Nos. 15-11500 & 15-13380 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

HES MERCHANT SERVICES CO., INC. AND HAL E. SMITH,
Defendants-Appellants in No. 15-11500

and

UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC,
Defendant-Appellant in No. 15-13380

On Appeal From the United States District Court
for the Middle District of Florida

BRIEF OF THE FEDERAL TRADE COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

The FTC believes oral argument may assist the Court in its consideration of this appeal and therefore requests oral argument.

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JURISDICTION

The district court had jurisdiction under Sections 5(a), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45a, 53(b), and 57b; and under 28 U.S.C. §§ 1331, 1337(a), and 1345. The district court's final order against Hal E. Smith and HES Merchant Services Co., Inc., appellants in No. 15-11500, was entered February 11, 2015 and a timely notice of appeal was filed April 7, 2015. JA 242, 248.[1] The district court's final order against Universal Processing Services of Wisconsin, LLC, appellant in No. 15-13380, was entered May 19, 2015, and a timely notice of appeal was filed July 17, 2015. JA 263, 268. This Court has jurisdiction under 28 U.S.C. § 1291.

[1] The Appellants' Joint Appendix is not consecutively paginated, so we cannot refer to material in the appendix with a simple page number. We use "JA __" to refer to the tab number of the appendix (which corresponds to the district court docket number) and "JA __:__" to refer to a district court docket number and ECF PageID. Where the referenced document was an attachment when filed in the district court, the first part of the reference includes the attachment number (*e.g.*, JA 94-2) and in most cases the appellants have placed such attachments in their own tabs (*but see, e.g.*, JA 110-1 in tab 110).

QUESTIONS PRESENTED

Appellant Universal provided credit card processing services that were essential to the operation of an illegal scheme created by appellant Smith. It is undisputed that Universal knew (or consciously avoided knowing) about the illegal conduct. The district court held Universal, Smith, and others jointly and severally liable for the net amount they illegally took from consumers. The questions presented are:

1. Whether Universal waived its argument that the district court improperly applied the standard for joint and several liability.

2. If the argument is preserved, whether one who violates the Telemarketing Sales Rule, 16 C.F.R. Part 310, by providing substantial assistance to others' violations of that Rule, while knowing or consciously avoiding knowledge of the violations, may be held jointly and severally liable with the others for equitable monetary relief equal to the total amount they collectively received from the violations.

3. Whether the district court's order of equitable monetary relief was authorized by section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

4. Whether the district court properly granted summary judgment and ordered equitable monetary and injunctive relief against appellants Hal E. Smith and HES Merchant Services Co., Inc.

INTRODUCTION

From November 2011 to July 2012, appellant Universal Processing Services, a credit-card processor, handled nearly $2.6 million in fraudulent payments that consumers made to the perpetrators of an illegal telemarketing scheme, taking a cut of each payment.[2] The scheme, operating under the name "Treasure Your Success," was the brainchild of Universal's sales agent, appellant Hal E. Smith. Together, the appellants provided Treasure Your Success with its lifeblood: merchant accounts that permitted it to collect money from consumers via credit cards.

Smith, who had been referring unscrupulous businesses to Universal's merchant accounts for years, proposed the business venture that became Treasure Your Success to its principals and was deeply involved with its operations. Universal ignored numerous red flags warning that the business would be a fraud, rejected its own risk department's concerns, and opened a merchant account for the operation. Consumers immediately began challenging credit card charges from Treasure Your Success, generating "chargebacks" at levels suggesting a high probability of fraud. Universal ignored that warning sign too and opened a second merchant account a few months later to process even more payments. Smith, meanwhile, kept a close eye on the business, using his control of the merchant

[2] Universal, which also does business as Newtek Merchant Solutions, is often referred to in the record as "Newtek" or "UPS."

accounts—and threats to cancel them—to dictate the scheme's day-to-day operations.

The district court found that by providing the merchant accounts, Universal assisted and facilitated the scheme's violations of the Telemarketing Sales Rule. The court held there was no material dispute that Universal knew (or consciously avoided knowing) of the illegal conduct, and Universal does not challenge that holding on appeal. The court likewise held that Smith used his access to Universal's merchant accounts to control the Treasure Your Success enterprise and that he knew about its deceptive practices. As a result, the court granted permanent injunctive relief against appellants and held them jointly and severally liable for the net amount of unlawful payments.

None of the appellants denies that Treasure Your Success was a scam from start to finish, or that its practices violated the FTC Act and the Telemarketing Sales Rule. Nor does Universal deny that it violated the Telemarketing Sales Rule by knowingly assisting and facilitating Treasure Your Success's fraud.

Instead, Universal argues that the district court could hold it jointly and severally liable only if it found Universal to be part of a "common enterprise." But Universal did not make that argument below and may not make it now. In any event, the argument is wrong, and no court has ever accepted it. Joint and several liability is appropriate when defendants act in concert to commit a single harm.

Universal's other theory, that section 13(b) of the FTC Act does not authorize the monetary award, is similarly without merit.

In their separate appeal, Smith and his company HES Merchant Services challenge the district court's summary judgment decision and its order of injunctive and equitable monetary relief, but they fail to identify any material fact dispute that would preclude summary judgment or any abuse of the district's discretion to enjoin Smith from further violations and hold him liable for the money Treasure Your Success took from consumers.

STATEMENT OF THE CASE

A. Universal Processing Services

Universal is a credit card processor that effects credit card transactions between banks that issue credit cards (known as "acquiring banks") and merchants who wish to accept credit card payments. Before a merchant may accept credit cards, it must first establish a "merchant account" with a processor such as Universal, which has contracted with an acquiring bank to process such payments. JA 174-1:1925.

Universal finds most of its merchant customers through "independent sales agents" such as appellant Smith.[3] Before approving a merchant's account

[3] Smith acted as a sales agent for Universal through HES. JA 174-1:1596. Because he concedes (Smith Br. 27) that HES is his "alter ego," we often use "Smith" to refer to both him and his company.

application, Universal and other payment processors perform due diligence on the merchant to ensure that its business is legitimate and creditworthy. JA 94-2:886; 94-3; 174-1:1925. This underwriting process allows the payment processor to identify warning signs that may lead it to deny the merchant's application or closely monitor the account. JA 174-1:1925-1926.

When Universal receives a credit card transaction from one of its merchant customers, it submits the transaction to the acquiring bank for authorization and payment. After receiving payment, Universal withholds a percentage for itself and a percentage in reserve to mitigate the risk of chargebacks, and credits the remainder to the merchant's account.

B. The Treasure Your Success Merchant Accounts

Universal processed nearly $2.6 million in credit card payments to a fraudulent operation known as "Treasure Your Success." Universal opened two merchant accounts for Treasure Your Success, both of which were "created by" appellant Smith. Smith Br. 25, 27.

Smith was one of Universal's most important sales agents. Over ten years he had referred more than 100 accounts to the company, amassing a portfolio of Universal's largest and most profitable accounts. JA 110-1:1073, 1077. Universal's former President Derek DePuydt estimated that the company made $4-5 million in profits from Smith's accounts. JA 110-1:1080. But Smith's accounts

also presented a high risk of chargebacks—claims from consumers that the charges were improper. JA 110-1:1073; 174-1:1855, 1935-1936. Smith's accounts typically involved phone sales by dubious businesses offering services such as loan modification, debt reduction, and timeshare-resale advertising. JA 94-2:887. Universal's own guidelines categorized those services as "unacceptable business types," professing to allow exceptions only "on a case by case basis." JA 94-3:899. Because of the high risk that consumers would challenge charges that came through Smith's accounts, Universal kept as much as 30% of those charges in reserve.[4] JA 110-1:1073, 1074; 174-1:1935.

Several of Universal's officers and employees thought Smith's accounts were too risky and that Universal should not do business with him. For example, Kim Olszewski—the company's Chief Operating Officer, responsible for risk assessment and underwriting—called Smith's accounts "garbage" and refused to underwrite them. JA 110-1:1075; 94-2:885, 887. Others shared her concerns. JA 94-2:887-888. When Olszewski brought those concerns to Universal's President (DePuydt), he responded by removing her from the underwriting process for Smith's accounts and underwriting them himself. JA 110-1:1073; 94-2:887.

[4] Universal is contractually required to refund chargebacks to consumers if the merchant is unable to pay.

DePuydt told Olszewski that the income from Smith's accounts "made it worth the risk." JA 110-1:1075.

As a result, Universal's President himself approved Treasure Your Success's merchant account application. And he approved that application even though it was rife with red flags that the business would be a fraud. *See* JA 174-1:1926. For example, the principals of the company had no meaningful income or assets, their credit scores were at or significantly below the cutoff for the "very high risk" category, and their credit reports showed serious delinquencies, including alerts for "high risk of fraud." *Id.* at 1930-1931; JA 174-2:2010, 2012. The application also claimed—without any track record or substantiation—anticipated sales of $2.7 million. JA 174-1:1926-1927. All of these sales were to come from outbound telemarketing, "card-not-present," telephone order transactions, known in the industry as the riskiest type of transaction with the greatest potential for merchant fraud. JA 174-1:1928.

Moreover, the application was incomplete and internally inconsistent, included a tax return for a different company than the applicant, and failed to provide required documentation. JA 174-1:1930-1931. Granting such an application violated Universal's credit policy guidelines. *See* JA 94-3:893, 898-899. Indeed, applying standard industry due diligence or merely reviewing Treasure Your Success's telemarketing scripts would have made it "readily apparent" that the

operation "was highly likely" to be engaged in the fraudulent telemarketing of interest-reduction debt-relief services. JA 174-1:1929.

At the same time, Smith's other merchant accounts with Universal were incurring extremely high chargeback rates. JA 174-1:1935-1936; JA 110-1:1073. Chargeback rates for legitimate businesses are very low: 0.2% for internet-based businesses; far lower for others. JA 174-1:1935-1937. When chargebacks reach 1%, MasterCard and Visa place merchants in a risk monitoring and compliance program. *Id.* at 1936-1937; JA 94-2:886. Yet of nineteen active Smith accounts with Universal, *fourteen* had chargeback ratios over 19%, with the highest at a remarkable 67.6%—meaning that consumers disputed two of every three charges on that account. JA 174-1:1932. At those levels, it was apparent that most of Smith's accounts were *already* engaged in fraud. *Id.* at 1932-1933.

Despite the obvious warnings in the Treasure Your Success application, the fraud-level chargeback rates of Smith's other accounts, and the opposition of Universal's risk department, Universal opened a merchant account and began processing payments for Treasure Your Success. Almost immediately, Treasure Your Success itself began to incur chargebacks at a rate that Universal's own expert agreed showed a "very high likelihood of fraud." JA 174-3:2116-2117; 174-1:1935. The FTC's expert likewise concluded that Universal "must have known" that Treasure Your Success "was engaged in merchant fraud." JA

174-1:1940. Nevertheless, after five months—and despite chargeback activity indicating fraud beginning the very first month—Universal opened a second account for the scam, based on an application with nearly all the same warning signs as the first. JA 174-1:1938-1940.

In total, Universal processed just under $2.6 million in payments to Treasure Your Success. JA 225-10:4043. Universal kept over $810,000 of that amount, placing $400,000 in reserve and booking $410,047.38 in gross revenue. *Id.*

C. Hal E. Smith, HES, And The Treasure Your Success Scheme

The Treasure Your Success scheme itself was illegal at every step. The operation first contacted consumers with unlawful robocalls, delivering prerecorded messages. These messages, purportedly from "Rachel" or "Card Services," instructed consumers to "press one" to "lower your credit card interest rate." JA 208:2924; 199-5:2758-2759. Consumers who did so were connected to telemarketers who falsely promised to reduce their credit card interest rates to as low as three percent, save them thousands of dollars in payments, and help them pay off their debt two to three times faster. JA 199-5:2759-2761, 208:2925-2926. When consumers signed up, the company promptly and illegally charged substantial upfront fees to their credit cards, while falsely promising the consumers that it would *not* charge those fees until it obtained results. JA 199-5:2759-2760; 208:2927.

Unsurprisingly, the company never delivered on its promises, which were never feasible in the first place. *See* JA 199-5:2760; 208:2926, 174-1:1920-1925.

These practices violated the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part 310, in numerous ways.[5] For example, the robocalls were illegal because (1) the company did not obtain prior written permission to contact its targets with robocalls (16 C.F.R. § 310.4(b)(1)(v)(A)); (2) the calls did not make required disclosures (*id.* § 310.4(b)(1)(v)(B)(ii)); (3) the calls were placed to consumers who had signed up for the national Do Not Call List (*id.* § 310.4(b)(1)(iii)(B)(i) and (ii)); (4) Treasure Your Success did not pay the fee to access the Do Not Call List (*id.* § 310.8); and (5) the operation called consumers after they asked not to be called again (*id.* § 310.4(b)(1)(iii)(A)). *See* JA 199-5:2760-2761, 208:2931.

The company's misrepresentations about its credit card interest rate reduction "services" violated not only section 5 of the FTC Act as deceptive acts or practices, 15 U.S.C. § 45(a), but also specific requirements of the Telemarketing Sales Rule that cover purported credit card interest rate reduction services, 16 C.F.R. §§ 310.2(m), 310.3(a)(2)(x). The company's charges to consumers' credit cards were also illegal, both because they were unauthorized (an unfair practice

[5] The Telemarketing Sales Rule is a trade regulation rule under the FTC Act. The FTC promulgated the Rule at the direction of Congress pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101 *et seq*.

under section 5) and because the Telemarketing Sales Rule prohibits up-front charges for interest rate reduction services. *See* 16 C.F.R. § 310.4(a)(5)(i). It is undisputed that those illegal charges were all processed by Universal and would not have been possible without its Treasure Your Success merchant accounts. JA 174-1:1572, 1580. By opening the merchant accounts, Smith and Universal thus provided critical support to the Treasure Your Success operation.

Smith was also deeply involved in the details of the Treasure Your Success operation. As he admitted, he initially "proposed a plan" or "business venture" to the principals of Treasure Your Success to set up a "one stop shop" for telemarketing credit card interest rate reduction services. JA 87:841, 845. He also admitted that he read the Treasure Your Success telemarketing scripts, JA 174-1:1573, 1582, 1635, 1663-1664, and knew that they guaranteed consumers that the company could significantly reduce their credit card interest rates, save them substantial amounts of money, and pay off their debts faster. JA 174-1:1574, 1582. The scripts clearly show, for example, false promises to get consumers "out of debt 3/5 times faster" and promises of guaranteed "minimum savings" or "$2,500 in . . . GUARANTEED SAVINGS." JA 174-2:2042. Smith also admitted knowing that Treasure Your Success promised consumers that it would not charge them for its services until *after* they achieved the savings it promised, but that the company in fact charged them *before* it achieved the savings, within a day of the telemarketing

call. JA 174-1:1574, 1582 (requests for admission 60, 63, 64). Again, the telemarketing scripts contained the false promises that Treasure Your Success's fee would be "collected by the loss of interest towards the account" and was "NOT AN OUT OF POCKET FEE TO YOU." JA 174-2: 2042, 2045, 2047, 2048, 2050.

Smith also helped Treasure Your Success prepare both of its merchant account applications, which contained all the warning signs for fraud described above. JA 174-1:1570, 1571, 1580. Smith then used his control of the merchant accounts to hold a tight rein on the operation. For example, he or his employee regularly visited Treasure Your Success and monitored its calls, under the constant threat that Smith would shut down the accounts if the business did not follow his instructions. JA 174-1:1615, 1634, 1653-1654, 1674. As Smith testified, he met with the principals and "went over everything with them, and told them what they could and couldn't do." JA 174-1:1619. He told them that if they violated any of his rules, "there is no second chance." *Id.* at 1673-1674. For example, he would terminate their merchant account if they did not follow the scripts, *id.* at 1615, 1621, or if they hired someone he disliked. *Id.* at 1612, 1653-1654; *see also* JA 174-1:1453, 1461-1462, 1471. Smith also directed that Treasure Your Success use a particular telephone and information technology company and hire a specific person to fight consumers' attempts to challenge Treasure Your Success charges on their credit cards. JA 174-1:1512-1513, 1684, 1693.

Universal handsomely rewarded Smith for the business he brought in, including Treasure Your Success. Universal withheld up to 42% of Treasure Your Success's charges, of which Smith received 15%. JA 147-1:1455-1456. In total, Universal paid Smith $343,328.96. JA 225-10:4043. In addition, HES billed Treasure Your Success directly for several thousand dollars each month. JA 174-1:1468-1469.

D. The FTC's Enforcement Action

To stop Treasure Your Success from continuing to defraud consumers, the FTC initially sued two principals of the operation and three businesses through which they operated the scheme, seeking, *inter alia*, a permanent injunction and equitable monetary relief under section 13(b) of the FTC Act, 15 U.S.C. § 53(b). JA 1. The FTC's complaint charged that Treasure Your Success was engaged in both "unfair or deceptive acts or practices" in violation of section 5 of the FTC Act and abusive and deceptive telemarketing acts or practices in violation of the Telemarketing Sales Rule. 16 C.F.R. Part 310.

During discovery, the FTC learned the identities of other individuals and companies integral to the Treasure Your Success operation, including (among others) Universal, its President Derek DePuydt, Smith, and HES. The Commission amended the complaint to add these defendants. JA 58-1; 61. The amended complaint charged Universal with providing substantial assistance to the Treasure Your

Success scheme's numerous Telemarketing Sales Rule violations while knowing or consciously avoiding knowledge of the violations. JA 61:750-751; *see* 16 C.F.R. § 310.3. The amended complaint charged Smith and HES with being part of a common enterprise with the other defendants running Treasure Your Success, and sought to hold Smith individually liable based on his participation in this scam, his control of it, and his knowledge of its violations. JA 61:729-731.

Smith and HES were initially represented by counsel, who prepared their pleadings and responses to requests for admission. JA 87; 115; 174-1:1590, 1692-1697. Counsel then moved to withdraw from the case, representing that HES was an inactive corporation with no assets and that Smith—its sole officer, director, and principal—perceived no need for an attorney. JA 163:1321-1322. The district court granted the motion, noting that Smith would "be responsible for representing himself unless and until new counsel enters an appearance on his behalf." *Id.* at 1322. But because Smith is not an attorney, the court directed that he could not represent HES. *Id.* Smith was later represented by an attorney at his deposition, though the attorney did not enter an appearance in the district court. JA 174-1:1590.

The FTC subsequently settled the claims against all of the defendants but Universal, Smith, and HES through stipulated final orders that granted permanent injunctions and monetary relief (largely suspended) against each of the stipulating

defendants. *See* JA 112, 203, 209, 210. The Commission moved for summary judgment against Universal, Smith, and HES. JA 174.

Smith filed a three-page affidavit in response to the motion. JA 188. In the face of the extensive admissions and testimony cited in the FTC's motion, Smith responded in nine paragraphs. *Id.* He summarily denied owning or being employed by Treasure Your Success; playing any role in hiring its employees or in its management decisions; or providing "training sessions," writing training manuals, and giving advice to the operation "in any official capacity." JA 188:2616-2618. He also denied, contrary to his deposition testimony, monitoring the operation, having any discussions or "dealings" with the company's employees and telemarketers, and playing a role in hiring a specialist to fight chargebacks. JA 188:2617-2619. HES did not oppose the Commission's summary judgment motion.

The district court granted summary judgment against all three appellants. JA 208. After summarizing the undisputed violations of the Treasure Your Success scheme, the court examined Smith's role in the enterprise, relying primarily on Smith's admissions and deposition testimony. The court found no genuine dispute that Smith helped "procure two merchant accounts" with Universal, without which Treasure Your Success could not have charged consumers' credit cards. JA 208:2927. In light of Smith's admission that he could "shut off" the merchant accounts—and thereby disable Treasure Your Success—the court found that he

had "effective control" over the other defendants. *Id.* The court found no genuine dispute that Smith reviewed the operation's telemarketing scripts, directed the other defendants' hiring practices, and "kept a close eye" on the operation, personally and through his employee. JA 208:2927-2928.

The district court found that the corporate defendants other than Universal operated Treasure Your Success as a common enterprise, and that Smith was liable for the enterprise's violations of the FTC Act and the Telemarketing Sales Rule by virtue of the control he exercised over the operation. JA 208:2933. The court found that Smith knew about the operation's deceptive practices or at least was aware of "a high probability of fraud" and intentionally avoided the truth. *Id.* The court rejected the "conclusory denials" in Smith's affidavit as "not probative evidence" that can establish a disputed issue of material fact, and found the rest of the affidavit to be "a sham, contradicted by Smith's statements in his own deposition." JA 208:2934.

The district court also granted summary judgment against HES, which it described as "technically still a Defendant" even though it "apparently holds no assets." JA 208:2923 n.1. No attorney had appeared for HES, and the company did not defend against the FTC's summary judgment motion. *Id.* The court found that HES was engaged in a common enterprise with the other defendants and that

no material facts were in dispute on the violations attributed to the other members of the enterprise. JA 208:2923-2924 n.1.

Turning to Universal, the district court held that the company violated the Telemarketing Sales Rule by substantially assisting the Treasure Your Success defendants. JA 208:2935. The court found that the two merchant accounts Universal provided to Treasure Your Success were "essential to the success of the scheme." JA 208:2936. "Absent these accounts, the [Treasure Your Success] Defendants would have been unable to process credit card payments," and thus, "as a matter of law, [Universal] substantially assisted the [Treasure Your Success] Defendants." *Id.*

The district court further held that Universal "knew or consciously avoided knowing that the [Treasure Your Success] Defendants were violating" the Telemarketing Sales Rule. *Id.* Universal did not deny that its President (DePuydt) was aware of the fraud, but argued instead that he was an "adverse agent" and that his knowledge could not therefore be imputed to the firm. JA 208:2936. The court rejected this argument because Universal could not show "that DePuydt was acting entirely in his own interests" or that he "act[ed] entirely in secret." JA 208:2936-2937. The court found that Smith had been working with Universal for a decade—starting *before* DePuydt became President of Universal; that his accounts were among Universal's largest and most profitable, netting the company $4-5 million

in profits; and that other officers of Universal, including its Chief Operating Officer, knew that DePuydt's approval of Smith's accounts posed a risk to the company, but took no action. JA 208:2937. The court thus entered summary judgment in favor of the Commission and against Universal. JA 208:2938.

The Commission sought an injunction and monetary relief of $1,734,972—the amount Treasure Your Success took from consumers after deducting refunds. JA 211, 212, 213. In its motion for monetary relief, the FTC argued that a defendant who "violated Section 5 of the FTC Act and the assisting-and-facilitating provision of the TSR" is liable for the full amount of consumer losses. The agency asked the court "to hold Defendants Smith, HES, and [Universal] jointly and severally liable for the payment of $1,734,972." JA 213:3114-3115.

In its motion for injunctive relief, the FTC showed that before Treasure Your Success, Smith was engaged in similar businesses that employed illegal robocalls and sold deceptive debt reduction services, and argued that in light of his long involvement with fraudulent telephone marketing, Smith should be banned from robocalling, telemarketing, and the marketing of debt reduction services. JA 211:2984-2985.

Smith (and HES, now represented by counsel) opposed both forms of relief. JA 231, 232. Universal stipulated to the entry of an injunction and contested only the amount of monetary relief. JA 225.

Universal's opposition argued mainly that it should not have to pay so much when other defendants had paid so little in stipulated judgments with the FTC. *See, e.g.*, JA 225:3672 ("This is patently unfair and should not be allowed by this Court."). Universal argued that it had "already paid" enough (JA 225:3675), had "already disgorged [its] alleged 'ill-gotten' gains" (JA 225:3676), and was not sufficiently culpable or knowledgeable to be held fully liable (JA 225:3677-3679). At no time did the company assert (as it does now) that there is a single established standard for imposing joint and several liability in FTC cases. Rather, Universal expressly agreed that the district court "has broad equitable discretion to fashion a remedy," but argued that the court "should exercise that discretion by limiting the amount of monetary relief required from [Universal] to an amount that reasonably reflects its relative responsibility level and level of knowledge in this matter and its profits in connection with this matter." JA 225:3672. Universal's only other arguments were that the FTC had not shown that "consumer redress is necessary" and that Universal did not have "ownership or control of the great majority of those funds paid by consumers." JA 225:3681-3682.

The district court granted the Commission's motion, holding that "the undisputed net revenue of the [Treasure Your Success] enterprise" was "the proper amount to be disgorged." JA 242:4309. The court rejected Universal's argument that it should not be ordered to pay more than it profited from the scheme, citing

this Court's decision in *FTC v. IAB Marketing Associates, LP*, 746 F.3d 1228, 1234 (2014).

In a separate order, the court granted permanent injunctive relief against Smith and HES and held them jointly and severally liable for equitable monetary relief equal to "the undisputed net revenue" of the Treasure Your Success enterprise. JA 241, 242:4309.

SUMMARY OF THE ARGUMENT

1. Universal does not dispute that it violated the law by assisting the Treasure Your Success scheme; instead, it challenges only the amount of equitable monetary relief it was ordered to pay. That challenge is without merit.

Universal first argues that it cannot be subject to joint and several liability without a finding that it was part of a "common enterprise" with Smith and Treasure Your Success. Universal Br. 31-37. But Universal never presented that argument below and may not present it for the first time on appeal.

In any event, this "common enterprise" argument is wrong on the merits. Courts regularly hold defendants jointly and severally liable for the amounts they collectively obtain from defrauded consumers. No court has ever suggested that a "common enterprise" finding is a necessary (as opposed to sufficient) basis for imposing such liability.

There is likewise no merit to Universal's argument that the district court's award contradicted the remedial principles discussed in *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006). *Verity* held that defendants need not disgorge the full amount of consumer loss from their fraud when a portion was collected by a blameless intermediary who was neither complicit in the illegal activity nor a party to the case. That holding does not apply here, however, because Universal is an undisputedly culpable party.

2. In his separate appeal, Smith identifies no material fact genuinely in dispute that should have precluded summary judgment. His skeletal affidavit contained only general denials that baldly contradicted his own deposition testimony and admissions. And HES—nominally a separate defendant—did not defend against summary judgment below and makes no argument against summary judgment now.

Like Universal, Smith also identifies no error in the district court's imposition of joint and several liability. And Smith's challenge to the district court's fencing-in relief is likewise without merit. Smith has engaged in a long pattern of misconduct similar to his activities in this case, and he has offered no reason to believe he would not continue the conduct.

STANDARD OF REVIEW

1. The Court "review[s] a district court's grant of summary judgment *de novo*, viewing all the evidence, and drawing all reasonable factual inferences, in favor of the non-moving party." *Stephens v. Mid-Continent Cas. Co.*, 749 F.3d 1318, 1321 (11th Cir. 2014). The Court may affirm the district court's judgment on any ground that finds support in the record. *Lucas v. W.W. Granger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001).

2. The Court reviews "a district court's order granting equitable monetary relief for an abuse of discretion." *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1325 (11th Cir. 2013). The Court likewise reviews a permanent injunction for an abuse of discretion. *Aronowitz v. Health-Chem Corp.*, 513 F.3d 1229, 1242 (11th Cir. 2008). An abuse of discretion is shown when "the district court has made a clear error of judgment or has applied an incorrect legal standard." *Doe v. Chiles*, 136 F.3d 709, 713 (11th Cir. 1998).

3. An issue that was not raised in the district court and is raised for the first time on an appeal "will not be considered by this court." *E.g.*, *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004), quoting *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994).

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO ORDER JOINT AND SEVERAL MONETARY RELIEF AGAINST UNIVERSAL.

Universal does not appeal the district court's holding that, in violation of the Telemarketing Sales Rule, Universal provided merchant accounts essential to the Treasure Your Success scam, processed all of the operation's fraudulent credit card payments, and knew (or consciously avoided knowing) about the underlying violations. Instead, Universal challenges only the sum it was ordered to pay in monetary relief for this now-undisputed wrongdoing. The district court's remedial order was well within its discretion.

A. Universal's Principal Argument Against Joint And Several Liability Is Both Waived And Wrong.

Universal argues for the first time on appeal that it is exempt from joint and several liability because the district court never entered a finding that Universal was part of a common enterprise with Smith and Treasure Your Success. *See* Universal Br. 33, 35. That argument is both waived and wrong.

1. Universal waived its "common enterprise" argument by failing to raise it below.

Universal argues (Br. 31-33) that joint and several liability may be imposed only if a defendant is found to have formed a "common enterprise" with the other participants in a fraud, even if it knowingly facilitated that fraud. But Universal made no such argument below, which explains why, as Universal now complains

(Br. 33), the district court "never addressed" whether the common enterprise that "existed among the *other* corporate defendants . . . extended to [Universal]."[6] And although Universal now professes (Br. 37) to find the district court's decision "puzzling" for its supposed failure to apply the common-enterprise factors listed in *FTC v. National Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), Universal never even cited that case to the district court.

Instead, in its remedies-stage advocacy below, Universal expressly agreed with the FTC that the district court "has broad equitable discretion to fashion a remedy, taking into account various factors in issuing a remedial order." JA 225:3672. Universal argued that the district court should limit Universal's liability as an "exercise [of] that discretion"—implicitly recognizing the district court's discretion *not* to do so. *Id.* Specifically, Universal argued that it would be unfair if Universal paid more than the other, putatively more culpable defendants, who had agreed to pay smaller sums. *Id.* at 3672-3675.[7] But Universal never argued that a defendant must be part of a common enterprise to be held jointly and severally liable.

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[6] Universal observes (Br. 37 n.11) that the FTC never argued it was part of the common enterprise, but that is simply because no party contended that a finding of joint and several liability required a resolution of that issue, and the issue was not otherwise relevant.

[7] Universal also sought to distinguish its conduct from that of Derek DePuydt, its own former President. JA 225:3674. By abandoning that argument, Universal concedes that it is liable for DePuydt's actions.

Because Universal failed to raise that argument below, it may not raise it now. The Court has "repeatedly held that 'an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.' " *Access Now*, 385 F.3d at 1331, quoting *Walker v. Jones*, 10 F.3d at 1572. "The reason for this prohibition is plain: as a court of appeals, we review claims of judicial error in the trial courts. If we were to regularly address questions—particularly fact-bound issues—that district[] court[s] never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court." *Access Now*, 385 F.3d at 1331.

This case does not present one of the five narrow circumstances in which the Court has permitted new arguments on appeal. *See Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001). First, a common enterprise analysis is not "a pure question of law," *id.*; as Universal admits (Br. 35), it "requires a fact-bound inquiry." Second, the argument is not one Universal "had no opportunity to raise at the district court level," *Wright*, 270 F.3d at 1342; Universal could have raised the issue in its brief opposing monetary relief. The monetary relief here likewise raises no issue of "substantial justice" or a "significant question[] of general impact or of great public concern." *Id.* The remaining factor—applicable when "the

proper resolution is beyond any doubt," *id.*—could only cut against Universal because, as next discussed, Universal's argument is incorrect.

2. Universal's "common enterprise" argument is meritless.

In addition to being waived, Universal's "common enterprise" argument fails on its merits. As courts have confirmed, joint and several liability under the FTC Act is appropriate in a range of circumstances. *E.g.*, *Washington Data Res.*, 704 F.3d at 1325; *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 636 (6th Cir. 2014); *FTC v. Ross*, 743 F.3d 886, 889 (4th Cir. 2014). Defendants are held jointly liable for an equitable reason: if one cannot pay the entire judgment, "the other defendants, rather than an innocent plaintiff, [are] responsible for the shortfall."[8] *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S. Ct. 1461 (1994). Indeed, as this Court has held, this equitable rationale extends joint and several liability not only to corporations such as Universal, but also to an individual if he or she "participated directly in the deceptive practices or acts or had authority to control them" and had "some knowledge" of the practices. *FTC v. IAB Mktg. Assocs., Inc.*, 746 F.3d 1228, 1233-1234 (11th Cir. 2014). The equitable case for such liability is

[8] In this case, Universal could seek reimbursement from HES, Smith, or other defendants who contractually agreed to indemnify Universal against losses stemming from the Treasure Your Success merchant accounts. JA 186-5:2466 (Universal contract with Smith and HES); JA 174-2:1987-1990 (Treasure Your Success merchant account application).

compelling here, where Universal knowingly provided substantial assistance to a fraudulent scheme that led to the defendants' collective unjust enrichment. It is unnecessary to show further that the defendant was part of a "common enterprise" with the other defendants. No court has ever suggested otherwise.

While the existence of a common enterprise is *one* reason that courts impose joint and several liability in FTC cases, it is not, as Universal contends (Br. 33, 35), the *only* "accepted test for ordering joint and several liability." Universal argues that the Sixth Circuit "has recognized that *some*" of the common enterprise factors "are relevant to the question of joint and several liability," but that obviously does not mean that a district court must find a "common enterprise" before exercising equitable discretion to impose joint and several liability. Universal Br. 35, citing *E.M.A.*, 767 F.3d at 636-637 (emphasis added). Universal cites *FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627 (7th Cir. 2005), for the same point (Br. 38), but that decision is even further afield because joint and several liability was conceded in that case. Neither this Court, nor any other to our knowledge, has stated that joint and several liability is limited to common enterprises.

Indeed, as Universal recognizes, many courts have found other reasons for "attributing one defendant's wrongs to another," such as "play[ing] an integral role" in violations and "exercis[ing] control" over corporate violators with "some

knowledge of the deceptive practices." *See* Universal Br. 38 n.12 (internal quotation marks omitted) (citing, *inter alia*, *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247 (S.D. Fla. 2007), and *FTC v. Windward Mktg., Ltd.*, 1997 WL 33642380 (N.D. Ga. Sept. 30, 1997)). Courts also impose joint and several liability when defendants act in concert to commit a single harm. *E.g.*, *FTC v. Leshin*, 618 F.3d 1221, 1236-1237 (11th Cir. 2010), citing *NLRB v. Laborers' Int'l Union of N. Am.*, 882 F.2d 949, 955 (5th Cir. 1989); *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014). In short, district courts have broad discretion to order joint and several liability for knowingly culpable wrongdoers who act in concert, unbound by the categorical "common enterprise" limitation that Universal would impose.

Finally, joint and several liability is particularly appropriate for defendants that, like Universal, have knowingly facilitated violations of the Telemarketing Sales Rule. The Rule makes it an unfair practice "to provide substantial assistance or support" to a telemarketer when the defendant "knows or consciously avoids knowing" that the telemarketer is engaged in practices that violate the Rule. 16 C.F.R. § 310.3(b). The Restatement of Torts similarly imposes liability where the defendant "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Restatement 2d of Torts § 876(b). The Restatement's commentary explains that

when the "assistance is a substantial factor in causing the resulting tort," the one giving it "is responsible for the consequences of the other's act." *Id.* cmt. d.

B. Universal's Remaining Challenge To Joint And Several Liability Is Also Without Merit.

Universal argues in the alternative that the presence of "middlemen" in these financial transactions precludes an award of joint and several liability under section 13(b) of the FTC Act, 15 U.S.C. § 53(b). That is also incorrect.

Section 13(b) authorizes district courts to enter permanent injunctions against violations of the FTC Act. *See generally Gem Merch.*, 87 F.3d at 468. This "unqualified grant of statutory authority . . . carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits." *Id.* The district court has broad equitable discretion to "mould each decree to the necessities of the particular case." *Id.* at 469, quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086 (1946). This Court has held that the appropriate measure of disgorgement under section 13(b) is the defendants' unjust gains, not consumer losses. *Washington Data Res.*, 704 F.3d at 1326.

As Universal acknowledges, in cases where consumers purchase goods or services directly from the defendants, "the two measurements will oftentimes closely or perfectly align." Universal Br. 43-44; *see also Washington Data Res.*, 704 F.3d at 1326, quoting *Verity*, 443 F.3d at 68 . In such a case, "it is of no

consequence that the measure of [defendants'] unjust gains happens to equal the amount of consumer loss." *Washington Data Res.*, 704 F.3d at 1326. This is one of those cases. Consumers purchased directly from the defendants and the funds sent to those defendants were all initially received by one of them—Universal—which kept part of the funds and distributed the rest to its codefendants. In short, the entire amount taken from defrauded consumers passed through Universal's merchant accounts, and none of the harm would have been possible without those accounts. Universal is thus jointly and severally liable for the collective unjust enrichment of all defendants.

Citing *FTC v. Verity Int'l*, 443 F.3d 48 (2d Cir. 2006), Universal nonetheless contends that courts must "consider the presence of a middleman between consumer and bad actor in order to avoid distorting the amount of disgorgement." Br. 46. But *Verity* held only that equitable relief can be smaller than consumer loss where a *non*-culpable intermediary (in that case, a telephone company) kept a portion of the payments from consumers before those payments reached the culpable parties. 443 F.3d at 68. That proposition has no application in cases like this one, where the amount lost by consumers is equal to the money unlawfully obtained by wrongdoers acting in concert, who are thus subject to joint and several liability. *See IAB Mktg. Assocs.*, 746 F.3d at 1234; *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 374 (2d Cir. 2011). Universal erroneously claims (Br. 47) that the

"sole difference" between this case and *Verity* is "whether the middleman is listed in the case caption." But it is Universal's culpability, not its mere status as a party, that supports joint and several liability.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT AND HELD SMITH AND HES LIABLE FOR MONETARY AND INJUNCTIVE RELIEF

Unlike Universal, which contests only the monetary remedy against it, Smith and HES challenge the district court's grant of summary judgment on liability, award of monetary relief, and injunction against them. None of their challenges has merit.

A. Summary Judgment Was Proper.

The Court "review[s] a district court's grant of summary judgment *de novo*, viewing all the evidence, and drawing all reasonable factual inferences, in favor of the non-moving party." *Stephens*, 749 F.3d at 1321. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Once the movant adequately supports its motion, the burden shifts to the nonmoving party to show that specific facts exist that raise a genuine issue for trial." *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 815 (11th Cir. 2010); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment"—"irrelevant or unnecessary"

disputes do not count. *Anderson*, 477 U.S. at 248. To show a genuine trial issue, there must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249.

As Smith admits (Br. 27), his affidavit in response to the FTC's summary judgment motion was "inadequate." Smith failed to show specific facts that created a genuine trial issue sufficient to avoid summary judgment. Many of the affidavit's statements allege no "specific facts" at all but are simply bare denials that cannot meet Smith's burden to show a genuine trial issue. *E.g.*, JA 188:2618 ("the allegations raised by the FTC against me are contrary to the facts and services that I performed on behalf of [Universal]"). Other statements, which Smith repeats in his brief, do not create genuine fact issues because they are not material to Smith's liability. For example, Smith states that he did not provide training, make telemarketing calls himself, recruit telemarketers, or own the Treasure Your Success corporate entities. Br. 25, 30. But even if those assertions were true, they would not negate the basis for Smith's liability: his control of the operation and knowledge of its deceptive practices. *See IAB Mktg. Assocs.*, 746 F.3d at 1233.

Some of the remaining statements in the affidavit contradict Smith's admissions and deposition testimony. For example, Smith denies having a role in any management decisions, making any "rules" for Treasure Your Success, and

having any role in hiring a specialist to challenge chargebacks. At his deposition, however, Smith testified that he in fact played those roles. *See* JA 174-1:1653, 1654; 188:2617-2618.

The district court therefore correctly found that the affidavit did not manufacture a genuine factual dispute. "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984). In other words, "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). Thus, whether or not these allegations were "a sham," as the district court found, they did not amount to "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. Accordingly, summary judgment was properly entered against Smith.

Finally, summary judgment was also properly entered against HES, which did not oppose the FTC's motion and has therefore conceded any objection to it.

B. Monetary Relief Was Proper.

Like Universal, Smith and HES argue that the district court improperly "blend[ed] disgorgement with an award of damages, measured by the consumers' loss." Smith Br. 32. As described in section I.B above, this argument fails because the consumers' loss in this case is equal to the amount by which the defendants were unjustly enriched. Smith is jointly and severally liable for the full amount of consumer redress because he controlled the Treasure Your Success operation and knew of its deceptive practices. *See IAB Mktg. Assocs.*, 746 F.3d at 1233.

In any event, Smith is independently liable for the full amount of monetary relief through HES. The district court held below, and HES did not deny, that HES was part of the Treasure Your Success common enterprise. JA 208:2923 n.1. As a result, HES is jointly and severally liable for the actions of the other corporate defendants. Because Smith admits that HES was his "alter ego" (Br. 27), its corporate form is ignored and its liability belongs to Smith.

C. The Permanent Injunction Was Proper.

Section 13(b) of the FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). An injunction against violating the FTC Act "is not limited to prohibiting the illegal practice in the precise form in which it is found to have exis-

ted in the past." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473, 72 S. Ct. 800 (1952). And those "caught violating" the FTC Act "must expect some fencing in." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 77 S. Ct. 502 (1957). Accordingly, injunctive relief under the FTC Act may be framed "broadly enough to prevent [defendants] from engaging in similarly illegal practices" in the future. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395, 85 S. Ct. 1035 (1965). The injunction should be upheld so long as it bears a "reasonable relation to the unlawful practices found to exist." *Id.* at 394-395.

Smith first argues that the district court erred by inadequately considering the purported "factual evidence that pointed to Smith's non-involvement" in Treasure Your Success. Smith Br. 38-39. But the injunction was entered after the district court had already entered summary judgment against Smith, finding no genuine issue regarding Smith's deep involvement with the Treasure Your Success operation. JA 208:2923-2938. The district court had no duty to consider reversing itself at the injunction stage.

Smith also argues that "evidence of past violations, without more," cannot justify an injunction. Smith Br. 39-40. But the Commission's motion went beyond mere evidence of past violations. The Commission showed that Smith had a long history with robocalling and knew that the practice is illegal. JA 211:2984 & n.4. Indeed, Smith admittedly became involved with Treasure Your Success after

another company—one he *directly* owned and operated—was shut down for telemarketing similar credit card interest rate reduction services. JA 174-1:1645, 1649, 1748-1749, 1482. Moreover, the uncontroverted evidence before the district court showed that Smith had established more than a hundred merchant accounts with Universal for businesses telemarketing credit repair services similar to Treasure Your Success or that had an equally high potential for fraud. JA 110-1:1073-1074.

In short, Smith's violations in this case were not an aberration—he has a pattern of engaging in illegal telemarketing practices and starting new ventures when old ones are shut down. The district court therefore acted well within its discretion in concluding that the injunction's terms were appropriate to prevent recidivism. Finally, that conclusion remains valid even though Smith is now older and purportedly less healthy than he was when he committed his past violations.

CONCLUSION

The district court's judgments should be affirmed.

Respectfully submitted,

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December 23, 2015

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STATUTORY APPENDIX

Section 13(b) of the FTC Act, 15 U.S.C. § 43(b), provides:

> Whenever the Commission has reason to believe
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

The Telemarketing Sales Rule provides, at 16 C.F.R. § 310.3:

> Assisting and facilitating. 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 §§ 3.10.3(a) or (c), or § 3.10.4 of this Rule.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7), in that it contains 8,139 words.

December 23, 2015

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CERTIFICATE OF SERVICE

I certify that on December 23, 2015 I served the foregoing on the following counsel of record for appellants using the Court's electronic case filing system. All counsel of record are registered ECF filers.

Mark S. Guralnick, Esq., counsel of record for appellants in No. 15-11500

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