISA transaction).

56. Interchange fees are generally calculated as a fixed per-transaction fee (e.g., $0.10 per transaction) plus a small percentage of each transaction (e.g., 1.65% of the amount of the transaction).

57. The interchange fee varies based on the type of card used. For example, a merchant will be charged a rate for transactions involving a bonus or rewards card that is higher than the rate for a card with no rewards program.

58. Although interchange fees are paid to the card-issuing bank or financial institution, the rates are uniform (based on card type) and have been established and published by the card associations, such as MasterCard and VISA.

59. Like interchange fees, access fees are established and published by the card associations, such as MasterCard and VISA, but these fees are actually paid to the card associations.

60. For example, VISA charges an APF fee (acquirer processing fee) and MasterCard charges a NABU fee (network access and brand usage). These fees are currently set at $0.0195, or 1.95¢, per transaction.

61. Prior to June 30, 2013, the MasterCard NABU rate was $0.0185.

62. As of July 2012, VISA began charging different APF fees for credit purchases and debit purchases. Credit purchases incur the $0.0195 rate, while debit purchases incur a lower rate of $0.0155. Prior to July 2012, all VISA card transactions were subject to the $0.0195 rate.

63. The card associations impose additional fees for specific events, such as declined card transactions.

64. Because interchange fees and card association access fees are established by the card associations, they are standardized charges that apply indiscriminately to each payment processor, and are outside the control of any such processor, including Mercury and Global.

65. Moreover, because interchange fees and card association access fees are imposed on every card transaction, merchant acquirers and processors, like Mercury and Global, pass these costs on to merchants.

66. A single credit card transaction with a customer using, for instance, a Chase VISA credit card will result in the merchant paying its processor (1) an interchange fee charged by the issuing bank, Chase, (2) a card association access fee charged by VISA, and (3) a fee charged by the processor. The first two charges are unavoidable, non-negotiable fees for all merchants and are set at published rates. The third fee is negotiable between processors and merchants and is typically established at the origination of a business relationship between a processor/acquirer and a merchant.

67. Mercury and Global have throughout the Class Period deceptively, fraudulently, unlawfully, and unfairly inflated both the card association access fees charged by the card associations and the interchange fees charged by the card-issuing banks or financial institutions, to the detriment of merchants, including Plaintiffs and the other Class members.

68. Plaintiffs and the other Class members are merchants that submitted Merchant Applications to Mercury and Global for the purpose of acquiring the ability to accept credit and debit card payments from their customers.

69. Plaintiffs attach to this Complaint as Exhibit A a copy of the Merchant Application form distributed by Mercury. Page 2 of this exhibit contains Mercury's Fee Schedule.

70. All Plaintiffs submitted a Merchant Application to Mercury and Global in substantially the form represented by Exhibit A.

B. *Mercury Aggressively Markets Payment Processing Services Using Pricing Models That Require Access Fees and Interchange Fees to Be Passed Through at Cost, But Impermissibly Inflates Those Fees.*

71. Under any pricing model, a payment processor is required to pass card association access fees and interchange fees through to merchants at cost, except where such merchants expressly agree to pay different card association access fees.

72. No processor has the authority or lawful ability to increase or decrease these fees, which are set by MasterCard and VISA, and are published by MasterCard and VISA.

73. The predominant pricing model used by payment processors, including Mercury, that serve small and mid-size consumer-oriented merchants is commonly referred to as an "interchange-plus" (or "cost-plus") model.

74. This pricing model consists of interchange fees merchants pay to card issuing banks or financial institutions and card association access fees merchants

pay to card associations, *plus* processing fees paid by merchants to the merchant acquirer or processor.

75. Under this model, the interchange fees and card association access fees are passed through to merchants at cost and are itemized in each monthly invoice or statement submitted by the acquirer or processor.

76. The acquirer or processor earns revenue in the form of processing fees, which are composed of a fixed per-transaction fee plus a small percentage of each transaction's value, as negotiated between the processor and the merchant. Processing fees represent the "plus" component of "interchange-plus" (or "cost-plus") pricing.

77. Other pricing structures utilized in the payment processing industry include tiered-rate pricing and flat-rate pricing.

78. Unlike interchange-plus pricing, tiered-rate pricing models formulate charges in tiers or categories. Flat-rate pricing further concentrates merchant charges into a single uniform rate. However, all three pricing structures incorporate interchange fees, card association access fees, and a processing fee.

79. The primary difference between interchange-plus and tiered-rate or flat-rate pricing models is that, in the former, merchants are supposed to be made

aware of the component parts of the charges imposed by the card issuing banks or financial institutions, the card associations, and the processor.

80. Because interchange-plus pricing, if done properly, provides merchants the most transparency into the costs of payment card processing, merchants have demanded it from nearly all acquirers and processors, and it has become the industry standard pricing model.

81. Interchange-plus (or cost-plus) pricing is a term of art in the payment card processing industry that is understood to mean that the acquirer or processor will pass through, at cost, the unavoidable third-party charges (interchange fees and card association access fees), and will add a separate processing fee representing the amount the processor is paid for its services, which is negotiated separately and disclosed to merchants prior to obtaining card processing services.

82. Mercury began offering interchange-plus pricing in or about 2008.

83. Today, most of Mercury's clients are charged according to an interchange-plus pricing model.

84. All Plaintiffs were charged according to an interchange-plus pricing model while they received payment processing services from Mercury and Global.

85. In its Merchant Application, Mercury and Global represent to merchants that they will pass interchange fees and card association access fees

through at cost, charging a separate processing fee (or "margin") that represents their fee.

86. The Merchant Application expressly states that, "Transactions will be priced based on ***actual interchange rates and assessments published by VISA, MasterCard and Discover*** plus the margin quoted in the above fee schedule." *See* Exhibit A at 2 (emphasis added).

87. This language in the Merchant Agreement unequivocally represents that Mercury and Global would charge merchants on an interchange-plus pricing basis – that is, that Mercury and Global's portion of the charges would be reflected in the "margin quoted in the above fee schedule" (which is subject to negotiation between Mercury and merchants), but that actual interchange fees and card association access fees (or assessments) would be passed through at cost.

88. Mercury and Global's statement that interchange fees and other dues and assessments would be passed on at cost is and was false.

89. Mercury and Global did not charge Plaintiffs and the other Class members "actual interchange rates and assessments published by VISA [and] MasterCard." Instead, as detailed below, Mercury significantly inflated, and inflates, both interchange rates and card association access fees for its own benefit, and for the benefit of Global.

90. The Merchant Application is accompanied by a set of terms called "Card Services Terms & Conditions," which was prepared by Global and distributed by Mercury.

91. The terms set forth in this portion of the document state, "Merchant pricing appears in the Card Services Fee Schedule of the Merchant Application." *See* Exhibit A at 11.

92. The terms also indicate that merchants will be charged "access fees" (that is, card association fees or dues and assessments), which are to be "displayed as a separate item on Merchant's monthly statement." *Id.*

93. In the terms, Global and Mercury further represent that such fees may incorporate fees imposed "by both the applicable card association and Member [i.e., the card issuing bank or financial institution] or Global Direct [i.e., Global]." *Id.*

94. This language in the Merchant Agreement unequivocally represents that card association access fees will be displayed on their monthly statements separately from other charges, including from charges imposed by Mercury and Global.

95. Further, this language in the Merchant Agreement unequivocally represents that fees imposed by the card associations will not be inflated or marked

up by Mercury, since Mercury is not "the applicable card association," the "Member," or "Global Direct."

96. Merchants, including Plaintiffs and the other Class members, thus were told that Mercury would pass its costs through to them and to separately display those costs on merchants' monthly statements, per the plain language of the terms.

97. These statements, too, are false because Mercury is and has for the duration of the Class Period been artificially inflating card association access fees, such as the MasterCard NABU fees and VISA APF fees.

98. Mercury marks those fees up and retains the difference between the actual published fees (owed to the card associations) and the inflated fees.

99. Mercury falsely states that the identified third parties (card associations, card issuing banks or financial institutions, or Global) "may" increase these fees, when in reality Mercury intends to, and does, inflate these fees for its own gain under the guise that any increases are the result of decisions by the identified third parties.

100. Global shares in Mercury's ill-gotten gains because Global and Mercury proportionally share transactional revenues obtained from merchants acquired by Mercury.

101. The terms further state that merchants will be charged a "PCI fee," which refers to a fee relating to Payment Card Industry compliance. *Id.*

102. Mercury does in fact charge merchants, including Plaintiffs and the other Class members, a PCI fee.

103. But Mercury falsely represents that the PCI fee will be assessed by "Member" (i.e., the card issuing banks or financial institutions) or Global. *Id.* at 11-12.

104. In reality, neither the card issuing banks or financial institutions nor Global imposes such a fee.

105. Mercury alone imposes the PCI fee and retains the revenue it generates.

106. The Merchant Application and the Card Services Terms & Conditions become the "Merchant Agreement" if a merchant submits a completed application and Mercury and Global accept it.

107. At that point, the merchant may submit transactions to Mercury for processing, and Mercury, in partnership with Global, will initiate credit and debit entries in the merchant's bank account.

108. In a document called "Operating Guide" published on its website (www.mercurypay.com), and attached to this Complaint as Exhibit B, Mercury

again states that certain charges (including the MasterCard NABU fees and VISA APF fees) will be "billed separately," but does not disclose that these itemized charges will be marked up solely by Mercury and for Mercury's and Global's benefit. *See* Exhibit B at 110-11.

109. By purporting to separately identify card association access fees on merchants' monthly statements, Mercury purposefully and intentionally deceives merchants into believing that those rates are ***actual*** assessments that do not include an arbitrary mark-up from Mercury.

110. The Card Services Terms & Conditions document is a boilerplate contract of adhesion that is not negotiable between merchants, Mercury, and Global. *See* MSA, § F(5) (prohibiting alterations). It consists of small, non-descript font occupying more than 30 densely-worded paragraphs over 14 pages.

111. The terms provide for at least a year-long duration and impose a termination fee of several hundred dollars if a merchant wishes to switch to another processor before the expiration of the contract.

C. *Defendants Systematically Overcharge Their Merchant Clients.*

112. Mercury provides its merchant clients with monthly statements reflecting the prior month's activity and the charges associated with that activity.

113. Mercury also utilizes the monthly statement platform to communicate directly with merchants, as it frequently includes messages relating to impending changes to fee structures and other matters.

114. Mercury's monthly statements are intended to, and do, induce merchants to continue purchasing Mercury's and Global's payment processing services.

115. In each monthly statement, Mercury represents that fees or charges required by third parties, such as the card associations and card issuing banks or financial institutions, have been passed through to the merchant at cost, and that Mercury's fees are separately identified.

116. This representation is communicated in Mercury's use of line items that purport to reflect the MasterCard NABU fees, VISA APF fees, and applicable interchange rates for different card types charged for the month.

117. But in fact, Mercury and Global substantially and deceptively inflate the rates attributed, in the monthly statements, to VISA, MasterCard, and the card issuing banks or financial institutions, so the MasterCard NABU rate, VISA APF rate, and various interchange rates identified in the monthly statements are false and deceptive.

118. After commencing a business relationship with a new merchant, Defendants typically comply with the terms of the Merchant Application and Card Services Terms & Conditions for a period of a few months before gradually inflating interchange rates and access fees and adding unauthorized "junk fees."

119. Plaintiffs attach to this Complaint as Exhibits C through G a series of monthly statements prepared by Mercury, each of which reflects fraudulent statements and omissions pertaining to the interchange rates, MasterCard NABU fees, and VISA APF fees charged by Mercury and Global.

120. For instance, in a September 28, 2012 statement, Defendants charged Champs a VISA credit card APF fee of $0.0295, or 2.95¢, per VISA credit card transaction, when the true fee should have been 1 cent cheaper, at $0.0195, or 1.95¢. The MasterCard NABU fee, which is billed at $0.0285, or 2.85¢, per transaction, should have been billed at $0.0185, or 1.85¢. *See* Exhibit C (Champs statement for Sept. 28, 2012) at 5.

121. According to the same statement, Defendants inflated the VISA debit card APF fee to $0.0295, or 2.95¢, per VISA debit card transaction, when the true fee should have been 1.4¢ cheaper, at $0.0155, or 1.55¢. *See id.*

122. Over time, Mercury and Global intentionally increased the amount by which these fees were improperly inflated.

123. By April 2013, Defendants had begun inflating the MasterCard NABU and VISA APF fees charged to Champs by 4 cents per transaction.

124. As reflected in Exhibit D, an invoice dated April 30, 2013, Defendants charged Champs a MasterCard NABU fee of $0.0585, or 5.85¢, per transaction, and VISA APF fees (for both credit and debit cards) of $0.0595, or 5.95¢, per transaction.

125. The true MasterCard NABU fee was $0.0185, or 1.85¢ per transaction, and the true VISA credit card APF fee was $0.0195, or 1.95¢.

126. The true VISA debit card APF fee was $0.0155, or 1.55¢.

127. Thus, Defendants inflated the MasterCard NABU fee and the VISA credit card APF fee by 4¢ per transaction, and the VISA debit card APF fee by 4.4¢ per transaction.

128. By June 2013, when MasterCard increased the NABU rate to $0.0195, Defendants had increased the MasterCard NABU fee to match the VISA APF fees. As shown in Exhibit E, Defendants charged Champs a MasterCard NABU fee of $0.0595, or 5.95¢, per transaction, starting in June 2013.

129. For the remainder of Champs' relationship with Defendants, which terminated in or around March 2015, Defendants charged MasterCard NABU and VISA APF fees of $0.0595, or 5.95¢, per transaction.

130. Defendants also overcharged Sam Malouf for card association access fees.

131. As shown in Exhibit F, a statement dated February 28, 2014, Defendants charged Sam Malouf MasterCard NABU fees and VISA APF fees (for both credit and debit cards) of $0.0295, or 2.95¢, per transaction.

132. This practice continued for the duration of Sam Malouf's business relationship with Defendants, which terminated in or around May 2015.

133. Mercury's monthly statements reflect inflated interchange rates as well.

134. For example, although the applicable interchange rate for a "VISA Rewards 1" credit card was, and is, 1.65% of the transaction amount plus 10 cents per individual transaction, Plaintiff Sam Malouf's March 2015 statement indicates that Defendants charged a rate of 2.5% (plus $0.10 per transaction), inflating the applicable rate by, in this case, 85 basis points, or 0.85%.

135. In other words, rather than multiplying the total dollar amount of transactions using that card type by 1.65%, as the published interchange rate requires, Defendants multiplied it by 2.5%, pocketing the difference.

136. In this single instance, the 0.85% inflation of the VISA Rewards 1 interchange rate netted Defendants a sum of $238.65 over and above the actual interchange charge Defendants should have applied.

137. This exemplar interchange overcharge calculation was computed in the following way. The statement shows that Sam Malouf's customers, during the month covered by the statement, used VISA Rewards 1 credit cards to purchase $28,075.82 worth of merchandise, in 26 separate transactions. The total interchange fees charged by Defendants were $704.50. This figure includes both the percentage-based fees and the fixed per-sale fee associated with each of the 26 individual transactions. Assuming Defendants charged the permissible rate of $0.10 per transaction, Defendants charged Sam Malouf $2.60 in fixed per-sale fees. That leaves $701.90 in percentage-based fees ($701.90 is 2.50% of the total sales figure, $28,075.82). Had Defendants used the proper interchange rate for this type of card – 1.65% – Defendants would only have charged Sam Malouf $463.25. The difference between the fee Defendants charged ($701.90) and the permissible fee ($463.25) is $238.65. This represents Defendants' inflation of the VISA Rewards 1 interchange rate for the month of March 2015.

138. Defendants inflated the interchange rates applicable to each Plaintiff's transactions throughout the Class Period.

139. This inflation is represented in each monthly invoice and can be quantified by comparing the rates Defendants used against the published interchange rates.

140. When a merchant begins receiving payment processing services from Defendants, the monthly invoice often lists the actual interchange rate charged for each card type. However, several months into the relationship, Defendants remove this level of detail from monthly invoices such that they no longer advise merchants of the rate associated with each card type, making it difficult for merchants to ascertain whether Defendants are overcharging them.

141. This formatting change is no accident. Indeed, Defendants' inflation of interchange rates, as alleged above, is typically coincident with the deletion of this level of detail.

142. For instance, Plaintiff Archer's formed a business relationship with Defendants in September 2013, and beginning with its May 2014 invoice, Mercury stopped itemizing the interchange rates it charged Archer's.

143. Concurrently, Defendants inflated the interchange rates for several of the card types Archer's had accepted the previous month.

144. In May 2014, for example, Defendants charged Archer's a rate of 2.3% plus $0.10 per transaction for each VISA Rewards 2 transaction, despite that

the actual published interchange rate for this card was at the time 1.95% plus $0.10 per transaction.

145. This increase resulted in Archer's being overcharged by $1.26 for this card type alone in May 2014.

146. Defendants increased the interchange rate applicable to several other card types accepted by Archer's starting in May 2014. Such overbilling continued until Archer's terminated its relationship with Defendants in September 2014.

147. Moreover, beginning in April 2014, Defendants inflated the following card association access fees charged to Archer's as follows: (a) MasterCard NABU fee from $0.0195 to $0.0595 per transaction; (b) VISA APF credit card fee from $0.0195 to $0.0595 per transaction; and (c) VISA APF debit card fee from $0.0155 to $0.0595 per transaction.

148. Archer's was overcharged for card association access fees in this fashion until it terminated its relationship with Defendants in September 2014.

149. Plaintiff Wokchow was similarly overcharged. Like Archer's, Wokchow was charged a 2.3% (plus $0.10 per transaction) rate for each VISA Rewards 2 transaction, even though the actual published interchange rate for this card type was 1.95% and $0.10 per transaction.

150. This increase resulted in Wokchow being overcharged by $3.45 for this card type during the month of January 2015.

151. Moreover, Defendants inflated the card association access fees charged to Wokchow as follows: (a) MasterCard NABU fee from $0.0195 to $0.0595 per transaction; (b) VISA APF credit card fee from $0.0195 to $0.0595 per transaction; and (c) VISA APF debit card fee from $0.0155 to $0.0595 per transaction.

152. For example, these inflated access fees resulted in Wokchow being overcharged by $66.53 during the month of June 2013.

153. By deleting the rate charged, Defendants undertake to obscure the actual charges and the process by which they were assessed in order to make it more difficult for the small and medium-sized merchants they serve to determine if they have been overcharged.

154. Defendants knew, and know, that the substantial amount of work and sophistication required to detect the truth would decrease the likelihood that the overcharges would be discovered by merchants.

155. For this reason, Defendants do not inflate the fees charged to *all* their merchant clients. Instead, they apply this practice to those merchants that lack the

resources and/or sophistication, in Defendants' estimation, to detect the overcharges.

156. For example, a large, national big-box retailer using Defendants' payment processing services, or a regional, high-volume restaurant chain, is unlikely to experience inflation of either card association access fees or interchange fees.

157. The reason is that Defendants know that such merchants have dedicated in-house resources for monitoring monthly expenses, including payment processing charges, whereas smaller merchants – such as Plaintiffs – lack such resources.

158. Indeed, Defendants test-marketed their scheme to overcharge merchants on a small group of customers to determine whether merchants would notice the inflation of interchange fees and card association access fees.

159. The test group did not notice the inflation.

160. Accordingly, Defendants expanded their scheme to a wider group of merchants, intentionally limiting this scheme at the time to smaller-volume merchants which they knew and understood would not have the resources to retain their own auditors to ensure they were charged only the agreed rates and fees.

161. Defendants have by now deployed their scheme generally, excluding only those merchants most likely to use internal or external auditors to review payment card processing charges.

162. This practice is no secret at Mercury's billing offices. Once inflation was introduced into a merchant's interchange and/or access fees, the Mercury billing system automatically created a marker or flag on the merchant's account, which was internally referred to as the "hoodwink" ticket.

163. The "hoodwink" ticket allowed, and allows, Mercury personnel to track merchants whose rates were inflated.

164. The purpose of the "hoodwink" ticket is to allow Mercury personnel – such as customer service representatives – to respond to complaints or inquiries from merchants that suspect they are being charged improperly.

165. In addition to falsely representing that interchange rates and card association access fees have been passed through to merchants at cost, and that processing fees are separately identified (or omitting to state that Mercury has included its own artificial inflation in those fees), Defendants' monthly statements are fraudulent because the messages Defendants include falsely indicate that pricing is based on a true interchange-plus model, when in reality it is not.

166. For example, Champs' June 2013 statement includes the following message: "Effective July 1, 2013, some merchants may see increases to both MasterCard's NABU fee and VISA's APF fee, which will continue to appear as separate line items on your merchant statement. These fees may include fees imposed by both the card associations and Global Payments." *See* Exhibit E at 6.

167. This message – which appeared on statements for all Class members having a Mercury account as of June 2013 – informs merchants that the MasterCard NABU fee and/or VISA APF fee may include fees imposed by third parties, *not* Mercury. Accordingly, it is false.

168. Moreover, the statement is false because, in Champs' June 2013 statement (and those of other Class members), Defendants had *already* increased the MasterCard NABU fee to maintain the same level of improper inflation that Defendants had previously imposed. That is, MasterCard increased the actual NABU rate from $0.0185 to $0.0195 in June 2013, and Defendants, in the June 2013 statement, increased the MasterCard NABU rate they charged from $0.0585 to $0.0595.

169. In addition, by purporting to separately identify card association fees as independent line items, Defendants purposefully and intentionally misrepresent

that those fees do not include Mercury's artificial inflation of those fees, and/or fail to disclose that those fees include inflation added by Mercury.

170. Defendants' fraudulent representations and omissions in the monthly statements induced merchants, including Plaintiffs and the other Class members, to continue purchasing Defendants' services.

171. Had Plaintiffs and the other Class members known that Defendants' monthly statements included improperly inflated card association access fees and interchange fees, they would have terminated their relationships with Defendants and demanded a return of the amounts by which they were overcharged.

172. Defendants also impose unwarranted and unauthorized fees on merchants.

173. For example, Defendants charged each Plaintiff a monthly maintenance fee (described as "MON MAINT" in statements) of $14.95, $15.95, $20.95, or $25.95, but the Merchant Application executed by each Plaintiff expressly provides that no such monthly maintenance fee will be charged. The amount identified for "Account Maintenance Fee (per month)" is "$0.00" in each Plaintiff's completed Merchant Application.

174. As alleged above, Defendants also charge merchants a "PCI fee" purportedly for costs associated with ensuring compliance with privacy and fraud-prevention standards.

175. These fees are described in the Card Services Agreement as having been imposed by member banks or Global, but in fact, Mercury imposes this $24.95 fee and retains the revenues it generates.

176. Defendants also impose a fee *in addition to the "PCI" fee* for "regulatory compliance," denoted "REG COMP" on monthly statements.

177. Defendants charged Sam Malouf $79.95 per month for regulatory compliance, but no provision in the Card Services Agreement or other document authorizes Defendants to charge this fee, and Sam Malouf never agreed to pay this fee.

178. It is unclear when Defendants first began charging this "REG COMP" fee, but Plaintiffs attach as Exhibit G an invoice to Sam Malouf dated May 29, 2015 reflecting this charge.

179. Plaintiffs believe that all merchants with accounts as of (at least) May 2015 were charged this unwarranted and unauthorized fee.

180. Defendants also charge merchants a "Data Security" fee on an annual basis, *on top of the PCI fee and the regulatory compliance fee*. This fee is $169.00 per year, and it is not authorized. Archer's, for example, was charged this fee.

181. Defendants have also imposed on merchants an undisclosed and unauthorized "MSA-Breach Only" fee of $5.95 per month. Both Archer's and Wokchow were charged this fee.

182. Finally, both Archer's and Wokchow were charged hidden, undisclosed, unauthorized fees labeled "Global ATL" of $0.20 per transaction.

183. Plaintiffs believe that Defendants have charged, and are charging, other improper and excessive fees that will be uncovered through discovery.

D. *Defendants' Practices Spawn Litigation.*

184. Defendants' practice of advertising and contracting for low-cost, transparent, interchange-plus pricing only to deceptively inflate their fees and charges after locking merchants into a long-term deal enforced with a hefty termination fee is reviled by their competitors.

185. In 2014, Heartland Payment Systems, Inc. ("Heartland"), a direct competitor of Mercury and indirect competitor of Global, sued Mercury in federal court alleging various causes of action, including violation of the Lanham Act, false advertising, and unfair competition, arising out of the same types of acts and

practices alleged in detail herein. *See Heartland Payment Systems, Inc. v. Mercury Payment Systems, LLC*, C.A. No. 4:14-cv-00437-CW (N.D. Cal.) (the "*Heartland* Action").

186. Heartland alleged that Mercury advertises low, transparent pricing in its Merchant Application and that these representations induce merchants to leave Heartland and do business with Mercury.

187. However, according to Heartland, after the merchants become customers of Mercury, Mercury "engages in a deceptive and deliberate scheme to divert money to itself" by (1) inflating interchange fees and card association access fees that were supposed to be passed through at cost, and (2) imposing undisclosed junk fees.

188. As alleged in the *Heartland* Action, Mercury's false advertisements harm not only Heartland, which loses business to Mercury, but also "the small and medium-sized merchants they are directed at, whose thin profit margins are being secretly eroded by Mercury."

189. Mercury subsequently moved for dismissal of these allegations, but that motion was substantially denied. *See* Feb. 23, 2015 Order on Motion to Dismiss.

190. Regardless of the outcome of the litigation, the *Heartland* Action will not make merchants, including Plaintiffs and the other Class members, whole for Defendants' prior improper fees and charges. Indeed, no claim is asserted on behalf of merchants in the *Heartland* Action.

191. In December 2015, nearly two years after Heartland initiated the *Heartland* Action against Mercury, Global announced that it had entered into a binding agreement to purchase Heartland for $4.3 billion.

192. Mercury was also sued in Colorado state court for breach of contract by Payment Revolution, LLC ("Payment Revolution"), an independent sales organization Mercury hired to market and sell payment processing services on its behalf, in part because Mercury asserted that it would pass through interchange fees and assessments to merchant at cost, but was secretly inflating those fees. *See Payment Revolution, LLC v. Mercury Payment Systems, LLC*, No. 14-cv-30171 (Colo. Dist. Ct., Denver Cnty.).

193. Payment Revolution alleged that such practices precluded it from being honest with merchants as to what fees and costs they would actually pay if they contracted to receive payment processing services through Mercury.

E. ***Defendants Attempt to Placate Merchants that Suspect Overbilling.***

194. Despite Defendants' best efforts, merchants occasionally suspect they are not being billed appropriately. Mercury has received complaints of overbilling, including complaints regarding inflated interchange fees and inflated card association access fees.

195. Merchants are de-incentivized from terminating their contracts with Defendants because, if the contractual period has not yet expired, they would be liable for a termination fee.

196. As alleged above, Mercury's internal merchant billing system generates a special marker or flag when interchange and/or card association access fees have been inflated – known internally as the "hoodwink" ticket – in part to facilitate customer inquiries and complaints. To induce merchants to stay with Mercury despite the overcharges, Mercury instructs its employees to waive certain overcharges if the merchant agrees to extend the term of its contract.

197. In other words, to obtain a refund of money it never should have been charged in the first place, and avoid a costly termination fee, the merchant is forced to extend its business relationship with Defendants – thus subjecting itself, at least potentially, to additional overcharges in the future, and certainly restricting its ability to shop for a new, honest vendor.

F. ***Defendants Attempt to Immunize Themselves Via Oppressive Contract Terms.***

198. The adhesive Card Services Agreement contains a series of oppressive terms designed to insulate or immunize Defendants from liability for the practices complained of herein.

199. These terms purport to (a) limit Defendants' liability to ***one month***'s worth of overcharges (¶12); (b) limit the statute of limitations for claims related to "billing errors" to ***90 days*** (*id.*); (c) require merchants to pay Defendants' attorney fees in ***any legal action***, regardless of whether Defendants win or lose (¶17); and (d) prohibit merchants from pursuing their claims in a class action (*id.*).

200. These provisions violate public policy, lack mutuality, are unconscionable, and are otherwise void and unenforceable.

201. Indeed, recognizing that the mandatory one-way fee provision is unenforceable (¶ 199(c), *supra*), Defendants have already stipulated that they will not seek to enforce it in this case. *See* Dkt. No. 16-1 in Civil Action File No. 15-cv-4311-MHC ("Defendants do not intend to seek attorneys' fees under Section 17 in this case, even if they are the prevailing party, and the Court may consider this a binding judicial admission in this case"). Although the admission occurred under an earlier case number, that case has been consolidated into this one. Moreover, all

Plaintiffs and Class members contemplated in this Complaint were purported Class members who benefited from Defendants' earlier judicial admission.

202. Defendants will not seek to enforce in this action the provision in the Card Services Agreement requiring merchants to pay their attorney's fees.

CLASS ACTION ALLEGATIONS

203. Plaintiffs bring this action individually and on behalf of all others similarly situated as a class action pursuant to the provisions of Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure.

204. The Class is defined as follows:

> All persons or entities that were charged (a) a card association access fee exceeding published access fees, and/or (b) an interchange rate exceeding published interchange rates, and/or (c) any other fee not authorized by the Card Services Agreement during the time period relevant to this action.

205. Excluded from the Class are Defendants and their subsidiaries, parents, and affiliates; all persons who make a timely election to be excluded from the Class; governmental entities; and the judge to whom this case is assigned and his immediate family. Plaintiffs reserve the right to revise the Class definition based on information learned through discovery.

206. Certification of Plaintiffs' claims for class-wide treatment is appropriate because Plaintiffs can meet all the applicable requirements of Federal

Rule of Civil Procedure 23 and can prove the elements of their claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claim.

207. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** The members of the Class are so numerous that individual joinder of all the members is impracticable. On information and belief, there are not less than tens of thousands of merchants that have been damaged by Defendants' wrongful conduct as alleged herein. The precise number of Class members and their addresses is presently unknown to Plaintiffs, but may be ascertained from Defendants' books and records. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

208. **Commonality and Predominance – Federal Rules of Civil Procedure 23(a)(2) and 23(b)(3).** Numerous common questions of law and fact exist as to the claims of Plaintiffs and the other Class members. Such questions include, but are not limited to:

a. Whether Defendants have acted and continue to act unlawfully by inflating fees charged to merchants and imposing unauthorized junk fees on

merchants, including Plaintiffs and the other Class members, for Defendants' own benefit;

b. Whether Defendants have acted and continue to act unfairly by inflating fees charged to merchants and imposing unauthorized junk fees on merchants, including Plaintiffs and the other Class members, for Defendants' own benefit;

c. Whether Defendants have acted and continue to act deceptively, misleadingly, unfairly, unlawfully, and/or fraudulently by inflating fees charged to merchants and imposing unauthorized junk fees on merchants, including Plaintiffs and the other Class members, for Defendants' own benefit;

d. Whether Defendants are liable to Plaintiffs and the other Class members for their practice of inflating fees charged to merchants and imposing unauthorized junk fees on merchants for Defendants' own benefit;

e. Whether Defendants' inflation of fees and imposition of unauthorized fees constitutes a breach of any contract and/or any duty of good faith and fair dealing;

f. Whether Defendants' contracts include unconscionable or otherwise unenforceable provisions; and

g. Whether Defendants should be enjoined from engaging in any or all of the unlawful, unfair, and/or fraudulent practices complained of herein.

209. Defendants have engaged in a common course of conduct toward Plaintiffs and the other Class members. The common issues arising from this conduct that affect Plaintiffs and the other Class members predominate over any individual issues. Adjudication of these common issues in a single action has important and desirable advantages of judicial economy.

210. **Typicality – Federal Rule of Civil Procedure 23(a)(3).** Plaintiffs' claims are typical of the other Class members' claims because, among other things, all of the claims arise out of a common course of conduct and assert the same legal theories. Further, Plaintiffs and members of the Class were comparably injured through the uniform misconduct described above.

211. **Adequacy of Representation – Federal Rule of Civil Procedure 23(a)(4).** Plaintiffs are adequate Class representatives because their interests do not conflict with the interests of the other Class members they seek to represent; Plaintiffs have retained counsel competent and experienced in complex commercial and class action litigation; and Plaintiffs intend to prosecute this action vigorously. Class members' interests will be fairly and adequately protected by Plaintiffs and their counsel.

212. **Declaratory and Injunctive Relief – Federal Rule of Civil Procedure 23(b)(2).** Defendants have acted or refused to act on grounds generally applicable to Plaintiffs and the other Class members, thereby making appropriate final injunctive and declaratory relief, as described below.

213. **Superiority – Federal Rule of Civil Procedure 23(b)(3).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiffs and each of the other Class members are small compared to the burden and expense that would be required to individually litigate their claims against Defendants, thus rendering it impracticable for Class members to individually seek redress for Defendants' wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

CLAIMS FOR RELIEF

COUNT I: Fraudulent Omission

214. Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-213, above, as though fully set forth herein.

215. Plaintiffs bring this claim individually and on behalf of all other Class members.

216. As alleged in this Complaint, Defendants knew but intentionally failed to disclose that their pricing models included inflated or marked-up card association access fees, NABU fees, APF fees, and dues and assessments, as well as inflated or marked-up interchange rates and fees, and a variety of junk fees not authorized by the Merchant Application and Card Services Agreement, including without limitation the PCI fee, the monthly maintenance fee, the regulatory compliance fee, the "Global ATL" fee, the Data Security fee, and the "MSA-Breach Only" fee described above.

217. Plaintiffs and the other Class members were told and otherwise led to believe that the payment processing services provided to them by Defendants would be based on an "interchange-plus" (or "cost-plus") basis, and that, accordingly, the access fees, NABU fees, APF fees, and dues and assessments, and the interchange rates and fees for which they would be charged would include only

those fees required by the card networks. Indeed, Mercury expressly stated that "[t]ransactions will be priced based on actual interchange rates and assessments published by VISA [and] MasterCard." Exhibit A at 2.

218. Plaintiffs and the other Class members executed the Merchant Application disclosing the permissible fees Defendants would charge them, and justifiably relied upon the terms of that document and the related Card Service Agreement, as alleged in this Complaint. Defendants knew that Plaintiffs and other Class members did not expect they would be charged inflated and marked up fees and card association access fees that were not authorized by the Merchant Application and intentionally and improperly failed to disclose the truth to induce Plaintiffs and other Class members to enter into the Merchant Application and continue doing business with Defendants.

219. The nature and amount of fees Defendants charged to and collected from Plaintiffs and the other Class members were material to Plaintiffs and the other Class members.

220. Had Defendants disclosed that they would not pass through the access fees, NABU fees, APF fees, and dues and assessments, or the interchange rates and fees, required by the card networks at cost – and would, in fact, mark up and

overcharge those fees – Plaintiffs and the other Class members would not have purchased card processing services from Defendants.

221. Similarly, had Defendants disclosed that they would charge Plaintiffs and the other Class members various junk fees – such as the PCI fee, the monthly maintenance fee, the regulatory compliance fee, the "Global ATL" fee, the Data Security fee, or the "MSA-Breach Only" fee alleged herein – not authorized by the Card Services Agreement, Plaintiffs and the other Class members would not have purchased card processing services from Defendants.

222. For the duration of the Class Period, Defendants, in fact, inflated the access fees, NABU fees, APF fees, and dues and assessments, and the interchange rates and fees, that they charged Plaintiffs and the other Class members, without authorization or disclosure of this fact.

223. Furthermore, in each monthly invoice that Mercury provided to Plaintiffs and other Class members during the Class Period, Mercury failed to disclose that it had imposed inflated or marked up access fees, NABU fees, APF fees, dues and assessments, and interchange rates and fees, on a per-transaction basis. Had Plaintiffs and the other Class members been apprised of the true facts – that Defendants had inflated or marked up the card association fees they were

required to pay – they would not have continued obtaining credit card processing services from Defendants.

224. Plaintiffs and the other Class members were damaged in an amount to be proven at trial as a result of Defendants' fraudulent omission and failure to disclose the true nature and amount of the fees it would charge them – and did charge them – during the Class Period.

225. Accordingly, Plaintiffs seek monetary, declaratory, and injunctive relief, including attorneys' fees and costs of suit.

COUNT II: Fraudulent Misrepresentation

226. Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-213, above, as though fully set forth herein.

227. Plaintiffs bring this claim individually and on behalf of all other Class members.

228. Defendants expressly represented to each Plaintiff and other Class member that "[t]ransactions will be priced based on actual interchange rates and assessments published by VISA [and] MasterCard." Exhibit A at 2.

229. In fact, Defendants inflated both the access fees, NABU fees, APF fees, and dues and assessments, and the interchange rates and fees that they charged to Plaintiffs and the other Class members, as alleged above.

230. Defendants also expressly represented to each Plaintiff and other Class member that they would charge no monthly maintenance fee. This representation is contained in the Merchant Application's "Account Maintenance Fee (per month)" line item. As alleged above, each Plaintiff's completed Merchant Application states that this fee will be "$0.00," and Plaintiffs allege, on information and belief, that the same is true for each Class member.

231. In fact, Defendants charged each Plaintiff a monthly maintenance fee (denoted "MON MAINT" in statements) in the amount of $14.95, $15.95, $20.95, or $25.95 per month.

232. Defendants also expressly represented that any PCI fee charged to Plaintiffs and the other Class members would be imposed by Global or the card-issuing banks or financial institutions. *See* Exhibit A at 11-12. Mercury does in fact bill merchants, including Plaintiffs and the other Class members, for a PCI fee. But neither the card issuing banks or financial institutions nor Global imposes such a fee. Mercury alone imposes the PCI fee and retains the revenue it generates.

233. Furthermore, each and every monthly statement supplied to Plaintiffs and the other Class members by Mercury contains additional fraudulent misrepresentations, all of which were made intentionally by Defendants with the purpose of causing Plaintiffs and other Class members to rely upon them.

234. For example, by stating on those monthly statements that each Plaintiff has been charged standard NABU fees, APF fees, and/or dues and assessments for each MasterCard or VISA credit card transaction, Mercury fraudulently misrepresents those charges.

235. By stating on those monthly statements that each Plaintiff has been charged the published interchange rate for any particular card type – including without limitation the "VISA Rewards 1" and "VISA Rewards 2" card types described above – Mercury fraudulently misrepresents those charges as well.

236. Had Mercury accurately represented that it would charge Plaintiffs and the other Class members unauthorized monthly maintenance fees, unauthorized PCI fees, unauthorized regulatory compliance fees, inflated card association access fees, and/or inflated interchange fees, Plaintiffs and the other Class members would not have obtained card processing services from Defendants, or would not have continued to receive such services from Defendants.

237. Plaintiffs and the other Class members were damaged in an amount to be proven at trial as a result of Defendants' fraudulent misrepresentations concerning the true nature and amount of the fees they would charge them – and did charge them – during the Class Period.

238. Accordingly, Plaintiffs seek monetary, declaratory, and injunctive relief, including attorneys' fees and costs of suit.

COUNT III: Breach of Contract and Breach of Duty of Good Faith and Fair Dealing

239. Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-213, above, as though fully set forth herein.

240. Plaintiffs bring this claim individually and on behalf of all other Class members.

241. Plaintiffs and Defendants have contracted for payment processing services. As alleged above, the actions taken by Defendants have violated the specific terms of the agreements among Plaintiffs and Defendants. Defendants are liable for the losses of Plaintiffs and the other Class members that have resulted from Defendants' breaches of the parties' contractual agreements.

242. Defendants violated the Card Services Agreement by imposing a range of fees and charges that were never authorized therein, including, without limitation, inflated interchange fees and card association access fees above and beyond their actual published rates, as well as unauthorized junk fees. Thus, Defendants have breached the express terms of their own standardized contracts.

243. Georgia law imposes upon each party to a contract the duty of good faith and fair dealing. According to the terms of the contract, Georgia law applies to it. *See* Exhibit A at ¶17.

244. Good faith and fair dealing, in connection with the execution of contracts and discharging of performance, means preserving the spirit, not merely the letter, of the bargain. The parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form.

245. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts. As alleged above, Defendants have evaded the spirit of their bargain with Plaintiffs and other Class members, and abused their power to specify terms, by charging unauthorized and undisclosed junk fees, inflating both interchange fees and card association access fees, and obscuring the rates they actually used to assess such fees by eliminating them from monthly invoices.

246. Subterfuge and evasion, such as Defendants' misconduct here, violate the obligation of good faith in performance even when an actor believes his conduct to be justified.

247. Plaintiffs and the other Class members have performed all, or substantially all, of the obligations undertaken by them in the Card Services

Agreement, or those obligations are waived.

248. Plaintiffs and the other Class members sustained damages as a result of Defendants' breaches of the Card Services Agreement, as well as the further breaches of the Card Services Agreement as modified by the covenant of good faith and fair dealing.

249. In the event Mercury is deemed a non-party to the Card Services Agreement, Plaintiffs allege that Mercury formed a contract with Plaintiffs by its performance, including without limitation its provision of payment card processing services, initiation of credit and debit transactions in their accounts, and its provision of monthly invoices.

250. Mercury breached this contract with Plaintiffs (and other Class members) by charging inflated interchange rates, inflated card association access fees, and imposing unauthorized junk fees, as alleged herein.

251. Plaintiffs and the other Class members sustained damages as a result of Mercury's breaches of this contract, as well as the further breaches of this contract as modified by the covenant of good faith and fair dealing.

COUNT IV: Unconscionability

252. Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-213, above, as though fully set forth herein.

253. Plaintiffs bring this claim individually and on behalf of all other Class members.

254. Defendants have attempted to immunize themselves from legal claims by imposing adhesive, unfair, and draconian terms in their Card Service Agreement making it extremely costly and practically impossible to obtain relief from their fraudulent overbilling practices, as alleged in this Complaint.

255. Such terms include those purporting to require merchants to pay attorneys' fees and other costs associated with any legal action, without regard to outcome (¶17) (a provision which Defendants have conceded they will not seek to enforce in this case); a limitation on liability to one month's worth of overcharges (¶12); a truncation of the statute of limitations for "billing errors" to only 90 days (¶12); and a prohibition on class action or other group litigation against them (¶17).

256. Defendants have also included provisions in the same document purporting to give Defendants the right to alter the agreed-upon fee structures and charges for any or no reason, without notice to merchants (¶¶18, 31-32).

257. The Card Service Agreement, as a whole or in part, is substantively and procedurally unconscionable.

258. Indeed, the Card Services Agreement is a contract of adhesion in that it is a standardized form, imposed and drafted by Defendants, which are the parties

of vastly superior bargaining strength, that only allowed Plaintiffs and the Class members the opportunity to adhere to them or reject them entirely.

259. The Card Services Agreement is deceptive, unfair, illusory, and misleading to any extent it allowed Defendants to perpetrate the grossly improper acts described herein.

260. Considering the great business acumen and experience of Defendants in relation to Plaintiffs and the Class members, the great disparity in the parties' relative bargaining power, the inconspicuousness and incomprehensibility of the contract language at issue, the oppressiveness of the terms, the commercial unreasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns, the Card Services Agreement is unconscionable and, therefore, unenforceable as a matter of law.

261. Plaintiffs and the Class members have sustained damages as a result of Defendants' unconscionable Card Services Agreement as alleged herein.

262. Accordingly, Plaintiffs seek monetary, declaratory, and injunctive relief, including attorneys' fees and costs of suit.

COUNT V: Unjust Enrichment

263. Plaintiffs restate and incorporate by reference the allegations in

Paragraphs 1-213, above, as though fully set forth herein.

264. Plaintiffs bring this claim individually and on behalf of all other Class members.

265. This claim is brought only in the alternative and is contingent on the Card Services Agreement or other applicable contract (e.g., ¶¶ 248-49, *supra*) either being deemed unenforceable or inapplicable. In either scenario, unjust enrichment will dictate that Defendants disgorge all improper fees.

266. As alleged in this Complaint, Defendants were unjustly enriched at the expense of Plaintiffs and the other Class members, who were grossly and inequitably overcharged for card association access fees (such as NABU fees, APF fees, and/or dues and assessments) and interchange rates and fees applicable to various card types, and were charged unauthorized junk fees, including monthly maintenance fees, regulatory compliance fees, PCI fees, "Global ATL" fees, Data Security fees, and "MSA-Breach Only" fees.

267. Plaintiffs and the other Class members were unjustly deprived of money obtained by Defendants as a result of their undisclosed, unfair, unscrupulous, and unconscionable inflation of the card association access fees, interchange fees, and unauthorized junk fees that Defendants charged to and collected from Plaintiffs and the other Class members.

268. It would be inequitable and unconscionable for Defendants to retain the profit, benefit, and other compensation obtained from Plaintiffs and the other Class members as a result of their wrongful conduct alleged in this Complaint.

269. Plaintiffs and the other Class members are entitled to seek and do seek restitution from Defendants as well as an order from this Court requiring disgorgement of all profits, benefits, and other compensation obtained by Defendants by virtue of their wrongful conduct.

COUNT VI: Violation of Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. §§ 1962(a), (c)-(d)

270. Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-213, above, as though fully set forth herein.

271. Plaintiffs bring this claim individually and on behalf of all other Class members.

272. Mercury and Global are each "persons" under 18 U.S.C. § 1961(3) because each is capable of holding, and does hold, "a legal or beneficial interest in property."

273. Section 1962(a) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a

principal within the meaning of Section 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a).

274. Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c).

275. Section 1962(d) makes it unlawful for "any person to conspire to violate" §§ 1962(a) and (c), among other provisions. 18 U.S.C. § 1962(d).

276. Since at least as early as 2011, Mercury and Global unlawfully increased their profits by inflating pass-through charges and by assessing other charges misrepresented as payable to third parties. The RICO enterprise, which both Mercury and Global engaged in, and the activities of which affected interstate and foreign commerce, was comprised of an association in fact of persons including Mercury, Global, and other unnamed co-conspirators. That association in fact was structured by a contract between Mercury and Global pursuant to which

Mercury agreed to market Global's payment processing services to merchants and perform various related tasks, such as obtaining merchant signatures on Global's merchant application and agreement, providing customer service to enrolled merchants, and handling merchant billing and collections, and Global agreed to pay Mercury compensation.

277. The enterprise was characterized by Defendants' false representations and omissions to merchants about their low and/or transparent fees, which enabled the enterprise to gain market share; the unauthorized inflation of the interchange rates and card association access fees payable, respectively, to card issuers and card networks; and the levying of other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized, all to fraudulently increase Defendants' profits, at least some of which were used to acquire, operate, and expand the enterprise, causing injury to Plaintiffs and the Class members.

278. Mercury and Global were employed by and associated with an illegal enterprise, and conspired, conducted, and participated in that enterprise's affairs, through a pattern of racketeering activity consisting of numerous and repeated uses of the interstate mail and wire facilities to execute a scheme to defraud, in violation of 18 U.S.C. §§ 1341 and 1343, all in violation of RICO, 18 U.S.C. §§ 1962(a),

(c)-(d). These acts, committed by interstate wire and through the mails, include: (1) sending and receiving thousands of statements over a number of years that contained what were purported to be pass-through interchange rates and card association access fees that were in fact secretly inflated by the Defendants and that contained other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized; and (2) receiving over that same time payments for inflated pass-through interchange rates and card association access fees and other misrepresented charges from Plaintiffs and members of the Class. Defendants enrolled merchants in numerous states and charged them inflated interchange rates and card association access fees, the payments for which flowed from the merchants in those various states back to Defendants.

279. Mercury and Global profited from the enterprise, and Plaintiffs and the Class members suffered because the enterprise significantly increased the amounts paid by them. Mercury and Global used the proceeds from this scheme to advance the scheme by, among other things, funding and operating their billing systems and the use of the mails and interstate wires to obtain inflated interchange rates and card association access fees and other misrepresented payments from Class members and by promoting and marketing their services to other merchants

not yet part of its network, thereby growing the enterprise and causing further injury to the members of the Class.

280. Mercury and Global conspired to defraud Plaintiffs and the Class, who obtained payment processing services from Mercury and Global. Those services are provided under a standard and uniform merchant agreement offered by Mercury but which is in fact a contract among the merchant, Mercury, and Global. Mercury and Global put in the jointly-offered merchant agreement a representation that they would not inflate the interchange rates and card association access fees charged to merchants, and Mercury aggressively marketed Global's (and its own) services through those merchant agreements to Plaintiffs and the members of the Class. Indeed, the merchant application expressly states that, as part of "cost-plus" pricing, "[t]ransactions will be priced based on actual interchange rates and assessments published by Visa, MasterCard and Discover plus the margin quoted in the above fee schedule." However, Global and Mercury in fact inflated the interchange rates and assessments they charged the Plaintiffs and the Class in excess of the actual interchange rates and card association access fees charged by card issuers and card networks, in addition to charging the margin quoted in the fee schedule (which is represented to be Mercury's and Global's fee). They also levied other charges misrepresented as payable to third parties or which were

otherwise undisclosed, omitted, and/or unauthorized, such as alleged regulatory compliance fees.

281. After commencing a relationship with a new merchant, Defendants usually complied with the merchant agreement for a few months. Mercury sent out monthly invoices charging the fees that are explicitly denoted in the merchant application. However, after a few months, as alleged above, Defendants raised the rates and fees in an undisclosed, unauthorized, and surreptitious fashion. When that occurred, Mercury's internal billing system automatically created a marker or flag internally referred to as the "hoodwink" ticket. This allowed Mercury personnel to track customers whose rates were inflated.

282. Mercury concealed Defendants' fraudulent inflation of the interchange rates and card association access fees by failing to disclose appropriate information on the statements it mailed or sent by wire to its customers. While initial statements contained significant amounts of detail regarding the actual interchange rates and card association access fees charged by the relevant card issuers and card networks, Mercury's practice was to omit that information from later statements while still attributing the fees to interchange rates and card association access fees. This removal of detail began at approximately the same time as the inflation of interchange rates and card association access fees.

283. Mercury and Global test-marketed this strategy on a group of customers to see if they would notice the inflation of the interchange rates and card association access fees. Based upon this test marketing, which disclosed that merchants were unlikely to notice or understand that they were being improperly charged, Defendants decided to expand the scheme to most or all of their smaller-volume customers. Mercury and Global purposefully limited their scheme to smaller merchants whom they knew and understood would not have the resources to retain their own auditors to insure that they were charged only what was agreed. The scheme was subsequently deployed more generally to a substantial portion of Defendants' merchant client base, excluding only merchants Defendants understood to possess the resources necessary to audit or review their payment card processing charges regularly.

284. To further obscure the fraudulent scheme, Mercury in its mailed and wired statements to customers blamed increases in interchange rates on the card networks, when, in fact, the card networks had not increased their fees or otherwise taken action that would justify inflated charges.

285. The members of the RICO enterprise all share a common purpose: to enrich themselves at Class members' expense by maximizing the revenues of Defendants by fraudulently inflating interchange rates and card association access

fees and adding unauthorized fees. Mercury and Global both benefitted financially from their joint scheme to defraud Plaintiffs and the Class members, including by sharing the inflated interchange rates and card association access fees and other fraudulently misrepresented or omitted charges received from Class members and otherwise obtaining monies which they would not have received but for the existence of the scheme.

286. This RICO enterprise has existed for at least five years and continues to exist and operates pursuant to agreements entered into between and among Mercury, Global, and other unnamed co-conspirators. The RICO enterprise has functioned as a continuing unit and has and maintains an ascertainable structure separate and distinct from the pattern of racketeering activity.

287. Mercury and Global conducted and participated in the affairs of the RICO enterprise through a pattern of racketeering activity that consisted of numerous and repeated violations of the federal mail and wire fraud statutes, which prohibit the use of any interstate or foreign mail or wire facility for the purpose of executing a scheme to defraud, in violation of 18 U.S.C. §§ 1341 and 1343.

288. Plaintiffs have attached a standard form merchant agreement (Exhibit A), and monthly statements (Exhibits C-G), which demonstrate the continuity of

Defendants' conduct over multiple years and on a monthly basis, representing numerous separate and distinct examples of mail and wire fraud.

289. By fraudulently inflating, charging and collecting fees to which they were not entitled, Defendants used the United States Mail and interstate electronic wires and thus committed hundreds of thousands, if not millions, of separate acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343. These acts and transactions were not isolated but were related and part of the same fraudulent scheme; were directed at Plaintiffs and each Class member; were committed in the same or similar manner; and resulted from the same or similar fraudulent and improper intent by Defendants.

290. Examples of specific predicate acts of mail and wire fraud committed by Defendants, some of which are shown on statements attached as exhibits to this Complaint, include the following:

a. On June 28, 2013, Defendants sent a monthly invoice through the United States Mail to Champs that charged card association fees of $0.0595 per transaction, when the proper fees were $0.0195 for MasterCard, $0.0195 for VISA credit, and $0.0155 for VISA debit. Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks

and other financial institutions involved. Not knowing that the charges were inflated, Champs paid the inflated charges;

b. On June 30, 2014, Defendants sent a monthly invoice through the United States Mail to Archer's that charged card association fees of $0.0595 per transaction, when the proper fees were $0.0195 for MasterCard, $0.0195 for VISA credit, and $0.0155 for VISA debit. Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Archer's paid the inflated charges;

c. On June 28, 2013 Defendants sent a monthly invoice through the United States Mail to Wokchow that charged card association fees of $0.0595 per transaction, when the proper fees were $0.0195 for MasterCard, $0.0195 for VISA credit, and $0.0155 for VISA debit. Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Wokchow paid the inflated charges;

d. On February 28, 2014, Defendants sent a monthly invoice through the United States Mail to Sam Malouf that charged card association fees of $0.0295 per transaction, when the proper fees were $0.0195 for MasterCard, $0.0195 for VISA credit, and $0.0155 for VISA debit. Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Sam Malouf paid the inflated charges;

e. On March 31, 2015, Defendants sent a monthly invoice through the United States Mail to Sam Malouf that charged an interchange rate of 2.5% (plus $0.10 per transaction) for VISA Rewards 1 transactions, when the proper interchange rate for that card type was 1.65% (plus $0.10 per transaction). Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Sam Malouf paid the inflated charges;

f. On May 30, 2014, Defendants sent a monthly invoice through the United States Mail to Archer's that charged an interchange rate of 2.3% (plus $0.10 per transaction) for VISA Rewards 2 transactions, when the proper

interchange rate for that card type was 1.95% (plus $0.10 per transaction). Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Archer's paid the inflated charges;

g. On January 30, 2015, Defendants sent a monthly invoice through the United States Mail to Wokchow that charged an interchange rate of 2.3% (plus $0.10 per transaction) for VISA Rewards 2 transactions, when the proper interchange rate for that card type was 1.95% (plus $0.10 per transaction). Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Wokchow paid the inflated charges;

h. On September 28, 2012, Defendants sent a monthly invoice through the United States Mail to Champs that charged "junk fees" including a monthly maintenance fee, Annual Data Security fee, a Global ATL fee, and a fee labeled "Assc Card Accept & License Fee." Defendants intentionally and fraudulently failed to disclose that the charges were unauthorized and/or had not been agreed upon in advance, and, in fact, the invoices misrepresented that the

junk fees had been properly assessed. Not knowing that the charges were unauthorized, Champs paid the junk fees;

i. On May 29, 2015, Defendants sent a monthly invoice through the United States Mail to Sam Malouf that charged "junk fees" including a monthly maintenance fee, PCI fee, and regulatory compliance fee. Defendants intentionally and fraudulently failed to disclose that the charges were unauthorized and/or had not been agreed upon in advance, and, in fact, the invoices misrepresented that the junk fees had been properly assessed. Not knowing that the charges were unauthorized, Sam Malouf paid the junk fees;

j. On March 31, 2014, Defendants sent a monthly invoice through the United States Mail to Archer's that charged "junk fees" including a monthly maintenance fee, a Data Security fee, an MSA-Breach Only fee, and a Global ATL fee. Defendants intentionally and fraudulently failed to disclose that the charges were unauthorized and/or had not been agreed upon in advance, and, in fact, the invoices misrepresented that the junk fees had been properly assessed. Not knowing that the charges were unauthorized, Archer's paid the junk fees; and

k. On January 30, 2015, Defendants sent a monthly invoice through the United States Mail to Wokchow that charged "junk fees" including a monthly maintenance fee, an MSA-Breach Only fee, and a Global ATL fee.

Defendants intentionally and fraudulently failed to disclose that the charges were unauthorized and/or had not been agreed upon in advance, and, in fact, the invoices misrepresented that the junk fees had been properly assessed. Not knowing that the charges were unauthorized, Wokchow paid the junk fees.

291. As Plaintiffs have alleged, Defendants have systematically inflated the interchange fees charged to Plaintiffs and the Class members, and the specific examples recited herein are illustrative and not exhaustive.

292. Furthermore, Mercury and Global continue to engage in these predicate acts and to harm the Class members on a regular basis, which establishes a threat of long-term racketeering activity and evidences the continuity of Defendants' open-ended pattern of racketeering activity.

293. Defendants received payment for the inflated and misrepresented charges from Plaintiffs and the Class members through the United States Postal Service and interstate wire facilities. These mailings and wirings are part of the pattern of racketeering activity in which Defendants engaged. In furtherance of the scheme, Defendants committed thousands of separate mail and wire fraud violations on a monthly basis over more than five years by transmitting their standard form merchant agreements and invoices, each one constituting its own separate and distinct predicate act, through the United States mail and interstate

wire facilities. Each of these violations was related because they effectuated the common purpose of the enterprise and its participants of defrauding Plaintiffs and the Class by collecting inflated interchange rates and card association access fees and other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized. Mercury and Global also transferred between and among themselves, and received from Plaintiffs and the Class, monetary proceeds of the enterprise, in furtherance of their scheme to defraud Plaintiffs and Class members in violation of 18 U.S.C. § 1343.

294. These related acts had the same or similar purpose, results, participants, victims, and methods of commission, and are otherwise related by distinguishing characteristics which are not isolated events.

295. Mercury and Global each had the specific intent to participate in the overall RICO enterprise and the scheme to defraud Plaintiffs and the Class. Defendants' scheme was reasonably calculated to deceive Plaintiffs and Class members, all of whom are of ordinary prudence and comprehension, through the execution of their complex and illegal billing scheme. Plaintiffs and Class members would not have paid the inflated and improper charges but for the uniform misrepresentations in Defendants' standard merchant agreements and promotional materials that they would not inflate interchange rates and card

association access fees charged by card issuers and card networks and that the charges would be clear and transparent.

296. Defendants received money from a pattern of racketeering activity and invested that money in the enterprise, and the enterprise affected interstate commerce. Furthermore, Defendants used and invested the income they received through a pattern of racketeering activity to operate the enterprise, which caused Plaintiffs and the Class members to suffer damages. As noted above, the investment of the proceeds from the scheme in the enterprise enabled Defendants to perpetuate the operation of the enterprise and to continue to defraud Plaintiffs and Class members, in violation of 18 U.S.C. § 1962(a).

297. Mercury and Global conducted and participated both directly and indirectly in the conduct of the above-described RICO enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). Specifically, Defendants' merchant agreements contained uniform misrepresentations that Defendants would not inflate interchange rates and card association access fees charged by card issuers and card networks, but would rather pass those fees through at cost, and that their charges would be clear and transparent. Mercury's statements continued the deception by misrepresenting itemized costs to make them appear as if they were pass-through charges or for third parties (or were

otherwise authorized), when neither in fact was the case. Plaintiffs and the Class, all of whom were of ordinary prudence and comprehension, relied on these uniform misrepresentations, believing that they accurately reflected the charges that they were obligated to pay, and paid Defendants' statements as a direct and proximate result of Defendants' representations and/or omissions.

298. Mercury and Global, and other unnamed co-conspirators, as noted above, conspired to violate sections 1962(a) and (c), in violation of 18 U.S.C. § 1962(d). The agreement between Mercury and Global is reflected by, among other things, the written agreement between them; their joint participation in the same fraudulent scheme that would not have been able to proceed without their joint participation and knowledge; and their intentional and knowing sharing of the proceeds from the scheme.

299. Mercury's and Global's conduct and participation in the racketeering activity described herein have directly and proximately caused Plaintiffs and the Class to incur damages.

COUNT VII: Violation of Georgia Racketeer Influenced and Corrupt Organizations Act OCGA §§ 16-14-4(a)-(c)

300. Plaintiffs restate and incorporate by reference the allegations in Paragraphs 1-299, above, as though fully set forth herein.

301. Plaintiffs bring this claim individually and on behalf of all other Class members.

302. OCGA § 16-14-4(a) makes it "unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money."

303. OCGA § 16-14-4(b) makes it "unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity."

304. OCGA § 16-14-4(c) makes it "unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (a) or (b) of this Code section."

305. Since at least as early as 2011, Mercury and Global unlawfully increased their profits by inflating pass-through charges and by assessing other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized. The Georgia RICO enterprise, which both Mercury and Global engaged in, was comprised of an association in fact of persons including Mercury, Global, and other unnamed co-conspirators. That association in fact was structured by a contract between Mercury and Global

pursuant to which Mercury agreed to market Global's payment processing services to merchants and perform various related tasks, such as obtaining merchant signatures on Global's merchant application and agreement, providing customer service to enrolled merchants, and handling merchant billing and collections, and Global agreed to pay Mercury compensation. The enterprise was characterized by Defendants' false representations to merchants about their low fees, which enabled the enterprise to gain market share; the inflation of the interchange rates and card association access fees charged by card issuers and card networks; and the levying of other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized, all to fraudulently increase Defendants' profits, at least some of which were used to acquire, operate, and expand the enterprise, causing injury to the Class.

306. Mercury and Global were employed by and associated with an illegal enterprise, and conspired, conducted, and participated in that enterprise's affairs, through a pattern of racketeering activity consisting of numerous and repeated uses of the interstate mail and wire facilities to execute a scheme to defraud, in violation of 18 U.S.C. §§ 1341 and 1343, and of numerous and repeated acts of theft by conversion, in violation of OCGA § 16-8-4, all in violation of Georgia RICO, OCGA §§ 16-14-4(a), (b), and (c). These acts, committed by interstate wire and

through the mails, include: (1) sending and receiving thousands of statements over a number of years that contained what were purported to be pass-through interchange rates and card association access fees that were in fact secretly inflated by the Defendants and that contained other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized; and (2) receiving, retaining, and converting over that same time payments for inflated pass-through interchange rates and card association access fees and other misrepresented charges from Plaintiffs and members of the Class.

307. Mercury and Global profited from the enterprise, and Plaintiffs and the Class members suffered because the enterprise significantly increased the amounts paid by them. Mercury used the proceeds from this scheme to advance the scheme by, among other things, funding and operating its billing systems and the use of the mails and interstate wires to obtain inflated interchange rates, card association access fees and other misrepresented payments from Class members and by promoting and marketing its services to other merchants not yet part of its network, thereby growing the enterprise and causing injury to the members of the Class.

308. Mercury and Global conspired to defraud Plaintiffs and the Class, who obtained payment processing services from Mercury and Global. Those

services are provided under a standard and uniform merchant agreement offered by Mercury but which is in fact a contract among the merchant, Mercury, and Global. Mercury and Global put in the jointly-offered merchant agreement a representation that they would not inflate the interchange rates and card association access fees charged to merchants, and Mercury aggressively marketed Global's (and its own) services through those merchant agreements to Plaintiffs and the members of the Class. Indeed, the merchant application expressly states that, as part of "cost-plus" pricing, "[t]ransactions will be priced based on actual interchange rates and assessments published by Visa, MasterCard and Discover plus the margin quoted in the above fee schedule." However, Global and Mercury in fact inflated the interchange rates and card association access fees they charged the Plaintiffs and the Class in excess of the actual interchange rates and assessments charged by card issuers and card networks, in addition to charging the margin quoted in the fee schedule (which is represented to be Mercury's and Global's fee). They also levied other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized, such as alleged regulatory compliance fees.

309. After commencing a relationship with a new merchant, Defendants usually complied with the merchant agreement for a few months. Mercury sent out

monthly invoices charging the fees that are explicitly denoted in the merchant application. However, after a few months, Defendants raised the rates and fees in an undisclosed, unauthorized, and surreptitious fashion. When that occurred, Mercury's internal billing system automatically created a marker or flag internally referred to as the "hoodwink" ticket. This allowed Mercury personnel to track customers whose rates were inflated.

310. Mercury concealed Defendants' fraudulent inflation of the interchange rates and card association access fees by failing to disclose appropriate information on the statements it mailed or sent by wire to its customers. While initial statements contained significant amounts of detail regarding the actual interchange rates and card association access fees charged by the relevant card issuers and card networks, Mercury's practice was to omit that information from later statements while still attributing the fees to interchange rates and card association access fees. This removal of detail began at approximately the same time as the inflation of interchange rates and assessments.

311. Mercury and Global test-marketed this strategy on a group of merchants to see if they would notice the inflation of the interchange rates and card association access fees. When the test group did not notice the change, Defendants decided to expand the scheme to most or all of their smaller-volume merchants.

Mercury and Global purposefully limited their scheme to smaller merchants whom they knew and understood would not have the resources to retain their own auditors to insure that they were charged only what was agreed. The scheme was subsequently deployed more generally to a substantial portion of Defendants' merchant client base, excluding only merchants Defendants understood to possess the resources necessary to audit or review their payment card processing charges regularly.

312. To further obscure its fraudulent scheme, Defendants in their mailed and wired statements to customers blamed increases in interchange rates on the card networks, when, in fact, the card networks had not increased their fees or otherwise taken action that would justify inflated charges.

313. The members of the RICO enterprise all share a common purpose: to enrich themselves at Class members' expense by maximizing the revenues of Defendants by fraudulently inflating interchange rates and card association access fees. Mercury and Global shared the bounty of their criminal enterprise by converting and sharing the Class' payments of inflated interchange rates and card association access fees and other misrepresented charges generated by the joint scheme to defraud Plaintiffs and the Class members.

314. Mercury and Global conducted and participated in the affairs of the RICO enterprise through a pattern of racketeering activity that consisted of numerous and repeated violations of the federal mail and wire fraud statutes, which prohibit the use of any interstate or foreign mail or wire facility for the purpose of executing a scheme to defraud, in violation of 18 U.S.C. §§ 1341 and 1343, and of numerous and repeated acts of theft by conversion, in violation of OCGA § 16-8-4.

315. Plaintiffs have attached a standard form merchant agreement (Exhibit A), and monthly statements (Exhibits C-G), representing the continuity of the Defendants' conduct over multiple years and on a monthly basis, representing numerous separate and distinct examples of mail and wire fraud.

316. In fraudulently inflating, charging, and collecting fees to which they were not entitled, Defendants used the United States Mail and interstate electronic wires and thus committed hundreds of thousands, if not millions, of separate acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343, and of numerous and repeated acts of theft by conversion, in violation of OCGA § 16-8-4. These acts and transactions were not isolated but related and part of the same fraudulent scheme; were directed at Plaintiffs and each Class member; were committed in the same or similar manner; and resulted from the same or similar fraudulent and improper intent by Defendants.

317. Examples of specific predicate acts of mail and wire fraud and of theft by conversion committed by Defendants, some of which are shown on the statements attached as exhibits to this Complaint, include the following:

a. On June 28, 2013, Defendants sent a monthly invoice through the United States Mail to Champs that charged card association fees of $0.0595 per transaction, when the proper fees were $0.0195 for MasterCard, $0.0195 for VISA credit, and $0.0155 for VISA debit. Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Champs paid the inflated charges;

b. On June 30, 2014, Defendants sent a monthly invoice through the United States Mail to Archer's that charged card association fees of $0.0595 per transaction, when the proper fees were $0.0195 for MasterCard, $0.0195 for VISA credit, and $0.0155 for VISA debit. Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Archer's paid the inflated charges;

c. On June 28, 2013, Defendants sent a monthly invoice through the United States Mail to Wokchow that charged card association fees of $0.0595 per transaction, when the proper fees were $0.0195 for MasterCard, $0.0195 for VISA credit, and $0.0155 for VISA debit. Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Wokchow paid the inflated charges;

d. On February 28, 2014, Defendants sent a monthly invoice through the United States Mail to Sam Malouf that charged card association fees of $0.0295 per transaction, when the proper fees were $0.0195 for MasterCard, $0.0195 for VISA credit, and $0.0155 for VISA debit. Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Sam Malouf paid the inflated charges;

e. On March 31, 2015, Defendants sent a monthly invoice through the United States Mail to Sam Malouf that charged an interchange rate of 2.5% (plus $0.10 per transaction) for VISA Rewards 1 transactions, when the proper

interchange rate for that card type was 1.65% (plus $0.10 per transaction). Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Sam Malouf paid the inflated charges;

f. On May 30, 2014, Defendants sent a monthly invoice through the United States Mail to Archer's that charged an interchange rate of 2.3% (plus $0.10 per transaction) for VISA Rewards 2 transactions, when the proper interchange rate for that card type was 1.95% (plus $0.10 per transaction). Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Archer's paid the inflated charges;

g. On January 30, 2015, Defendants sent a monthly invoice through the United States Mail to Wokchow that charged an interchange rate of 2.3% (plus $0.10 per transaction) for VISA Rewards 2 transactions, when the proper interchange rate for that card type was 1.95% (plus $0.10 per transaction). Defendants intentionally and fraudulently failed to disclose that the charges were inflated and, in fact, the invoices misrepresented that the inflated charges had been

assessed by the card networks and other financial institutions involved. Not knowing that the charges were inflated, Wokchow paid the inflated charges;

h. On September 28, 2012, Defendants sent a monthly invoice through the United States Mail to Champs that charged "junk fees" including a monthly maintenance fee, Annual Data Security fee, Global ATL fee, and a fee labeled "Assc Card Accept & License Fee." Defendants intentionally and fraudulently failed to disclose that the charges were unauthorized and/or had not been agreed upon in advance, and, in fact, the invoices misrepresented that the junk fees had been properly assessed. Not knowing that the charges were unauthorized, Champs paid the junk fees;

i. On May 29, 2015, Defendants sent a monthly invoice through the United States Mail to Sam Malouf that charged "junk fees" including a monthly maintenance fee, PCI fee, and regulatory compliance fee. Defendants intentionally and fraudulently failed to disclose that the charges were unauthorized and/or had not been agreed upon in advance, and, in fact, the invoices misrepresented that the junk fees had been properly assessed. Not knowing that the charges were unauthorized, Sam Malouf paid the junk fees;

j. On March 31, 2014, Defendants sent a monthly invoice through the United States Mail to Archer's that charged "junk fees" including a monthly

maintenance fee, a Data Security fee, an MSA-Breach Only fee, and a Global ATL fee. Defendants intentionally and fraudulently failed to disclose that the charges were unauthorized and/or had not been agreed upon in advance, and, in fact, the invoices misrepresented that the junk fees had been properly assessed. Not knowing that the charges were unauthorized, Archer's paid the junk fees; and

k. On January 30, 2015, Defendants sent a monthly invoice through the United States Mail to Wokchow that charged "junk fees" including a monthly maintenance fee, an MSA-Breach Only fee, and a Global ATL fee. Defendants intentionally and fraudulently failed to disclose that the charges were unauthorized and/or had not been agreed upon in advance, and, in fact, the invoices misrepresented that the junk fees had been properly assessed. Not knowing that the charges were unauthorized, Wokchow paid the junk fees.

318. As Plaintiffs have alleged, Defendants have systematically inflated the interchange fees charged to Plaintiffs and the Class members, and the specific examples recited herein are illustrative and not exhaustive.

319. Defendants sent fraudulent statements and received payment for the inflated and misrepresented charges from Plaintiffs and the Class members through the United States Postal Service and interstate wire facilities, and converted those payments to their own use, causing Plaintiffs and the Class to suffer monetary

damages. Plaintiffs' and the Class' injuries were the direct result of Defendants' acts of mail and wire fraud and theft by conversion targeting them, and they were the intended victims of Defendants' acts. These mailings and wirings are part of the pattern of racketeering activity in which Defendants engaged.

320. In furtherance of the scheme, Defendants committed thousands of separate mail and wire fraud violations on a monthly basis over more than five years by transmitting their standard form merchant agreements and invoices, each one constituting its own separate and distinct predicate act through the United States mail and interstate wire facilities. Defendants committed thousands of separate acts of theft by conversion on a monthly basis over more than five years by collecting, retaining, and converting to their own use, in whole or in part, Plaintiffs' and the Class' payments of inflated interchange rates and card association access fees and other misrepresented charges.

321. Each of these violations was related because they effectuated the common purpose of the enterprise and its participants of defrauding Plaintiffs and the Class by collecting inflated interchange rates and assessments and other charges misrepresented as payable to third parties or which were otherwise undisclosed, omitted, and/or unauthorized. Mercury and Global also transferred between and among themselves, and received from Plaintiffs and the Class,

monetary proceeds of the enterprise, in furtherance of their scheme to defraud Plaintiffs and Class members in violation of 18 U.S.C. § 1343.

322. These related acts had the same or similar purpose, results, participants, victims, and methods of commission, and are otherwise related by distinguishing characteristics which are not isolated events.

323. Mercury and Global each had the specific intent to participate in the overall Georgia RICO enterprise and the scheme to defraud Plaintiffs and the Class. Defendants' scheme was reasonably calculated to deceive Plaintiffs and Class members, all of whom are of ordinary prudence and comprehension, through the execution of their complex and illegal billing scheme. Plaintiffs and Class members would not have paid the inflated and improper charges but for the uniform misrepresentations and/or omissions in Defendants' standard merchant agreements and promotional materials that they would not inflate interchange rates and card association access fees charged by card issuers and card networks and that their charges would be clear and transparent.

324. Mercury and Global acquired, directly and indirectly, interests in and control of money through a pattern of racketeering activity. As noted above, Defendants sent fraudulent statements and received payment for the inflated and

misrepresented charges from Plaintiffs and the Class members through the United States Postal Service and interstate wire facilities.

325. Mercury and Global, through the above-described pattern of racketeering activity, directly and indirectly acquired interests in and control over money paid by Plaintiffs and members of the Class for what Defendants represented were pass-through interchange rates and card association access fees charged by card issuers and card networks or were charges for third parties (or were otherwise authorized), none of which was true. Defendants used the mails and interstate wires to defraud Plaintiffs and members of the Class, and accepted, retained, and converted the funds paid by Plaintiffs and the Class for these inflated and misrepresented charges, all in violation of OCGA § 16-14-4(a). Mercury and Global conducted and participated both directly and indirectly in the conduct of the above-described RICO enterprise's affairs through a pattern of racketeering activity in violation of OCGA § 16-14-4(b). Specifically, Defendants' merchant agreements contained uniform misrepresentations that Defendants would not inflate interchange rates and card association access fees charged by card issuers and card networks and that their charges would be clear and transparent. Defendants' statements continued the deception by misrepresenting itemized costs to make them appear as if they were pass-through charges or for third parties (or

were otherwise authorized), when neither in fact was the case. Defendants then accepted, retained, and converted the funds paid by Plaintiffs and the class for these charges. Plaintiffs and the Class, all of whom were of ordinary prudence and comprehension, relied on these uniform misrepresentations and/or omissions, believing that they accurately reflected the charges that they were obligated to pay, and paid Defendants' statements in reliance of Defendants' representations and/or omissions.

326. Mercury and Global, and other unnamed co-conspirators, as noted above, conspired to violate sections OCGA §§ 16-14-4(a) and (b), in violation of OCGA § 16-14-4(c). The agreement between Mercury and Global is reflected by, among other things, the written agreement between them; their joint participation in the same fraudulent scheme that would not have been able to proceed without their joint participation and knowledge; and their intentional and knowing sharing of the proceeds from the scheme.

327. Mercury's and Global's conduct and participation in the racketeering activity described herein has directly and proximately caused Plaintiffs and the Class to incur damages.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the other Class members, respectfully request that the Court enter judgment in their favor and against Mercury and Global as follows:

A. Certification of the proposed Class, including appointment of Plaintiffs as Class Representatives and their counsel as Class Counsel;

B. Declaratory and injunctive relief as set forth herein;

C. An order requiring Defendants to return all sums obtained from Plaintiffs and the other Class members as a result of its unlawful, fraudulent, deceptive, misleading, and unfair business practices;

D. Actual damages in an amount to be proven at trial;

E. Compensatory and treble damages pursuant to 18 U.S.C. § 1964(c), and OCGA § 16-14-6(c);

F. Punitive damages pursuant to OCGA § 51-12-5.1 in an amount to be proven at trial on the ground that Defendants' actions have shown willful misconduct, malice, fraud, wantonness, oppression, or such entire want of care which would raise the presumption of conscious indifference to consequences, and because Defendants have acted with specific intent to cause harm, the statutory limitation on punitive damages is not applicable;

G. Costs of suit and attorneys' fees pursuant to OCGA § 13-6-11 and any other applicable law on the ground that Defendants have acted in bad faith, been stubbornly litigious and caused Plaintiffs and the Class unnecessary trouble and expense;

H. Pre- and post-judgment interest on any amounts awarded; and

I. Such other or further relief as may be appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims so triable.

DATED: June 10, 2016

Respectfully submitted,

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Additional Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2016, I caused the foregoing document to be electronically filed with the Clerk of Court using the CM/ECF system which automatically sends email notification of such filing to all attorneys of record.

/s/ E. Adam Webb
E. Adam Webb