No. 21-51

IN THE

Supreme Court of the United States

CENTRAL PAYMENT CO., LLC,

Petitioner,

v.

CUSTOM HAIR DESIGNS BY SANDY, LLC, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs Custom Hair Designs by Sandy, LLC, and Skip's Precision Welding, LLC, are limited liability companies. They have no parent corporations, and there are no publicly held companies that own 10% or more of their stock.

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INTRODUCTION

Congress sanctioned the class-action device for cases like this one. The brothers who ran Central Payment Co. ("CPAY"), previously banned from an entire industry, took tens of millions of dollars from thousands of small businesses, pennies at a time. The District of Nebraska properly certified a class of merchants defrauded by CPAY, and the Eighth Circuit properly affirmed that decision. Nothing about the case warrants this Court's attention.

CPAY is a sales organization that acts as a middleman. It contracts with merchants on behalf of a payment processor and a bank that provide the actual payment processing services. This relationship allowed CPAY to raise rates and invent new fees, with neither contractual authorization from the merchant nor legitimate justification. Zach and Matt Hyman ("the Hyman Brothers") would devise ways to take more of the merchants' money, through what CPAY euphemistically termed "pricing initiatives."

CPAY operated a single scheme, though it devised several ways to cheat its small-business customers. CPAY's Petition presents this case as merely a contract dispute, but primarily Plaintiffs allege that CPAY violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs also have claims under Nebraska law for common-law fraud and breach of contract. Plaintiffs allege that CPAY breached the duty of good faith and fair dealing, and they allege that CPAY breached express, uniform contract terms by raising rates with no contractual authority. All of these claims derive from CPAY's systematic practices.

There are several reasons this Court should deny the Petition. First and foremost, there is no circuit split. Notably, CPAY has failed to identify competing legal principles espoused by the Eighth Circuit and any other circuit. No circuit requires contracts to be 100% identical to affirm certification. Every circuit agrees that the inquiry under Rule 23 focuses on whether the contracts at issue are substantially similar in all material respects.

The Eighth Circuit does not treat contract-based class actions differently from other circuits—in fact, it has denied certification of several contract classes in recent years. The differing results in this case and the cases cited in the Petition represent nothing more than the application of Rule 23's standards to different sets of facts. CPAY asserts that this case raises whether a contract class may be certified despite material differences in the contracts. But the Eighth Circuit did no such thing. The Eighth Circuit determined that there **were no** material differences in the contracts that were relevant to Plaintiffs' legal theories. Plaintiffs' theories rest on a centralized overbilling fraud scheme, and an express breach of contract that rests on a uniform contract provision in the terms and conditions. The certification outcome would be the same in all circuits. *See, e.g., In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 121-22 (2d Cir. 2013). CPAY's Petition fails to acknowledge Plaintiffs' actual legal theories.

Second, when Plaintiffs' legal theories are properly understood, this case does not present any issues of interest for this Court. The Petition fails even to identify any basis to address the RICO and fraud claims. Thus, CPAY ignores most of Plaintiffs' claims. As described

below, numerous circuits have endorsed RICO claims on comparable facts, based on this Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008). The fraud claim, and the claim based on the duty of good faith and fair dealing, parallel the RICO claim but are governed by Nebraska law.

Even if this Court were inclined to review a case involving material contract differences, this case does not present any, as the lower courts properly held. Common evidence predominates over individualized evidence once the case is evaluated in the context of Plaintiffs' claims. Every merchant's contract had two parts: the financial details and the terms and conditions. CPAY's agents negotiated the financial terms with each merchant. However, the terms and conditions were **uniform**, and Plaintiffs' claims are based on CPAY's breach of those uniform terms and its systematic practices. Only the bank had the authority to raise the merchants' fees, and CPAY has admitted that it is not a bank. CPAY claims that it has individualized "defenses" to Plaintiffs' contract claims, yet it fails to explain what they are. At most, CPAY contends that its actions were authorized. But that is a common issue based on the uniform terms and conditions, and CPAY has the opportunity to file a motion for summary judgment in the district court on or before October 12, 2021.

Finally, all of the contracts in this case are governed by uniform law, specifically Nebraska law. This fact both supports the certification decisions and provides another reason to reject the Petition. If the Court at some point accepts review of a Rule 23 decision involving contract claims, it should choose a case involving contracts governed

by the laws of multiple states. That issue frequently arises in this context, but it has not arisen here.

For these reasons and those laid out below, this Court should deny the Petition.

STATEMENT OF THE CASE

In 2001, the Federal Trade Commission permanently banned the Hyman Brothers from the telemarketing industry, after they were caught debiting customers' accounts without authorization. (JA0307-26,[1] 0333, 2418-28); *see also Fed. Trade Comm'n v. Productive Mktg., Inc.*, 136 F. Supp. 2d 1096 (C.D. Cal. 2001). Needing a new scheme, the Hyman Brothers formed CPAY in 2006. CPAY acts as a "middleman," marketing credit card processing services to merchants. These businesses enter into agreements with CPAY, a bank, and a credit card processor. (JA0529 at 29:3-13.) CPAY targeted "local businesses [and] small mom-and-pop shops" because, in CPAY's view, they "are not educated and never know what they are paying." (JA527 at 20:13-18, JA1088.)

New CPAY customers signed contracts with (1) a short-form application and agreement, and (2) boilerplate terms and conditions. The terms in the first part were negotiated between the merchant and CPAY's sales agent. (JA0832-34.) CPAY kept this information in a central database that tracked fees, sent out standard billing invoices, and extracted all merchant payments in the same way. (JA0531 at 36:20-37:8; JA0567 at 178:19-179:11.) The

1. "JA" refers to the Joint Appendix filed in the Eighth Circuit.

terms and conditions were uniform and did not materially change during the class period, as CPAY's corporate representative, Tommy Chang, admitted. (JA0543 at 83:22-84:5.) The terms and conditions in every merchant agreement dictated that the "BANK must pre-approve all FEES," and that "the AGREEMENT may not be amended without BANK's express written consent." (PL-ADD.14,[2] JA0640 at § 13.20.) The "BANK," at all relevant times, was First National Bank of Omaha ("FNBO"). (JA0529-30 at 22:5-8, 29:3-30:12.) CPAY is not a bank. (JA0528 at 22:5-8.) The payment processor was TSYS Merchant Solutions ("TMS"). (JA0528 at 23:8-13.)

With control of the billing process, CPAY's leaders created opportunities to bilk money from merchants. Mr. Chang described these actions as "pricing initiatives." (JA0558 at 143:1-144:15.) When questioned as to when "pricing initiatives" would be instituted, Mr. Chang responded: "I mean, it would be based off of Matt or Zach's … collective decision as far as any sort of business need, yeah." (JA0588 at 263:13-17.) In making decisions about rate increases, CPAY did not consult with TMS or the bank. (JA0530 at 33:5-22.)

As laid out below, CPAY's scheme manifested itself in two ways, broadly speaking. CPAY raised existing fees without either contractual authorization or any legitimate explanation in the billing statements sent to all merchants. CPAY also collected two fees that it invented, and for which it provided nothing in return. CPAY sent deceptive notices to customers suggesting, falsely, that market conditions necessitated the fees.

2. "PL-ADD" refers to the Addendum that Plaintiffs filed in the Eighth Circuit.

I. Improper fee increases

Because only the BANK could raise fees, CPAY had no right to raise fees. (PL-ADD.14, JA0640 at § 13.20; *see also* Pet. App'x at 45-50 (rejecting summary judgment on breach-of-contract claim based in part on argument that CPAY did not have the right to change fees)). But CPAY did it anyway. CPAY's fee increases took three forms: raising interchange rates (also known as credit card "discount rates"), shifting certain transactions to higher pricing tiers, and inventing a new fee.

The most straight-forward fee increase occurred several times, when CPAY universally raised the credit card "interchange" rates that merchants pay with each purchase. (JA0488.) Per the uniform terms and conditions, the BANK had to notify merchants in writing before imposing any increases to interchange fees. (JA0635 at § 3.2.) CPAY's agreement with FNBO similarly dictates that the bank controls all fees; CPAY cannot unilaterally add fees. (JA1260 at §5.6.) Throughout the class period, CPAY raised these interchange rates without FNBO's involvement. (JA0530 at 33:5-22.) Upon raising these fees, CPAY sent standard notices in billing statements, falsely suggesting that CPAY was responding to market conditions. (*See* JA1899-1902.) Some examples:

> **March 2015 - As a response to recent modifications made by industry card brands affecting interchange rates**, you will see a change to unregulated offline debit processing volume to the Rate 3 qualification as well as an additional 0.06% increase to all qualification tiers.

> **February 2016 - In response to upcoming modifications made by industry card brands to interchange rates**, merchants boarded prior to January 1st, 2016 will see an eight basis point increase to their gross processing volume beginning April 1st, 2016.
>
> **January 2017 - In response to recent modifications made by industry card brands to interchange rates**, effective March 1, 2017 there will be a four basis point increase on all gross card brand processing volume.

(JA1899-1902 (emphasis added); *see also* PL-ADD.04, JA1763.)

CPAY also raised fees through a process called tier shifting. Some of CPAY's customers were on a tiered pricing system, meaning that different categories of transactions had different interchange rates. (JA0572 at 199:1-201:4.) CPAY fully controlled the tier to which each category of transaction was assigned. (JA0574 at 207:8-13.) For instance, in 2015 CPAY moved all "unregulated debit" transactions to Tier 3, thereby increasing the interchange rate on those transactions without changing the rate for any particular tier. (JA1902, JA924-27). True to form, CPAY sent a uniform and deceptive notice to merchants:

> **As a response to recent modifications made by industry card brands affecting interchange rates**, you will see a change to unregulated offline debit processing volume to the Rate 3 qualification … .

(JA1902 (emphasis added).)[3]

CPAY also fraudulently raised merchants' rates by inventing a new fee "out of pure imagination." (JA0445 at ¶ 65.) One 2014 strategy e-mail from Zach Hyman shows how this fee came to be, and it also highlights the Hyman Brothers' larger scheme. Zach Hyman wrote:

> We have worked with IT to charge a flat 4 basis point charge on [the] entire portfolio, charged in 'other fees' and described something like: TSYSNF (TSYS Network Fees). This would not be shared with the sales agents thus CPAY would gain 4 basis points on roughly $500,000,000 in processing ($200,000). Perhaps we can budget on $180,000 assuming a few issues arise with merchants/agents.

(PL-ADD.10, JA0768.) CPAY then imposed this new fee. One agent noticed the fee, causing Zach Hyman to write internally: "How can he see TSYS NF???? It's suppose [sic] to be hidden in 'other fees.'" (JA0777.) Mr. Chang advised not to change the fee name, as it would suggest that CPAY had something to hide. Zach Hyman responded: "We do tho." (PL-ADD.11-12, JA0779-80.)

The same strategy e-mail demonstrates how these fee increases were part of a uniform scheme. Zach Hyman identified "opportunities for future increases" in the next year—demonstrating that CPAY was not reacting to

3. In addition to this tier shift, CPAY also raised the rates on every tier. There were slight variations in the amount of these increases, but every merchant got the same "justification." (*Id.*)

market forces. (PL-ADD.10, JA0768.) He listed seven ways that CPAY could impose small charges on a large portfolio of customers to increase CPAY's profits. (*Id.*) One of those "opportunities" was the tier shift explained above. Zach Hyman wrote that CPAY could profit "$275,000 monthly (would be shared with agents)" by "[d]owngrading non regulated debit on tiered accounts." (*Id.*)

II. Fees for nothing in return

Plaintiffs also allege that two fees were fraudulent because CPAY did not explain that it invented these fees, or that customers received nothing in return for paying them. As noted, Zach Hyman invented one of those fees in 2014. Initially, CPAY simply billed the fee, sending out its usually uniform, cryptic, billing notices. (*See* JA1903-06.) Eventually, CPAY added this "TSSNF" fee to contracts with new merchants, starting in April 2016. Still, CPAY provided no information about how this fee came to be—i.e., the Hyman brothers made it up—or what merchants receive for paying it—absolutely nothing. The contracts simply listed the TSSNF Fee among those fees to be assessed "at Central Payment Rates." (JA1906.)

The other fee that is part of CPAY's fraudulent scheme is the "PCI Noncompliance Fee." CPAY charged this throughout the class period, charging merchants if they did not comply with data protection standards adopted by an industry panel. (JA1207 at § 43(d).) When asked what services a merchant receives for paying the PCI Noncompliance Fee, Mr. Chang replied: "there is no service that is being offered." (JA0586 at 254:13-20.) The fee is "all markup" and offsets "no cost" for CPAY. (JA0587 at 259:10-19.) When an agent asked Matt Hyman to explain

how the fee related to data security or industry services, he replied: "I have NO documentation to support these cost [sic]." (JA0827.) The fee was purely a sham.

III. CPAY engaged in a single scheme to defraud.

All of these "pricing initiatives" were connected by a single scheme. If one idea for taking merchants' money was untenable, CPAY would find another. For instance, when Matt Hyman expressed concern about increasing the PCI Noncompliance Fee, shortly before the brothers sold the company, Zach Hyman responded: "Grab your BALLS SON. Unreal. I want a dam [sic] going away present, and TSYS is asking for it!" Matt Hyman responded that, instead of increasing the PCI annual fee, CPAY should "introduce a new fee or increase pricing on new merchants???!!!! LETS DO IT!!!!" (PL-ADD.13, JA0753.)

There is no record evidence that any of the challenged "pricing initiatives" correlated to an increase in interchange rates or to any other authorized event. Under the veil of legitimate pass-through fees, CPAY camouflaged the true nature of its pricing initiatives: CPAY's "business need[s]." (JA0588 at 263:13-17.) Then, CPAY extracted these fees from merchants' bank accounts, often before merchants even received their monthly statements. (JA0531-32 at 34:7-10, 39:17-21.)

This scheme was effective because the amounts that CPAY snatched from merchants were relatively small. For instance, the two named Plaintiffs—Custom Hair Designs by Sandy ("Sandy") and Skip's Precision Welding ("Skip's")—suffered damages of $158.73 and $63.85, respectively, through CPAY's pricing initiatives.

(JA0800-01 at ¶¶ 34-36.) In the aggregate, however, CPAY extracted huge sums from its merchant customers. More than 200,000 small businesses fell victim to CPAY's scheme. (Pet. App'x at 16.) Addressing less than the full class period because not all data was then available, Plaintiffs' damages expert calculated that class members paid over $128 million in improper rate increases and fees from 2012 to 2018. (*See* JA0798-99, ¶¶ 22-29; Pet. App'x at 18.)[4] Thus, the average total loss per merchant is likely between $500 and $1,000.

CPAY presented no evidence that individual merchants received materially different descriptions of these fees or fee increases. CPAY also presented no evidence that CPAY was authorized under the merchant agreement to make these increases, or any evidence that CPAY had a legitimate justification for any increase. Nor did CPAY present evidence that any merchants understood that they were receiving nothing in return for the fees, or that the fees and rate increases were "business decisions" to increase CPAY's profits.

The large majority of the challenged fees were extracted months after the application and agreement were executed. CPAY did not raise rates on new merchants until after they had been on board for at least four months (JA0568 at 184:13-17)—further demonstrating that CPAY was operating a calculated scheme, not responding to market conditions. These increases occurred through uniform billing-statement messages that provided the same false justifications to all affected merchants for

4. CPAY's expert does not dispute this calculation. (JA0416-17 at 26:1-27:7.)

every challenged rate increase. (*See, e.g.*, PL-ADD.05-08, JA1903-06; JA1763; *see also* PL-ADD.02, JA1766; PL-ADD.04, JA1763.)

IV. Litigation

Initially, Plaintiffs filed their putative class action as a breach-of-contract case. (JA0019, JA0052.) But after discovery revealed the illicit scheme conducted by the Hyman Brothers and CPAY, through CPAY's agents, Plaintiffs filed an amended complaint in 2018, alleging civil RICO claims under federal law and fraudulent concealment under Nebraska law. (JA0059, JA0117, JA0125.) Eventually, Plaintiffs moved to certify a class action, while CPAY moved for summary judgment and moved to strike the expert report of Plaintiffs' liability expert, Dr. Karl Borden. In a lengthy order, the district court certified the class, denied CPAY's summary judgment motion, and denied the motion to strike Dr. Borden. (*See* Pet. App'x at 15-56.) After permitting an interlocutory appeal under Rule 23(f), the Eighth Circuit affirmed class certification. (*Id.* at 14.) The court held that "[c]ommon questions and common answers predominate here," because "all claims deal with either a common scheme of fraud or a term common to all contracts with CPAY." (*Id.* at 6.)

ARGUMENT

This Court should deny the Petition for Certiorari because CPAY has not identified a legitimate circuit split, and because there are multiple reasons why this case presents no issues that should interest this Court.

I. There is no circuit split; rather, various circuit courts have reached different conclusions by applying the Rule 23 standards to different sets of facts.

The Eighth Circuit did not create a "circuit split" by affirming class certification in this case. In claiming otherwise, CPAY fails to identify a statement of law in the Eighth Circuit's decision that conflicts with a statement of law from any other circuit. Rather, CPAY attempts to manufacture a circuit split from courts reaching different conclusions from different sets of facts. CPAY's argument also ignores Plaintiffs' claims for RICO and fraud.

Plaintiffs' case centers on their civil RICO claim, alleging that CPAY, the Hyman Brothers, TMS, and CPAY's agents participated in a scheme to defraud the class of merchants. (*See* Pet. App'x at 51-52.) The district court certified the RICO claim (with all claims) and denied CPAY's summary judgment motion. (*Id.* at 31-34, 51-52.) The Eighth Circuit affirmed certification of the RICO claim. (*Id.* at 7-9.) CPAY's Petition largely ignores the RICO claim—it is mentioned once, in passing (Pet. at 5)—and provides no assertion that there is a circuit split as to RICO law.

CPAY's primary argument below was that RICO causation requires proof of individual reliance. Applying this Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), the Eighth Circuit rejected that argument. (Pet. App'x at 8-9.) Other circuit decisions are in accord. *See, e.g.*, *Torres v. S.G.E. Mgmt., LLC*, 838 F.3d 629, 639 (5th Cir. 2016); *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1090 (10th Cir. 2014);

U.S. Foodservice, 729 F.3d at 121-22. CPAY does not claim a circuit split on that issue, or a circuit split related to the application of Rule 23 to Nebraska-law fraud claims. Thus, CPAY's "circuit split" argument only pertains to one claim in this case.

There is also no circuit split regarding the breach-of-contract claim. Every circuit engages in the same analysis under Rule 23: evaluating the contracts to determine whether they are materially similar or have differences substantial enough that each individual contract must be reviewed to adjudicate the claims. *See, e.g.*, *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013) (commonality not established where it was unclear that defendant had same duty to all potential class members); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1172 (11th Cir. 2010) (stating that form contracts "best facilitate[] class treatment," while "common questions rarely will predominate if the relevant terms vary in substance among the contracts"); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (no commonality where potential class members signed contracts with "materially different contract language, [and] the actual contractual undertaking of each was subject to several critical variables"); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998) (class claims lacked commonality because of "myriad variations" in contracts).

None of these cases, relied on by CPAY, held that a class may not be certified where there is **any** variation in the contracts. That point is clear from *Sacred Heart*, the primary case upon which CPAY relies. In *Sacred Heart*, the court noted that it previously affirmed certification

where it discerned "material similarity" in the relevant contracts. *Sacred Heart*, 601 F.3d at 1171 (citing *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1251 (11th Cir. 2003), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005)). In *Sacred Heart*, there were six different **categories** of contracts. *Id.* at 1171-72. That fact alone did not preclude certification, and the court found sufficient similarity in the Group A contracts to continue the analysis. *Id.* at 1172 ("So far, so good."). However, the analysis broke down when the court found no homogeneity within Group B. *Id.* On the whole, the Eleventh Circuit determined that the contracts lacked sufficient similarity, "either as to the payment provisions, or as to other terms like the termination and waiver clauses that bear on Humana's potential liability." *Id.* at 1171. Further, *Sacred Heart* involved the laws of several states, *id.* at 1180, a non-issue in this case where all contracts are governed by Nebraska law. (JA0639 at § 13.2.)

The court in *Sacred Heart*—and the courts in the other cases cited by CPAY—did precisely what the Eighth Circuit did here. They analyzed the contracts to see whether the variations were substantial enough to preclude class treatment. In this case, the Eighth Circuit analyzed that question and determined that the contracts were sufficiently similar, when considered in the context of the Plaintiffs' theories of liability. (Pet. App'x at 6.) The court recognized differences in the negotiated pricing. However, it also recognized that terms common to all contracts precluded the raising of fees, and that CPAY's statements to merchants regarding changes to billing were "nearly identical." (*Id.*) Further, the court determined that any pricing differences would affect only damages, and the need to assess individual damages will

rarely defeat class certification. (*Id.* at 6-7.) As this Court held in *Tyson Foods, Inc. v. Bouapheakeo*, 557 U.S. 442 (2016):

> When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."

Id. at 453-54 (quoting 7AA C. Wright, A. Miller, & M. Kane, Fed. Prac. & Proc. § 1778, pp. 123-24 (3d ed. 2005)). *See also Sacred Heart*, 601 F.3d at 1179 ("Individualized damages issues are of course least likely to defeat predominance where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods.") (quotations omitted).

Thus, the Eighth Circuit did not ignore the differences in the contracts, as CPAY suggests. Rather, the court analyzed the similarities and differences material to Plaintiffs' legal theories, and then determined that common issues predominated due to the uniformity of the terms and conditions—i.e., the provisions upon which the Plaintiffs have based their case. (Pet. App'x at 6-7.) This analysis does not represent a departure from any other circuit's analysis. In all of these cases, the courts are analyzing the contracts to determine whether they are materially similar, or whether "every one of the contracts will have to be considered individually, defeating commonality and predominance." *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 795 (10th Cir. 2019).

CPAY's suggestion that it lost on appeal because of the accident[5] of being in the Eighth Circuit is, therefore, meritless. The Eighth Circuit does not treat Rule 23 issues involving contracts differently from any other circuit. In fact, it has rejected several such class actions in recent years. *See, e.g.*, *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1156-57 (8th Cir. 2017) (affirming denial of certification where claims were dependent on condition of individual properties and contract laws of four states); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779-80 (8th Cir. 2013) (reversing class certification where liability would be determined by whether each customer's charges were "usual and customary"); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1030 (8th Cir. 2010) (affirming denial of certification where extrinsic evidence was critical to plaintiffs' breach-of-contract theories). *Cf. Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 481 (8th Cir. 2016) (decertifying class in environmental contamination suit due to the "disparate factual circumstances" among class members).

Meanwhile, every circuit cited by CPAY has permitted class actions in contract cases where the contracts were not 100% identical. *See, e.g.*, *Zehentbauer Fam. Land, LP v. Chesapeake Expl., L.L.C.*, 935 F.3d 496, 505–06 (6th Cir. 2019) (lease contracts were sufficiently similar to support certification, when evaluated in context of plaintiffs' remaining claims); *Naylor Farms*, 923 F.3d at 795 (certification proper where plaintiffs' claims turned on uniform clause in lease contracts); *Allapattah Servs.*, 333 F.3d at 1260-61 (common issues predominated, despite

5. "Accident" is an imperfect word, given that CPAY's terms and conditions dictate that any lawsuit must be filed in Douglas County, Nebraska. (JA0639 at § 13.2.) But CPAY's Petition suggests that it was a victim of bad luck by landing in the Eighth Circuit. (*See* Pet. at 13 (claiming that CPAY's appeal "would have come out differently" in any other circuit).)

individualized issues in affirmative defenses); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 428–29 (4th Cir. 2003) (certification proper where class all had unpaid insurance claims, despite some contract variations); *Grey v. Hearst Communications, Inc.*, 444 Fed. App'x 698 (4th Cir. Aug. 25, 2011) (unpublished) (affirming district court's certification of claim for breach of the duty of good faith and fair dealing).

There is no fundamental difference in how the circuits interpret Rule 23. It is a highly fact-specific analysis that ultimately leads to a balancing of all issues in a particular case, to determine whether common issues predominate. *See* Fed. R. Civ. P. 23(b)(3); *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545-46 (9th Cir. 2013) ("The main concern of the predominance inquiry under Rule 23(b)(3) is the balance between individual and common issues."). In this case, the Eighth Circuit determined that common issues predominated because of the uniformity in CPAY's terms and conditions. (Pet. App'x at 6-7.) Whether that determination was right or wrong, it did not create a circuit split. It was an application of one set of facts to the general principles of Rule 23.

Because CPAY's Petition relies heavily on the false assertion of a circuit split, the Petition should be denied.

II. There are multiple additional reasons that this case is not ideal for consideration by this Court, including that CPAY's Petition does not address the entire case, there are no "material" contract differences, and uniform law governs all contracts.

This Court should also deny the Petition because this case would not position the Court to evaluate whether

common issues may predominate despite material differences in class members' individual contracts, as CPAY erroneously claims. (Pet. at i.) Rather, this case is a routine class action because the terms that matter to the Plaintiffs' theories are uniform.

There are several reasons why this case is not the right case, even if the Court is inclined to address, at some point, the Rule 23 certification of state-law contract claims. Those reasons include:

- Plaintiffs primarily allege a centralized fraudulent scheme under RICO that also constituted fraud under Nebraska law, so their contract claims are only one aspect of a larger case.

- The relevant contract provisions are uniform. CPAY has failed to demonstrate in its Petition—as it failed to demonstrate in the trial court or the Eighth Circuit—how any alleged differences in individual merchants' contracts are material to any issue other than damages.

- Because the relevant contract terms are uniform, CPAY may present any defenses it may have through summary judgment proceedings and at trial.

- All contracts are all governed by Nebraska law. If this Court reviews a contract case in the context of Rule 23, it should select a case that implicates the laws of several states, as that is an issue that courts often wrestle with in addressing class certification.

A. The focus at trial will be on CPAY's common scheme, not on the actions of any individual Plaintiff.

CPAY's myopic argument largely ignores Plaintiffs' RICO and fraud claims. Plaintiffs allege a common, centralized scheme to defraud them, in violation of the RICO Act. The sole question presented focuses on what CPAY describes as "materially different contractual rights and obligations between the defendant and each class member." (Pet. at i.) That question does not address the RICO and fraud claims.

Plaintiffs' RICO claim places the focus on CPAY's conduct, not on the conduct of any individual Plaintiff. *See Bridge*, 553 U.S. at 647 ("The gravamen of the offense is the scheme to defraud."); *see also Reyes v. Netdeposit, LLC*, 802 F.3d 469, 487 (3d Cir. 2015) (stating that "a properly supported RICO allegation will often contain common issues because … a RICO allegation is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members" (quotations and alterations omitted)). The same analysis that applies to Plaintiffs' RICO claim also applies to Plaintiffs' claims under Nebraska law for fraudulent concealment, and to the claim for breach of contract based on the duty of good faith and fair dealing.[6]

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6. The fraudulent concealment claim requires proof that Plaintiffs acted or refrained from acting in response to a concealment and sustained damages as a result. *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 791 N.W.2d 317, 334 (Neb. 2010). Here, the Plaintiffs paid fees due to CPAY's failure to disclose information about what they were paying. *See, e.g.*,

The evidence shows that CPAY engaged in an intentional overbilling scheme that systematically added illegitimate charges to more than 200,000 merchant accounts. (Pet. App'x at 15-16.) As noted above, CPAY overbilled merchants in two ways: (1) by imposing rate increases without contractual authority or any other legitimate basis; and (2) by charging illegitimate fees, accompanied by deceptive notices. The evidence shows that all of these contested charges share the same pertinent characteristics: they were planned and devised by the Hyman brothers, often months in advance, (PL-ADD.10, JA0768); they were not pre-approved by the bank, as every contract required, (PL-ADD.14, JA0640 at § 13.20; JA0530 at 33:5-22); they were disclosed with language suggesting that there was a legitimate external reason for them when there was not, (JA1899-1908); and, they were charged without CPAY disclosing all material facts. They even shared a common name: "pricing initiatives." (JA0558 at 143:1-144:19.) Merchants were not subjected to these "pricing initiatives" until they had been on board for four months. (JA0568 at 184:13-17.)

Plaintiffs will also use common proof to establish the scope of the scheme. The evidence shows that CPAY raised discount rates about twice a year, (JA1899-1902; JA0457,

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CHG Holding, 773 F.3d at 1081; *U.S. Foodservice*, 729 F.3d at 120 (allowing for inference of reasonable reliance across a class). In Nebraska, every contract includes a covenant of good faith and fair dealing, which "requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract." *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 655 N.W.2d 390, 400 (Neb. 2003). Here, CPAY uniformly violated this covenant through its fraudulent scheme. Or, if CPAY proves otherwise, that decision will also apply to the entire class.

¶ 92; JA0588 at 262:23-263:21), that each increase came with a common statement to all affected merchants, and that no increase was approved by the bank. (JA0530 at 33:5-22.) If CPAY has evidence that any particular rate increase was legitimate—which it has not yet produced—that evidence would apply to every merchant subjected to that increase. The jury could then review the evidence and determine which rate increases, if any, were legitimate, and those findings would govern damages calculations.

The same goes for CPAY's other fee increases—tier-shifting, inventing the TSYS Network Fee (*see* PL-ADD.10, JA0768), and imposing the PCI Noncompliance Fee with no service in return. (JA0586 at 254:13-20.) Common evidence—including documents from CPAY's files showing it trying to hide the fees, (PL-ADD.12, JA0780), and testimony that increases were "business decisions," (JA0588 at 263:13-17; JA0581 at 237:3-13; JA0577-78 at 221:17-222:1)—will drive those determinations. Here, too, the jury will be able to make categorical findings about their legality based on common proof.

The common thread through all of CPAY's actions was its deception. CPAY did not disclose that it was simply raising fees for its own profit, without the authorization of the bank, and without providing anything in return. Regarding the PCI Non-compliance Fee, CPAY did not disclose that it was providing "no service" related to this fee, or that it was pure profit for CPAY and not necessary to recoup any costs. (JA0586 at 255:13-17; JA587 at 259:10-14; JA0859.) Initially, CPAY attempted to hide the TSSNF fee entirely. (PL-ADD.11-12, JA0779-80.) Even after it added the fee to all new contracts, CPAY failed to tell merchants that the fee was entirely made up and offered nothing in return. (JA1906.)

Further, when CPAY raised existing rates, it sent merchants identical notices that told them nothing. These notices stayed essentially the same over time—claiming, with no support, that fee increases were "in response to recent modifications made by industry card brands to interchange rates." (JA1899-1902; PL-ADD.04, JA1763.) These notices failed to disclose that CPAY had planned rate increases in advance, or that the bank had not authorized the increases as required by the merchants' contracts. (*See id.*) CPAY also has produced no evidence that any fee increase correlated to an action by "industry card brands." Even if such information would constitute individualized evidence—which it would not—courts should not assume the existence of evidence not shown. *See In re Foodservice*, 729 F.3d at 122 (holding that "conjectural" claims of individual reliance "do not undermine class cohesion and thus cannot be said to predominate for purposes of Rule 23(b)(3)") (quoting *Amgen, Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013)).

At trial, the jury will evaluate all of this evidence and determine whether CPAY engaged in a scheme to defraud these small businesses, such that CPAY violated the RICO Act, committed fraud under Nebraska law, and/or violated the covenant of good faith and fair dealing under Nebraska law. All Plaintiffs' liability claims will rise and fall with common evidence. And again, the necessity to calculate damages at an individualized level does not defeat class certification. *Tyson Foods,* 557 U.S. 453-54.

B. Plaintiffs' breach-of-contract claim also is based on common evidence, and thus the question presented does not apply here.

Even if the Court were inclined to address a case that presented the scenario encompassed by the question presented, this case is not that case. Again, the question asks this Court to grant the Petition to address whether a class may be certified despite "materially different contractual rights and obligations between the defendant and each class member." (Pet. at i.) But CPAY has failed to explain how CPAY's or class members' contractual obligations **materially** differ from one class member to the next.

The evidence as to Plaintiffs' express breach-of-contract claim is every bit as common as for the claims laid out above. CPAY insists that the strength of its defense—that it did nothing wrong—"necessarily depends on the terms of the contracts CPAY signed with each merchant." (Pet. at 5.) But that argument ignores a critical point: The contract terms that matter **are** uniform.

The key documents governing CPAY's relationships with merchants are the terms and conditions and application that comprised the merchants' original contracts, plus the billing statements. The billing statements and terms and conditions are plainly common. The statements had a uniform notice of each increase that barely changed over time, (*see, e.g.*, JA1899-1908; PL-ADD.04, JA1763), and CPAY admits that the terms and conditions did not materially change throughout the class period. (JA0543 at 83:22-84:5.) As for the applications, CPAY never identifies any differences that matter to

any issue other than damages. CPAY's expert "did not perform any legal analysis with regard to the distinctions across the various versions" of the application. (CPAY-ADD.46.)[7] Because CPAY failed to identify any relevant distinctions in the individual contracts, certification was proper. *See U.S. Foodservice*, 729 F.3d at 124-25 (rejecting argument that vendors' contract presented individualized issues where record contained "no evidence of any USF customer's contract negotiations or individualized conduct in performing pursuant to the contract").

While the RICO, fraud, and duty of good faith claims focus on CPAY's deception, the express breach claim focuses on CPAY's breach of specific and uniform contract terms. Every class member's contract included boilerplate requirements that the "BANK must pre-approve all FEES," and that "the AGREEMENT may not be amended without BANK's express written consent." (PL-ADD.14, JA0640 at § 13.20); *see also* Pet. App'x at 6 (acknowledging "[t]he relevant contract term was uniform").) Further, "[t]he FEES may be amended by BANK on thirty (30) days written notice to MERCHANT unless provided otherwise herein." (JA0635 at § 3.5). All class members claim that CPAY breached these terms by (a) imposing new fees not pre-approved by FNBO and (b) amending the agreed-upon fees without FNBO's written consent. (Pet. App'x at 6 (stating that "all Plaintiffs allege failure to get bank preauthorization")).

That uniformity places this case in stark contrast to the decisions cited by CPAY, all of which involved

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7. CPAY-ADD refers to the Addendum filed by CPAY in the Eighth Circuit.

contract terms that varied widely. For instance, in *Sacred Heart*, the Eleventh Circuit held that differences in the most material contract terms were overwhelming. *Sacred Heart*, 601 F.3d at 1176. The court reversed certification due, in part, to the district court's error in "overlook[ing] the substantial variation in the contracts and the corresponding rights and duties they provide the plaintiffs." *Id. See also Sprague*, 133 F.3d at 398 (breach of contract action could not be certified given "myriad variations" in non-uniform oral and written promises regarding retirement benefits)[8]; *Broussard*, 155 F.3d at 340 (holding that key contractual provision varied widely, and thus "the breach of contract action that is the cornerstone of plaintiffs' case raises numerous uncommon questions"); *Wallace B. Roderick*, 725 F.3d at 1218 (10th Cir. 2013) (noting that the plaintiff failed to prove that key contract term existed "in every class member's lease").

Here, some merchants bargained for specific rates per transaction, but Plaintiffs' liability theories have nothing to do with those initial discussions or rates. The merchants' individual rates only impact the damages inquiry. As this Court recently held in *Tyson*, and as the Eleventh Circuit wrote in *Sacred Heart*, individualized damages inquiries usually will not defeat class certification. *Tyson*, 557 U.S. at 453-54; *Sacred Heart*, 601 F.3d at 1179 (noting that damages are unlikely to defeat predominance "where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical

8. In certifying a contract class, *U.S. Foodservice* distinguished *Sprague* as "decertifying [a] class of early retirees in [an] ERISA case where 'side deals' contained myriad variations as to what each retiree was promised." *U.S. Foodservice*, 729 F.3d at 124.

methods"). That is precisely the situation here. The measure of damages is straightforward—the merchants' price increases due to CPAY's fraudulent scheme—and damages can be calculated using CPAY's own records. (JA0793-97.)

The certified class is defined to include any merchant subject to any of the challenged fees. (Pet. App'x at 56.) So, if the jury determines that CPAY engaged in a fraudulent scheme or breached the terms and conditions of its merchant contracts, then the only remaining issue will be the calculation of damages, as the lower courts recognized. (Pet. App'x at 6-7, 32-33.)

CPAY's Central Station computer system stores data regarding the fee information for each merchant from the start of their agreement to the present (or until termination of their agreements with CPAY). (JA0793 (Olsen Report, ¶ 14, citing Chang Dep. at 93:11-19, 159:9-23, 164:5-169:23, 172:1-24, 176:7-177:9[9]).) Using that data, Mr. Olsen developed a program to determine the amount of credit card rate increases, as well as the PCI Noncompliance and TSSNF Fees charged by CPAY. (JA at 798-800 (Olsen Report, ¶¶ 22-33).) Using the spreadsheets produced in discovery, Mr. Olsen could calculate all damages from CPAY's raising of fees and collection of the PCI Noncompliance and TSSNF Fees, to the penny. (*Id.*) He did the same for the named Plaintiffs. (*Id.* at 800-01 (Olsen Report, ¶¶ 34-37).)

CPAY asserts that the damages inquiry defeats predominance, claiming that the Eighth Circuit's opinion

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9. JA0545, JA0562-66.

necessitates a review of every contract. (*See* Pet. at 18 (citing Pet. App'x at 7) (stating "that some contracts authorize a 'PCI Noncompliance Fee' or a 'TSSNF Fee' does not defeat predominance").) But the Eighth Circuit never wrote that every contract needed to be reviewed.

Plaintiffs contend that the PCI Noncompliance Fee and TSSNF Fee are part of CPAY's fraudulent scheme, and violate the covenant of good faith and fair dealing, regardless of whether they were disclosed in a merchant's application. CPAY created the PCI Noncompliance Fee for pure profit in exchange for no services. (*See* JA0586 at 254:13-20, JA0587 at 259:10-19, JA0827.) Zach Hyman invented TSSNF fee out of nothing, and then tried to hide it from merchants. (PL-ADD.10-12, JA0768, JA0779-80.) On the question of whether these fees were legitimate, the class's claims will rise and fall together.[10]

The PCI Noncompliance Fee has been standard on the merchants' applications since June 2011. (*See* JA0585 at 253:13-23; JA1773.) Beginning in April 2016, CPAY disclosed the TSSNF Fee in the small print of contracts with new merchants. (JA1387; JA1906.) If necessary, Plaintiffs' expert can easily determine which merchants had disclosure of these fees in their contracts by reviewing CPAY's database to determine the start date for a particular merchant. (*See* JA545 at 93:11-19 (stating that Central Station records all fee information from the inception of each merchant's agreement).) Thus, there is no need to review every contract.

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10. Plaintiffs do not assert that any merchant was improperly charged because it was compliant with PCI standards. Their only argument is that the fee is fraudulent and, therefore, void *ab initio*.

This case, therefore, does not present any questions about the impact of "material" deviations in every contract.

C. CPAY has failed to identify any contract "defenses" that would not apply to the entire class if viable.

This Court should also reject the assertion that certiorari is needed so that CPAY will have the opportunity to present its contract defenses. (Pet. at i.) Though CPAY makes this point in the buildup to its question presented, CPAY fails to explain how it would be precluded from raising any defense through summary judgment or trial. It also fails to explain which "individualized" defenses that it supposedly possesses. (*See id.*)

Nothing prevents CPAY from asserting its "principal defense to these claims," which, CPAY claims, is "that it had every right to bill its merchant customers through the practices at issue." (*Id.* at 5.) CPAY already sought summary judgment on the contract claims, as to the named Plaintiffs. (Pet. App'x at 43-50). Notably, this argument did not focus on any issues unique to the named Plaintiffs. (*See id.*) There is an October 12 deadline for summary judgment motions on the merits of the case, and Plaintiffs understand that CPAY plans to seek summary judgment as to the entire class. Of course, CPAY will also have the opportunity to defend its actions at trial. The fact that CPAY claims to have defenses based on individual contracts is meaningless when it has failed to support that claim with evidence. *U.S. Foodservice*, 729 F.3d at 124-25. CPAY has made no showing that it will be precluded from raising any particular defense if certiorari is denied.

The express breach claim applies to fees raised without contractual authorization or fees not disclosed at all. Again, every class member's contract was governed by the same set of terms and conditions, which did not materially change during the class period. (JA0543 at 83:22-84:5.) Thus, while each class member agreed to pay different **amounts** to CPAY for its services, the parties' contractual rights and obligations were governed by an identical set of rules. CPAY begrudgingly admits this critical detail. (*See* Pet. at 6 (noting that terms and conditions were "standardized").) Therefore, any defenses that CPAY believes it has would apply uniformly throughout the class.

D. This Court should not accept a contract case in the Rule 23 context where, as here, all contracts are governed by one state's law.

Finally, even if the Court is inclined to—at some point—address a contract-based class case, this case is not ideal for that inquiry because it is missing a key component. While many class cases involving contracts present the issue of how to synchronize multiple states' laws, in this case all contracts are governed by Nebraska law. (JA0639 at § 13.2.)

As noted above, one reason the *Sacred Heart* court rejected certification was that the contracts involved the laws of six states. *Sacred Heart*, 601 F.3d at 1180. However, the fact that a class case involves contracts governed by the laws of several states does not necessarily defeat certification. *See, e.g.*, *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 147 (2d Cir. 2015) ("We have held that the fact that contract terms must be interpreted according

to multiple different state laws does not necessarily make individual issues predominate over common ones, because state contract laws generally define breach consistently.") (citing *U.S. Foodservice*, 729 F.3d at 127); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004) ("[I]f the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate.") (citing *Krell v. Prudential Ins. Co. of Am.,* 148 F.3d 283, 315 (3d Cir. 1998); *Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1017 (D.C. Cir.1986); *cf. In re Am. Med. Sys.,* 75 F.3d 1069, 1085 (6th Cir. 1996) (noting that too many variations in state laws make the district judge's task impossible).

Contract-based claims are heavily fact-specific and are governed by state law, so that is presumably why this Court rarely grants certiorari in such cases. But if the Court is inclined, at some point, to accept a contract case in the Rule 23 context, the ideal case would have contracts governed by the laws of multiple states. Only then could this Court provide guidance on how the lower courts should handle that situation. All of the contracts in this case are governed by the same law, so that is yet another reason to deny CPAY's Petition.

III. CPAY's attacks on the lower-court judges who have decided this case are irrelevant to the sole question presented.

This Court should also reject CPAY's efforts to obtain the Court's review by attacking the federal judges who previously have decided this case. That the district court made an error or two in a 35-page order that covered three

separate motions does not indicate that Judge Bataillon failed to give the matter a rigorous review. Meanwhile, it is unclear what exactly Judge Benton did wrong in his decision for the Eighth Circuit, other than ruling against CPAY's interests. He is accused of "fact-finding," but any decision reviewing a certified class will necessarily have to review the facts that were presented to the district court. *See, e.g.*, *Sacred Heart*, 601 F.3d at 1171-76 (reviewing relevant contracts in detail).

Regardless of how this Court rates the quality of the lower courts' analysis, one thing is certain: The question presented does not address whether the district court engaged in a rigorous analysis. Per this Court's rules, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." U.S. Sup. Ct. R. 14. CPAY's Petition, ignoring the hyperbole that precedes the actual question presented, asks: "Whether a class may be certified under Rule 23 of the Federal Rules of Civil Procedure when the class claims turn on materially different contractual rights and obligations between the defendant and each class member." (Pet. at i.) As laid out above, the premise underlying this "question" is false. Plaintiffs' contractual claims are based on uniform terms and conditions, not "materially different contractual rights." That point aside, CPAY did not raise any issues regarding the depth of the lower courts' analysis.

Nor could such an issue be fairly included in the question that CPAY presented. The question presented focuses entirely on the alleged circuit split. It does not raise any question about the depth of the analysis. The question merely assumes a set of facts and asks the Court to determine whether a class should be certified under those alleged circumstances. Further, even if the depth

of the lower courts' analysis could be considered within the question presented, it does not represent an issue of general importance. The question of whether Judge Bataillon and Judge Benton included sufficient analysis in their decisions bears on this case, and this case only.

CPAY appears to be attacking the lower-court judges to try to create the impression that something unusual happened in this case. It did not. Plaintiffs have alleged a cohesive scheme that deprived small-business merchants of funds in small increments that added up to well over $100 million. CPAY's conduct was uniform, and CPAY's terms and conditions were uniform. This case is a quintessential class action, and both lower courts properly recognized it as such.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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