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20 **UNITED STATES DISTRICT COURT**
 21 **SOUTHERN DISTRICT OF CALIFORNIA**

22 GERALD MCGHEE, an individual, on
23 behalf of himself and all others similarly
24 situated,

25 Plaintiff,
26 vs.

27 NORTH AMERICAN BANCARD,
28 LLC,

Defendants.

CASE NO. '17CV586 AJB KSC

CLASS ACTION COMPLAINT FOR:

- (1) **NEGLIGENT MISREPRESENTATION;**
- (2) **FRAUDULENT CONCEALMENT;**
- (3) **INTENTIONAL MISREPRESENTATION;**
- (4) **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;**
- (5) **RESTITUTION/UNJUST ENRICHMENT;**
- (6) **VIOLATIONS OF CALIFORNIA'S UCL; AND**
- (7) **VIOLATIONS OF CALIFORNIA'S FAL.**

1 Plaintiff, Gerald McGhee (“McGhee” or “Plaintiff”), on behalf of himself
2 and those similarly situated, based upon facts which either have evidentiary support,
3 or are likely to have evidentiary support after a reasonable opportunity for further
4 investigation and discovery, alleges as follows:

5 **INTRODUCTION**

6 1. This is a class action lawsuit on behalf of consumers who incurred
7 undisclosed and misrepresented monthly charges after they obtained mobile credit
8 card processing devices.

9 2. Defendant NORTH AMERICAN BANCARD, LLC (“Defendant” or
10 “NAB”), is a payment processing company. One service NAB offers under the
11 assumed name (does business as) Pay Anywhere, LLC is a mobile credit card reader
12 (“Card Reader” or “Card Readers”). NAB advertises this product as free, with no
13 setup fees, monthly fees, or other hidden fees (“Fees”) (these statements as a whole
14 are collectively referred to as “Misrepresentations”). NAB offers the Card Reader in
15 exchange for payment of a set percentage of transactions processed through the
16 Card Reader.

17 3. Plaintiffs are individuals who obtained a Card Reader from NAB and
18 agreed to pay NAB a set percentage of transactions processed through the Card
19 Reader.

20 4. Despite the Misrepresentations, Defendant charges Fees to individuals
21 who obtain a Card Reader.

22 5. As a result of the above conduct, Defendants engaged in negligent
23 misrepresentation, fraudulent concealment, and intentional misrepresentation. They
24 also breached the covenant of good faith and fair dealing inherent in every
25 agreement. These actions entitle Plaintiff and those similarly situated to restitution
26 based on Defendant’s unjust enrichment.

27 6. Defendant’s conduct also implicates several specific California
28 consumer statutes, namely California’s Unfair Competition Law (“UCL”),

1 California Business and Professions Code sections 17200, *et seq.* and California’s
2 False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, *et seq.*

3 **JURISDICTION AND VENUE**

4 7. This Court has diversity jurisdiction pursuant to 28 U.S.C. §
5 1332(a)(1) because Plaintiff is a California resident and Defendant is a Delaware
6 and/or Michigan resident. The amount in controversy exceeds the sum or value of
7 \$75,000, exclusive of interests and costs.

8 8. This Court also has jurisdiction based on 28 U.S.C. § 1332(d). Plaintiff
9 is informed and believes that the National Class, defined *infra*, is comprised of over
10 100 persons. Furthermore, Plaintiff is a citizen of California, whereas Defendant is
11 a citizen of Delaware and/or Michigan. Plaintiff is informed and believes that the
12 amount in controversy in the Complaint exceeds the sum or value of \$5,000,000.

13 9. This Court has personal jurisdiction over Defendant because it
14 conducts substantial business in California. NAB intentionally availed itself to the
15 laws and markets of California through operation of its business in California.

16 10. Venue is proper in the Southern District of California pursuant to 28
17 U.S.C. § 1391(b) and (c). A substantial part of the events or omissions giving rise to
18 Plaintiff’s claims occurred in this judicial District.

19 **THE PARTIES**

20 11. Plaintiff GERALD MCGHEE is, and at all times herein mentioned
21 was, an individual residing in the County of San Diego, California. He obtained a
22 Card Reader from Defendant in California around November 2014 and was charged
23 Fees from approximately December 2015 through April 2016.

24 12. Plaintiff is informed and believes defendant NORTH AMERICAN
25 BANCARD, LLC is, and at all times mentioned was, a corporation organized and
26 existing under and by virtue of the laws of the State of Delaware, and doing
27 business in the County of San Diego, State of California. Defendant’s principle
28 place of business is in Michigan. Defendant is registered with the State of Michigan

1 to use the assumed name (do business as) Pay Anywhere, LLC (“Pay Anywhere”).

2 **GENERAL ALLEGATIONS**

3 13. On or about November 2014, Plaintiff acquired a Card Reader from
4 Defendant for processing credit card transactions in connection with a business
5 Plaintiff owned and operated. Plaintiff was contacted by Defendant’s salesperson.
6 The salesperson represented that Defendant would send Plaintiff the device, but that
7 Plaintiff would never be charged or otherwise owe anything unless and until
8 Plaintiff used the device to process credit card transactions. Where use occurred,
9 Defendant was to receive a set percentage of the transaction. Plaintiff agreed to
10 these terms.

11 14. NAB’s website (www.nabancard.com) lists Pay Anywhere under its
12 “Our Companies” heading and directly links to Pay Anywhere’s website
13 (www.payanywhere.com). On Pay Anywhere’s website, the same
14 Misrepresentations are set forth – that Card Readers have no setup, monthly, or
15 hidden fees (“Fees”); and that the user pays “just [a set percent] per swipe.”

16 15. Defendant sent Plaintiff a Card Reader in accord with their agreement.

17 16. Plaintiff never used the Card Reader.

18 17. On or about December 2015, Defendant began deducting Fees from
19 Plaintiff’s bank account. This continued through April 2016.

20 18. At some point after the charges began, Plaintiff called Defendant in an
21 effort to stop the charges and to obtain a refund. Defendant promised to stop any
22 further charges. The charges did not stop, however, and Defendant continued to
23 charge Plaintiff monthly for several months thereafter.

24 19. Defendant refused to refund, and has not to this date refunded, any of
25 the charges incurred by Plaintiff.

26 **CLASS ALLEGATIONS**

27 20. Plaintiff brings class action claims pursuant to FRCP Rule 23. Plaintiff
28 seeks to represent a class defined as follows:

1 All persons in the United States charged a Fee as a result of
2 obtaining Defendant's Card Reader beginning at the start of the
3 applicable statute of limitations period and ending on the date as
determined by the Court ("National Class").

4 21. Plaintiff also seeks to represent a subclass defined as follows:

5 All National Class members who were California residents at the
6 time they obtained a Card Reader or were within the State of
California when they obtained a Card Reader ("California Class").

7 22. Defendant, as a matter of corporate policy, practice, and procedure,
8 and in violation of the applicable law, intentionally, knowingly, and willfully
9 charged Fees despite its Misrepresentations.

10 23. This Class Action meets the statutory prerequisites for the maintenance
11 of a Class Action as set forth in FRCP Rule 23, in that:

12 (a) The persons who comprise the respective Classes are so numerous that
13 the joinder of all such persons is impracticable and the disposition of their
14 claims as a class will benefit the parties and the Court;

15 (b) Nearly all factual, legal, statutory, declaratory and injunctive relief
16 issues that are raised in this Complaint are common to the respective Classes
17 and will apply uniformly to every member of the respective Classes;

18 (c) The claims of the representative Plaintiff are typical of the claims of
19 each member of the respective Classes. Plaintiff, like all other members of
20 the respective Classes, was subjected to Defendant's illegal practice of
21 charging Fees despite representing that such charges would not occur.
22 Plaintiff sustained economic injury as a result of Defendant's practices.
23 Plaintiff and the members of the respective Classes were and are similarly or
24 identically harmed by the same unlawful, deceptive, unfair, and pervasive
25 pattern of misconduct engaged in by Defendant; and

26 (d) The Plaintiff will fairly and adequately represent and protect the
27 interest of the respective Classes, and has retained attorneys who are
28 competent and experienced in Class Action litigation. There are no material

1 conflicts between the claims of the representative Plaintiff and the members
2 of the respective Classes that would make class certification inappropriate.
3 Counsel for the respective Classes will vigorously assert the claims of all
4 Class Members.

5 24. In addition to meeting the statutory prerequisites to a Class Action, this
6 action is properly maintained as a Class Action pursuant to FRCP Rule 23, in that:

7 (a) Without class certification and determination of declaratory,
8 injunctive, statutory, and other legal questions within a class format,
9 prosecution of separate actions by individual members of the respective
10 Classes will create the risk of:

11 1) Inconsistent or varying adjudications with respect to individual
12 members establishing incompatible standards of conduct for the parties
13 opposing the respective Classes and/or which would as a practical
14 matter be dispositive of interests of the other members not party to the
15 adjudication. This would substantially impair or impede their ability to
16 protect their interests.

17 (b) The parties opposing the respective Classes have acted or refused to act
18 on grounds generally applicable to the respective Classes, making appropriate
19 class-wide relief with respect to the respective Classes as a whole.

20 (c) Common questions of law and fact exist as to the members of the
21 respective Classes, with respect to the practices and violations of law as listed
22 above, and predominate over any question affecting only individual
23 members. A Class Action is superior to other available methods for the fair
24 and efficient adjudication of the controversy, including consideration of:

25 1) The interests of the members of the respective Classes in
26 individually controlling the prosecution or defense of separate actions;
27
28

1 2) The extent and nature of any litigation concerning the
2 controversy already commenced by or against members of the
3 respective Classes;

4 3) The desirability or undesirability of concentrating the litigation
5 of the claims in the particular forum;

6 4) The difficulties likely to be encountered in the management of a
7 Class Action; and,

8 5) The basis of Defendant’s conduct towards Plaintiff and the
9 respective Classes.

10 25. The class is ascertainable. Defendant maintains records from which the
11 Court can ascertain the identity, purchase dates, and other information of each of
12 Defendant’s customers who were systematically, intentionally, and uniformly
13 subjected to Defendant’s unlawful behavior. The records of Defendant will identify
14 which customers incurred monthly charges for lack of use.

15 **FIRST CAUSE OF ACTION**
16 **BY PLAINTIFF ON BEHALF OF HIMSELF AND THE NATIONAL CLASS**
17 **AGAINST DEFENDANT FOR NEGLIGENT MISREPRESENTATION**
(Class Action under FRCP Rule 23)

18 26. Plaintiff repeats the allegations contained in the foregoing paragraphs
19 as if fully set forth herein.

20 27. Plaintiff brings this claim individually and on behalf of the National
21 Class against Defendant.

22 28. Defendant represented to Plaintiff and the National Class that the Card
23 Reader was free, with no setup fees, monthly fees, or other hidden fees
24 (“Misrepresentations”).

25 29. In fact, Defendant charged Plaintiff and the National Class Fees.

26 30. Defendant knew or should have known that Plaintiff and the National
27 Class would rely on the Misrepresentations and that the Misrepresentations were
28 false.

1 31. The truth of the Misrepresentations was important to Plaintiff and the
2 National Class and was a substantial factor in their election to obtain Card Readers.

3 32. Plaintiff and the National Class were harmed by the resulting Fees.

4 **SECOND CAUSE OF ACTION**
5 **BY PLAINTIFF ON BEHALF OF HIMSELF AND THE NATIONAL CLASS**
6 **AGAINST DEFENDANT FOR FRAUDULENT CONCEALMENT**
7 **(Class Action under FRCP Rule 23)**

8 33. Plaintiff repeats the allegations contained in the foregoing paragraphs
9 as if fully set forth herein.

10 34. Plaintiff brings this claim individually and on behalf of the National
11 Class against Defendant.

12 35. Defendant knew that the Misrepresentations were false at the time
13 Plaintiff and the National class acquired the Card Readers.

14 36. Defendant fraudulently concealed from and/or intentionally failed to
15 disclose to Plaintiff and the National Class that there would be monthly charges
16 associated with the Card Readers.

17 37. Knowledge regarding monthly charges associated with the Card
18 Reader was within the exclusive knowledge of Defendant and was not something
19 that Plaintiff or the National Class, in the exercise of reasonable diligence, could
20 have discovered independently prior to purchase.

21 38. Plaintiff and the National Class were reasonably misled as to the true
22 terms of the acquisition of the Card Reader, as Defendant intended.

23 39. Plaintiff and the National Class were harmed by the resulting Fees.

24 **THIRD CAUSE OF ACTION**
25 **BY PLAINTIFF ON BEHALF OF HIMSELF AND THE NATIONAL CLASS**
26 **AGAINST DEFENDANT FOR INTENTIONAL MISREPRESENTATION**
27 **(Class Action under FRCP Rule 23)**

28 40. Plaintiff repeats the allegations contained in the foregoing paragraphs
as if fully set forth herein.

1 41. Plaintiff brings this claim individually and on behalf of the National
2 Class against Defendant.

3 42. Defendant made Misrepresentations regarding charges associated with
4 the Card Reader to Plaintiff and the National Class.

5 43. The Misrepresentations were false.

6 44. Defendant knew the Misrepresentations were false when made and/or
7 made the Misrepresentations recklessly, without regard to their truth. Defendants
8 were in fact charging and/or planned to charge individuals who obtained Card
9 Readers Fees at the time of the transactions involving Plaintiff and the National
10 Class.

11 45. Defendant intended for Plaintiff and the National Class to rely on the
12 Misrepresentations and they reasonably did so.

13 46. Plaintiff and the National Class were harmed by the resulting Fees. The
14 Misrepresentations were a substantial factor in causing this harm; Plaintiffs and the
15 National Class would have opted not to receive the Card Readers had the Fees been
16 disclosed.

17 **FOURTH CAUSE OF ACTION**
18 **BY PLAINTIFF ON BEHALF OF HIMSELF AND THE NATIONAL CLASS**
19 **AGAINST DEFENDANT FOR BREACH OF THE IMPLIED COVENANT**
20 **OF GOOD FAITH AND FAIR DEALING**
21 **(Class Action under FRCP Rule 23)**

22 47. Plaintiff repeats the allegations contained in the foregoing paragraphs
23 as if fully set forth herein.

24 48. Plaintiff brings this claim individually and on behalf of the National
25 Class against Defendant.

26 49. Implicit within any agreement that Plaintiff and the National Class may
27 have entered into with respect to the Card Readers is a covenant by Defendant to act
28 in good faith and deal fairly.

50. Defendant breached this implied duty by intentionally, knowingly,
willfully, and/or recklessly:

- 1 a. Promoting the Card Reader as free and without Fees;
- 2 b. Refusing to refund Plaintiff and National Class who were
- 3 charged Fees in association with the Card Reader;
- 4 c. Refusing to stop the monthly charges once these charges were
- 5 brought to Defendant's attention by Plaintiff and National Class members;
- 6 d. Engaging in such other conduct to be disclosed in discovery.

7 51. Plaintiff and the National Class suffered damages as a result of
8 Defendant's breach of its duty to act in good faith and deal fairly. They were
9 charged monthly, did not receive refunds on those charges, and did not have
10 charges stopped despite their requests.

11 **FIFTH CAUSE OF ACTION**
12 **BY PLAINTIFF ON BEHALF OF HIMSELF AND THE NATIONAL CLASS**
13 **AGAINST DEFENDANT FOR UNJUST ENRICHMENT**
(Class Action under FRCP Rule 23)

14 52. Plaintiff repeats the allegations contained in the foregoing paragraphs
15 as if fully set forth herein.

16 53. Plaintiff brings this claim individually and on behalf of the National
17 Class against Defendant.

18 54. By obtaining the Card Readers and incurring Fees, Plaintiff and the
19 National Class conferred benefits on Defendant.

20 55. Defendant has been unjustly enriched in retaining the Fees derived
21 from Plaintiff and the National Class. Retention of those Fees under these
22 circumstances is unjust and inequitable based on Defendant's Misrepresentations
23 and resulting injuries to Plaintiffs and the National Class who would not have
24 obtained the Card Readers and/or agreed to the terms associated with the Card
25 Readers had they known the Misrepresentations were false.

26
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1 **SIXTH CAUSE OF ACTION**
2 **BY PLAINTIFF ON BEHALF OF HIMSELF AND THE CALIFORNIA**
3 **CLASS AGAINST DEFENDANT FOR VIOLATIONS OF CALIFORNIA'S**
4 **UNFAIR COMPETITION LAW**
5 **(Class Action under FRCP Rule 23)**

6 56. Plaintiff repeats the allegations contained in the foregoing paragraphs
7 as if fully set forth herein.

8 57. Plaintiff brings this claim individually and on behalf of the California
9 Class against Defendant.

10 58. The UCL prohibits any “unlawful, unfair or fraudulent business act or
11 practice.” Cal. Bus. & Prof. Code § 17200.

12 59. Defendant has committed, and upon information and belief continues
13 to commit, ongoing business practices within the meaning of California’s UCL,
14 including, but not limited to: (i) making negligent misrepresentations regarding its
15 Fees; (ii) fraudulently concealing that it charges Fees; (iii) making intentional
16 misrepresentations regarding its Fees; (iv) breaching the implied covenant of good
17 faith and fair dealing; (v) and being unjustly enriched at Plaintiff and the California
18 Class’ expense.

19 60. The unlawful business practices described above have proximately
20 caused monetary damages to Plaintiff, the California Class, and the general public.

21 61. Pursuant to the UCL, Plaintiff and the California Class are entitled to
22 restitution of money or property acquired by Defendant by means of such unlawful
23 business practices, in amounts not yet known, but to be ascertained at trial.

24 62. Pursuant to the UCL, Plaintiff, the California Class, and the general
25 public are entitled to injunctive relief against Defendant’s ongoing continuation of
26 such unlawful business practices.

27 63. If an injunction does not issue enjoining Defendant from engaging in
28 the unlawful business practices described above, Plaintiff, the California Class, and
the general public will be irreparably injured, the exact extent, nature, and amount
of such injury being impossible to ascertain.

1 64. Plaintiff and the California Class have no plain, speedy, and adequate
2 remedy at law.

3 65. Defendant, if not enjoined by this Court, will continue to engage in the
4 unlawful business practices described above in violation of the UCL, in derogation
5 of the rights of Plaintiff, the California Class, and of the general public.

6 66. Plaintiff's success in this action will result in the enforcement of
7 important rights affecting the public interest by conferring a significant benefit upon
8 the general public.

9 67. Private enforcement of these rights is necessary as no public agency
10 has pursued enforcement. There is a financial burden incurred in pursuing this
11 action, and it would be against the interests of justice to require the payment of
12 attorneys' fees from any recovery in this action.

13 68. Plaintiff is therefore entitled to an award of attorneys' fees and costs of
14 suit pursuant to California Code of Civil Procedure section 1021.5.

15 **SEVENTH CAUSE OF ACTION**
16 **BY PLAINTIFF ON BEHALF OF HIMSELF AND THE CALIFORNIA**
17 **CLASS AGAINST DEFENDANT FOR VIOLATIONS OF THE FALSE**
18 **ADVERTISING LAW**
19 **(Class Action under FRCP Rule 23)**

20 69. Plaintiff repeats the allegations contained in the foregoing paragraphs
21 as if fully set forth herein.

22 70. Plaintiff brings this claim individually and on behalf of the California
23 Class against Defendant.

24 71. The False Advertising Law prohibits any statement in connection with
25 the sale of goods "which is untrue or misleading." Cal. Bus. & Prof. Code § 17500.

26 72. As described above, Defendant's Misrepresentations regarding Fees
27 are untrue as well as misleading.

28 73. Defendant knew or should have known that the Misrepresentations
were untrue and misleading.

1 8. For reasonable attorneys’ fees, expenses and costs as provided by
2 California Code of Civil Procedure Section 1021.5 and the other statutes at issue;
3 and

4 9. For such other relief that the court may deem just and proper.

5 **REQUEST FOR JURY TRIAL**

6 Plaintiffs hereby request a Trial by Jury.

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8 DATED: March 24, 2017

NICHOLAS & TOMASEVIC, LLP

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