APPENDIX

APPENDIX

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APPENDIX A

[PUBLISH]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 16-17727

D.C. Docket No. 6:12-cv-01618-ACC-KRS

[Filed December 13, 2017]

FEDERAL TRADE COMMISSION,)
)
Plaintiff - Appellee,)
)
versus)
)
WV UNIVERSAL MANAGEMENT, LLC,)
a Florida limited liability company,)
d.b.a. Treasure Your Success, et al.,)
)
Defendants,)
)
UNIVERSAL PROCESSING SERVICES)
OF WISCONSIN, LLC, a New York)
limited liability company, d.b.a. Newtek)
Merchant Solutions,)
)
Defendant - Appellant.)

Appeal from the United States District Court
for the Middle District of Florida

(December 13, 2017)

Before ED CARNES, Chief Judge, BLACK, Circuit Judge, and MAY,[*] District Judge.

BLACK, Circuit Judge:

The Telemarketing Sales Rule (TSR), 16 C.F.R. § 310.1 *et seq.*, promulgated by the Federal Trade Commission (FTC), prohibits certain deceptive and abusive telemarketing practices. It also makes assisting and facilitating a TSR violation unlawful. *Id.* § 310.3(b). In 2011 and 2012, a number of individuals and closely held corporations known as Treasure Your Success (TYS) operated a fraudulent credit card interest reduction scheme. Universal Processing Services of Wisconsin, LLC (Universal) violated the TSR by providing substantial assistance to the TYS schemers. At this stage in the litigation, only the extent—but not the fact—of Universal's liability is in dispute. The district court held Universal jointly and severally liable with the members of the TYS scheme; Universal contests that judgment, and the FTC defends it. The sole issue before us is whether joint and several liability was available as a matter of law, and we hold that it was. Accordingly, we affirm.

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[*] Honorable Leigh Martin May, United States District Judge for the Northern District of Georgia, sitting by designation.

I. BACKGROUND

TYS's brief but active existence began in November 2011.[1] Operating out of Winter Park, Florida, Willy Plancher, Valbona Toska, and Jonathon Warren, together with a handful of corporate entities they controlled, conceived and operated TYS to extract payments from consumers in exchange for fraudulent credit card interest reduction services. The scheme operated roughly as follows. TYS would cause automated calls to be made to consumers informing them that they could lower their credit card interest rates by dialing the number one. Any call recipient who did so would be transferred to a series of live TYS representatives. The sales agents would "promis[e] . . . the world," albeit in an intentionally confusing manner, in order to persuade the consumer to divulge his or her credit card number. Agents were instructed to represent that by authorizing TYS to charge between $600 and $1000 to the consumer's credit card, the consumer would be entitled to receive $2500 or more in credit card interest rate reductions. Of course, TYS did not have the ability to make good on these promises. It did, however, manage to fraudulently amass more than $2.5 million by means of them.

Universal is a payment processor. Its involvement began when it approved TYS as one of its merchant

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[1] In this appeal, neither party disputes the material facts set forth in the district court's summary judgment order. In addition, in a prior appeal before this Court, Universal challenged only the remedy imposed on it, but not the district court's grant of summary judgment. Accordingly, the facts herein are drawn from the summary judgment order.

customers. Like many merchants, TYS used a payment processor to charge customers' credit cards and deposit the funds in its bank account. Hal Smith, an independent sales agent who had worked with Universal for roughly a decade, was also involved in the TYS scheme. Smith referred TYS to Universal and procured a merchant account on TYS's behalf. Because Smith's referrals to Universal over the prior ten years had been so profitable, the merchant applications Smith brought to Universal were personally reviewed by Universal's then-president, Derek DePuydt.

On Smith's referral, DePuydt approved TYS's first merchant account with Universal, despite several glaring red flags indicating TYS might be a fraud risk. In particular, both Plancher and Toska, proprietors of TYS, had serious credit delinquencies. After the first account was established, TYS began to experience an unusually high number of chargebacks, or instances in which a credit card provider demands a refund of a disputed transaction on behalf of its customer. The chargeback levels were so significant that MasterCard took notice of TYS as a potential fraud risk. But, despite mounting evidence of fraud, DePuydt approved a second TYS merchant account.

It did not take long for the FTC to expose the TYS schemers. In October 2012, the FTC filed this suit against Plancher and Toska and their related corporate entities, alleging violations of the Federal Trade Commission Act (the FTC Act), 15 U.S.C. § 41 *et seq.*, the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.*, and the TSR. After discovery had commenced, the FTC added eight additional defendants, including Smith, DePuydt, and

Universal. Only the final count of the amended complaint averred any wrongdoing on the part of DePuydt and Universal. That count, Count Twelve, alleged that Universal and DePuydt provided substantial assistance or support to the members of the TYS scheme, who Universal and DePuydt knew, or consciously avoided knowing, were engaged in violations of the TSR.

In 2014, the FTC moved for summary judgment against the defendants. After numerous settlements, only Universal, Smith, and HES Merchant Services Company (HES), Smith's wholly-owned personal corporation, remained to oppose the motion. The district court granted summary judgment to the FTC on all counts, including Counts One through Eleven against Smith and HES and Count Twelve against Universal and DePuydt. With respect to Count Twelve, the court found the FTC had established that Universal, through DePuydt, knew or consciously avoided knowing of the fraudulent activities TYS conducted, and that Universal substantially assisted TYS in perpetrating the scheme by providing the merchant accounts.

The FTC subsequently filed a Motion for Equitable Monetary Relief Judgment against Smith, HES, and Universal seeking disgorgement in the amount of $1,734,972; that is, the amount of the unjust gains that accrued to the TYS scheme less chargebacks and refunds already remitted. The district court found the defendants were jointly and severally liable for the entire amount of restitution.

The defendants appealed to this Court. Smith and HES appealed both the merits of summary judgment and the court's imposition of joint and several liability. Brief of Appellants HES Merchant Services Co. & Hal E. Smith at 3, *FTC v. HES Merch. Servs. Co.*, 652 F. App'x 837 (11th Cir. 2016) (Nos. 15-11500, 15-13380). Universal, on the other hand, challenged joint and several liability only. Opening Brief of Defendant-Appellant Universal Processing Services of Wisconsin, LLC at 1, *HES Merch. Servs.*, 652 F. App'x 837. We affirmed with respect to Smith and HES. *HES Merch. Servs.*, 652 F. App'x at 838. In particular, we agreed with the district court's conclusion that Smith and HES could be held jointly and severally liable because they had operated together with the other TYS defendants as a common enterprise in perpetrating the fraud. *Id.*

However, we vacated the district court's award of equitable monetary relief against Universal. *Id.* We held the district court had not explained why Universal's conduct warranted joint and several liability, since its common enterprise finding did not extend to Universal. *Id.* We remanded the case and instructed the district court to state whether Universal was a part of the common enterprise or, if not, what other grounds there were for imposing joint and several liability. *Id.*

On remand, the district court reasoned that a violation of the TSR constitutes an "unfair or deceptive act or practice" in violation of the FTC Act. As such, the district court was authorized to order restitution and disgorgement under the Act. Furthermore, the court clarified that Universal's liability was premised on substantial assistance rather than on a common enterprise theory. Observing the dearth of cases involving substantial assistance under the TSR, the district court looked to tort and securities law for guidance. Both sources of law suggested that joint and several liability is appropriate where a defendant substantially assists the primary violator. In short, the district court clarified that substantial assistance under the TSR was itself sufficient to justify joint and several liability. The court reaffirmed its order holding Universal jointly and severally liable, and Universal filed the instant appeal.

II. STANDARD OF REVIEW

"We review a district court's order granting equitable monetary relief for abuse of discretion." *FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1325 (11th Cir. 2013). "An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous." *Id.* at 1326 (quoting *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883, 890 (11th Cir. 1990)).

III. DISCUSSION

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). The Telemarketing and Consumer Fraud and Abuse Prevention Act directs the FTC to make rules "prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." *Id.* § 6102(a)(1). Accordingly, the FTC promulgated the TSR, which does exactly that. *See* 16 C.F.R. § 310.3(a), (c)–(d) (deceptive practices); *id.* § 310.4 (abusive practices). Relevant here, the rule also provides as follows:

> It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

Id. § 310.3(b). It was undisputed in both this and the prior appeal that Universal violated this provision by providing two merchant accounts to TYS despite a slew of red flags indicating TYS was engaged in a fraudulent telemarketing scheme. Thus, for the purposes of this appeal, it has been established as a matter of law that Universal violated the TSR: Universal provided substantial assistance or support to TYS despite knowing or consciously avoiding knowing that TYS was engaged in violations of the FTC's telemarketing rules.

Section 13(b) of the FTC Act authorizes "the FTC to seek, and the district courts to grant, preliminary and permanent injunctions against practices that violate any of the laws enforced by the Commission." *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996) (citing 15 U.S.C. § 53(b)). Although that provision does not expressly authorize courts to grant monetary equitable relief, this Court has held that "the unqualified grant of statutory authority to issue an injunction under section 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits." *Id.* Disgorgement and restitution may be joint and several. *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016) (holding that district courts may impose joint and several restitution liability and observing that "[e]quity courts have long exercised the power to impose joint and several liability"), *cert. denied*, 137 S. Ct. 624 (2017). The sole issue, then, is whether the district court abused its discretion by ruling that Universal's violation of the TSR's substantial assistance rule justifies holding Universal jointly and severally liable with the members of the TYS scheme.

A. Common Enterprise

As noted above, the district court did not find Universal to be a part of a common enterprise with the other TYS defendants. Rather, it determined Universal could be held jointly and severally liable by virtue of its violation of the TSR alone. Universal contends that was error and joint and several liability can only lie where the defendant is a participant in a common enterprise with the primary violators.

Universal is correct that courts have justly imposed joint and several liability where a common enterprise exists. *See, e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 636–37 (6th Cir. 2014). But in contending joint and several liability cannot exist absent a common enterprise, Universal mistakes a sufficient condition for a necessary one. That a common enterprise finding can support joint and several liability does not mean that such liability cannot attach without one. Universal cites no authority for that proposition, and we have found none.

B. Joint and Several Liability for Substantial Assistance

We hold that a violation of the TSR's substantial assistance rule can support joint and several liability to the extent of the unjust gains. Consequently, it was within the district court's discretion to hold Universal jointly and severally liable with the TYS defendants.

To begin with, we agree with the district court that the text of the TSR supports our conclusion. The substantial assistance rule itself states that any violation of it constitutes a violation of the TSR. 16 C.F.R. § 310.3(b) ("It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance . . . ."). Similarly, the Telemarketing and Consumer Fraud and Abuse Prevention Act states that any violation of a rule promulgated thereunder (such as the TSR) constitutes a violation of the FTC Act and subjects the violator to its penalties. 15 U.S.C. § 6105(b). Finally, Section 13(b) of the FTC Act authorizes "the FTC to seek, and the district courts to grant, preliminary and permanent injunctions against practices that violate any of the laws enforced by the Commission," and this includes the power to grant equitable monetary relief of the kind sought here. *Gem Merch. Corp.*, 87 F.3d at 468; 15 U.S.C. § 53(b). Therefore, by violating the TSR, Universal violated the FTC Act and is subject to its penalties.

The FTC directs our attention to aider-abettor principles in support of this interpretation, and the legal concepts we find there satisfy us that our holding is correct. In promulgating the TSR, the FTC expressly stated that it took guidance from comparable tort and securities concepts in formulating the rule. In its statement of basis and proposed final rule, the FTC noted that "knowledge of, and substantial assistance to, another's wrongdoing are a sufficient basis for liability in tort." Telemarketing Sales Rule, 60 Fed. Reg. 43842, 43851 (Aug. 23, 1995). The FTC invoked Section 876(b) of the Restatement of Torts, which provides that:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so as to conduct himself . . . .

Id. at 43851 n.96 (quoting Restatement (Second) of Torts § 876(b) (1977)). There can be little mistaking the resemblance between the Restatement § 876(b) and the TSR. The provisions share the same three basic elements: a primary violation; substantial assistance or encouragement (in the case of the Restatement) or support (the TSR); and knowledge (the Restatement and the TSR) or conscious disregard (the TSR).

The TSR's resemblance to a well-established torts concept is noteworthy because aiding and abetting in tort can result in joint and several liability.[2] In tort, the

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[2] The Restatement's pedigree on this topic is well established. *See Halberstam v. Welch*, 705 F.2d 472, 476–86 (D.C. Cir. 1983) (adopting the Restatement formulation in a lengthy discussion of aiding and abetting liability in tort); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181, 114 S. Ct. 1439, 1450 (1994) (calling *Halberstam* "a comprehensive opinion on the subject" of aiding and abetting liability); *Doe v. Drummond Co.*, 782 F.3d 576, 608 n.44 (11th Cir. 2015) ("Although

aider-abettor is liable to the injured party "for the entire harm." Restatement (Second) of Torts § 875 & cmt. a (1979) (referring to § 876 as a "specific application[ ] of the rule here stated"); *accord Thompson v. Johnson*, 180 F.2d 431, 433–34 (5th Cir. 1950) (listing, among "settled principles of law," the rule that "persons who aid, abet, or procure the commission" of a tort are jointly and severally liable where the aider-abettor is "present, assist[s], or participate[s]" in the tort). We extend the analogy: Universal may be held jointly and severally liable with the TYS defendants for providing them substantial assistance in violation of the TSR. *Cf. Honeycutt v. United States*, 137 S. Ct. 1626, 1631 (2017) ("If two or more defendants jointly cause harm, each defendant is held liable for the entire amount of the harm; provided, however, that the plaintiff recover only once for the full amount." (citing Restatement (Second) of Torts § 875 (1977))).

Before moving on, we note that we also find securities law aiding and abetting instructive.[3] Like the Restatement and the TSR, the test for liability there

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we explicitly cited *Halberstam* for conspiracy liability [in an Alien Tort Statute case], we clearly incorporated and applied *Halberstam*'s aiding and abetting standards as well. In turn, *Halberstam* relied upon the Restatement (Second) of Torts to set the standards for aiding and abetting liability.").

[3] Although the Supreme Court eliminated aiding and abetting suits by private plaintiffs in 1994, Congress made clear in the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 104, 109 Stat. 737, that the SEC may still bring such suits. *See SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 799–800 (11th Cir. 2015); 15 U.S.C. § 78t(e).

requires a primary violation, substantial assistance, and a culpable state of mind. *See SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 800 (11th Cir. 2015); 15 U.S.C. § 78t(e). The securities formulation, however, bears perhaps even more striking a resemblance to the TSR because "severe recklessness can satisfy the scienter requirement in [a securities] aiding and abetting case."[4] *Big Apple*, 783 F.3d at 800 (quotation and alteration omitted). The Restatement requires knowledge; recklessness is an even closer analog to "consciously avoid[ing] knowing" as set forth in the TSR.

The FTC recognized this similarity when it promulgated the TSR, specifically invoking securities law in explaining the TSR's substantial assistance rule. *See* Telemarketing Sales Rule, 60 Fed. Reg. at 43851 & n.97. The analogy to securities law further persuades us that joint and several liability is appropriate in substantial assistance cases under the TSR.[5] *See* 15

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[4] In so holding, *Big Apple* applied judicial gloss to the pre-2010 version of 15 U.S.C. § 78t(e), which spoke only of knowing, but not reckless, substantial assistance. *Big Apple*, 783 F.3d at 798 n.6. In 2010, Dodd-Frank amended that section to explicitly include recklessness. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929O , 124 Stat. 1376, 1862 (2010).

[5] Universal points to *SEC v. Hughes Capital Corp.*, 124 F.3d 449 (3d Cir. 1997) and *SEC v. Monterosso*, 756 F.3d 1326 (11th Cir. 2014) for the proposition that the district court must find, at the very least, that the defendant collaborated or was closely associated with the primary violator before it can impose joint and several liability. But Universal fails to explain what difference it sees between collaboration or close association and substantial assistance or support. Even so, the argument suffers from the

U.S.C. § 78t(e) ("[For certain actions brought by the SEC], any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided."); 4 Thomas Lee Hazen, The Law of Securities Regulation § 12:207 (7th ed. 2017) ("Until 1994 [when the Supreme Court eliminated private aiding and abetting suits], aiders and abettors were generally held to be jointly and severally liable to plaintiffs for [securities] violations and were often viewed as better sources from which to seek monetary awards.").

Finally, we are not concerned that our holding will work any injustice in practical application. Liability for substantial assistance under the TSR can attach only if the defendant knows or consciously avoids knowing that the person to whom the defendant renders such assistance is engaged in telemarketing violations. The requirement of a culpable mind assures us that joint and several liability will not result in collateral damage to innocent third parties.

C. Whether the District Court Abused Its Discretion in Determining the Amount of Restitution

Conceding for argument that joint and several liability was available, Universal points to several reasons the district court erred in calculating the

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same fundamental deficiency as its common enterprise argument: these findings may be sufficient, but there is no indication that they are necessary, conditions for joint and several liability.

amount of restitution Universal owed. None persuade us.

First, Universal contends the district court should not have held it jointly and severally liable because liability could be apportioned. That is, one can easily track how much money flowed into Universal's coffers and separate that amount from the sums that ended up going to TYS. True enough, but apportionment is appropriate only where "there are *distinct harms*" or where "there is a reasonable basis for determining the contribution of each *cause* to a single harm." Restatement (Second) of Torts § 433A(1)(a) & (b) (1965) (emphasis added). By contrast, Universal seeks to apportion the unjust *gains*. But neither the distinct portion of the harm Universal caused nor Universal's relative contribution to the undivided harm can be determined. The harm to each consumer defrauded by the TYS scheme is indivisible—in each case, the whole amount was caused by the actions of both the TYS defendants and Universal together.[6] And there is no reasonable basis on which to determine the relative contribution of Universal's conduct to the single harm; without its payment processing services, no money would have been stolen.[7] Apportionment cannot

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[6] An example of distinct harms: "two defendants independently shoot the plaintiff at the same time, and one wounds him in the arm and the other in the leg." *Id.* § 443A cmt. b. The harms can be apportioned; each shooter is liable to the plaintiff for the distinct harm he caused. *Id.*

[7] An example of a reasonable basis for determining the contribution of each cause: two ranchers negligently fail to restrain their cattle, which then trample the crops of a farmer. If three of the cattle belong to one rancher and two to the other, it can be

preserve Universal from joint and several liability.[8] *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614–15, 129 S. Ct. 1870, 1881 (2009) ("When two or more causes produce a single, indivisible harm, 'courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.'" (quoting Restatement (Second) of Torts § 433A cmt. *i* (1963–64))); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8, 99 S. Ct. 2753, 2756 & n.8 (1979) (restating identical principles of apportionment in an admiralty context).

Next, Universal submits that because it received only a small portion of the gains from the scheme and passed the rest on to TYS, it can be forced to disgorge only the amount it retained, because "[t]he equitable

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assumed that each cow caused a proportional amount of the damage, and that liability can be apportioned according to the number of cows owned by each rancher. *See id.* § 443A cmt. d.

[8] Universal misreads the Tenth Circuit case of *FTC v. Chapman*, 714 F.3d 1211 (10th Cir. 2013), one of the few appellate opinions that deals with the TSR. Universal asserts that "rather than impose joint and several liability on the defendant for the entire amount of the fraud, the Tenth Circuit affirmed the district court's finding that the defendant remit only the money she was paid for the services she provided." Brief of Appellant at 44. That is a mischaracterization of the case. The district court held the defendant liable for the full amount of her unjust receipts, and denied her motion for remittitur. *Chapman*, 714 F.3d at 1215. The Tenth Circuit affirmed the denial. *Id.* at 1219. The issue of joint and several liability was simply not before the court. *Chapman* is not on point and lends no support to Universal's argument, and in any event its relevance with respect to apportionment is not apparent.

remedy of restitution does not take into consideration the plaintiff's losses, but only focuses on the defendant's unjust enrichment." *Wash. Data Res.*, 704 F.3d at 1326 (quoting *CFTC v. Wilshire Inv. Mgmt. Co.*, 531 F.3d 1339, 1345 (11th Cir. 2008)). This contention, however, fails as well. The district court found that the total amount of unjust gains *to all the defendants* equaled $1,734,972 after chargebacks and refunds. Differentiating between money Universal ultimately kept and funds it passed on to the TYS schemers is merely another way of challenging joint and several liability, an issue we have already decided. Universal's argument in reality has nothing to do with the measure of restitution, and the district court did not err in calculating it.

Though courts must determine restitution based on the defendant's unjust enrichment, and not the consumer's losses, the two amounts will often equate. *See Wash. Data Res.*, 704 F.3d at 1326. That will not always be the case, however, which brings us to Universal's final argument. Universal attempts to draw an analogy between this case and *FTC v. Verity International Ltd.*, 443 F.3d 48 (2d Cir. 2006). The defendants in *Verity* operated an online pornography scheme. Rather than accept payment from customers via credit card, the defendants set up the pornography website to bill users for international calls to Madagascar. *Id.* at 51. Charges would accrue through the telephone system and show up on customers' telephone bills, rather than on their credit card statements. *Id.* at 51–52. The international telephone companies carrying the Madagascar calls deducted their usual fees in exchange for their services, so the defendants received only a portion of the amount ultimately billed to the consumer. *Id.* at 53–54. The Second Circuit held that telephone companies' fees should not have been included in the measure of restitution, because although they constituted losses to consumers (the charges accounted for a portion of the total telephone bill, but not the whole thing), the fees never made it to the defendants. *Id.* at 67–68. The defendants thus could not be forced to disgorge the phone companies' fees, because those amounts did not unjustly enrich the defendants. *Id.*

Universal attempts to cast the amounts it passed on to the TYS defendants as equivalent to the fees withheld from the defendants in *Verity* by the international telephone companies, but the comparison fails. The sum Universal paid over to TYS constituted payments to its *codefendants*. Thus those amounts are part and parcel of the unjust enrichment of the entire group. *Cf. FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1234 (11th Cir. 2014) (distinguishing *Verity* in part because "the third-party middlemen here [in *IAB*] . . . were parties to the suit"). To subtract them is merely to contest joint and several liability; once again, we have already decided that question.[9]

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[9] *Verity* is distinguishable for the additional reason that a defendant cannot deduct business expenses from the measure of unjust enrichment. *Wash. Data Res.*, 704 F.3d at 1327 ("[D]efendants in a disgorgement action are not entitled to deduct costs associated with committing their illegal acts." (quotation omitted)). In *Verity*, the fees withheld by the telephone companies could not constitute unjust enrichment because they never entered the possession of the defendants. *Verity*, 443 F.3d at 67–68. By contrast, the defendants could not have deducted their rent, for example, from the amount of their unjust enrichment, because net revenue, not profit, is the correct measure of unjust gain. *Wash.*

IV. CONCLUSION

For the reasons stated above, the district court did not abuse its discretion in holding Universal jointly and severally liable with the members of the TYS scheme.

AFFIRMED.

Data Res., 704 F.3d at 1327 ("We agree with our sister circuits and today hold that the amount of revenue (gross receipts minus refunds), rather than the amount of profit (net revenue minus expenses), is the correct measure of unjust gains under section 13(b).").

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No: 6:12-cv-1618-Orl-22KRS

[Filed October 26, 2016]

FEDERAL TRADE COMMISSION,	)
	)
Plaintiff,	)
	)
v.	)
	)
HES MERCHANT SERVICES COMPANY, INC., a Florida corporation, HAL E. SMITH, individually and as an officer of HES Merchant Services Company, Inc., AKA H.E. Smith, , AKA Harold E. Smith, , AKA Howell E. Smith, and UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC, a New York limited liability company, DBA Newtek Merchant Solutions,	)
	)
Defendants.	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

1. That the Plaintiff the Federal Trade Commission shall recover of the Defendants UPS, jointly and severally, a judgment in the amount of One Million Seven Hundred Thirty-Four Thousand Nine Hundred and Seventy-Two dollars ($ 1,734,972.00), as equitable monetary relief.

2. Any amounts Defendants contribute and any of the sums for consumer redress awarded pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to UPS's practices alleged in the Amended Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. UPS has no right to challenge any actions the Commission or it representatives may take pursuant to this Subsection.

Date: October 26, 2016

SHERYL L. LOESCH, CLERK

s/JLCountryman, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No: 6:12-cv-1618-Orl-22KRS

[Filed October 26, 2016]

FEDERAL TRADE COMMISSION,	)
	)
Plaintiff,	)
	)
v.	)
	)
HES MERCHANT SERVICES COMPANY, INC., HAL E. SMITH and UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC,	)
Defendants.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause comes before the Court on remand of a single issue in the appeal from the Eleventh Circuit for findings of fact and conclusions of law as to whether and why Universal Processing Services of Wisconsin, LLC is "jointly and severally liable for restitution and in what amount." (Doc. No. 283.)

I. PRELIMINARY STATEMENT

The Federal Trade Commission ("FTC") brought this action against telemarketers and their credit card payments processor to dismantle a telemarketing boiler room and recover consumer funds from the various companies and individuals who facilitated the scam. The FTC began with a complaint and temporary restraining order against five original defendants: Willy Plancher, Valbona Toska, and three companies they controlled, including a company doing business as Treasure Your Success ("TYS"). (Doc. No. 1.) After commencing discovery, the FTC filed an Amended Complaint naming, among others, additional Defendants, Jonathon E. Warren and his two companies[1]. For ease of reference, the Court refers to Plancher, Toska, Smith, Warren, and their companies collectively as the "TYS Defendants." The FTC subsequently settled with these Defendants.

The Amended Complaint also alleged claims against Hal E. Smith and his company, HES[2]; Ramon Sanchez-Ortega[3]; and Universal Processing Services of

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[1] Business First Solutions, Inc. and VoiceOnyx Corporation.

[2] Smith was the sole officer, director, and principal of HES, an inactive Florida corporation that held no assets. Although HES was technically still a Defendant, following the withdrawal of its attorney without the appearance of new counsel, HES was not permitted to continue to defend itself. Because the Court found that HES was involved in a common enterprise with the other corporate defendants, the Court granted summary judgment against HES on Counts I through XI. (Doc. 208 at 1 n. 1.)

[3] The FTC also settled with Sanchez-Ortega. (Doc. No. 203.)

Wisconsin, LLC ("UPS") and its president, Derek DePuydt. The FTC filed a motion for summary judgment against the only remaining Defendants—Smith and UPS—who had not settled with the FTC. (Doc. No. 174.) On November 18, 2014, the Court granted summary judgment to the FTC, holding that Smith had violated the FTC Act and the Telemarketing Sales Rule ("TSR"), and UPS had provided substantial assistance to the TYS Defendants in violating the TSR. (Doc. No. 208 at 13-15.) Subsequent to the summary judgment Order, the FTC moved for a permanent injunction seeking equitable monetary and injunctive relief against Smith/HES and UPS on December 5, 2014. (Doc. Nos. 211, 212, 213). Following a hearing on the FTC's Motions seeking permanent injunctive relief, on February 11, 2015, the Court entered Orders granting equitable monetary relief and permanently enjoining Defendants Smith, HES, and UPS from certain activities. (Doc. Nos. 240, 241, 242, 265 (transcript).) Defendants Smith, HES, and UPS timely appealed the Court's rulings granting summary judgment and awarding equitable monetary relief. (Doc. No. 248, 268.) The Eleventh Circuit, in a per curiam opinion[4], affirmed this Court's rulings "in all respects" except for remand of the issue of the "joint and several liability for equitable monetary relief" awarded against UPS. (Doc. No. 283 at 4-5).

Concerning the appeal of Smith and HES, the Eleventh Circuit concluded "that there is no reversible error with respect to the district court's grant of summary judgment in favor of the FTC or with respect

[4] The opinion was entered on June 14, 2016 and mandate issued on August 10, 2016. (Doc. No. 284.)

to the district court's injunction," and "the district court's imposition of joint and several liability for equitable money relief in the amount of $1,734,972 was entirely appropriate" based on the common enterprise theory. (*Id.* at 2-3.) However, the Eleventh Circuit concluded that the Court's order awarding equitable monetary relief against UPS would be vacated and remanded:

> Although the district court did not specifically name UPS as part of the common enterprise, the district court did refer to the "corporate defendants." On the other hand, the district court appeared to not include UPS in the common enterprise. If UPS was not included in the common enterprise, then the district court provided no explanation as to why joint and several liability in the amount of $1,734,972 was appropriate, and made no findings which made such an award obviously appropriate. Accordingly, we vacate the judgment of the district court with respect to UPS only and only insofar as it imposed upon UPS joint and several liability for equitable monetary relief in the amount of $1,734,972, and we remand this case for findings of fact and conclusions of law as to whether and why UPS is jointly and severally liable for restitution and in what amount.

(*Id.* at 4.) Set forth below are the Court's findings of facts and conclusions of law in support of the Court's finding that UPS, as the credit card processing company, violated § 310.3(b) of the TSR by assisting and facilitating the boiler room's unlawful business practices and, thus, is jointly and severally liable to pay

$1,734,972 in equitable monetary relief as necessary and appropriate to relieve the substantial and undisputed consumer losses in this case.

II. FINDINGS OF FACT[5]

A. *Background: TYS and the Telemarketing Boiler Room*

Over a nine-month period beginning in November 2011, a group of telemarketers obtained more than $2,500,000 from consumers through a fraudulent credit card interest rate reduction scheme called "Treasure Your Success" ("TYS"). The TYS Defendants operated a telemarketing scheme purporting to be a credit card interest rate reduction service using "robocalls" (precorded voice messages) to solicit consumers and failing to disclose the identity of the person(s) responsible for placing them. Many consumers received robocalls despite having registered their numbers on the National Do Not Call Registry; these consumers testified that they had never had any previous dealings with the TYS Defendants[6]. If consumers responded

[5] The Findings of Fact are adopted from the undisputed facts in the Motion for Summary Judgment (Doc. No. 208) which was affirmed by the Eleventh Circuit. *See United States v. Robinson*, 690 F.2d 869, 872 (11th Cir. 1982) ("Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case.").

[6] Defendants failed to remove the phone numbers of consumers who were on the Do Not Call Registry, as the TYS Defendants never paid the requisite fees to access it. The TYS Defendants also lacked an effective procedure for removing consumers' phone numbers from their call lists, and called some consumers multiple

favorably to the robocalls, they would be transferred to live persons who would push the consumers into giving their credit card number, and convince them to spend between $600-$1,000 in order to get out of debt,[7] even though the salespeople were vague as to who they were and how they were going to get the rates reduced.

TYS managed to create a "one-stop shop" telemarketing operation based on the purported credit card interest rate reduction service. The TYS Defendants told some consumers that they could reduce the consumers' credit card interest rates dramatically—sometimes, to a specific rate, and other times, by "over" or "at least half"—while other consumers were told that the TYS Defendants' debt relief program would achieve thousands of dollars in guaranteed savings, or that they would be able to repay their credit card debt significantly faster by enrolling with TYS[8]. The TYS Defendants supported these representations by telling consumers about their "special relationships" with banks and credit card companies, despite the lack of any such relationships.

None of the customers of the TYS Defendants received the promised interest rate reductions or debt relief, or paid down their debt more quickly. In reality, these representations by TYS Defendants were false

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times, even though the consumers had previously instructed the TYS Defendants not to call again.

[7] This information is from a telemarketing training manual which the FTC obtained after searching the telemarketing boiler room.

[8] Training manuals and telemarketing scripts used by the TYS Defendants recommended making these and similar offers.

and fraudulent.[9] Nevertheless, consumers who agreed to purchase the TYS Defendants' services, or whom the TYS Defendants thought had agreed to do so, were charged as much as $1,493.93 in fees. Consumers were often told that they would not be charged until they achieved the promised savings, or that any fees would be refunded if the TYS Defendants did not deliver the promised results, all of which turned out to be misrepresentations since TYS Defendants routinely charged consumers the same day or the next day after the telemarketing call. When customers demanded refunds from the TYS Defendants, they were often refused.

B. *UPS, DePuydt, and the TYS Credit Card Processing Agreements*

UPS[10] is a third-party credit card payments processor that provides the interface between banks and their merchant customers, and relies significantly on 50 to 100 independent sales agents to generate business, employing only six or so salaried agents. Hal Smith[11], was an independent sales agent of UPS for ten years, from 2002 until 2012. In that role, Smith assisted telemarketing companies, including TYS, in obtaining merchant accounts with UPS. Prior to his

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[9] The FTC's expert witness, Lisa Wilhelm, opined that the TYS Defendants' claims and representations pertaining to interest rate reductions and faster debt repayment "were deceptive and neither credible nor feasible." (Pl.'s Ex. 46 (Wilhelm Expert Rep.) (Doc. No. 174-1) ¶ 6.)

[10] UPS also does business as Newtek.

[11] Hal Smith is the owner, officer, and operator of HES.

involvement with the telemarketing scheme at issue in this case, Smith owned and operated a company that telemarketed debt relief services—until the Florida Department of Agriculture shut it down.

Smith helped TYS procure two merchant accounts with UPS, and but for these accounts, TYS would not have been able to process credit card payment charges made by consumers. In addition to exerting considerable leverage over the business, Smith testified that he charged a handsome percentage of TYS's sales—ten to twelve percent, minus what he paid UPS—as his fee for brokering the merchant accounts. UPS opened two merchant accounts for the TYS Defendants: TYS 1, opened on November 22, 2011; and TYS 2, opened on May 3, 2012.

The centrality of the merchant accounts to the scheme, coupled with Smith's authority to have the accounts "shut off," gave him effective control over the TYS Defendants' activities. Smith testified that he reviewed the TYS Defendants' telemarketing scripts, sometimes required corrections, and would not write a contract for a merchant account if he was unsatisfied with the scripts. He also threatened to terminate the accounts if TYS Defendants hired certain people of whom Smith did not approve, and he recommended that they hire a specialist to defend TYS against consumers who sought chargebacks; in addition, he kept a close eye on the TYS Defendants personally and through a surrogate by visiting the TYS premises to monitor its business practices.

Derek DePuydt served as UPS's president during the time period relevant to the alleged misconduct. DePuydt had "final review" of merchant account applications brought to the firm by Smith because Smith was an important and profitable source of referrals for UPS. DePuydt reviewed TYS's merchant account application and Plancher's and Toska's personal financial statements, tax returns, and credit reports in the course of approving the merchant application that eventually became TYS 1. DePuydt personally approved TYS 1, even though the materials he reviewed noted "serious delinquencies" on Toska's credit report, $10,000 of past due debt, and a credit score of just 494 for Plancher, as well as notations indicating "high risk fraud alert" for both Toska and Plancher. DePuydt subsequently approved TYS 2, even though he knew by then that TYS 1 had chargeback problems and was "already on MasterCard's radar" for fraud. DePuydt did not operate in secrecy and he assured other employees of UPS that "upper management knew" about the Smith accounts and that the revenue from them "was too important to the company." According to DePuydt, UPS's relationship with Hal Smith produced a net profit of four to five million dollars for the company over a ten-year period.

III. CONCLUSIONS OF LAW

This Court has jurisdiction over the parties and the action pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b).

A. Common Enterprise

In Counts I to XI, the FTC alleged that the TYS Defendants violated the FTC Act and TSR by engaging in deceptive telemarketing acts and practices by making misleading statements to induce consumers to purchase goods or services; they promised unsecured credit cards and credit card loss protection services in exchange for advance fees but never intended or made arrangements to follow through with the promised services; they submitted billing information for payment even though it was unauthorized and premature, and violated the National Do Not Call Registry. (Doc. No. 61.)

Section Five of the Federal Trade Commission Act ("FTC Act") prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The Telemarketing Sales Rule ("TSR"), established pursuant to the FTC's authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102, prohibits various "deceptive telemarketing acts or practices" or the substantial assistance thereof, 16 C.F.R. § 310.3; and "abusive telemarketing acts or practices," 16 C.F.R. § 310.4; and failing to pay national registry fees in connection with telemarketing calls, 16 C.F.R. § 310.8. As the Court found on summary judgment, and the Eleventh Circuit affirmed, there was no dispute that the TYS Defendants who had previously settled with the FTC committed the underlying violations of Section 5 of the FTC Act and the TSR; the Court also determined that Smith was individually liable for violations of the FTC Act and the TSR. (Doc. No. 208 at 9 (citing *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630-34 (6th Cir. 2014) (affirming summary judgment in favor of the FTC on claims against telemarketers under Section 5 of the FTC Act and the TSR).) All of the corporate Defendants, including HES, were part of a common enterprise. (Doc. No. 208 at 9-11.)

The Court also found Smith was individually liable for violations of the FTC Act and the TSR as an individual member of HES in the common enterprise because he had an ample degree of control over the entire operation and knowledge of its deceptive practices. The TYS Defendants would not have been able to process credit card payment charges made by consumers had Smith not arranged for merchant accounts at UPS. Smith's authority to "shut off" those accounts, coupled with his strong influence in the TYS Defendants' hiring and business practices established his authority to control the deceptive practices; Smith also had an awareness of a high probability of fraud along with an intentional avoidance of truth by virtue of his personal visits to the business site, reports from his on-site agents, and receipt of information pertaining to chargebacks. (Doc. No. 208 at 11-13.)

B. Substantial Assistance by UPS

In Count XII, the FTC alleged that UPS and DePuydt violated the TSR, 16 C.F.R. § 310.3(b), by providing substantial assistance or support to the TYS Defendants who UPS knew, or consciously avoided knowing, were engaged in violations of the TSR by processing all of their credit card transactions[12]. (Doc. No. 61 at 31.) The Telemarketing Sales Rule prohibits support or "substantial assistance" in the conduct of "deceptive telemarketing acts or practices" under the TSR's assisting and facilitating provision:

[12] Count XII for "substantial assistance" was the only count asserted against UPS.

> It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

16 C.F.R. § 310.3(b).

The FTC must identify something more than "'casual or incidental' help to the telemarketer," but does not have to show a "direct connection" between the assistance and the misrepresentation for an entity to be liable under § 310.3(b). *FTC v. Chapman*, 714 F.3d 1211, 1216 (10th Cir. 2013) (citation omitted). Thus, "cleaning a telemarketer's office" is not enough to support substantial assistance liability, *id.*, but "[p]roviding lists of contacts to a seller or telemarketer that identify persons over the age of 55" could be. *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050 CIV, 2004 WL 5149998, at *41 (S.D. Fla. Feb. 20, 2004) (quoting Telemarketing Sales Rule Statement of Basis and Purpose, 60 Fed. Reg. 43,842, 43,852 (Aug. 23, 1995) (listing examples such as "providing lists of . . . persons who have bad credit histories, or persons who have been victimized previously by deceptive telemarketing or direct sales; providing any certificate or coupon which may later be exchanged for travel related services; providing any script, advertising, brochure, promotional material, or direct marketing piece used in telemarketing; or providing an appraisal or valuation of a good or service sold through telemarketing when such an appraisal or valuation has no reasonable basis in fact or cannot be substantiated at the time it is rendered")).

The act of UPS providing TYS with two merchant accounts was essential to the success of the scheme, and absent these merchant accounts, the TYS Defendants would have been unable to process credit card payments; thus, UPS substantially assisted the TYS Defendants. UPS, through DePuydt, knew or consciously avoided knowing that the TYS Defendants were violating the TSR in light of several "red flags" which should have prompted DePuydt to investigate the TYS accounts: The experts for both the FTC and UPS agreed that if DePuydt had followed company protocols and ordered an investigation, UPS would not have approved the TYS Defendants' applications for merchant accounts; which is enough to show, at a minimum, that DePuydt consciously avoided knowing about the TYS Defendants' TSR violations.[13] DePuydt also did not act entirely in secret since other UPS employees were aware of the accounts but took no action for various reasons. Smith, who had worked as a sales agent of UPS for approximately a decade, overseen by DePuydt and his predecessor, maintained one of the "largest, highest risk, most profitable, and highest maintenance accounts" in UPS's portfolio, producing a net profit of four to five million dollars for the company over a ten-year period.

[13] The Court rejected the defense asserted by UPS that it was not liable under § 310.3(b) because DePuydt was acting as an "adverse agent." The Eleventh Circuit affirmed this determination. (Doc. No. 283.)

C. Calculation of Equitable Monetary Relief

The FTC argued that the TYS Defendants were unjustly enriched and the Court should order disgorgement of ill-gotten monies as a remedy under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b). "A violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of [S]ection 5(a) of the FTC Act." *FTC v. Gem Merch. Corp*., 87 F.3d 466, 469-70 (11th Cir. 1996).

For a defendant who has violated Section 5 of the FTC Act and the TSR, the FTC is entitled to seek relief under section 13(b) of the FTC Act which grants district courts the authority to order restitution and disgorgement for violations of the FTC Act and the TSR. *FTC v. Lalonde*, 545 Fed. Appx. 825, 840-41 (11th Cir. 2013)[14] (citing *FTC v. Wash. Data Res., Inc*., 704 F.3d 1323, 1326 (11th Cir. 2013); *FTC v. Gem Merch. Corp*., 87 F.3d 466, 468-70 (11th Cir. 1996)). "Disgorgement and restitution are measured by a defendant's unjust enrichment," which is the amount of "[n]et revenue (gross receipts minus refunds)" the defendants received. *Lalonde*, 545 F. App'x at 841 (citing *Wash. Data Res., Inc.*, 704 F.3d at 1326-27). The FTC sought to obtain $1,734,972 in equitable monetary relief from UPS, Smith, and HES, jointly and severally. (Doc. No. 242 at 2.)

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[14] Unpublished Eleventh Circuit decisions are persuasive, but not binding.

From December 2011 to July 2012, the TYS enterprise generated gross revenues of $2,592,427, the total payments consumers made to TYS in exchange for services that TYS promised but failed to deliver; of which $857,455 has been returned to consumers ($839,849 by way of chargebacks, and $17,606 through returns or refunds[15]); thus, the net revenue of the TYS enterprise during its entire period of operation equaled $1,734,972. This amount constitutes the undisputed net revenue of the TYS enterprise, and is based on the records of UPS. On appeal, the Eleventh Circuit affirmed the calculation of damages as to Smith and HES: "[W]ith respect to Smith and HES, the district court's imposition of joint and several liability for equitable money relief in the amount of $1,734,972 was entirely appropriate." (Doc. No. 283 at 3.)

D. Joint and several liability of UPS

The Court now turns to the narrow issue on which the Eleventh Circuit ordered a remand for further consideration, *i.e.*, "whether and why UPS is jointly and severally liable for restitution and in what amount." (Doc. 283 at 4.) At the hearing on permanent injunctive and equitable relief[16], the FTC argued UPS

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[15] The FTC used information and records provided by UPS since UPS exclusively managed the inflows and outflows of TYS's revenues; the parties previously stipulated to the exact numbers. *See* Stipulated Facts Nos. 27-28 (Doc. No. 199-5 (Pretrial Statement) at 9.)

[16] One day before the hearing, UPS and the FTC stipulated to the terms of the permanent injunction, which was only mentioned in passing at the hearing. (*See* Doc. No. 265.)

was jointly and severally liable for equitable monetary relief of the full amount of restitution of $1,734,972.

UPS violated § 310.3(b) of the TSR by providing substantial assistance to the TYS Defendants while knowing or consciously avoiding knowing that the TYS Defendants were violating the TSR[17]. Defendants who violate Section 5 of the FTC Act can be held jointly and severally liable for the total amount of monetary relief. *FTC v. Transnet Wireless Corporation*, 506 F. Supp.2d 1247, 1251 (S.D.Fla. 2007) (citing *Atlantex Assocs*., No. 87-0045-Civ, 1987 WL 20384 (S.D. Fla. Nov. 25, 1987)); *FTC v. Windward Mktg., Ltd*., No. 1:96-cv-615, 1997 WL 33642380, *2-3 (N.D. Ga. Sept. 30, 1997) ("[A] defendant who is jointly and severally liable may be required to redress the entire consumer injury.").

The thrust of UPS's argument for a reduced apportionment of the disgorgement is that, even if UPS had "substantially assisted" the TYS Defendants in processing the credit card payments for their activities, UPS was the least culpable of all the Defendants and it only received a reduced portion ($410,000) in fees from the total amount that the TYS Defendants received ($1,734,972); thus, UPS argues, it should not be ordered to disgorge amounts it did not receive and/or had already refunded to consumers. (Doc. No. 225.)

"[I]t is within the court's discretion to find joint and several liability when multiple defendants collaborated in the prohibited conduct." *FTC v. Bronson Partners, LLC*, 674 F. Supp.2d 373, 392 (D. Conn. 2009) (citing

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[17] The Eleventh Circuit affirmed this finding. (Doc. No. 208 at 14; Doc. 283 at 4.)

SEC v. AbsoluteFuture.com, 393 F.3d 94, 97 (2d Cir. 2004) (joint and several liability is warranted "for combined profits on collaborating or closely related parties" so long as the total disgorgement amount does not exceed the defendants' combined profits)). There are a limited number of cases ordering disgorgement based on a finding of liability for "substantial assistance" in violation of the TSR—as opposed to the more-frequently found "common enterprise"— thus, a number of cases have looked to holdings in SEC fraud cases discussing disgorgement in the context of substantial assistance and "aiding or abetting." *See, e.g.*, *Bronson Partners*, 674 F. Supp.2d at 391 (citing SEC fraud cases). Disgorgement in the two situations are based on the same equitable principles.

In enacting § 310.3(b) of the TSR, the Commission relied on Section 876(b) of the Restatement of Torts which provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so as to conduct himself." Restatement (Second) of Torts §876(b) (1977). *See* Telemarketing Sales Rule Statement of Basis and Purpose, 60 Fed. Reg. 43842-01, 43851 & n. 96 (Aug. 29, 1995) (commentary § 310.3(b): Assisting and Facilitations). "Aiding and abetting" in the securities law context has similarly been defined with reference to the common law as stated in Restatement of Torts § 876 and the criminal law of conspiracy. *See SEC v. Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974) (cited with approval in *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985) (the accused aider-abettor must be shown to have knowingly and substantially assisted the violation)).

In *SEC v. Hughes Capital Corporation*, the Third Circuit considered the principles underlying joint and several liability for disgorgement in an "aiding and abetting" securities fraud case where one participant argued she should be liable for only $85,000 in proceeds she had allegedly received, rather than the full $1.4 million in illegal profits:

> "Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating securities laws." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C.Cir. 1989). When apportioning liability among multiple tortfeasors, it is appropriate to hold all tortfeasors jointly and severally liable for the full amount of the damage unless the liability is reasonably apportioned. "Where joint tortfeasors cause a single and indivisible harm for which there is no reasonable basis for division according to the contribution of each, each tortfeasor is subject to liability for the entire harm." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268–69 (3d Cir. 1992).
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> Courts have held that joint-and-several liability is appropriate in securities cases when two or more individuals or entities collaborate or have close relationships in engaging in the illegal conduct. *See S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996), *cert. denied*, 522 U.S. 812, 118 S.Ct. 57, 139 L.Ed.2d 21 (1997); *Hateley v. SEC*, 8 F.3d

> 653, 656 (9th Cir. 1993). In the instant case, the defendants all collaborated in a single scheme to defraud Hughes' investors through the bogus initial public offering and the subsequent sale of warrants. They enjoyed a "close relationship" with each other through their connection to Hughes, the other corporations used in the scheme, and the nominee accounts used to perpetuate the scheme.

124 F.3d 449 (3d Cir. 1997) (emphasis added) (holding individual defendant who provided substantial assistance had failed to carry her burden seeking to apportion the disgorgement). "It is a well settled principle that joint and several liability is appropriate in securities laws cases where two or more individuals or entities have close relationships in engaging in illegal conduct." *SEC v. Monterosso*, 557 Fed. Appx. 917 (11th Cir. 2014). "This holds true even where one defendant is more culpable than another." *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004).

UPS's then-president DePuydt had control over approval of the merchant account applications from Smith, who was a profitable source of accounts. DePuydt approved the two accounts for TYS, despite pronounced problems on the applications which indicated serious delinquencies, past due debt of $10,000, extremely low credit scores, a "high risk fraud alert," and subsequently, the first account's known chargeback problems and status "on MasterCard's radar" for fraud. But for the UPS merchant accounts, the TYS Defendants would not have been able to process credit card payment charges from consumers.

Moreover, UPS—through Smith, its agent tasked with selling payment processing services to merchants—established the TYS 1 and TYS 2 merchant accounts, which were central to the scheme, yet Smith retained authority to have the accounts "shut off," he reviewed the TYS telemarketing scripts and sometimes required corrections, and threatened to terminate accounts, all of which gave Smith effective control over the TYS Defendants' activities. UPS's relationship with Hal Smith produced a net profit of four to five million dollars for the company over a ten-year period.

Given these facts, the Court finds UPS is jointly and severally liable along with Smith, HES, and the TYS Defendants for the full disgorgement amount of $1,734,972 in equitable monetary relief as necessary and appropriate to relieve the substantial and undisputed consumer losses in this case. *See, e.g.*, *SEC v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014) (affirming joint and several liability for full amount of disgorgement against vice president of company who had collaborated in the fraudulent scheme, even though he had not received the full proceeds, because "a personal financial benefit is not a prerequisite for joint and several liability").

In FTC cases brought against companies who facilitated or substantially assisted telemarketers in fraudulent schemes by processing checks or credit cards payments despite obvious signs of problems, the district courts have consistently found the processors jointly and severally liable for the full disgorgement resulting from the entire telemarketing scheme. In *FTC v. Global Marketing Group, Inc.*, the telemarketers violated the assisting and facilitating provision of the TSR by inducing consumers to purchase unsecured credit cards and credit card loss protection services for advance fees even though the telemarketers never made any arrangements for the consumers to receive what they had purchased. 594 F.Supp.2d 1281, 1285-86 (M.D.Fla. 2008). The district court found the processor who withdrew the funds from consumers' bank accounts was liable for the full $8.6 million[18] of "sales" that the telemarketers' scheme had netted from consumers during the four year period of the processor's involvement with the eight telemarketers, and was not limited to the fees for processing of the bank payments that the processor had received. *Id*. at 1285-86. The processor, who edited and approved the telemarketers' scripts, continued to process millions of dollars in payments from consumer bank accounts to telemarketers despite consumer return rates as high as 71%, consumer complaints, and law enforcement inquiries, which he handled. *Id*. at 1288.

Similarly, in *FTC v. Windward Marketing, Ltd*., the defendants who had provided substantial assistance to telemarketers by agreeing to process printed bank drafts on accounts—although unauthorized and unsigned by consumers—in exchange for six to eight percent of the funds withdrawn, were held jointly and severally liable for the entire amount of the telemarketing scheme ($12.6 million), and not merely

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[18] The amount awarded, $8.6 million, resulted after subtraction of the "high level of returns" from the $26 million actually removed from customer's accounts. *Global Marketing*, 594 F.Supp.2d at 1285-86.

the processing fees ($1 million) they had received. No. 1:96-CV-615F, 1997 WL 33642380, *6 (N.D. Ga. 1997). The bank draft-processing defendants continued to provide substantial assistance for the telemarketing transactions, even though they knew that the telemarketers had a 40% return rate for the unsigned/unauthorized checks, that a national bank had warned the unsigned drafts were not authorized by consumers, and that the state consumer affairs department had begun an investigation into the telemarketers. *Id*. at *7. The district court rejected the draft-processing defendants' contention that any disgorgement of profits from them was limited to the amount of fees they had earned and instead held them jointly and severally liable for the entire amount. *Id*. at *15. "Any Defendant's liability may exceed the amount that particular Defendant received from his participation in the scheme, and instead, a Defendant may be liable for all the money Defendants received from the telemarketing scheme." *Id*. (citing *F.T.C. v. Magui Publishers, Inc.*, No. 89–3818, 1991 WL 90895, *15-17 (C.D.Cal. Mar. 28, 1991)). *See also FTC v. Loewen*, 2013 WL 5816420, *6 (W.D.Wash. Oct. 29, 2013) (finding payment processing companies who substantially assisted telemarketing company (under a common owner) would be held liable for the full amount of deceptive practices of the others where the telemarketer had high chargeback rates and the processor resorted to setting up new merchant accounts using aliases to avoid poor publicity and thwart credit-card excessive-chargeback policies).

A third case awarding more limited equitable monetary relief, *FTC v. Chapman*, 714 F.3d 1211, 1213 (10th Cir. 2013), is distinguishable because the individual providing "substantial assistance" facilitated the four-state telemarketing scheme but did not provide payment processing services for the entire scheme and lacked any connection to the telemarketers as an owner or insider. In *Chapman*, the Tenth Circuit affirmed the disgorgement of service fees and book proceeds from the author of a grant-writing "guidebook" who violated § 310.3(b) of the TSR by "assisting and facilitating" telemarketers in their scheme selling grant-related goods and services with false representations that the consumers were guaranteed or likely to receive grants. *Id.* In addition to selling the telemarketers the guide-book touting the false "success rate of 70%," the author also developed a sales questionnaire for the telemarketers to use, provided the research results—often flawed—that were used in the scheme, and wrote grant applications and developed the workshop marketed in the final stage of the scheme. *Id.* at 1215. The guide-book author received compensation from the telemarketers to provide grant research, writing, and/or grant-coaching services for more than 8000 consumers totaling $1,682,950, but she never felt compelled to inquire whether any of the consumers actually received a grant. *Id.* at 1214-15. The trial court awarded damages limited to the amount of gross revenue the author earned primarily from one group of telemarketers, which amounted to nearly all of her revenue for the time period, and not the amount garnered by the entire group of individuals and corporate defendants who marketed and sold the grant-related goods and services in other states. *Id*. at 1212.

UPS contends that, under the holding in *FTC v. Verity International, Ltd*., the amount of restitution must not exceed the amount that the defendants actually gained, even if consumers lost more because nonparty middlemen took some of the proceeds. 443 F.3d 48, 67-68 (2d Cir. 2006). The *Verity International* decision is not relevant here in that the Eleventh Circuit has already distinguished the case such that it is inapposite to the instant dispute. In *FTC v. IAB Marketing Associates, LP*, the panel explained that the key issue in *Verity* "was the appropriate amount of restitution where multiple nonparty middlemen retained a significant portion of the total revenues." 746 F.3d 1228, 1234 (11th Cir. 2014) (emphasis added) (citing *FTC v. Verity Int'l, Ltd*., 443 F.3d 48, 68 (2d Cir. 2006)). In *IAB Marketing*, as is also the case here, the entities claiming to be "middlemen" are named parties in the suit who provided substantial assistance. Because the holding in *Verity* is limited to nonparty middlemen, it does not apply to named defendants subject to joint and several liability. Moreover, if *Verity* did apply to this case, the Eleventh Circuit on appeal presumably would have subtracted the amount of the processing fees the TYS Defendants had paid to UPS (approximately $410,000) from the $1,734,972 judgment against Smith and HES which was instead affirmed for the full amount. Accordingly, the Court finds that a judgment ordering UPS to pay $1,734,972 in equitable monetary relief is necessary and appropriate to relieve the substantial and undisputed consumer losses in this case.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED** as follows:

1. Plaintiff the Federal Trade Commission shall recover of the Defendants UPS, jointly and severally, a

judgment in the amount of One Million Seven Hundred Thirty-Four Thousand Nine Hundred and Seventy-Two dollars ($ 1,734,972.00), as equitable monetary relief.

2. Any amounts Defendants contribute and any of the sums for consumer redress awarded pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to UPS's practices alleged in the Amended Complaint. Any money not used for such equitable relief is to be deposited to the U.S . Treasury as disgorgement. UPS has no right to challenge any actions the Commission or it representatives may take pursuant to this Subsection.

DONE and **ORDERED** in Chambers, in Orlando, Florida on October 26, 2016.

/s/Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties