

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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| -----X | : | |
| CENTRAL FLORIDA LIQUIDATION AND | : | |
| SALES, LLC and L & M ENTERPRISES | : | |
| USA, LLC, individually and on behalf of all | : | |
| others similarly situated, | : | |
| | : | |
| Plaintiffs, | : | CIVIL ACTION NO. |
| | : | |
| v. | : | _____ |
| | : | |
| | : | |
| EVO PAYMENTS INTERNATIONAL, LLC, | : | <u>Jury Trial Demanded</u> |
| and EVO MERCHANT SERVICES, LLC, | : | |
| | : | |
| Defendants. | : | |
| -----X | : | |

CLASS ACTION COMPLAINT

Plaintiffs Central Florida Liquidation and Sales, LLC and L & M Enterprises USA, LLC, by and through their undersigned counsel, on behalf of themselves and the class of persons and entities preliminarily defined below, submit this Class Action Complaint and allege the following based on personal knowledge, investigation of counsel, and information and belief:

INTRODUCTION

1. This is a civil action seeking monetary damages and declaratory and injunctive relief against Defendants EVO Payments International, LLC and EVO Merchant Services, LLC (collectively, "EVO") arising from EVO's assessment of improper and excessive fees for credit and debit card processing.

2. In today's business world, the vast majority of merchants accept payment for goods and services via credit and debit cards. Indeed, because the majority of customer payments are made via credit and debit cards, acceptance of such payments is necessary for most merchants to survive in the marketplace.

3. In order to accept this method of payment, the merchant is required to utilize a payment processing service.

4. Merchants rely on the companies that provide such services to do so at a fair price. Indeed, for some businesses, fees for card processing services are the third highest expense merchants incur, following labor and product costs.

5. The card processing system can be a difficult one to understand, with many parties involved. For instance, in addition to the merchant which receives payment and the customer who provides such payment, the processing of a card transaction involves several other parties:

a. The Card Issuer – the company that issued the credit or debit card to the customer, which is typically a bank such as Chase or Bank of America, and which charges a fee whenever a customer uses one its cards for a transaction. These banks charge fees that are usually calculated as a percentage of a transaction plus a per-transaction fee (e.g., 1.65% + \$0.10/transaction). This fee varies based on the type of card used. For example, the card issuers will charge a higher fee for transactions involving a rewards credit card than a card with no rewards program. These fees are generally known as “interchange rates.”

b. The Card Network – the card networks (i.e., Visa, MasterCard, Discover) also charge per transaction fees. By way of example only, Visa assesses a set fee known as the “APF” (“Acquirer Processing Fee”), and MasterCard charges a set fee known as the “NABU” (“Network Access Brand Usage”) fee. The card networks also charge various additional fees depending on the type and nature of a given transaction.

c. The Payment Processor – this is the entity that actually processes the payment through the card network and ensures that whenever a customer pays for an item or

service with a credit or debit card the customer's account is debited and the merchant's account is credited. EVO is a payment processor.

d. The Member Bank – only banks, such as Deutsche Bank or HSBC, may be members of card networks. These member banks “sponsor” payment processors so they may process transactions through the card networks.

e. The Merchant Acquirer – this is the entity which – in conjunction with Independent Sales Organizations (“ISOs”) – markets the payment processor's services to merchants. ISOs are sometimes referred to as Merchant Services Providers (“MSPs”). Merchant acquirers and ISOs essentially act as a “middle man” between merchants and payment processors. They enroll merchants in payment processing services and then are usually supposed to provide customer support to the merchant and handle monthly billing. Defendant EVO declares itself a “registered ISO and MSP of Deutsche Bank, AG.” It can also be described as a merchant acquirer because it acquires merchants from other ISOs. EVO claims it “is among the largest fully integrated merchant acquirer and payment processors in the world,” meaning it can both sign up merchants and actually perform the back office processing of their card transactions. Most providers do not wear both of these hats.

6. Ordinarily, a merchant that desires to accept credit and debit cards as a form of payment obtains such services through an ISO or merchant acquirer. For convenience, the term “merchant acquirer” is used below.

7. At the outset of their relationship, the merchant and the merchant acquirer reach consensus on the fees and charges the merchant will pay for payment processing services. Such fees and charges can take a variety of forms, including “per item” fees, fees based on a percentage of the transaction amount, and monthly or annual fees.

8. After terms are accepted and processing begins, the merchant acquirer (in conjunction with the payment processor) sends monthly billing statements to the merchant that reflect the prior month's activity and specify the fees imposed.

9. The number of involved parties, moving pieces, and the formatting of monthly billing statements can make it difficult for small and medium-sized merchants to understand whether the fees they are being charged are proper. Large merchants, by contrast, sometimes devote the resources to ensure that their charges are in line with those they agreed to pay.

10. Unfortunately, some merchant acquirers take advantage of this confusion. They induce "mom and pop" merchants to use their services with the promise of low, straightforward pricing, but once the parties are doing business, they sneak in new fees and mark-ups.

11. These additional fees are often imposed in a deceptive fashion, such that it is very difficult for merchants to even notice them. Moreover, even if a merchant does notice the new or increased charges, they are labeled in such a manner to appear as though they are required by law or by one of the card networks. In reality, however, these improper fees are being assessed for the sole purpose of raising additional revenue and profit at the merchant's expense.

12. For many years, Defendants have perpetrated this scheme. Recently, two EVO agents and affiliates were indicted on charges of mail and wire fraud and stand accused of imposing fees on merchant customers that far exceeded those set forth in customer agreements. *See* Indictment in Case No. 17-CRIM-248 (S.D.N.Y.) (Exh. 1 hereto). These purported fraudsters worked for entities majority-owned by EVO. EVO is described as the "Parent Company" in the indictment. For years, EVO and the indicted individuals worked closely together and signed up over 12,000 merchants. The victims were then assessed higher fees and charges than agreed-upon through EVO automated systems. EVO made tens of millions of

dollars based on these practices. More importantly, the same practices described in the indictment were not limited to the 12,000 customers signed up by the purported fraudsters. Rather, EVO jacked up the fees of other customers in the same manner. As just one example among many, EVO has charged a bogus “IRS Reporting” fee to many of its 500,000 customers, even customers that were not signed up by the New York fraudsters.

13. This case challenges the amount and nature of the payment processing fees that Defendants impose. Such fees violate the express terms of EVO’s “Merchant Processing Agreement,” as well as the covenant of good faith and fair dealing.

JURISDICTION AND VENUE

14. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d)(2) because there are more than 100 potential 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 other than New York.

15. This Court has personal jurisdiction over Defendants because they are registered to transact business in New York and have engaged in a continuous and systematic course of doing business in New York by offering their services to thousands of New York merchants and citizens. Further, the North American headquarters of Defendants is located in Melville, Suffolk County, New York. Although Defendants also have operations elsewhere, including a world headquarters in Atlanta, their New York facilities are extensive.

16. Venue lies within this judicial district under 28 U.S.C. § 1391 because Defendants have their headquarters here and conduct substantial business in this district, and a substantial portion of the events, omissions, and acts giving rise to the claims herein occurred in this district. Moreover, Defendants’ form contract with Plaintiffs and the class specifies this Court as the proper forum.

THE PARTIES

17. Plaintiff Central Florida Liquidation and Sales, LLC (“CFLS”) is a former customer of EVO. CFLS is a Florida limited liability company that sells fixtures to retail stores. CFLS is headquartered in Orlando, Florida.

18. Plaintiff L & M Enterprises USA, LLC (“L&M”) is a former customer of EVO. L&M is an Iowa limited liability company that sells specialty firearms and custom knives. L&M is headquartered in Cedar Rapids, Iowa.

19. Defendant EVO Payments International, LLC (“EVO Payments”) is a Delaware limited liability company that is registered to do business in New York. According to its website, EVO Payments:

is the largest privately held payment processor and acquirer for merchants, Independent Sales Organizations (ISOs), financial institutions, government organizations, and multinational corporations throughout the United States, Canada, and Europe. EVO processes \$50 billion in transactions annually and actively services over 500,000 merchant customer businesses.

EVO Payments’ global headquarters is located in Atlanta, Georgia, but its North American headquarters is in Melville, New York. According to Bloomberg and other media outlets, EVO has put itself up for sale with an asking price in the \$2 billion range.

20. Defendant EVO Merchant Services, LLC (“EVO Merchant Services”) is a Delaware limited liability company that is registered to do business in New York. EVO Merchant Services is a subsidiary of EVO Payments and provides payment processing services to EVO Payments customers located in the United States.

FACTUAL ALLEGATIONS

A. EVO Induces Merchants to Enter Long Term Contracts Via Promises of Transparent, Low Cost Pricing.

21. EVO and its affiliates approach and market to merchants in an attempt to induce them to switch their payment processing to EVO through promises of transparent, low cost pricing. Merchants are attracted by promises of being able to save money by reducing the costs they would pay for payment processing services if they switched providers. This approach is very appealing to merchants because payment processing is a substantial business expense for them.

22. EVO provides prospective merchants with the form Merchant Application which identifies the fees and charges to which the merchant will be subject if it decides to enroll in Defendants' services. Many of these fees are negotiable.

23. The Application thus informs the merchant in clear terms what it will be charged if it agrees to enroll in EVO's services and how such charges will be calculated. The Merchant Application is not merely an advertisement, but is part and parcel of the deal.

24. This transparency is very important because the Agreement typically extends for a set period of time (such as an initial term of three years). If a merchant desires to end its relationship with EVO prior to the expiration of this term, it often must pay an early termination fee of several hundred dollars.

25. Those merchants that are interested in doing business with EVO for the specified fees identified in the Merchant Application sign it, as does the merchant's personal guarantor, usually the small business owner.

26. EVO contends that by signing the Merchant Application, the merchant is binding itself to what is often a separate document – the "Merchant Processing Agreement" ("the

Terms”). Collectively, the Merchant Application and Terms are referred to hereinafter as “the Agreement” or “the contract.”

27. The Terms are a boilerplate form that is not negotiable and is presented to the merchant on an adhesive, take-it-or-leave-it basis. It consists of tiny, non-descript font occupying many densely-worded paragraphs over several pages. Several different versions of the Terms have been used by EVO and its affiliates and predecessors over the last several years.

28. The Terms represent a unilateral effort by EVO to give itself the power to backtrack from the rates and fees set forth in the Agreement and to immunize itself from liability for its improper practices.

29. EVO uses the Terms, as well as the hefty early termination fees, as tools to discourage aggrieved merchants from terminating their relationships with EVO or pursuing legal action for overcharges.

B. EVO Raises Fees and Imposes New Categories of Fees Not Reflected in the Application.

30. After EVO begins providing payment processing services, almost immediately it begins increasing charges and cramming merchants with fees that are inconsistent with the agreed-upon charges that are prominently set forth in the Application.

31. Indeed, Defendants increase agreed-upon rates and add new categories of fees that are not referenced in the Application.

32. EVO knows that if it disclosed these substantial additional fees in the Applications, merchants would be much less likely to do business with EVO. Instead, EVO crams merchants with these unanticipated fees after the relationship has commenced and merchants are “locked in” to long term deals that are only terminable upon payment of hefty penalties.

33. EVO describes these fees in a very misleading fashion so as to preclude merchants from realizing the fees are improper or that EVO, as opposed to the card networks or the government, is responsible.

34. EVO seizes these additional amounts from merchant bank accounts before merchants even know they are gone. Even if merchants could effectively decipher EVO's monthly statements, by the time merchants receive such statements, EVO has already debited the identified amounts from merchant bank accounts.

C. EVO's Activities Spawn Prosecution.

35. EVO's practice of contracting for low cost, transparent pricing only to deceptively jack up fees and charges after locking merchants is not only contemptible, but it is criminal in some instances.

36. On May 2, 2017, two individual agents of "Commerce Payment Group" ("CPS") were indicted on mail and wire fraud. *See* Indictment in Case No. 17-CRIM-248 (S.D.N.Y.). CPS is one of the many subsidiaries that EVO has used to acquire merchants for its payment processing business. CPS is *majority-owned* by EVO, which is described as the "Parent Company" in the indictment. The indictment states that CPS and its affiliates acquired more than 12,000 merchant customers on behalf of EVO.

37. The agents stand accused of committing mail and wire fraud and conspiracy to commit mail and wire fraud by, among other things, (a) advertising low payment processing fees despite knowledge that that actual fees would be much higher, (b) inducing merchants to sign Applications identifying fees that were not the actual fees that would be assessed, (c) concealing the Terms from merchants, and (d) imposing fees that were much higher than those that had been advertised and disclosed in the Applications.

38. As made clear by paragraph 11 of the indictment, as the majority owner of the purported fraudsters' various companies EVO reaped millions of dollars in improper payment processing fees as a result of these unlawful actions. None of this money has been refunded to merchants. Similarly, none of the identical fees assessed against EVO's non-CPS customers across the country have been returned.

D. EVO's Practices Have Harmed Plaintiffs and the Class.

39. EVO's wrongful overbilling policies and practices described above harmed Plaintiffs and members of the class proposed below.

40. CFLS and L&M are former merchant customers of EVO that were victimized by EVO's overbilling practices during the relevant period. Based on the applicable New York law, it is likely that the class period will extend for six years before the filing of this case, or a related case that is already pending before the Court.

41. As one example of EVO's improper practices, CFLS's Merchant Application specified it would be charged the following discount rates: 1.65% for Visa and MasterCard credit transactions and 1.69% for Discover credit transactions. Nonetheless, CFLS was routinely charged higher rates for these transactions, such as 1.73% for Visa, MasterCard, and Discover credit transactions.

42. Moreover, CFLS was assessed certain "pass through" fees that are mentioned nowhere in the Application, such as access fees and assessments imposed by the card networks (e.g., "MC NABU", VISA AUTH ACCESS FEE," "VISA AUTH ACCESS DEBIT," "VISA ASSESSMENTS," "MASTERCARD ASSESSMENTS," etc.). As a "discount rate" customer (as opposed to an "interchange plus" customer) CFLS never agreed to pay such "pass through" fees. Even if it had, CFLS certainly would not have agreed to pay more than the standard actual

cost of such “pass through” fees. Nonetheless, EVO routinely inflated these supposedly “pass through” fees.

43. CFLS was also assessed junk fees that are not identified in the Merchant Application, such as “EPSD WATS” fees.

44. L&M was also subjected by EVO to inflated discount rates. For instance, rather than the agreed discount rate of 2.15% for credit cards, L&M was routinely charged higher rates, which were often in excess of 4.0%.

45. Like CFLS, L&M was also subjected by EVO to unauthorized assessments and access fees that were greater than the amounts set by the card networks.

46. L&M was also subjected by EVO to junk fees not authorized by its Merchant Application, including “PCI-DSS REGULATIONS UPDATE,” “PCI-DSS NONCOMPLIANCE,” and “GROSS VS. DAILY DISCOUNTING” fees. These are the same type of fees mentioned in the New York criminal indictment. Even after L&M terminated its relationship with EVO, EVO made up another new fee by threatening to apply a \$95 monthly fee to deplete the remaining balance in L&M’s reserve account.

47. Finally, other fees that were noted in L&M’s Application were improperly inflated, for example the “monthly service fee” was increased from \$10 to \$11.

48. EVO automatically deducted the improper fees referenced herein from Plaintiffs’ accounts before Plaintiffs received the monthly statement showing the fee. Thus, any payment of such fees by Plaintiffs was not voluntary.

49. Even if Plaintiffs had received the statements in a timely fashion, this is not a simple case where readily accessible information would have easily put Plaintiffs on notice they were being overcharged.

50. First, the statements do not separately identify “pass through” fees from those imposed solely by EVO – such line items are all mixed together. Thus, determining whether a fee should be checked against the Application or the “pass through” fee schedules published by the card networks is often impossible. This is especially true because the fee codes on the statements are often given different names than those set forth in the Application and the fee schedules. EVO often lists fees as being in the amount of “.00” on monthly statements even though a fee is actually charged and collected as part of aggregated totals listed later on the statements.

51. Moreover, a single credit card transaction often involves many different fees, making it even more difficult to compare published rates with those appearing on a statement.

52. Additionally, Defendants often buried cryptic language in prior monthly statements purporting to indicate that the card networks (as opposed to EVO) were raising or varying the charges noted in the Application. Thus, to determine if they were being overcharged, Plaintiffs would arguably have to check the charges against every prior monthly statement (in addition to the Application and the card network fee schedules).

53. Plaintiffs anticipate presenting evidence from industry experts that it is extraordinarily difficult for merchants to understand invoices from payment card processors, which are in many ways even more incomprehensible than the explanations of benefits sent to patients by health insurers. The amount of work needed by a merchant to understand the details of an EVO statement, even if possible, can be extraordinary.

54. These descriptions are intended only as illustrations of EVO’s overcharges. Plaintiffs are not in possession of complete information as to many of the charges imposed upon them. Discovery will likely reveal other examples of Plaintiffs being overcharged.

55. As a consequence of Defendants' overbilling policies and practices, Plaintiffs and the members of the class proposed below have been wrongfully forced to pay unauthorized fees and charges. Defendants have improperly deprived Plaintiffs and the members of the proposed class of significant funds, causing ascertainable monetary losses and damages.

CLASS ALLEGATIONS

56. Plaintiffs bring this action on behalf of themselves and all others similarly situated.

57. The Class is defined as:

All EVO merchant customers in the United States that paid a fee or charge that was not authorized in the Merchant Processing Application.

58. Plaintiffs reserve the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate and as the Court may otherwise allow.

59. Excluded from the Class are EVO, its parents, subsidiaries, affiliates, officers, and directors, any entity in which EVO has a controlling interest, all customers who make a timely election to be excluded, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

60. The time period for the Class is the number of years immediately preceding the date on which this Complaint is filed (or the filing date of a related case already pending) as allowed by the applicable statute of limitations, going forward into the future until such time as Defendants remedy the conduct complained of herein. As described above, it is likely that the relevant period will begin in 2010 based on New York law.

61. 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(a) and

(b)(3) 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.

62. **Numerosity.** The members of the Class are so numerous that individual joinder of all the members is impracticable. On information and belief, there are 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, and/or published notice.

63. **Commonality and Predominance.** 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 EVO has acted and continues to act improperly by imposing excessive and unauthorized fees on merchants, including Plaintiffs and the other Class members, for EVO's own benefit;
- b. Whether EVO deceptively formats notices and monthly statements in order to mask the origin and imposition of unauthorized fees and charges;
- c. Whether EVO debits amounts from merchant accounts before they have a legitimate opportunity to object;
- d. Whether EVO has breached its contract with Plaintiffs and the other Class members, either directly or via the covenant of good faith and fair dealing;

e. Whether certain of the Terms are invalid exculpatory clauses, violate public policy, lack mutuality, are procedurally and substantively unconscionable, and are otherwise void and unenforceable;

f. Whether EVO is liable to Plaintiffs and the other Class members for imposing improper fees on merchants for EVO's own benefit; and

g. Whether EVO should be enjoined from engaging in any or all of the unfair practices complained of herein.

64. Other questions of law and fact common to the Class include:

- a. The proper method or methods by which to measure damages; and
- b. The declaratory and/or injunctive relief to which the Class is entitled.

65. EVO has 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.

66. **Typicality.** 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.

67. **Adequacy of Representation.** Plaintiffs are adequate Class representatives because their interests do not conflict with the interests of the other Class members; 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.

68. **Declaratory and Injunctive Relief.** EVO has 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.

69. **Superiority.** 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 EVO, thus rendering it impracticable for Class members to individually seek redress for EVO's 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.

CLAIM FOR RELIEF

BREACH OF CONTRACT INCLUDING BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

70. Plaintiffs reallege and incorporate by reference all paragraphs as though fully set forth herein.

71. The actions taken by EVO have materially violated the specific terms of its contracts with Plaintiffs and the Class. Further, EVO has breached the contract by violating the covenant of good faith and fair dealing. EVO is liable for the losses of Plaintiffs and the Class that have resulted from its breaches of contract.

72. EVO violated the contract by assessing improper charges not provided for in the contract, to include improperly inflated charges, additional fees not even mentioned in the contract, and by unilaterally marking up agreed-upon fees and charges without legal basis and without proper notice. Thus, EVO has materially breached the express terms of its own form contract.

73. Plaintiffs and the Class have performed all, or substantially all, of the obligations imposed on them under the contracts, or those obligations have been waived by EVO.

74. Plaintiffs and the Class sustained damages as a result of EVO's breaches of contract.

75. The law also imposes upon each party to a contract the duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute violations of good faith and fair dealing in the performance of contracts.

76. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty.

77. By charging fees that are inconsistent with those laid out in the contract, including but not limited to, increasing the amounts of agreed-upon fees and imposing new categories of fees not referenced in the contract, EVO has violated the spirit of the contract and breached the covenant of good faith and fair dealing. Even if EVO believed that it had given itself contractual

discretion to increase mark-ups and fees, or add new fees, such discretion is constrained by good faith and fair dealing and EVO's actions do not comport with this duty.

78. Plaintiffs and the Class have performed all, or substantially all, of the obligations imposed on them under the contract. There is no legitimate defense for EVO's conduct.

79. Plaintiffs and members of the Class sustained damages as a result of EVO's direct breaches of the contract and Defendants' breaches of the covenant of good faith and fair dealing.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the Class demand a jury trial on all claims so triable and judgment as follows:

1. Certifying this case as a class action pursuant to Federal Rule 23;
2. Granting declaratory and injunctive relief as set forth herein;
3. Awarding damages in an amount to be determined by a jury;
4. Awarding pre-judgment interest at the maximum rate permitted;
5. Awarding such other relief as this Court deems just and proper.

Dated: August 1, 2017

Respectfully submitted,

WEBB, KLASE & LEMON, LLC

By: /s/ E. Adam Webb

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* Motion for *Pro Hac Vice* Admission to be filed after case number assigned

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - X
:
UNITED STATES OF AMERICA
:
- v. -
:
MICHAEL MENDLOWITZ,
a/k/a "Moshe Mendlowitz,"
RICHARD D. HART,
a/k/a "Rick Hart,"
Defendants.
:
- - - - - X

SEALED INDICTMENT

17 Cr.

17 CRIM 248

COUNT ONE
(Conspiracy to Commit Mail Fraud and Wire Fraud)

The Grand Jury charges:

OVERVIEW OF THE FRAUD SCHEME

1. From at least in or about 2009 through at least in or about July 2015, Commerce Payment Systems did business as a payment card processor for its merchant-customers, who were merchants and small businesses that accepted credit cards and debit cards from consumers. Commerce Payment Systems' management and employees operated under a variety of corporate names, including "Commerce Payment Systems," "Commerce Payment Group," "Merchant Commerce," "Empire Payments," "Evolution Bankcard," and "Optimal Bankcard" (collectively referred to herein as "CPS").

2. From at least in or about 2010, through at least in or about July 2015, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz,"

and RICHARD D. HART, a/k/a "Rick Hart," the defendants, orchestrated and participated in a scheme to defraud the merchant-customers of CPS. In the course of the scheme, MENDLOWITZ and HART used false and deceptive statements to market and sell CPS's services as a payment card processor. Specifically, the fees and other charges that CPS collected from its merchant-customers for providing CPS's payment card processing services far exceeded what CPS represented to its merchant-customers in CPS's marketing materials, sales calls, and written agreements. In addition, MENDLOWITZ further concealed these overcharges from CPS's merchant-customers, and, when such merchant-customers called to complain, caused the employees of CPS to continue to make false statements to such merchant-customers.

Background

3. Merchants who accept major brands of credit cards and debit cards typically use the services of payment card processors. A payment card processor acts as an intermediary between the merchant, the merchant's bank, the cardholder's bank, and "Card Associations," such as Visa, MasterCard, and Discover, to assist in processing the sales proceeds, and to ensure that the merchant receives payment for a credit or debit card purchase by a consumer. As part of this process, a

merchant typically enters into an agreement or contract with a payment card processor, pursuant to which the merchant agrees to pay various fees to the payment card processor in exchange for the processor's services.

4. Fees that payment card processors charge their merchant-customers are calculated in various ways. For example, such fees may be calculated as a percentage of a sales transaction, as a "per item" or "per transaction" fee, or as a regularly recurring monthly or annual fee.

CPS Operations

5. At all times relevant to this Indictment, the majority owner of CPS was a large payment processing company (the "Parent Company"), while a minority of CPS was owned by MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant.

6. Beginning in or about April 2009, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, on behalf of Commerce Payment Group, entered into a series of written agreements with the Parent Company, governing the operations of CPS and its relationship with the Parent Company, as well as the processing of funds.

7. At all times relevant to this Indictment, pursuant to agreements between the Parent Company and Commerce Payment Group, CPS performed various business functions in accordance

with procedures established by the Parent Company, while using software, computer systems, and other systems provided by the Parent Company. CPS performed such functions as marketing and sales, obtaining signed service agreements (called "Merchant Applications") with new merchant-customers, and thereafter inputting the relevant information about new merchant-customers and Merchant Applications into computerized systems used by the Parent Company to process payments and fees.

8. After CPS approved the Merchant Application of a new merchant-customer, certain CPS employees were responsible for entering the new merchant-customer's billing information into computer systems used by the Parent Company. Such information included details about the fees that a particular merchant-customer would be charged. These computer systems generated such charges regardless of what was in the customer's signed Merchant Application, and regardless of what the customer had been told during sales calls.

9. Once a merchant-customer began using the services of CPS, the Parent Company performed such functions as routing the funds generated by the sales made in the merchant-customer's store or business, minus the fees retained by the Card Associations and the bank that had issued the credit card or payment card to the cardholder-shopper. The Parent Company

thereafter credited CPS's fees to CPS, based upon information that CPS had inputted into the computer systems of the Parent Company, and caused the remaining net sales proceeds to be forwarded to CPS's merchant-customer, from bank accounts in the Southern District of New York. In sum, this meant that for any given transaction, the amount of money sent to a merchant-customer was reduced by the fees retained by the CPS, the Parent Company, and other entities.

10. After CPS's merchant-customers received these net proceeds, CPS also caused additional fees to be collected from its merchant-customers. These additional fees included various monthly and annual fees, among others.

11. In or about 2013, CPS received over \$9.9 million from more than 12,000 merchant-customers. In or about 2014, CPS received over \$13.5 million from more than 11,500 merchant-customers. In or about the first half of 2015, CPS received more than \$6.6 million from its merchant-customers.

The Defendants

12. At all times relevant to this Indictment, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, was the president and chief executive officer of CPS, as well as the owner of a minority share of CPS. In his capacity as president and chief executive officer of CPS, MENDLOWITZ supervised and

oversaw all CPS departments and operations. Among other things, MENDLOWITZ was closely involved in preparing false and fraudulent marketing materials and websites, causing sales staff to be provided with false and fraudulent written scripts of sales pitches, setting fee and charge schedules, designing and preparing customer agreements, directing employees on how much to charge merchant-customers - including ways to fraudulently overcharge such merchant-customers - directing employees on how to handle complaints from merchant-customers, and interacting with and deceiving the Parent Company. MENDLOWITZ also directed the creation of a website called bestpaymentprocessors.com, which purported to be an independent website that evaluated and compared payment card processors, but in truth and in fact was owned by MENDLOWITZ and used to promote CPS.

13. RICHARD D. HART, a/k/a "Rick Hart," the defendant, was employed at CPS from in or about November 2011 through in or about February 2015. For most of that time, HART was the supervisor of the majority of CPS's sales representatives, and held himself out at times as an executive of CPS and its various corporate affiliates. For example, at various times HART held himself out as the "Vice President of Sales," as well as the president of Empire Payments, the president of Evolution Bankcard, and the president of Optimal Bankcard.

14. In his capacity as a supervisor of CPS's sales staff, RICHARD D. HART, a/k/a "Rick Hart," the defendant, among other things, developed and wrote false and fraudulent scripts and training materials to be used by sales representatives and instructed sales representatives to make specific misrepresentations to potential merchant-customers about particular fees and other terms of service. HART also prepared marketing materials, including fraudulent "cost comparison calculators" that purported to compare the rates that merchants were paying with other credit card processing companies with rates that the merchants would be charged by CPS. In truth and in fact, however, these cost comparison calculators were designed to deceive potential merchant-customers by concealing fees that they ultimately would be charged by CPS. HART also participated in fraudulent sales calls, and distributed recordings of those calls to sales representatives, as instructional models on how to conduct sales calls with potential merchant-customers. HART also assisted in creating websites for CPS corporate affiliates, as well as in making changes and additions to the bestpaymentprocessors.com website.

MEANS AND METHODS OF THE CONSPIRACY

15. MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, carried out

their scheme through means and methods that included false marketing, misrepresentations by CPS's sales staff to potential merchant-customers, and misrepresentations to merchant-customers when the merchant-customers called to complain about overcharges. In addition, MENDLOWITZ made false statements to representatives of the Parent Company and directed CPS employees to impose additional improper undisclosed fees.

False Marketing

16. In furtherance of the scheme, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, caused CPS to include false and misleading statements on the websites and marketing brochures of CPS and its corporate affiliates. For example, these websites and brochures:

a. advertised fees that were far below the fees that merchant-customers would actually be charged, and added the false claim that there were "no hidden fees," when in truth and in fact, CPS charged its merchant-customers a variety of hidden fees;

b. falsely stated the number of customers that the various CPS corporate affiliates had, and the number of years that those affiliates had been in business;

c. listed a variety of entities that were falsely described as customers of CPS; and

d. provided written and video testimonials from purportedly satisfied merchant-customers, when in truth and in fact, many of the persons featured in those testimonials:

- i. did not exist or were not CPS customers; or
- ii. were privileged associates and family of MENDLOWITZ who did not pay most of the undisclosed fees that CPS charged to the rest of its customers.

17. Through CPS's marketing and sales activities, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, and others, took steps to conceal from potential and existing merchant-customers, the fact that "Commerce Payment Systems," "Merchant Commerce," "Empire Payments," "Evolution Bankcard," and "Optimal Bankcard" were actually all operated by the same management and employees, operating from the same office. MENDLOWITZ and HART undertook such concealment in part because certain of the CPS-affiliated companies suffered, over time, from increasingly negative reputations on the internet, caused in part by a large number of consumer complaints about, among other things, undisclosed fees

charge by the CPS-affiliated companies. Such concealment included:

- a. using different corporate logos, different websites, different mailing labels, and different telephone lines, with employees answering those lines differently depending on which company they were purporting to represent;
- b. assigning CPS employees multiple email addresses, in order to make it appear that different corporate names represented different companies;
- c. expressly denying to potential and existing merchant-customers that CPS's affiliates were related;
- d. launching "Evolution Bankcard" under a new name, to distance it from the negative ratings and reputation of CPS, and then concealing Evolution Bankcard's relationship with CPS; and
- e. later launching "Optimal Bankcard," essentially to replace "Evolution Bankcard," which had itself developed many negative ratings and reviews on the internet, and then concealing Optimal Bankcard's relationship with CPS.

18. To further support the fraudulent marketing of CPS and its various corporate components, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, together with others, created and utilized the

website bestpaymentprocessors.com to advance their fraudulent scheme in various ways, including the following:

a. After registering the bestpaymentprocessors.com domain name on or about May 2, 2013, MENDLOWITZ worked with website designers to make the website appear to be an independent website that provided comparative information about different payment card processors, including CPS affiliates.

b. From in or about August 2013 through at least in or about the fall of 2014, MENDLOWITZ and website designers whom he hired arranged for Evolution Bankcard -- a CPS corporate component whose sales force was supervised by HART -- to appear as the #1 top-rated payment card processor on the website bestpaymentprocessors.com.

c. On or about October 30, 2013, MENDLOWITZ sent a series of emails to a website designer contracted by CPS, instructing the designer to take steps to conceal MENDLOWITZ's and CPS's connection with the website bestpaymentprocessors.com.

d. From in or about late 2014, after MENDLOWITZ and HART began to market the new CPS corporate affiliate "Optimal Bankcard," MENDLOWITZ and HART worked with website designers to arrange for Optimal Bankcard to replace Evolution Bankcard as the #1 top-rated payment card processor on bestpaymentprocessors.com.

19. In or about December 2014, when MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, launched Optimal Bankcard, MENDLOWITZ and HART worked with graphics and website designers contracted by CPS to create new marketing materials for Optimal Bankcard, including a new webpage and new marketing brochures, filled with false information. For example:

a. The Optimal Bankcard marketing materials falsely stated that Optimal Bankcard had been in business for ten years; and was "trusted by over 300,000 merchants," including a variety of national chains of hotels, restaurants, and stores, and a university.

b. The Optimal Bankcard marketing materials falsely stated that Optimal Bankcard charged no "hidden fees," and that there was a "\$0 Annual Fee." In truth and in fact, Optimal Bankcard charged a number of annual fees that were concealed from merchant-customers, including an annual "membership fee."

c. The Optimal Bankcard marketing materials contained written "testimonials" from purportedly satisfied customers who, in truth and in fact, did not exist or were not customers of CPS or Optimal Bankcard. HART provided some of these testimonials to a website designer on or about December 15, 2014, and instructed the website designer to find racially

and ethnically diverse photos on the internet, which could be used as purported photos of the non-existent merchants.

20. In or about July 2015, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, registered a new website, toprankedprocessors.com, and began taking steps with a website designer to use toprankedprocessors.com in the same manner that MENDLOWITZ and RICHARD D. HART, a/k/a "Rick Hart," the defendant, had previously used bestpaymentprocessors.com.

Misrepresentations by CPS Sales Representatives

21. In furtherance of the scheme, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, controlled the procedures by which CPS's sales personnel interacted with potential merchant-customers, ensuring, among other things, that they adhered to deceptive written scripts, and providing such sales representatives with training, practice sessions, and model examples of recorded telephone sales calls.

22. MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, directed CPS's sales representatives to follow specific scripts, which contained false, fraudulent and misleading statements about the fees that customers would be charged. Such scripts, as well as instructions and example telephone calls provided by HART,

directed sales representatives to make false statements about such matters as whether additional undisclosed fees would be imposed, whether certain fees would be waived, whether certain rates were guaranteed, how customers could access their bills, and whether additional fees and charges would be withdrawn directly out of customers' bank accounts.

23. RICHARD D. HART, a/k/a "Rick Hart," the defendant, and CPS sales representatives made numerous misrepresentations to potential merchant-customers during sales calls. For example, HART and the CPS sales representatives made numerous false statements to potential merchant-customers about the fees they would be charged by CPS, and denying that there were any annual fees. In truth and in fact, and as HART well knew, merchant-customers were charged fees that were several times larger than the fees quoted to them during sales calls, and were charged various annual fees exceeding \$195 per year.

24. After potential merchant-customers submitted signed Merchant Applications to CPS, CPS sent such potential merchant-customers emails that falsely stated in part, "Important Note: Each and every rate that is agreed on this application will be set in for the lifetime of the account." In truth and in fact, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, repeatedly caused various fees collected by CPS to be

dramatically increased, sometimes by several times the quoted price.

25. RICHARD D. HART, a/k/a "Rick Hart," the defendant, instructed CPS's sales personnel to use written "cost comparison calculators," which were spreadsheets showing potential customers what their prospective bills would purportedly be with CPS. HART created and revised the cost comparison calculators, and provided sales representatives with detailed instruction on how to use the calculators. HART also instructed sales representatives to make similar "cost comparisons" orally during sales calls - and often joined the conversation himself to set forth detailed fraudulent calculations. In truth and in fact, HART intentionally designed the written and oral cost comparisons so that they generally concealed whole categories of hidden fees, such as recurring annual fees, large surcharges, and other fees and assessments.

Concealment of the "Merchant Application"

26. In accordance with procedures implemented by MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, during or immediately after a CPS sales representative spoke with a prospective merchant-customer, the sales representative provided to the prospective merchant-

customer a Merchant Application, to be initialed, and signed by the merchant-customer.

27. Although CPS was required by the Parent Company to use a specific form of the Merchant Application, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," RICHARD D. HART, a/k/a "Rick Hart," the defendants, and others, used and caused to be used an altered form of the Merchant Application. In particular, until in or about January 2015 -- when the Parent Company performed an audit inspection at CPS -- MENDLOWITZ caused three pages of the Merchant Application to be removed from the version of the Merchant Application that was provided to CPS's merchant-customers. Those three pages contained the "Merchant Processing Agreement," which in turn contained detailed "Terms and Conditions." The omitted Terms and Conditions related to material aspects of the merchant-customer's agreement, and the terms were often in direct contradiction to the representations that CPS's sales representatives made to potential customers during the sales process. Such omitted terms included that:

a. CPS and the Parent Company reserved the right to alter fees and charges - a clause that directly contradicted representations that CPS employees made to potential customers during the sales process, that fees were "guaranteed for life;"

b. CPS and the Parent Company would notify the customer of such changes only through a notice on the customer's on-line monthly statement - a statement that many customers did not know existed;

c. such monthly statements and the accompanying notices would not be mailed or emailed to the customer, but would be provided by logging into a website, and would be accessible to the customer only for three months;

d. that the terms written in the Terms and Conditions "constitute[d] the entire agreement" among the parties, and that all prior "representations, written or oral, made to Merchant are superseded;" and

e. that the customer could be charged an annual Payment Card Industry ("PCI") fee. This term directly contradicted written and verbal assurances made to potential customers at the direction of MENDLOWITZ and HART that the customers would not be charged such a PCI fee.

28. In or about January 2015, when the Parent Company performed an audit inspection of CPS's procedures, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, together with a co-conspirator not named as a defendant herein ("CC-1"), falsely told the Parent Company auditors that CPS was routinely sending the Terms and Conditions of the Merchant Processing

Agreement to new customers, but was sending them in a separate communication after a merchant-customer's account was approved. On or about January 16, 2015, in an effort to deceive the Parent Company auditors, MENDLOWITZ and CC-1 prepared fraudulent emails - with fictitious addressees and attachments - that were created to give the false appearance that CPS had sent the Terms and Conditions of the Merchant Processing Agreement to CPS merchant-customers.

29. In or about January and February 2015, after the Parent Company reiterated its requirement that that the Terms and Conditions of the Merchant Processing Agreement be provided to potential customers prior to signing, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, and others, devised new ways of keeping those customers from seeing the Terms and Conditions, but making it appear as if CPS's clients had reviewed and signed off on the Terms and Conditions. More specifically, MENDLOWITZ and HART caused to be created, and used, a computer device that caused the initials of potential merchant-customers to be copied onto pages of the Merchant Application that those potential customers had not in fact initialed.

**Fraudulent Overcharging for Misstated,
Undisclosed and Unauthorized Fees**

30. After CPS approved a potential customer's Merchant Application, CPS employees loaded the customer's information into the Parent Company's computer system, which generated the charges that would be imposed upon that merchant-customer, regardless of what was in that customer's Merchant Application and regardless of what that customer had been told during sales calls.

31. MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, CC-1, and others, took steps to ensure that the rates and fees that merchant-customers were to be charged were often several times higher than the rates and fees that had been represented to the merchant-customers during the sales process or set forth in their Merchant Applications. These increased fees were imposed through a number of different mechanisms, including:

a. calculating and collecting percentage fees that were significantly higher than those set forth in the Merchant Applications and that were contrary to representations made by CPS sales representatives during the sales process;

b. collecting percentage fees multiple times, which could only properly be charged once under the terms of the

Merchant Applications and according to the representations made by CPS sales representatives during the sales process;

c. over-charging merchant-customers for multiple per-transaction fees when only one fee could properly be charged under the terms of the Merchant Applications and according to the representations that CPS sales representatives made during the sales process;

d. charging merchant-customers an annual PCI fee of \$99.00, purportedly for protective and insurance services, which directly contradicted representations made to potential customers by CPS in the sales and marketing processes that no such fee would be charged;

e. charging merchant-customers various fees, including "IRS reporting fees," annual "membership fees," and "inactivity fees," in contradiction to representations made to potential customers by CPS in the marketing and sales processes that no such fees would be charged;

f. charging some merchant-customers for "dues and assessments" at rates as much as ten times greater than those reflected in their Merchant Application, and in contradiction to representations made by CPS in the marketing and sales processes;

g. charging some merchant-customers a "network access fee" that was in some cases ten times the fee reflected in their Merchant Applications;

h. charging merchant-customers for "surcharges" at rates far in excess of those reflected in their Merchant Application, and applying such surcharges to transactions to which they did not properly apply under the terms of the Merchant Application, in contradiction to representations by CPS in the marketing and sales processes; and

i. arbitrarily and periodically increasing these fees and others, when MENDLOWITZ wished to generate additional revenue.

Additional Concealment of the Fraud

32. CPS operated a Customer Service department, which handled customer questions and complaints about charges and overcharges, as well as requests for refunds or cancellation of accounts. MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, instructed members of the Customer Service department to make a variety of false statements to merchant-customers who complained about charges and overcharges for CPS's processing services. Such false statements included:

a. telling merchant-customers who complained that the hidden fees were in fact provided for in the customers' agreements when they were not;

b. misrepresenting to merchant-customers that certain charges did not originate with CPS but rather with various third parties; and

c. misrepresenting to merchant-customers that the overcharges imposed upon them were the result of billing errors, when they were in truth and in fact deliberately imposed.

33. MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, instructed CPS employees in CPS's Customer Service department that they were required to limit the amount of money to be paid each month for refunds, subject each month to MENDLOWITZ's approval. It was also a common practice of CPS not to pay refunds to merchant-customers who were cancelling their accounts.

Concealment of the Fraud Scheme from the Parent Company

34. MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," the defendant, repeatedly made false and misleading statements to the Parent Company, with the intention of concealing aspects of the fraud scheme. For example:

a. In or about October 2013, MENDLOWITZ represented to the Parent Company that CPS would be charging a 2.95%

surcharge only on certain credit or debit card transactions. In truth and in fact, however, MENDLOWITZ instructed CPS employees that for most customers they were to impose the surcharge on all transactions, thus greatly increasing the surcharges that those customers were charged.

b. On or about October 31, 2013, after the Parent Company had instructed MENDLOWITZ to lower an assessment fee that CPS was charging its customers, MENDLOWITZ instructed a CPS employee not to lower that assessment fee for CPS's largest customers. MENDLOWITZ subsequently represented to the Parent Company that CPS had lowered the assessment fee for all of its merchant-customers, when in truth and in fact, CPS had not reduced the assessment fee for more than 700 of its largest customers.

STATUTORY ALLEGATIONS

35. From at least in or about 2010, through at least in or about July 2015, in the Southern District of New York and elsewhere, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, and others known and unknown, willfully and knowingly, combined, conspired, confederated and agreed together and with each other to violate Title 18, United States Code, Sections 1341 and 1343.

36. It was a part and an object of the conspiracy that MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, and others known and unknown, knowingly and willfully, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, for the purpose of executing such scheme and artifice and attempting so to do, would and did place in a post office and authorized depository for mail matter, a matter and thing to be sent and delivered by the Postal Service, and would and did deposit and cause to be deposited a matter and thing to be sent and delivered by a private and commercial interstate carrier, and would and did take and receive therefrom, a matter and thing, and would and did cause to be delivered by mail and such carrier according to the direction thereon, and at the place at which it was directed to be delivered by the person to whom it was addressed, such matter and thing, in violation of Title 18, United States Code, Section 1341.

37. It was a further part and object of the conspiracy that MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, and others known and unknown, knowingly and willfully, having devised and intending

to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire, radio, and television communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343.

(Title 18, United States Code, Section 1349.)

COUNT TWO

(Mail Fraud)

The Grand Jury further charges:

38. The allegations set forth in paragraphs 1 through 34 are repeated, realleged, and incorporated by reference as if set forth fully herein.

39. From at least in or about 2010, through at least in or about July 2015, in the Southern District of New York and elsewhere, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, knowingly and willfully, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, for the purpose of executing such scheme and artifice

and attempting so to do, placed in a post office and authorized depository for mail matter, a matter and thing to be sent and delivered by the Postal Service, and deposited and caused to be deposited a matter and thing to be sent and delivered by a private and commercial interstate carrier, and took and received therefrom, a matter and thing, and caused to be delivered by mail and such carrier according to the direction thereon, and at the place at which it was directed to be delivered by the person to whom it was addressed, such matter and thing, to wit, MENDLOWITZ and HART made, and caused to be made, materially false statements to CPS's merchant-customers and its Parent Company about the fees that CPS charged its merchant-customers for payment card processing services, and in connection therewith and in furtherance thereof, MENDLOWITZ and HART sent and received and caused materials to be sent and received using the United States mail and private and commercial interstate carriers.

(Title 18, United States Code, Sections 1341 and 2.)

COUNT THREE

(Wire Fraud)

The Grand Jury further charges:

40. The allegations set forth in paragraphs 1 through 34 are repeated, realleged, and incorporated by reference as if set forth fully herein.

41. From at least in or about 2010, through at least in or about July 2015, in the Southern District of New York and elsewhere, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, knowingly and willfully, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, transmitted and caused to be transmitted by means of wire, radio, and television communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, to wit, MENDLOWITZ and HART made, and caused to be made, materially false statements to CPS's merchant-customers and its Parent Company about the fees that CPS charged its merchant-customers for payment card processing services, and in connection therewith and in furtherance thereof, MENDLOWITZ and HART

transmitted and caused to be transmitted interstate electronic mail, telephone calls, and wire transfers of funds.

(Title 18, United States Code, Sections 1343 and 2.)

FORFEITURE ALLEGATION

42. As a result of committing the offenses charged in Counts One, Two, and Three of this Indictment, MICHAEL MENDLOWITZ, a/k/a "Moshe Mendlowitz," and RICHARD D. HART, a/k/a "Rick Hart," the defendants, shall forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), any and all property, real or personal, that constitutes or is derived, directly or indirectly, from proceeds traceable to the commission of the offenses alleged in Counts One, Two, and Three of this Indictment, including but not limited to a sum of money in United States currency representing the amount of proceeds traceable to the commission of said offenses.

Substitute Asset Provision

43. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;


d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty,

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of the defendants up to the value of the above forfeitable property.

(Title 18, United States Code, Section 981;
Title 21, United States Code, Section 853(p); and
Title 28, United States Code, Section 2461(c).)


FOREPERSON



JOON H. KIM
Acting United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

MICHAEL MENDLOWITZ, a/k/a "Moshe
Mendlowitz," and
RICHARD D. HART, a/k/a "Rick Hart,"

Defendants.

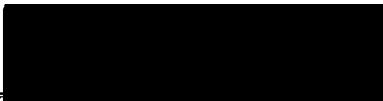
SEALED INDICTMENT

17 Cr.

(18 U.S.C. §§ 1341, 1343, 1349, and 2)

JOON H. KIM

Acting United States Attorney.



CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
CENTRAL FLORIDA LIQUIDATION AND SALES LLC and L & M ENTERPRISES USA, LLC,
(b) County of Residence of First Listed Plaintiff Florida
(c) Attorneys (Firm Name, Address, and Telephone Number) E. Adam Webb; Webb, Klase & Lemond, LLC; 1900 The Exchange S.E., Suite 480, Atlanta, GA 30339; (770) 444-0773

DEFENDANTS
EVO PAYMENTS INTERNATIONAL, LLC and EVO MERCHANT SERVICES, LLC,
County of Residence of First Listed Defendant Suffolk County, NY
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State 1 X 1
Citizen of Another State X 2 2
Citizen or Subject of a Foreign Country 3 3
Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT: 110 Insurance, 120 Marine, 130 Miller Act, 140 Negotiable Instrument, 150 Recovery of Overpayment & Enforcement of Judgment, 151 Medicare Act, 152 Recovery of Defaulted Student Loans (Excludes Veterans), 153 Recovery of Overpayment of Veteran's Benefits, 160 Stockholders' Suits, 190 Other Contract, 195 Contract Product Liability, 196 Franchise
TORTS: PERSONAL INJURY: 310 Airplane, 315 Airplane Product Liability, 320 Assault, Libel & Slander, 330 Federal Employers' Liability, 340 Marine, 345 Marine Product Liability, 350 Motor Vehicle, 355 Motor Vehicle Product Liability, 360 Other Personal Injury, 362 Personal Injury - Medical Malpractice
PERSONAL INJURY: 365 Personal Injury - Product Liability, 367 Health Care/Pharmaceutical Personal Injury Product Liability, 368 Asbestos Personal Injury Product Liability
PERSONAL PROPERTY: 370 Other Fraud, 371 Truth in Lending, 380 Other Personal Property Damage, 385 Property Damage Product Liability
FORFEITURE/PENALTY: 625 Drug Related Seizure of Property 21 USC 881, 690 Other
LABOR: 710 Fair Labor Standards Act, 720 Labor/Management Relations, 740 Railway Labor Act, 751 Family and Medical Leave Act, 790 Other Labor Litigation, 791 Employee Retirement Income Security Act
IMMIGRATION: 462 Naturalization Application, 465 Other Immigration Actions
BANKRUPTCY: 422 Appeal 28 USC 158, 423 Withdrawal 28 USC 157
PROPERTY RIGHTS: 820 Copyrights, 830 Patent, 835 Patent - Abbreviated New Drug Application, 840 Trademark
SOCIAL SECURITY: 861 HIA (1395ff), 862 Black Lung (923), 863 DIWC/DIWW (405(g)), 864 SSID Title XVI, 865 RSI (405(g))
FEDERAL TAX SUITS: 870 Taxes (U.S. Plaintiff or Defendant), 871 IRS—Third Party 26 USC 7609
OTHER STATUTES: 375 False Claims Act, 376 Qui Tam (31 USC 3729(a)), 400 State Reapportionment, 410 Antitrust, 430 Banks and Banking, 450 Commerce, 460 Deportation, 470 Racketeer Influenced and Corrupt Organizations, 480 Consumer Credit, 490 Cable/Sat TV, 850 Securities/Commodities/Exchange, 890 Other Statutory Actions, 891 Agricultural Acts, 893 Environmental Matters, 895 Freedom of Information Act, 896 Arbitration, 899 Administrative Procedure Act/Review or Appeal of Agency Decision, 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)
X 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. § 1332(d)(2)
Brief description of cause:
Defendants overcharged Plaintiffs for payment processing services.

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint:
JURY DEMAND: X Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):
JUDGE Joseph F. Bianco DOCKET NUMBER 17-cv-3650 (JFB) (SIL)

DATE 08/01/2017 SIGNATURE OF ATTORNEY OF RECORD /s/ E. Adam Webb

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

CENTRAL FLORIDA LIQUIDATION AND SALES
LLC and L & M ENTERPRISES USA, LLC,
individually and on behalf of all
others similarly situated,

Plaintiff(s)

v.

EVO PAYMENTS INTERNATIONAL, LLC,
and EVO MERCHANT SERVICES, LLC,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) DEFENDANT EVO PAYMENTS INTERNATIONAL, LLC
c/o PETER S. COHEN
515 BROADHOLLOW ROAD
MELVILLE, NEW YORK, 11747

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

E. Adam Webb
Webb, Klase & Lemond, LLC
1900 The Exchange, S.E., Suite 480
Atlanta, Georgia 30339

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

CENTRAL FLORIDA LIQUIDATION AND SALES
LLC and L & M ENTERPRISES USA, LLC,
individually and on behalf of all
others similarly situated,

Plaintiff(s)

v.

EVO PAYMENTS INTERNATIONAL, LLC,
and EVO MERCHANT SERVICES, LLC,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) DEFENDANT EVO MERCHANT SERVICES, LLC
515 BROADHOLLOW ROAD
MELVILLE, NEW YORK, 11747

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

E. Adam Webb
Webb, Klase & Lemond, LLC
1900 The Exchange, S.E., Suite 480
Atlanta, Georgia 30339

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [EVO Facing Claims It Charges Excessive Payment Processing Fees](#)
