

The post-transaction marketing employed by Trilegiant and its e-merchant partners functions **[**3]** as follows. Online merchants such as Buy.com, Inc. and Priceline.com, Inc. enter into an arrangement with Trilegiant to permit the advertisement of membership club programs to their customers. In the course of completing a transaction, a link, banner, or webpage appears on the e-merchant's website advertising a Trilegiant program. A customer who selects the link is immediately taken to an enrollment page for a Trilegiant membership product, or the customer may see the Trilegiant enrollment page **[*120]** after completing a purchase on the e-merchant's site, but before reaching the e-merchant's confirmation page. These enrollment pages purport to offer a coupon or rebate, in addition to a membership in a program that makes available special discount rates on future sales (such as the "Great Fun" program in which plaintiffs enrolled).

The customer is solicited to enter basic personal information, such as a birth date or hometown, and then asked to select "YES" to accept the offer. The online offer screens disclose, in less conspicuous placement and font, the terms of the program, including billing, renewal, cancellation, and the transfer of data from the e-merchant to Trilegiant. These terms advise **[**4]** that "[b]y entering my information and clicking 'Yes,' I acknowledge that I have read and agreed to these offer details and Terms & Conditions," including the information transfer. Supp. App. 37; see also App. 67-70. If the customer opts to participate, the e-merchant seamlessly shares the customer's credit card and personal identifying information with Trilegiant to complete the enrollment. This exchange is a "datapass." Supp. App. 35. The customer is then billed monthly to that credit card (between \$10 and \$20 per month) until the customer cancels the membership, an internet sale technique termed "negative option billing." Trilegiant follows up after enrollment with confirmation emails welcoming the customer to the program and providing again the full list of terms and conditions. When the customer calls in to cancel the membership, Trilegiant's call center engages in "refund mitigation," a customer retention strategy.

The plaintiffs allege that they did not consent to join any membership clubs, and that they were duped by techniques of post-transaction marketing, datapass, negative option billing, and refund mitigation into paying for a product that had no apparent value to them. **[**5]** The named plaintiffs testified or declared that: they never agreed to sign up for a membership club with a monthly recurring fee; they did not recall entering any registration information; and they did not recall selecting "YES" to accept the terms and conditions of the program. Supp. App. 40-43. They complain that at no point in the purported transaction did they re-enter their credit card or billing information, and that datapass abets a scam devised by Trilegiant to collect monthly fees without their knowledge.

To snare members, Trilegiant (with the implicit approval of the e-merchant defendants) allegedly designs its enrollment screens to appear as confirmation pages for the legitimate, just-completed transaction, so that the customer is unaware of having registered to buy a new and completely different product. Trilegiant's cancellation and billing process allegedly prolongs the fraud. To cancel a subscription, the customer must first discover the monthly billing on a credit card statement and call Trilegiant's customer service; Trilegiant's representatives then attempt to keep members enrolled as long as possible, either through promotion of the program benefits or delay in the **[**6]** cancellation process.

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