UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RUDEL CORPORATION, individually and on behalf of all others similarly situated, Plaintiff, v. HEARTLAND PAYMENT SYSTEMS, INC., Defendant.	**CLASS ACTION COMPLAINT** Civil No.: JURY TRIAL DEMANDED

Plaintiff Rudel Corporation ("Rudel"), doing business as Jacala Mexican Restaurant, brings the claims set forth below against Heartland Payment Systems, Inc. ("Heartland").

Nature of the Action

1. Plaintiff, individually and on behalf of all others similarly situated, brings this action against Heartland, a payment card processor that operates throughout the United States.

2. Heartland markets its credit card processing services to small and medium-sized merchants by claiming that its services and billing are fair and transparent, in contrast to its competitors in the credit card processing industry—an industry known for implementing hidden and bogus fees. But Heartland has abandoned any semblance of honest billing by charging merchants unjustifiable fees – sometimes retroactively -- hidden within a labyrinthine monthly statement, in flagrant disregard of the promises it made to merchants.

3. Before June 2014, merchants who processed American Express transactions through Heartland would complete a merchant application with Heartland setting forth the rates and fees that Heartland would charge when the merchant processed transactions through Heartland. As set forth in the application, Heartland would keep a portion of the fee and would

pass on the balance of the fees to the card companies (such as Visa, MasterCard and American Express).

4. The application was part of the contractual agreement between Heartland and the merchant and could only be amended in writing.

5. Before June 2014, when Heartland processed American Express transactions Heartland would charge its merchants a swipe fee for each transaction (called a "Transaction Fee") but did not charge its merchants a percentage of the transaction (called a "Discount Rate") for processing American Express transactions.

6. In June of 2014, Heartland promised its customers a lower cost for processing American Express transactions while also allowing for "simpler processing and servicing" and "one easy-to-read statement."

7. Heartland represented to its customers that it would process American Express transactions, which were historically more costly for merchants, at the same Heartland rate as for Visa and MasterCard transactions.

8. After implementing the new American Express program, known as "OptBlue," Heartland increased its total card processing volume from $27 billion to $29.6 billion in part because customers believed Heartland's representations about the purportedly new, lower rates for processing American Express transactions.

9. But, without getting its merchants to sign new agreements authorizing Heartland to charge them more fees for processing American Express transactions, Heartland began imposing additional fees on its merchants for processing American Express transactions that dramatically increased Heartland's profits.

10. For example, in October 2014, Heartland retroactively charged its customers an unauthorized, one-time "American Express Fee Adjustment".

11. In every merchant's monthly statement for October 2014, Heartland feigned that this "American Express Fee Adjustment" was the result of a "miscalculation" in its American Express OptBlue program and indicated that it would charge a "one-time adjustment . . .pricing back to [each merchant's] account conversion date."

12. There was no miscalculation. Instead, Heartland retroactively charged these fees to every merchant for whom it processed American Express transactions between June 2014 and October 2014, often amounting to hundreds of dollars of extra fees for each merchant in October 2014.

13. By retroactively charging its customers these fees, Heartland increased its profits by tens of millions of dollars, violated its contracts with its merchants, and reneged on its representations to those merchants.

14. In November 2014, Heartland charged Plaintiff and the Class two separate American Express Discount Fees to process American Express transactions. The Discount Fee was a percentage of the dollar amount of American Express transactions that the merchant processed each month and the Discount Fee went directly to Heartland. One of those Discount Fees was significantly higher than the rates that Heartland charged to process Visa and MasterCard transactions, again resulting in tens of millions of dollars in additional revenues for Heartland at the expense of its merchants. Charging this higher Discount Fee violated Heartland's contracts with, and representations to, its merchants.

15. Then beginning in December 2014, Heartland charged only the higher Discount Fee it had charged in November. This Discount Fee exceeded that charged for processing Visa

and MasterCard transactions by as much as 15 times. Charging these higher American Express Discount Fees violated Heartland's contracts with, and representations to, its merchants.

16. Heartland charged its unconscionable and deceptive fees to small and medium-sized merchants in violation of its contract and its representations to the merchants, and did so in bad faith.

17. Plaintiff, individually and on behalf of all of Heartland's customers, brings claims against Heartland for breach of contract, breach of the implied covenants of good faith and fair dealing, violating the New Jersey Consumer Fraud Act, and for unjust enrichment.

Parties

18. Defendant Heartland is a Fortune 1000 company organized under the laws of the state of Delaware with its principal place of business at 90 Nassau Street, Princeton, New Jersey.

19. Rudel Corporation, doing business as Jacala Mexican Restaurant, is a corporation organized under the state laws of Texas.

20. Jacala Mexican Restaurant is a family-run business and is one of the oldest originally owned Mexican restaurant in San Antonio, Texas.

21. Jacala processed its credit card and debit card transactions with Heartland from 2008 through 2014.

Jurisdiction and Venue

22. This Court has original jurisdiction over this case under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). Plaintiff is a citizen of Texas. Heartland is a citizen of New Jersey. The amount in controversy in this action exceeds $5,000,000 and there are more than 100 members of the Class.

23. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant Heartland resides in this District, a substantial part of the events giving rise to Plaintiff's claims occurred in this District, and Heartland is subject to personal jurisdiction in this District.

Facts

I. *Heartland's Payment Processing Business*

24. Heartland is engaged in the business of electronic payment processing, which involves processing credit card and debit card transactions for merchants who accept those forms of payment.

25. Payment processors such as Heartland provide services to merchants to ensure that transactions are properly credited to the merchant and charged to the customer through the bank or institution that issued the customer's credit or debit card. Thus, each time a customer's credit or debit card is swiped through a terminal at a store, restaurant, or other place of business, information is accumulated to be transmitted through the payment processing system so that the merchant can receive the proceeds of the transaction, the issuing institutions (*i.e.*, Wells Fargo, Chase, etc.) and card brands (*i.e.*, Visa, MasterCard, Discover, American Express) can receive their fees, and the consumer's account can be correctly and appropriately charged. Payment processors such as Heartland act as intermediaries between these various entities.

26. A substantial part of Heartland's processing business is focused on providing various services and solutions to small and medium-sized enterprises ("SME"), especially in the restaurant, lodging and hospitality, and retail sectors. The vast majority of Heartland's customers in these sectors are small chains or independent locations, and not part of national chains. These kinds of businesses typically operate on thin profit margins, so that even a small difference in the cost of processing services matters greatly to these merchants. These kinds of businesses are also

usually owned and managed by a single person or a small group of entrepreneurs, and are therefore especially vulnerable to the predatory and deceptive practices in which Heartland has engaged, as alleged herein.

27. As of December 31, 2014, Heartland provided card payment processing services to 169,831 active SME merchants across the United States, in addition to 2,181 "Network Services Merchants," which are predominantly petroleum industry merchants of all sizes.

28. Heartland's card payment processing revenue from SME merchants and Network Services Merchants is recurring in nature. Heartland typically enters into three-year service contracts with SME merchants and three-to-five year agreements with Network Services merchants.

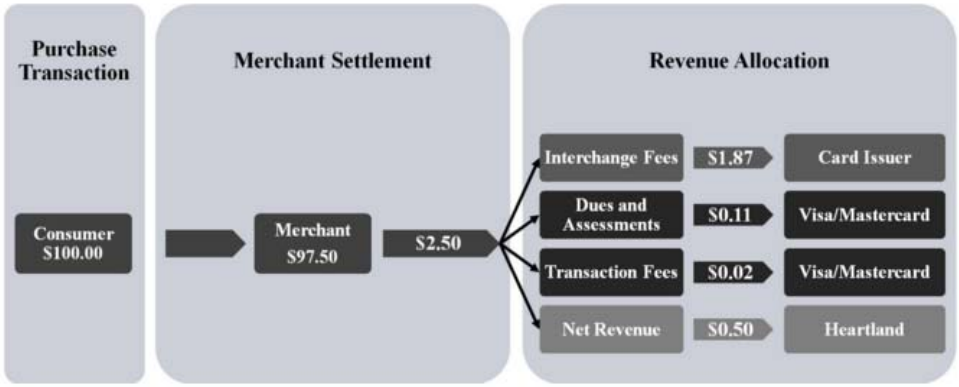
29. Most of Heartland's SME revenue is from fees for processing transactions, which are primarily a combination of a percentage of the dollar amount of each card transaction Heartland processes, plus a flat fee per transaction.

30. Heartland makes mandatory payments of interchange fees to card issuing banks through card networks and dues, assessments and transaction authorization fees to Visa, MasterCard, and Discover, and retains the remainder as its net revenue.

31. In addition to interchange fees, Heartland also charges access fees, also referred to in the payment card industry as "dues and assessments". These fees are established by Visa, MasterCard, American Express, and Discover as a percentage of each transaction. These fees are paid by merchants and collected by payment card processors like Heartland, and distributed to the card associations. Heartland does not have authority to increase or decrease these fees.

32. Interchange fees are established and published by card associations, such as Visa, MasterCard, or American Express, but are distributed to card-issuing banks or financial institutions instead of to card associations.

33. For example, in a transaction using a Visa or MasterCard credit card, the funds from a $100 transaction would be allocated as follows:



II. *The Changing Landscape of Payment Processing*

A. The Durbin Amendment

34. The Payment Processing field has been greatly affected by the so-called Durbin Amendment to the 2010 Dodd-Frank Act, which set limits on interchange fees paid by merchants to large banks to process debit card purchase transactions.

35. The Durbin Amendment directs the Federal Reserve Board to regulate debit card interchange fees so that they are "reasonable and proportional to the cost incurred by the issuer with respect to the transaction."

36. Before the Durbin Amendment many processors hid the true cost of interchange from their merchant customers and did not show the true rate mix or pricing on their statements. Under the Durbin Amendment, however, payment processors are obligated by law not to over-charge for interchange rates on regulated debit purchases. These reduced rates often appear on

statements as a refund or rebate, usually as an item marked "Durbin Rebate", or identified in the interchange category breakdown as "regulated debit".

37. While the Durbin Amendment applies only to Visa and MasterCard debit cards and only to issuing non-exempt institutions with $10 billion or more in total assets, it has substantially affected the payment processing industry by preventing processors like Heartland from tacking on fees to the interchange cost.

38. Although the Durbin Amendment has diluted processors' per-transaction profit, processors and banks have since found other ways to capture that profit, and even more.

39. Indeed, a recent study conducted by the Federal Reserve Bank of Richmond found that the regulation has had a limited effect on merchants. In a sample of 420 merchants across 26 sectors, two-thirds reported no change or did not know the change of debit costs after the regulation. One-fourth of the merchants, however, reported an increase of debit costs. The study suggests that the regulation has backfired.

B. Heartland Faced Increased Competition during the Class Period

40. Heartland is the fifth largest payment processor in the United States, and the ninth largest in the world.

41. During the Class Period, Heartland was facing increasing competition from other payment processing companies that were expanding their business among SME merchants.

42. For instance, in 2014, Heartland filed an antitrust lawsuit against Mercury Payment Systems, LLC, a company that competes directly with Heartland in providing processing services to small and medium-sized merchants, particularly restaurants and retail stores. Heartland described Mercury as a competitor that had quadrupled in size over four years, both in the volume of transactions and the number of merchant outlets to which it provides

services. In order to check this competition, Heartland filed an antitrust lawsuit against Mercury claiming that Mercury had been charging customers undisclosed fees.

43. Heartland has also been encountering intense competition from disruptive entrants into the payment processing business. For instance, in 2010, Square entered the market and began processing payments for "micro-merchants" by creating software that permitted merchants to use mobile devices to process payments, rather than require these small businesses to acquire costly hardware. For Visa and MasterCard transactions, Square became an "aggregator" for merchants with less than $100,000 in transactions, which allowed merchants to forego applying for Merchant IDs and process with Square in a matter of minutes instead of days.

44. The growth of Square has been extraordinary and has led to copycat payment processing businesses competing for the business of the same SME merchants that have historically formed the majority of Heartland's client base.

45. Heartland also risks losing its place among competitors because its business is overly dependent on its profits from Visa and MasterCard transactions. Heartland is registered as an Independent Sales Organization with Visa and as a Member Service Provider with MasterCard. In its 2013 Form 10-K, Heartland conceded that:

> The termination of our registration or our status as an Independent Sales Organization or Member Service Provider, or any changes in card network or issuer rules that limit our ability to provide payment processing services, could have an adverse effect on our bankcard processing volumes, revenues or operating costs. In addition, if we were precluded from processing Visa and MasterCard bankcard transactions, we would lose the majority of our revenues.

46. During the Class Period, Heartland and its management was attempting to sell or merge Heartland and had a strong financial incentive to increase its revenues in an attempt to make itself more attractive as a merger candidate or as an acquisition target.

47. Prompted by increasing competition and a desire to increase its revenues, Heartland made changes to how it processed American Express transactions to increase its profits on those transactions and to reduce its dependency on Visa and MasterCard.

48. These changes, however, took form primarily in increased fees on merchants that Heartland either misrepresented or failed to properly disclose.

III. *Heartland's Purported Transparency Policy*

49. Processing services are sold with a variety of pricing approaches for merchants, including flat and tiered discount rates. However, in recent years, Heartland has priced SME merchants increasingly on a cost-plus basis. Issuing institutions charge certain fees when cards that they issue are used, generally calculated as a percentage of the transaction plus a per-transaction fee. Those fees vary based on the type of card used (*e.g.*, a merchant will pay a different fee for transactions in which a basic bank credit card is used than for transactions in which a rewards card, for which the user gets airline miles or similar benefits, is used; similarly, the merchant will pay a much lower fee for a debit card transaction than for a credit card transaction). Those fees, charged by the card issuers, are referred to as "interchange" fees. The card networks (*e.g.*, Visa and MasterCard) also charge fees, including fees that are assessed on a per-transaction basis. For example, Visa charges a fee known as the "APF" (or "Acquirer Processing Fee") and MasterCard charges a fee known as the "NABU" (or "Network Access Brand Usage") fee. The card brands charge additional fees for particular kinds of transactions or events, such as transactions in which a customer's credit card is declined. All of those fees, charged by the card brands, are known as "network" fees. As interchange and network fees are established by the card networks, apply identically, regardless of the acquirer of the transaction, and are outside the control of those acquirers (or the merchants), they are often combined

colloquially and described as "interchange" fees. Thus, the "interchange-plus" pricing model that Heartland and others offer to merchants means that the acquirer (1) will pass through at cost the uncontrollable interchange and network fees to the merchant, and (2) will add a separate mark-up, usually in some combination of basis points and cents-per-transaction, that is supposed to represent the amount the acquirers are being paid for their services. As network fees and interchange fees can be adjusted or reset as often as twice a year, a merchant on interchange-plus pricing would expect to see changes in their fees based on those adjustments, but would not and should not expect to see any change in the spread paid to the acquirer.

50. The purported purpose of interchange-plus is transparency. Interchange-plus pricing allows merchants to see how much they are paying the card brands and how much they are paying Heartland. This is claimed to protect merchants from arbitrary price increases and ensure that merchants receive the full benefit of cost reductions, such as the Durbin Amendment Savings.

51. In accord with its supposed transparency policy, Heartland promises "full and honest disclosure with easy-to-read statements" as well as "fairness and transparency."

52. Heartland has promulgated a "Merchant Bill of Rights." Among other things, the Merchant Bill of Rights discusses the issue of undisclosed fee markups by processors, stating that merchants have the "right to know the markup on Visa, Mastercard, American Express and Discover Network fee increases", as well as the "right to know all surcharges and bill-backs."

53. As alleged below, this is precisely the kind of improper and deceptive conduct in which Heartland has engaged.

IV. *Heartland Swindles Its Customers with Bogus Retroactive Fees Relating to Its American Express OptBlue Program*

54. While proclaiming that it has passed on the Durbin savings to SME merchants, Heartland has then bilked them with other fees that impose the same, or an even greater, burden as SME Merchants faced before the Durbin Amendment.

55. Furthermore, Heartland has responded to increasing competition by increasing its profits on American Express transactions to attempt to correct the lop-sidedness of its business towards Visa and MasterCard transactions.

56. Heartland did not, however, truthfully disclose the increases to its fees for processing American Express transactions. Heartland's attempt to create a new cash cow breached the terms of its contracts with SME merchants, misrepresented its fees, and contradicted Heartland's representations to Plaintiff and the Class.

57. In May of 2014, Heartland began a new program run by American Express, called "OptBlue". Heartland promised merchants that the new program would offer greater simplicity and flexibility for merchants, providing them with competitive rates and the ability to receive funds faster than traditional American Express settlements.

58. This program was not exclusive to Heartland, but the fees that Heartland tacked on to its customers' monthly statements were.

59. As late as June 2014, Heartland charged SME merchants for whom it performed payment processing "American Express Pass-thru Fees" and a Heartland Processing Fee called the "American Express Transaction Fee".

60. On June 13, 2014, Heartland sent the Class member merchants a letter stating that Heartland was launching a new program "that will allow you to accept American Express Card charges the same way you do other payment cards today. . . . There are no POS [Point of Sale]

changes needed and your American Express transactions will now be billed, by Heartland, at the same Heartland rate as your Visa and MasterCard transactions, in addition to passing through American Express fees."

61. Heartland's Chairman and Chief Executive Officer, Robert O. Carr ("Carr") personally promised that the program would offer greater simplicity and flexibility for merchants, give merchants funds faster than traditional American Express settlements, and charge merchant the same rate for American Express transactions as Heartland charged for Visa and MasterCard transactions.

62. Carr began the letter by stating, "We have great news about your American Express Merchant Account! … [Y]our American Express transactions will now be billed, by Heartland, at the same Heartland rate as your Visa and MasterCard transactions, in addition to passing through American Express fees."

63. Carr and Heartland implemented a bait and switch technique in order for Heartland to take for itself the financial benefits (the reductions in cost) that merchants would have received under the OptBlue Program. Rather than passing those savings to its merchants, as it promised it would, Heartland used the OptBlue program to keep for itself the American Express Interchange reductions by imposing additional fees on merchants that violated Heartland's contract with, and its representations to, its merchants.

64. Beginning in July of 2014, in conjunction with the roll out of the American Express OptBlue program, Heartland created an extra fee to charge SME merchants, which it called the "American Express Discount Fee".

65. Although the rate of the discount fees may differ between merchants, Heartland implemented OptBlue in the same way for all merchants.

66. Heartland included the Discount Fee in its July 2014 account statements to Class Members.

67. After its promises in the June 13, 2014 letter to merchants about processing American Express transactions, Heartland's processing volume increased significantly. For example, in its quarterly report to the SEC for the period ended September 30, 2014, Heartland attributed a 9.8% increase in total card processing volume for the company in part to the impact of "new and existing merchants who previously were not American Express accepting merchants" beginning to accept American Express under OptBlue. Furthermore, Heartland indicated that it had "converted a majority of its existing merchants currently processing under the former sales and servicing agreement with American Express to OptBlue during third quarter of 2014."

68. Heartland was able to increase the volume of American Express transactions that it processed by falsely promising merchants that they could process those American Express transactions through Heartland at the same rates that Heartland charged for processing Visa and MasterCard transactions.

69. In the fall of 2014, however, Heartland increased its Discount Fee for American Express transactions (meaning Heartland charged more for processing American Express transactions) without obtaining written consent from its merchants and without giving notice to merchants. Heartland also applied the increase retroactively.

70. For example, in October 2014, without obtaining prior written agreement from its merchants and without giving prior notice to Plaintiff and the Class, Heartland retroactively charged Plaintiff an "American Express Fee Adjustment" of $255.44 which was unauthorized and violated Plaintiff's contract and its prior representations to Plaintiff and the Class about the

fees that Heartland would charge for processing American Express transactions. Heartland applied this retroactive charge to the American Express transactions that Plaintiff and the Class processed with Heartland from July 2014 through October 2014.

71. Heartland imposed similar charges on Class members in October 2014.

72. This retroactive fee meant that Heartland charged Plaintiff and the Class at a higher rate for processing American Express transactions than it did for processing MasterCard and Visa. This directly contradicted Heartland's June 13, 2014 representations to Plaintiff and the Class.

73. These retroactive charges often amounted to tens or hundreds of dollars in extra charges for each merchant in October 2014. For example, while Heartland charged Plaintiff $255.44 in October 2014 as an American Express Fee Adjustment, Heartland charged other merchants more than $300, $400, $500 and $600 that month as an American Express Fee Adjustment, all without a written agreement from the merchant for the additional charges.

74. The additional October 2014 charges created tens of millions of dollars of unauthorized income for Heartland in October 2014 at the expense of its merchants who processed American Express through Heartland.

75. At that time, Heartland processed transactions for approximately 170,000 merchants and, upon information and belief, approximately 160,000 of those merchants processed American Express transactions through Heartland.

76. If, for example, 150,000 merchants processed American Express transactions with Heartland and were charged on average a $100 one-time "American Express Fee Adjustment" per merchant for October 2014, those additional charges would have meant an extra $15,000,000 of income for Heartland in October 2014

77. In the monthly account statement that Heartland sent to each Class member for October 2014, Heartland represented that:

> Upon review we have determined that we incorrectly calculated the rates for the new American Express Card Acceptance program [OptBlue]. We are adjusting the rates to correct our miscalculation. Your rate for the new American Express Care Acceptance program will continue to be less than the rate for the One Point Program, but it will be increased from the initial estimate. Your rate will be approximately 5 basis points less than what you were previously billed for the One Point Program. Additionally, you will see a line item on your statement for a one-time adjustment for your new American Express pricing back to your account conversion date.

78. Heartland did not "incorrectly calculate[]" the Discount Fee but merely decided to change it. Heartland's characterization of the fee increase as a "miscalculation" is a misrepresentation.

79. The American Express Discount Fee that Heartland increased was a Heartland fee. It was not passed through to, or shared with, American Express.

80. Heartland's increase in its Discount Fee could not have been a miscalculation because it had been charging exactly the amount that it had stated it would in its June 13, 2014 letter and because Heartland's Discount Fee is decided entirely by Heartland. There was no third party, such as American Express, dictating what the fee should be.

81. In addition, after October 2014 Heartland unilaterally increased its American Express Discount Fee (the rate that Heartland charged Plaintiff and the Class for processing American Express transactions through Heartland), causing more charges to Plaintiff and increasing Heartland's revenues. Heartland increased the Discount fee above the Discount fee that it was charging merchants for processing Visa and MasterCard transactions. By doing so, Heartland violated its contracts with merchants and went back on its representations to Plaintiff

and the Class, causing damages to Plaintiff and the class in the form of the unauthorized, higher fees.

82. Even if the "miscalculation" representation was proper notice of a fee increase—which it was not—Heartland violated the contract by charging Plaintiff and members of the Class at the increased fee rate, not only retroactively, but immediately. The contract requires that Heartland provide fifteen days' notice before implementing a fee change. By charging Plaintiff and members of the Class a higher Discount Fee for the period between November 1 and November 15, Heartland violated its own notice requirement.

83. After November 2014, Heartland continued to charge Plaintiff and the Class an American Express Discount Fee that was higher than the Discount Fees that Heartland charged for processing Visa and MasterCard transactions, increasing Heartland's revenues in violation of Heartland's contracts and representations, and damaging Plaintiff and the Class.

84. By imposing these charges Heartland took for itself tens of millions of dollars in additional fees from its merchants.

85. The retroactive fees and the additional, higher fees that Heartland charged violated Heartland's contracts and directly contradicted Heartland's June 13, 2014 letter, which indicated that Heartland would process American Express at the same rates as Visa and MasterCard, and also contradicted Heartland's October 2014 representations to Plaintiff and the Class, including its representation on each of the account statements that "Heartland is committed to fair dealings and full disclosure."

86. Plaintiff and the Class relied upon Heartland's representations and processed American Express transactions through Heartland because Heartland had falsely represented that the rates would be the same as the rates for MasterCard and Visa, only to then charge merchants

rates that were higher than MasterCard and Visa and also retroactively charging merchants rates that were higher than the rates for MasterCard and Visa.

87. Furthermore, the Terms and Conditions of each SME merchant's contract required that Heartland provide at least fifteen days' notice before any change to the rate. Heartland's decision to provide a retroactive "one-time adjustment . . . pricing back to your account conversion date" and its decision to increase the American Express rates starting in November 2014 without notice violated Heartland's contract with its merchants, including the Terms and Conditions, as well as its representations to its merchants.

88. Heartland's improper and deceitful conduct has benefitted Heartland and damaged Plaintiff and the Class.

Class Allegations

89. Plaintiff brings this action individually and on behalf of all other similarly situated merchants as a class action pursuant to the provisions of Federal Rule of Civil Procedure 23, sections (a), (b)(2) and (b)(3).

90. Plaintiff brings the claims on behalf of the following Class:

> All Heartland customers who processed American Express transactions through Heartland at any time after July 1, 2014 and who were retroactively charged an "American Express Fee Adjustment" in the October 2014 account statement and/or were charged American Express Discount Fees that were higher than the Discount Fees that Heartland charged for processing Visa or MasterCard transactions.

91. The Class excludes any judge or magistrate assigned to this case, Defendants and any entity in which Defendants have a controlling interest, and Defendants' officer, directors, legal representatives, successors, and assigns.

92. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of these 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.

93. Numerosity: The Class is so numerous that joinder of all Class members is impracticable. Heartland had approximately 170,000 merchants who processed with it during the time period at issue in this lawsuit and a large percentage of those merchants processed American Express transactions through Heartland. As a result, the Class likely includes thousands of Heartland customers.

94. Typicality: Plaintiff's claims are typical of the members of the proposed Class.

95. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class, and has retained counsel experienced in complex class action litigation. Plaintiff has no interests which are adverse to those of the Class that Plaintiff seeks to represent.

96. Commonality: Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class, including:

a. Whether Heartland breached its contract with its merchants;

b. Whether Heartland provided sufficient notice under the contract for the retroactive fee (called an "American Express Fee Adjustment") that it imposed on merchants in October 2014 and for the higher "American Express Discount Fee" that it began charging merchants in November 2014;

c. Whether Heartland intended to increase the American Express Discount fee at or around the time of implementing the OptBlue program;

d. Whether Heartland acted in good faith when it substantially increased its fees and charged its customers retroactively;

e. Whether Heartland acted unconscionably by misrepresenting in October 2014 the reason for its rate increase as being to correct a "miscalculation";

f. Whether Heartland violated its Terms and Conditions by retroactively increasing its American Express Discount Fee and imposing higher fees without notice;

g. Whether Heartland was unjustly enriched by retroactively increasing its fees in contravention of its June 13, 2014 letter;

h. Whether Heartland has acted unlawfully by inflating fees charged to merchants, including Plaintiff and the other Class members, for Heartland's own benefit;

i. Whether Heartland has acted and continues to act deceptively, misleadingly, unfairly, unlawfully, and/or fraudulently by increasing fees charged to merchants, including Plaintiff and the other Class members, for Heartland's own benefit; and

j. Whether Heartland is liable to Plaintiff and the other Class members for its practice of retroactively increasing fees and increasing fees without proper notice.

97. These and other questions of law and fact are common to the Class and predominate over any questions affecting only individual members of the Class.

98. Adjudicating these common issues in a single action has important and desirable advantages of judicial economy.

99. Plaintiff is a member of the Class and will fairly and adequately represent and protect the interests of the Class. Plaintiff has no claims antagonistic to those of the Class. Plaintiff has retained counsel competent and experienced in complex nationwide class actions, including all aspects of this litigation. Plaintiff's counsel will fairly, adequately and vigorously protect the interests of the Class.

100. Class action status is warranted under Rule 23(b)(1)(A) because prosecuting separate actions by or against individual members of the Class would create a risk of

inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants.

101. Class action status is also warranted under Rule 23(b)(1)(B) because prosecuting separate actions by or against individual members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

102. Class action status is also warranted under Rule 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

103. Class action status is also warranted under Rule 23(b)(3) because questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

104. Plaintiff reserves the right to modify or amend the definition of the proposed Class at any time before the Class is certified by the Court.

CLAIMS

COUNT I

Breach of Contract

105. Heartland's Merchant Processing Terms and Conditions provides, in relevant part, that:

> [Heartland], from time to time, may amend the Schedule of Fees and the charges set forth in such amended Schedule shall be effective on the date specified in a written notice thereof, which **date shall not be fewer than fifteen (15) days after the date of notice**. . . . As certain pricing to Merchant is based upon annual volume, average ticket and method of doing business stated in the Application, [Heartland] may adjust Merchant's Discount and/or Transaction fees without prior written notice in the event actual volume and/or average ticket are not as stated or if in the sole opinion of [Heartland], Merchant has significantly altered its stated method of doing business.

Terms and Conditions, ¶ 6.2 (emphasis supplied).

106. Heartland had no right to increase fees without notice or to implement fee increases retroactively.

107. In a June 13, 2014 notice to all customers, Heartland announced that it was "launching a new American Express Card Acceptance Program that will allow you to accept American Express Card charges the same way you do other payment cards today. . . . **We are simplifying the pricing for your American Express transactions.** There are no POS changes needed and *your American Express transactions will now be billed, by Heartland, at the same Heartland rate as your Visa and MasterCard transactions*, in addition to passing through American Express fees." (bold in original; italics added).

108. On the front page of each statement, Heartland represented that "Heartland is committed to fair dealings and full disclosure."

109. Heartland increased the Discount Fee of Plaintiff and all of its SME merchants, and charged Merchants the increased fee retroactively with an unauthorized fee called an "American Express Fee Adjustment". Heartland backcharged each of its customers tens or hundreds of dollars. This violated the requirement that Heartland provide fifteen days' notice

and, therefore, the "one-time adjustment" was improperly levied against Plaintiff and other SME merchants.

110. Heartland's inaccurate portrayal of the fee change as a miscalculation does not save it from the fifteen-day notice requirement under the contract.

111. Heartland charged Plaintiff an "American Express Fee Adjustment" of $255.44, having retroactively increased Plaintiff's American Express Discount Fee rate by fifteen times.

112. Furthermore, Heartland violated the fifteen-day notice requirement by charging increased Discount Fees immediately after its "miscalculation" representation in the October monthly statement.

113. In Plaintiff's November monthly statement, Heartland charged five transactions at Plaintiff's old American Express Discount Fee rate of five basis points, but then charged 206 transactions at the increased American Express Discount Fee rate of 74 basis points. Heartland did not wait fifteen days before implementing its increased fee, and therefore violated the contract.

114. Plaintiff brings these breach of contract claims under the laws of New Jersey, in compliance with the Terms and Conditions of Heartland's contract with its merchants, which states "This Agreement shall be construed and governed by the laws of the State of New Jersey without regard to legal principles related to conflict of laws." Terms and Conditions, ¶ 15.12.

COUNT II

Breach of the Implied Covenant of Good Faith and Fair Dealing

115. Plaintiff realleges and incorporates by reference the factual allegations set forth above.

116. A covenant of good faith and fair dealing is implied in every contract under New Jersey law.

117. Implied covenants are as effective components of an agreement as those covenants that are express.

118. Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term.

119. To the extent the contract did not prohibit Heartland's retroactive fee increase, Heartland utilized its discretion under the contract in bad faith to increase the fee it received from Plaintiff by 15 times.

120. Given Heartland's June 13, 2014 letter indicating that Heartland would bill Plaintiff "at the same Heartland rate as [its] Visa and MasterCard transactions, in addition to passing through American Express fees[,]" Plaintiff reasonably expected that it would be charged a Discount Fee equal to that of Heartland's Visa and MasterCard Discount Fee, of five basis points.

121. That Heartland did, in fact, charge Plaintiff a Discount Fee of five basis points on each transaction for several months solidified this reasonable expectation.

122. Because the Discount Fee was Heartland's fee, and not shared or passed through to American Express or any other third party, Heartland had sole discretion over the fee it charged.

123. Heartland concealed and misrepresented the reason for increasing its fee.

124. Heartland raised its Discount Fee arbitrarily, capriciously, and inconsistently with the reasonable expectations of the parties.

125. Heartland's unreasonable and unfair conduct violated the implied covenant of good faith and fair dealing.

COUNT III

New Jersey Consumer Fraud Act

126. Plaintiff realleges and incorporates by reference the factual allegations set forth above.

127. The New Jersey Consumer Fraud Act declares it to be an unlawful practice for "any person" to use an "unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact ... in connection with the sale or advertisement of any merchandise." N.J.S.A. 56:8-2.

128. The term "Person" is defined broadly to "include any natural person or his legal representative, partnership, corporation, company, trust, business entity or association." N.J.S.A. § 56:8-1(d). Defendant is therefore a "person" under the Act.

129. The Consumer Fraud Act protects individuals and businesses alike from unconscionable commercial practices, deception, fraud, false pretenses, false promises, misrepresentations, or the knowing concealment, suppression, or omissions of material facts.

130. Such unconscionable commercial practices make defendant liable to the plaintiffs and the Class under N.J.S.A. 56:8-2, which provides that "[a]ny person violating the provisions of the act shall be liable for a refund of all moneys acquired by means of any practice declared to be unlawful."

131. Heartland engaged in unconscionable business practices by informing Plaintiff and the Class that Heartland would process American Express transactions at the same rate as it

processed MasterCard and Visa transactions, and then later retroactively changing the pricing without any notice, so that Heartland processed American Express transactions at rates that were many times more expensive than MasterCard or Visa transactions.

132. Furthermore, Heartland attempted to conceal its drastic change in Discount Fees by claiming that it had merely miscalculated the rate. But Heartland made a deliberate decision to change the Discount Fee rate for all merchants. There was no miscalculation.

133. By misrepresenting that it miscalculated the rate and by retroactively adjusting its fees, Heartland unscrupulously hid behind the highly complex billing statements that it sent to its customers and profited by increasing its fees to merchants. Heartland made the charges difficult to uncover by splintering its monthly fees into dozens of different fees, nearly all of which are incomprehensibly described.

134. Before implementing American Express OptBlue in July of 2014, Heartland bought-out most of the contracts of its service representatives who were entitled to continuing commissions from payments made by merchants they signed up for American Express card processing. By buying-out their contracts, Heartland sought to keep all of the increased fees for itself and to avoid having to pay commissions to its service representatives based upon on the higher fees that Heartland generated as a result of its scheme. This further suggests that Heartland had planned to drastically hike up rates.

135. Defendant violated the Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.*, by engaging in unconscionable commercial practices, as alleged herein.

136. Defendant is further liable to Plaintiff and the Class for treble damages under N.J.S.A. 56:8-13, 19.

137. Plaintiff and the Class are also entitled to recover attorney's fees and costs, as

well as treble damages under N.J.S.A. 56:8-19.

COUNT IV

Unjust Enrichment

138. Plaintiff realleges and incorporates by reference the factual allegations set forth above.

139. Plaintiff brings this claim in the alternative to its other claims in this Complaint.

140. Heartland wrongfully enriched itself at the expense of Plaintiff and the Class by telling Plaintiff and the other Class members that merchants would receive the same Heartland rate for American Express transactions as they do for Visa and MasterCard only to later, prospectively and retroactively, charge Plaintiff and the Class members a much higher rate under the false pretense of a "miscalculation".

141. Equity demands that Heartland disgorge itself of the benefit of the wrongfully obtained fees it assessed against Plaintiff and the Class, which totals tens of millions of dollars.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class demand a jury trial on all claims and demand judgment against Heartland, to include the following:

A. Certifying the action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, and appointing Plaintiff as Class Representative and Plaintiff's counsel as Class Counsel;

B. An award of damages to Plaintiff and the Class, including damages in the increased amount that Heartland charged merchants as a one-time American Express Fee Adjustment in October 2014 and as the American Express Discount fee beginning in November 2014 for processing American Express transactions over and above the rates that Heartland

charged to process Visa and MasterCard transactions during that time period, which damages, upon information and belief, amount to tens of millions of dollars, together with treble damages and attorneys' fees;

C. An order providing injunctive relief to enjoin the conduct about which Plaintiff complains;

D. An order declaring that Heartland's unconscionable commercial practices, misrepresentations, omissions and other conduct as alleged herein violate the New Jersey Consumer Fraud Act;

E. Reimbursement of ascertainable damages in the amount of money paid by Plaintiff and Class for the October 2014 retroactive fees and the fees that Heartland charged Plaintiff and the Class for processing American Express transactions where the fees were higher than the fees charged by Heartland for processing Visa and MasterCard transactions;

F. Actual damages, statutory damages, attorneys' fees, costs and other relief to Plaintiff and the Class as provided by New Jersey Consumer Fraud Act;

G. Pre-judgment and post-judgment interest on such monetary relief;

H. Such other relief to which Plaintiff and the members of the Class may be entitled at law or in equity.

Dated: April 20, 2016

By: /s/ Olimpio Lee Squitieri

Olimpio Lee Squitieri
Raymond Barto
SQUITIERI & FEARON, LLP
2600 KENNEDY BOULEVARD
SUITE 1K
JERSEY CITY, NEW JERSEY 07306
TELEPHONE: (201) 200-0900
FACSIMILE: (201) 200-9008
LEE@SFCLASSLAW.COM
RAYMOND@SFCLASSLAW.COM

Stephen J. Fearon, Jr.
SQUITIERI & FEARON, LLP
32 East 57th Street
12th Floor
New York, New York 10022

Attorneys for Plaintiff