

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FIRST DATA MERCHANT SERVICES LLC

Plaintiff,

v.

MM DEVELOPMENT COMPANY d/b/a
PLANET 13; SISTEM COMMERCE CITY LLC
d/b/a SILVER STEM FINE CANNABIS; KTZ
HOLDINGS, INC. d/b/a SILVER STEM; GTR
SOURCE, LLC; NEW YORK CITY MARSHAL
STEPHEN W. BIEGEL; ML FACTORS
FUNDING LIMITED LIABILITY COMPANY;
PELICAN COMMUNICATIONS, INC. d/b/a THE
PELICAN GROUP; LINX CARD, INC.; and
GIVV, INC.

Defendants.

**PLAINTIFF FIRST DATA MERCHANT SERVICES LLC'S COMPLAINT
FOR INTERPLEADER AND INJUNCTIVE RELIEF**

Plaintiff First Data Merchant Services LLC ("First Data") brings this Complaint for Interpleader and Injunctive Relief, and alleges as follows:

INTRODUCTION

1. First Data has in its custody and possession \$619,560.55 (the "Disputed Funds") to which each of the Defendants may claim entitlement. Through this action, First Data seeks to interplead Claimants' claims to the Disputed Funds, deposit the Disputed Funds with the Court, extricate itself from Claimants' competing adverse claims, and enjoin Claimants from initiating or prosecuting any action against First Data regarding the Disputed Funds.

PARTIES

2. First Data is a limited liability company registered in the State of Florida. The sole member of First Data is CESI Holdings, LLC. The sole member of CESI Holdings, LLC is First Data Corporation. First Data Corporation is a Delaware corporation with its principal place of business in Atlanta, Georgia.

3. MM Development Company, Inc. (“MM Development”) is a Nevada corporation doing business as Planet 13, with its principal place of business at 205 North Stephanie St., Suite D-126, Henderson, Nevada 89074.

4. Sistem Commerce City LLC is a Colorado limited liability company doing business as Silver Stem Fine Cannabis, with its principal place of business located at 1110 W Virginia Ave., Unit 1, Denver, Colorado 80223.

5. KTZ Holdings Inc. is a Colorado corporation doing business as Silver Stem (collectively with Sistem Commerce City LLC, “Silver Stem”), with its principal place of business at 730 17th Street, Suite 405, Denver, Colorado 80202.

6. GTR Source, LLC (“GTR Source”) is a New Jersey limited liability company with its principal place of business at 111 John Street, Suite 1210, New York, New York 10038.

7. New York City Marshal Stephen W. Biegel (“Marshal Biegel”) is located at 109 West 38th Street, Room 200, New York, New York 10018.

8. ML Factors Funding Limited Liability Company (“ML Factors Funding”) is a New Jersey limited liability company with its principal place of business at 428 Central Avenue, Fifth Floor, Cedarhurst, NY 11516.

9. Pelican Communications, Inc. is a California corporation doing business as The Pelican Group, with its principal place of business at 77 Front Street, Danville, California 94526.

10. Linx Card, Inc. (“Linx Card”) is a Delaware corporation with its principal place of business located at 1990 North California Boulevard, 8th Floor, Walnut Creek, California 94596.

11. GiVV, Inc. (“GiVV”) is a California corporation with its principal place of business at 2121 N. California Blvd., Ste. 275, Walnut Creek, California 94596.

JURISDICTION AND VENUE

12. The Court has original jurisdiction of this Complaint under the Federal Interpleader Act (the “Act”) as the Complaint involves more than \$500 in funds and two or more adverse claimants of diverse citizenship claiming entitlement to those funds. 28 U.S.C. § 1335(a)(1); *see also State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530 (1967).

13. Pursuant to the Act, First Data has, simultaneously with this Complaint, moved the Court for an order permitting First Data to deposit the Disputed Funds into the registry of the Court, there to abide judgment of the Court. *See* 28 U.S.C. § 1335(a)(2).

14. Venue is proper in this District under the Act as one or more of the claimants to the Disputed Funds reside(s) in this District. 28 U.S.C. § 1397.

THE DISPUTED FUNDS

15. First Data is a data processor who processed payment card transactions for GiVV, a subsidiary of Linx Card, pursuant to a Merchant Processing Application and Agreement (“MPAA”). (GiVV’s MPAA with First Data, including the incorporated Confirmation Page and Terms and Conditions, is attached hereto as **Exhibit 1**.) First Data terminated GiVV’s merchant account on or about February 6, 2019 and holds a reserve of \$22,235 pursuant to the MPAA for the purpose of settling any remaining chargebacks or reversals against GiVV’s merchant account.

16. On or about December 2008, First Data began processing payment card transactions for Pelican pursuant to an MPAA executed between First Data and Pelican. (Pelican's MPAA with First Data, including the incorporated Terms and Conditions, is attached hereto as **Exhibit 2**.) After discovering Pelican used its account to improperly process transactions on behalf of Linx Card, First Data terminated Pelican's merchant account on or about May 24, 2019. First Data holds a reserve of \$597,325.55 pursuant to the MPAA to settle any remaining chargebacks or reversals against Pelican's merchant account.¹

¹ First Data retains an additional \$10,000 in reserve pursuant to the MPAA for the purpose of paying future chargebacks, obligations, liabilities, and expenses against Pelican's merchant account.

4.4 Transfer of Settlement Funds. For all Payment Transactions, we will process your Transaction Data to facilitate the funds transfer between the various Payment Brands and you for Payment Transactions. Promptly after we receive credit for such Transaction Data, we will provide provisional credit to your Settlement Account for the proceeds. The proceeds payable to you shall be equal to the amounts received by us in connection with your Transaction Data minus the sum of the following: (i) all fees imposed by us or any third parties passed through to you, charges, and discounts set forth in Schedule A; (ii) all adjustments and Chargebacks; . . . (iv) all Customer refunds, returns, and adjustments; (v) all Reserve Account amounts; . . . You agree that all amounts set forth above, and any other amounts are due and payable by you at the time the related services are rendered to you; that all Reserve Account amounts are due and payable by you upon establishment; and that the related Chargebacks, Customer refunds, and adjustments, fees, charges, fines, assessments, penalties, and all other liabilities are due and payable by you when we receive notice thereof from the Payment Brands or otherwise pursuant to Section 4. . . .

4.6 Delinquency/Merchant Fraud. At any time and from time to time we may temporarily suspend or delay payments to you and/or designate an amount of funds that we must maintain in order to protect us against the risk of, among other things, existing, potential, or anticipated Chargebacks and to satisfy your other obligations under this Agreement (such funds being hereinafter referred to as the "Reserve Account") The Reserve Account will contain sufficient funds to cover any unbilled processing costs plus our estimated exposure based on reasonable criteria for Chargebacks, returns, unshipped merchandise, and/or unfulfilled services and all additional liabilities anticipated under this Agreement. We may (but are not required to) apply funds in the Reserve Account toward, and set off any funds that would otherwise be payable to you, the satisfaction of any

17. Collectively, the \$22,235 GiVV reserve and \$597,325.55 of the Pelican reserve make up the Disputed Funds.

CLAIMS TO THE DISPUTED FUNDS

18. On or about June 27, 2019, First Data received a Levy and Demand from Marshal Biegel notifying First Data of Claimant GTR Source's judgment in the Supreme Court of New York against Linx Card and GiVV in the amount of \$5,190,734.98 plus interest and demanding First Data satisfy the judgment with the Disputed Funds. (Marshal Biegel's Levy and Demand sent on behalf of GTR Source is attached hereto as **Exhibit 3**.)

19. On or about September 6, 2019, First Data received an Information Subpoena with Restraining Notice from ML Factors Funding notifying First Data of ML Factors Funding's claim to the Disputed Funds and seeking restraint of the same. (ML Factors Funding's Information Subpoena and Restraining Notice is attached hereto as **Exhibit 4**.)

amounts which are or become due from you pursuant to this Agreement. The Reserve Account will be held and controlled by FDS, will not bear interest, and you will have no legal right or interest in the funds in the Reserve Account, provided, however, that upon satisfaction of all of your obligations under this Agreement, we will pay to you any funds then remaining in the Reserve Account.
...

10.2 Account Activity After Termination. Termination does not affect either party's respective rights and obligations under this Agreement as to Transaction Data submitted before termination. If you submit Transaction Data to us after the date of termination, we may, at our sole discretion and without waiving any or our rights or remedies under this Agreement, process such Transaction Data in accordance with all of the terms of this Agreement. Upon notice of any termination of this Agreement, we may estimate the aggregate dollar amount of Chargebacks and other obligations, liabilities, and expenses that we reasonably anticipate subsequent to termination, and you agree to immediately deposit such amount in your Settlement Account or as otherwise directed by us, or we may withhold such amount from your settlement funds, in order to establish a Reserve Account pursuant to and governed by the terms and conditions of this Agreement.

(Exhibit 2 ¶¶ 4.4, 4.6, and 10.2.) First Data will seek to deposit any remaining amounts with the Court following First Data's final determination that there remains no risk of chargebacks, obligations, liabilities, or expenses from Pelican's merchant account.

20. On or about September 30, 2019, First Data received a demand letter addressed to Linx Card, Inc. from Silver Stem, demanding payment of \$114,962.00 plus interest for amounts allegedly owed. (Silver Stem's demand letter is attached hereto as **Exhibit 5**.)

21. On or about October 28, 2019, MM Development filed a lawsuit in the Superior Court of California against Linx Card and GiVV, and named First Data as a Defendant in that case for the purpose of recovering the Disputed Funds. (MM Development's Complaint captioned *MM Development Company LLC d/b/a Planet 13 v. Linx Card, Inc. et al.*, Case No. C19-02278, is attached hereto as **Exhibit 6**.)

22. First Data is unable to determine, without exposing itself to multiple liability, which Claimants are rightfully entitled to the Disputed Funds.

COUNT I: INTERPLEADER

23. First Data adopts and incorporates by reference each and every allegation contained in the foregoing paragraphs as if set forth fully herein.

24. First Data is in possession of the Disputed Funds.

25. The Claimants each may claim a right to the Disputed Funds, subjecting First Data to conflicting demands which First Data cannot resolve.

26. First Data is unable to determine, without potentially exposing itself to multiple liabilities, to whom the comingled Disputed Funds should rightfully be delivered.

27. First Data claims no interest in the Disputed Funds and has simultaneously with this Complaint for Interpleader filed a motion to deposit the Disputed Funds into the registry of the Court.

28. First Data has incurred costs and reasonable attorneys' fees relating to this action in an amount to be proven and may continue to incur fees and costs until the matter is adjudicated with finality as to First Data's obligations. The Court may award attorneys' fees and

costs to a disinterested stakeholder, such as First Data, in an interpleader action. *See Estate of Ellington v. EMI Music Publishing*, 282 F. Supp. 2d 192, 193–94 (S.D.N.Y. 2003); *Correspondent Servs. Corp. v. J.V.W. Investments Ltd.*, 204 F.R.D. 47, 49–50 (S.D.N.Y. 2001). Such fees are normally paid from the interpleaded fund. *See, e.g., Estate of Ellington*, 282 F. Supp. 2d at 194.

29. First Data therefore brings this Complaint for Interpleader pursuant to the Act, and asks this court to issue an Order:

- (i) Allowing First Data to deposit the Disputed Funds into the registry of the Court;
- (ii) Interpleading the competing claims of Claimants to the Disputed Funds;
- (iii) Discharging First Data, a disinterested stakeholder, from liability;
- (iv) Awarding First Data recovery of its costs and expenses associated with this action, including but not limited to its reasonable attorneys' fees, and;
- (v) Awarding First Data such further relief as this Court may deem just and proper.

COUNT II: INJUNCTIVE RELIEF

30. First Data adopts and incorporates by reference each and every allegation contained in the foregoing paragraphs as if set forth fully herein.

31. Claimants have sent demand letters and restraining notices to First Data claiming their respective alleged interests in the Disputed Funds. Additionally, MM Development has filed suit against First Data claiming its alleged interest to the Disputed Funds.

32. Pursuant to 28 U.S.C. § 2361, First Data requests this Court enter an order restraining all Claimants from instituting or prosecuting any proceeding in any State or United States court affecting the Disputed Funds involved in the interpleader action until further order of the court. *See, e.g., Sotheby's, Inc. v. Garcia*, 802 F. Supp. 1058, 1067 (S.D.N.Y. 1992).

PRAYER FOR RELIEF

WHEREFORE, First Data prays as follows:

1. That this Court issue an Order allowing First Data to deposit the Disputed Funds into the registry of the Court;
2. That this Court issue an Order interpleading the competing claims of Claimants to the Disputed Funds;
3. That this Court discharge First Data, a disinterested stakeholder, from liability;
4. That this Court enjoin Claimants from instituting or prosecuting any action against First Data with regard to the Disputed Funds;
5. That this Court award First Data recovery of its costs and expenses associated with this action, including but not limited to reasonable attorneys' fees;
6. All other and further relief as this Court may deem just and proper.

DATED: November 26, 2019

Respectfully submitted,

POLSINELLI PC

By: /s/ John W. Peterson
John W. Peterson (#5394200)
401 Commerce Street, Suite 900
Nashville, TN 37219
john.peterson@polsinelli.com
(615) 259-1510

Attorneys for Plaintiff
First Data Merchant Services LLC