

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

EXPRESSIONS HAIR DESIGN, LINDA
FIACCO, THE BROOKLYN FARMACY &
SODA FOUNTAIN, INC., PETER FREEMAN,
BUNDA STARR CORP., DONNA PABST, FIVE
POINTS ACADEMY, STEVE MILLES,
PATIO.COM LLC, and DAVID ROSS,

Plaintiffs,

v.

ERIC T. SCHNEIDERMAN, in his official capacity
as Attorney General of the State of New York,

Defendant.

No. 13-CIV-3775 (JSR)

DECLARATION OF DAVID ROSS

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DAVID ROSS hereby declares:

1. I am the President of Patio.com LLC (“Patio.com”), a New York limited liability company. I am responsible for the day-to-day management of the company, as well as long term financial planning.

2. Patio.com is one of the largest, independently owned retailers of outdoor furniture and game room furnishings in the country. In addition to its online store, Patio.com has fourteen store locations across seven states. In New York, Patio.com has stores in Mount Kisco, Scarsdale, Southampton and Westbury.

3. Patio.com’s origins predate the dot-com era. The company, which is owned by myself and my two brothers, was founded in 1984. As a high school student, I started a swimming pool service company with \$50. Business grew quickly, and when my brother Phillip joined me we became the first pool service company in Connecticut to open a retail location. Shortly thereafter, a second retail store was opened in Greenwich on a site of over an acre. As Patio.com's retail business grew, my oldest brother Mitchell joined the company as the director of purchasing and merchandising for outdoor furniture. Over the past ten years, Patio.com has opened new stores almost every year – including its first Florida store in 2010.

4. Patio.com has been accepting credit cards since its inception. Over the years, credit cards have become an increasingly popular form of payment at our storefront locations. Currently, about 80% of our storefront sales are on credit cards. Patio.com typically pays between 2% and 3% of the transaction total in merchant

discount fees (commonly known as “swipe fees”) when a customer uses a credit card to make a purchase. If a customer pays using a debit card Patio.com loses much less on the sale. For cash and check sales, Patio.com pays no merchant discount fee.

5. Last year Patio.com paid over \$200,000 in credit card-related merchant discount fees. These fees represent a significant operating expense for Patio.com. It has been a point of enormous frustration for Patio.com that, unlike other areas of the business, we have not been able to realize any cost efficiencies with respect to credit card processing as our charge volume on credit cards has grown. In contrast to costs such as rent and advertising, which have decreased in proportion to our sales as Patio.com has grown, we have not experienced any of the same efficiencies with merchant discount fees. Despite adding a new store virtually every year for the past ten years and continually growing our charge volume, the effective cost for Patios.com to accept credit cards has increased – not decreased – over time.

6. One of our goals at Patio.com is to guarantee our customers competitive, low prices for the outdoor furniture and game room furnishings that we sell. Patio.com, however, must include the costs of accepting credit cards in the prices that we charge to all customers because the New York no-surcharge law effectively prohibits us from passing along those costs only to those customers who pay with credit cards. This means that our customers who pay with cash, check or debit cards pay more for their purchases than they otherwise would if we could pass along the costs of credit card acceptance directly to those customers who actually use credit cards. We believe that it is unfair to force cash-paying and debit-paying customers to pay higher prices for the benefit of credit card users, and unfair for merchants to bear the hidden transaction costs.

7. In order to better inform our customers about the financial impact of merchant discount fees, Patio.com would like to add a line item to the receipt that illustrates the payment processing costs that Patio.com incurs when customers pay with credit cards. Such a line item would inform customers that they are paying more for using a credit card, but we are afraid that such a line item would also be considered a “surcharge” under the New York no-surcharge statute. Given the criminal penalties associated with the New York no-surcharge law, Patio.com has steered well clear of bumping up against the law.

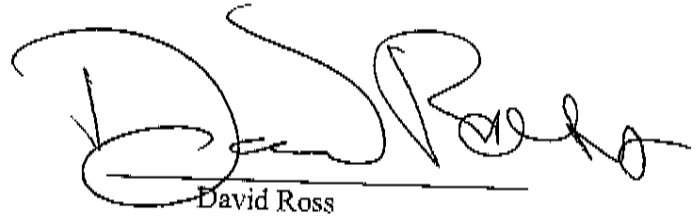
8. At various times, Patio.com has attempted to encourage customers to use their debit cards through verbal steering. Our store and phone clerks try to list debit cards first when asked which forms of payment are accepted and there have been attempts to communicate the high costs associated with accepting credit cards. These attempts have had very limited positive results, however, as they do not provide customers with an incentive (other than perhaps altruism) to use their debit cards. Accordingly, Patio.com would like to charge customers more for paying with a credit card and to state that there is no charge for paying with debit, cash or checks. We believe that being able to charge a different price for credit card usage—and to call that price a “surcharge”—would provide a meaningful incentive to many customers to switch to paying with a debit card, cash or check. For those customers who continue to pay with a credit card, the “surcharge” would allow us to defray some of the costs of credit cards acceptance. Between switching customers to less expensive forms of payment and collecting a surcharge for those who pay with a credit card, we believe that Patio.com could realize substantial cost savings that would, in turn, allow us to keep our prices down.

9. We understand that Patio.com could in effect charge credit-card customers more by labeling the price difference between credit and a different payment method as a “discount” for paying with cash, check, or a debit card rather than a “surcharge” for paying with credit. We do not, however, believe that labeling this difference as a “discount” is as effective as calling it a “surcharge” for using a credit card, and we feel that such discounting would only be marginally more effective than the verbal steering that we already attempt with our customers. If the same transaction is communicated to the consumer as a “surcharge” rather than a “discount,” customers will react very differently. Even though the transaction is the same, consumers are much more likely to switch to less expensive payment forms when faced with a “surcharge” as opposed to a “discount.”

10. In addition, we are concerned about the difficulty in controlling the language our employees would use to express a discount. We understand that employees may tell customers that they will pay *less* if they don’t use credit cards but not that they will pay *more* if they use credit cards. This distinction is difficult to understand and we are not confident that we could ensure that our employees would be able to constantly adhere to that distinction in practice. We are not willing to take that risk, especially in light of the fact that New York’s no-surcharge law imposes criminal penalties on merchants who make the mistake of telling consumers that they are paying more for using credit cards.

I declare under penalty of perjury the foregoing is true and correct.

Dated: Stamford, Connecticut
May X, 2013



David Ross