No. 16-17727

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC,
Defendant-Appellant.

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

BRIEF OF THE FEDERAL TRADE COMMISSION

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Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Pursuant to 11th Cir. R. 26.1-2, Plaintiff-appellee Federal Trade Commission certifies that the following persons or entities are known to have an interest in the outcome of this appeal:

Advanced Cyber Security Systems, LLC, Affiliate of Universal

ADR Partners LLC, Affiliate of UPS

Andreoli, Michael, Attorney for defendant Hal E. Smith

Atleson, Michael, FTC Attorney

Automated Merchant Services, Inc., Affiliate of Universal

Banc-Serv Acquisitions, Inc., Affiliate of Universal

Brill, Julie, Former FTC Commissioner

Business Connect, LLC, Affiliate of Universal

Callais, Amanda, Former attorney for Universal

CCC Real Estate Holding Co., LLC, Affiliate of Universal

CDS Business Services, Inc., Affiliate of Universal

Conway, Hon. Anne C., U.S. District Judge

Cove, Andrew N., Attorney for defendant Hal E. Smith

Crystal Tech Web Hosting, Inc., Affiliate of Universal

de Banate, Fil, FTC Attorney

Exponential Business Development Company, Inc., Affiliate of Universal

Exponential Business Development Company, L.P., Affiliate of Universal

Exponential of New York, LLC, Affiliate of Universal

Federal Trade Commission, Appellee

First BankCard Alliance of Alabama, LLC, Affiliate of Universal

Furbush, Michael J., Attorney for Universal

Fortress Data Management, LLC, Affiliate of Universal

Gregory, J. Kelly, U.S. Magistrate Judge

Guralnick, Mark S., Attorney for defendant Hal E. Smith

Hegedus, Mark, FTC Attorney

HES Merchant Services Co., Inc., defendant

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Kruly, Charles, Attorney for Universal

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McSweeny, Terrell, FTC Commissioner

Metzler, Theodore (Jack), FTC Attorney

Milgrom, Michael, former FTC Attorney

Newtek Asset Backed Securities, LLC, Affiliate of Universal

Newtek Business Services Holdco 1, Inc., Affiliate of Universal

Newtek Business Services, Corp., Ticker symbol: NEWT; 100% owner of Defendant-Appellant Universal Processing Services of Wisconsin

Newtek Insurance Agency, LLC, Affiliate of Universal

Newtek Small Business Finance, LLC, Affiliate of Universal

Nuechterlein, Jonathan E., Former FTC General Counsel

Ohlhausen, Maureen K., FTC Acting Chairman

Panek, Christopher D., FTC Attorney

PMTWorks Payroll, LLC, Affiliate of Universal

Premier Payments LLC, Affiliate of Universal

Ramirez, Edith, Former FTC Chairwoman

Rosenberg, Mark L., former Attorney for Universal

Secure CyberGateway Services, LLC, Affiliate of Universal

Shonka, David C., FTC Acting General Counsel

Small Business Lending, LLC, Affiliate of Universal

Smith, Hal E., defendant

Solar Processing Solutions, LLC, Affiliate of Universal

Steiger, Jon M., FTC East Central Region Director

Summit Systems & Design LLC, Affiliate of Universal

The Texas Whitestone Group, LLC, Affiliate of Universal

The Whitestone Group, LLC, Affiliate of Universal

Titanium Asset Management, LLC - Affiliate of Universal

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Wiener, Lewis, Attorney for Universal

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Wilshire Colorado Partners, LLC, Affiliate of Universal

Wilshire DC Partners, LLC, Affiliate of Universal

Wilshire Holdings I, Inc., Affiliate of Universal

Wilshire Holdings II, Inc., Affiliate of Universal

Wilshire Louisiana Bidco, LLC, Affiliate of Universal

Wilshire Louisiana Capital Management Fund, LLC, Affiliate of Universal

Wilshire Louisiana Partners II, LLC, Affiliate of Universal

Wilshire Louisiana Partners III, LLC, Affiliate of Universal

Wilshire Louisiana Partners IV, LLC, Affiliate of Universal

Wilshire New York Advisers II, LLC, Affiliate of Universal

Wilshire New York Partners III, LLC, Affiliate of Universal

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Wright, Joshua D., Former FTC Commissioner

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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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QUESTION PRESENTED

The Telemarketing Sales Rule makes it illegal for a person "to provide substantial assistance or support" to a telemarketer violating the Rule if he "knows or consciously avoids knowing" of the illegal conduct. 16 C.F.R. § 310.3. The district court held that Universal Processing Services violated the Rule by providing credit card services that were critical to the operations of a fraudulent telemarketing operation while ignoring obvious signs of the fraud. On the basis of that violation, the court held Universal jointly and severally liable with the other defendants and ordered Universal to disgorge the full amount stolen from consumers (deducting charges already repaid to them).

The question presented is whether the district court abused its discretion in awarding that relief.

INTRODUCTION

Universal Processing Services helped the perpetrators of an illegal telemarketing scheme called Treasure Your Success steal $2.6 million from defrauded consumers. Universal gave the scheme access to the credit card system and processed its illegal charges in the face of numerous red flags warning that Treasure Your Success was a fraud—the principals' credit reports, for example, *literally* warned "high risk of fraud"—but rather than heeding those warnings, Universal bypassed its ordinary risk assessment process and had its President personally approve the accounts. Ignoring yet more warning signs, Universal later opened a second merchant account to process even more payments.

The district court found that Universal violated the Telemarketing Sales Rule by substantially assisting the Treasure Your Success scheme while knowing (or consciously avoiding knowledge) of its illegal conduct. The court held Universal jointly and severally liable with the others who participated in the fraud for the net amount of the illegal payments it took from consumers.

Universal does not deny that it violated the Telemarketing Sales Rule by assisting and facilitating the fraud. Universal appeals only the amount of the monetary relief it was ordered to pay, arguing that the district court improperly held it jointly and severally liable with other defendants because it was not part of a "common enterprise" with them.

The district court reasonably exercised its discretion in ordering the remedy in this case. Universal violated the law in its own right. Because it acted in concert with Treasure Your Success to cause a single, indivisible harm to consumers, Universal is properly liable for the entire harm under standard legal principles. Joint and several liability does not, as Universal contends, make it liable for the conduct of others. Universal is liable only for *its own* violation of the law, but because the consequences of its illegal conduct cannot be separated from that of the other actors', Universal must repay all of the money that it helped take from consumers. That Universal's liability is "joint and several" simply means that the other defendants are also liable for the same amount.

STATEMENT OF THE CASE

The economy runs on credit cards. American consumers rely more on credit cards as their primary means of payment for goods and services than any other method. In 2015, U.S. consumers made over 103 billion credit and debit card purchases totaling nearly $6 trillion—almost one third of the country's gross domestic product.[1] Such sums make the credit card system not just vital to our economy but

[1] Federal Reserve, *2016 Payments Study* 5 (Dec. 2016), www.federalreserve.gov/newsevents/press/other/2016-payments-study-20161222.pdf; World Bank, *World Development Indicators database*, *Gross Domestic Product* 1 (Feb. 2017), databank.worldbank.org/data/download/GDP.pdf.

also an attractive target for fraud: $3.5 billion worth in 2010.[2] Recognizing that the ability to accept credit cards can make fraudulent businesses appear legitimate, Congress and the FTC have worked to restrict access to the credit card system to legitimate businesses and prevent access by those engaged in telemarketing fraud. *See* S. Rep. 103-80 at 10 (June 29, 1993); 60 Fed. Reg. 43842, 43853 (Aug. 23, 1995).

Fraudulent telemarketers' access to the credit card system is at the heart of this case. Appellant Universal Processing Services is one of the gatekeepers to the system.[3] It has the ability to grant or deny credit card access to businesses through its decisions to open, or decline to open, "merchant accounts"—the means by which businesses become able to accept credit cards. Fraudulent telemarketers ordinarily cannot legitimately obtain merchant accounts, but Universal had established a back-door process to approve merchant accounts for a line of shady but highly lucrative operations.

One of those businesses was a fraudulent telemarketing scheme known as Treasure Your Success. It was obvious from Treasure Your Success's merchant

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[2] Philadelphia Fed, *The Efficiency and Integrity of Payment Card Systems: Industry Views on the Risks Posed by Data Breaches* 9 (Oct. 2012), www.philadelphiafed.org/-/media/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2012/D-2012-Efficiency-and-Integrity-of-Payment-Card-Systems.pdf.

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

account application that the company would be fraudulent, but that was no obstacle under Universal's back-channel process. Universal opened a merchant account and then handled a flood of illegal credit card charges for the company—$2.5 million worth in 8 months—all the while ignoring ongoing signs that those charges were fraudulent. Universal even opened a second merchant account to help the business expand. Universal's conduct violated the Telemarketing Sales Rule, 16 C.F.R. § 310.3, by providing substantial assistance to Treasure Your Success while knowing or intentionally avoiding knowledge that the operation was engaged in telemarketing fraud.

A. A Brief Introduction To Processors And Merchant Accounts

A business can establish a merchant account either directly with an "acquiring bank" that is a member of a credit card network (like MasterCard or Visa), or with an intermediary company that has contracted with an acquiring bank to sell credit card processing services. App. Vol. 4 at JA-683; 60 Fed. Reg. 43842, 43852 (Aug. 23, 1995).

These intermediary companies, called "processors," effect credit card transactions between their merchant customers and an acquiring bank. *Id.* When a processor receives a credit card transaction from one of its merchants, it submits the transaction to the acquiring bank for authorization and payment. Once the transaction is authorized, the acquiring bank credits the payment to the processor's account.

The processor then keeps a percentage of the payment for itself, may direct part of it to a reserve account (used, for riskier merchants, to refund consumer challenges to credit card charges, known as "chargebacks"), and credits the rest to the merchant's account. The percentage that a processor keeps depends on the "discount rate" that it negotiates with the merchant. On average, retail businesses where the consumer presents the card in person pay a discount rate of about 1.95 to 2 percent. Businesses that accept cards from consumers who are not personally present (like online or telephone sales), have an average discount rate of 2.30 to 2.50 percent.

Just as consumers have no "right" to a credit card, businesses have no right to a merchant account. Rather, they must apply for an account from an acquiring bank or a credit card processor, and just as a bank wants to know that a consumer is a good credit risk before extending credit, processors typically want to know the same about a business before they will open a merchant account; indeed, the credit card networks require it. Businesses complete an account application which processors subject to vigorous underwriting. The application typically includes detailed information about the applicant's products and services, copies of its organizational papers, credit reports on the business and its principals, and an estimate of the volume of credit card business (number and size of transactions) that the merchant expects to handle. The underwriting process assesses the risk, guards against fraud, ensures that the applicant is a legitimate and creditworthy business, and determines whether the processor will require a reserve account as a hedge against refunded payments. App. Vol. 1 at JA-119, JA-126–32; Vol. 4 at JA-683. Red flags in the underwriting process signal a higher level of risk, which can lead processors to monitor an account for signs of fraud or to deny the application altogether. App. Vol. 4 at JA-683–84.

B. Universal Processing Services

Universal Processing Services is a credit card processor. According to its underwriting standards, Universal applies typical industry underwriting principles to new merchant account applications. *See* App. Vol. 1 at JA-119, JA-126, JA-131–32. At a minimum, Universal's guidelines require that applications be complete and provide both proof that the business exists and credit reports for all persons listed on the application. *Id.* at JA-126. The guidelines distinguish between low- and high-risk applicants and mandate greater documentation requirements for riskier businesses, including in particular those that operate by telephone or the internet. *Id.* at JA-127–31. Some types of businesses, such as "debt consolidation," "credit repair," and telemarketing sales are deemed "unacceptable business types." *Id.* at JA-120, JA-132.

Despite its ostensibly rigorous underwriting standards, Universal did not apply them to its highest-volume and most profitable accounts. Those accounts, like most of Universal's business, came from independent sales agents (rather than in-house sales people). The largest and most profitable accounts came through one particular agent (who is also one of Universal's codefendants in this case): Hal E. Smith, and his company HES Merchant Processing Services. *Id.* at JA-145, JA-149. Over the course of ten years, Smith and HES brought Universal more than 100 accounts, earning the company about $4 to $5 million in total profits. *Id.* at JA-152; App. Vol. 9 at JA-1668.

While ordinary applications were processed through Universal's underwriting and risk department and subject to its credit standards, the Smith/HES accounts were not. Instead, the company's President, Derek DePuydt, bypassed the ordinary process and personally handled those accounts. App. Vol. 1 at JA-120, JA-145. The reason for that special treatment is clear: Smith's accounts would not have passed the ordinary underwriting process. The accounts typically involved phone sales by shady operations offering services such as loan modification, debt reduction, and timeshare-resale advertising—services that are rarely legitimate and would have been deemed unacceptable under Universal's guidelines. *Id.* at JA-120. Universal charged a hefty premium for that special treatment. Rather than the 2.5% discount rate typical for card-not-present businesses, Smith's accounts through Universal carried discount rates up to 15.5 percent. And because the Smith businesses' dubious (and likely fraudulent) services posed a high risk of chargebacks, Universal kept up to 30 percent of every charge in reserve.[4] App. Vol. 1 at JA-145–46; Vol. 4 at JA-693. Universal thus kept as much as 45 cents of every dollar that some Smith accounts charged to consumers' credit cards. *See id.* No legitimate business could afford (or would tolerate) such fees.

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. App. Vol. 1 at JA-118, JA-120, JA-147. Others at Universal shared her concerns. *Id.* at JA-120–21. Olszewski told investigators how (before Smith's accounts bypassed the underwriting department and were underwritten by DePuydt directly) she had on several occasions rejected applications brought in by Smith only to be overruled by DePuydt. *Id.* at JA-120, JA-145; App. Vol. 3 at JA-443. He told her that the income from Smith's accounts "made it worth the risk" and their revenue "was too important to the company." App. Vol. 1 at JA-147; Vol. 9 at JA-1668. DePuydt assured employees that "upper management

[4] Under Universal's service contract with the acquiring banks, it must refund money directly to card holders if the merchant cannot do so. Processors usually require reserves only for new or risky merchants. In such cases, processors typically withhold no more than 5 to 10 percent of transactions, with the funds released on a six-month rolling basis. *See* chargebacks911.com/knowledge-base/what-is-a-merchant-account-reserve/.

knew" about his handling of the Smith accounts. App. Vol. 1 at JA-120–21; Vol. 9 at JA-1668.

C. The Treasure Your Success Merchant Accounts

This case concerns two merchant accounts that Smith brought to Universal for what turned out to be the fraudulent operation known as "Treasure Your Success." Like other Smith accounts, Treasure Your Success's merchant account application would have failed any processor's (including Universal's) ordinary underwriting process. It was rife with signs that the business would be a fraud. *See* App. Vol. 4 at JA-684. The principals of the company had no meaningful income or assets; their credit scores were worse than even the "very high risk" category; and their credit reports showed serious delinquencies, quite literally warning of a "high risk of fraud." *Id.* at JA-685–86; App. Vol. 5 at JA-813, JA-815; Vol. 9 at JA-1668. The application also claimed—without any track record or substantiation—a suspiciously high volume of anticipated sales for a new company: $2.7 million in the first year. App. Vol. 4 at JA-686; Vol. 5 at JA-773. Further, all of these sales were to come from outbound telemarketing, "card-not-present," telephone order transactions, the riskiest type of transaction with the greatest potential for merchant fraud. App. Vol. 4 at JA-686; Vol. 5 at JA-776.

Moreover, the application was incomplete, gave conflicting information, included a tax return for a different company than the applicant, and failed to provide required documentation. App. Vol. 4 at JA-686, JA-688–89. Granting such an application violated Universal's credit policy guidelines. *See* App. Vol. 1 at JA-126–32. Indeed, applying ordinary due diligence or merely asking for Treasure Your Success's telemarketing scripts, a task Universal delegated to Smith, *see* Universal Br. 15, would have made it "readily apparent" to any reviewer that the operation was highly likely to be engaged in the telemarketing of fraudulent debt-relief services.[5] App. Vol. 4 at JA-687.

But Treasure Your Success's application did not pass through Universal's risk department. Instead, it was sent via the special pipeline for Hal Smith accounts directly to Universal's President DePuydt. App. Vol. 9 at JA-1668. And like other Smith accounts, Treasure Your Success promised to be very profitable. In addition to numerous monthly and per-transaction fees, the company agreed to pay Universal a discount rate of 14 to 15.5 percent (over 6 times the industry average). App. Vol. 5 at JA-773. Universal also would keep an additional 15 percent of each

[5] The scripts contain false promises to get consumers "out of debt 3/5 times faster" and promises of guaranteed "minimum savings" or "$2,500 in GUARANTEED SAVINGS." App. Vol. 4 at JA-758. Such promises are specifically prohibited by federal law, 31 C.F.R §§ 310.3(a)(2); 310.4(a)(4). The scripts also contain 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," while its merchant account application clearly stated that Treasure Your Success intended to collect its entire fee up front. *Compare* App. Vol. 4 at JA-758, JA-761, JA-763–64 *with* App. Vol. 5 at JA-776. Collecting an up-front fee for debt reduction is also unlawful. 16 C.F.R. § 310.4(a)(5).

transaction in reserve to repay chargebacks, each of which would carry a $35 fee. *Id.* DePuydt approved the application as he did other questionable Smith accounts, and Universal began processing credit card transactions for Treasure Your Success.

Almost immediately, Treasure Your Success began to incur chargebacks at a rate that Universal's own expert witness agreed showed a "very high likelihood of fraud." App. Vol. 5 at JA-831–32; Vol. 4 at JA-693. The FTC's expert likewise concluded that Universal "must have known" that Treasure Your Success "was engaged in merchant fraud." App. Vol. 4 at JA-698. And Treasure Your Success's high chargeback rate could have been no surprise. By the time DePuydt approved the account, Smith's other merchant accounts with Universal were already incurring extremely high chargeback rates. *Id.* at JA-693–94; App. Vol. 1 at JA-145. An average chargeback rate for internet businesses is about two chargebacks out of a thousand credit card charges (0.2%); for other industries the average is much lower (0.01 to 0.04%). App. Vol. 4 at JA-693–95. MasterCard and Visa have set 1%—one chargeback out of a hundred charges—as the threshold where merchants can be placed in a risk monitoring and compliance program. *Id.* at JA-694–95; App. Vol. 1 at JA-119. 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. App. Vol. 4 at JA-690. At those levels, it was apparent that when DePuydt approved the Treasure

Your Success application, most of Smith's accounts were *already* engaged in fraud. *Id.* at JA-690–91.

Although from its first month Treasure Your Success generated chargeback activity at levels indicating fraud, and although it continued to do so every month after that, five months later Universal opened a second account. By then, DePuydt himself noted that Treasure Your Success was "already on MasterCard's radar" for fraud. App. Vol. 9 at JA-1668. The application for Treasure Your Success 2 gave no reason to doubt that the company was engaged in fraud; it had nearly all the same warning signs as the first application. App. Vol. 4 at JA-696–98; Vol. 5 at JA-833–56. But it also promised to be even more profitable for Universal, with both a higher discount rate (up to 16.5%) and higher reserves (18%) than the first merchant account. App. Vol. 5 at JA-834, JA-839. Again, the application bypassed the ordinary underwriting process and instead was fast-tracked through the presidential approval process reserved for Smith's accounts. Soon after, Universal increased its reserve withholding for both accounts to 20%. App. Vol. 1 at JA-1020, JA-1021. By the time the accounts were closed, Universal was withholding 42% of Treasure Your Success's charges. App. Vol. 1 at JA-274–75.

Universal eventually shut down the Treasure Your Success accounts—but only when chargebacks from its accounts (and ten other Smith accounts) grew so large that they overwhelmed reserves and the accounts became unprofitable. *Id.* at

JA-137, JA-146. In documents reviewing the mounting chargebacks from Smith's accounts, Universal did not question whether the accounts were legitimate businesses or whether their high chargeback levels were due to fraud. *See id.* at JA-145–51. Universal's primary concern was whether it could hold back enough money from Smith's accounts to cover the chargeback losses. At first Universal thought that the losses "could be met over the course of several years by applying Mr. Smith's monthly residual payments." *Id.* at JA-137, JA-151. The company terminated Smith only after calculating that his residual payments would be insufficient to offset the chargeback payments. *Id.*

In total, Universal processed just under $2.6 million in consumer credit card payments to Treasure Your Success. App. Vol. 8 at JA-1529. Universal itself received that entire amount and kept over $810,000 of it, placing $400,000 in reserve and booking $410,047.38 in gross revenue. *Id.*

D. The Telemarketing Sales Rule

In 1994, Congress passed the Telemarketing Act to help protect consumers from "deceptive and abusive" telemarketing practices, 15 U.S.C. §§ 6101–6109, and it directed the Commission to issue regulations that define and prohibit such practices. *Id.* Congress was concerned not only with the direct perpetrators of abusive telemarketing practices, but also with third parties who assist or facilitate telemarketing fraud. 15 U.S.C. § 6102(a). Acting pursuant to the Act, the Commission promulgated the Telemarketing Sales Rule in 1995, *see* 60 Fed. Reg. 43842 (Aug. 23, 1995), and revised it in 2003, 68 Fed. Reg. 4580 (Jan. 29, 2003).

Congress was particularly concerned that third parties be prohibited from assisting and facilitating telemarketing fraud by giving fraudulent telemarketers access to merchant accounts and the credit card system. As an example of the type of assistance Congress had in mind, the Telemarketing Act cited "credit card laundering"—the practice of using one company's merchant account to process payments to another company. 15 U.S.C. § 6102(a). As the Commission noted in issuing the Telemarketing Sales Rule, "most deceptive telemarketers are unable to establish a merchant account." 60 Fed. Reg. 43842, 43853. "Credit card laundering facilitates deceptive telemarketing . . . by providing telemarketers engaged in fraud with ready access to cash through the credit card system." *Id.*; *see also id.* at 43851 ("Credit card laundering is a pernicious practice because it enables deceptive telemarketers access to the credit card system that they would otherwise be unable to obtain.").

The Telemarketing Sales Rule defines and prohibits a range of deceptive and abusive telemarketing practices. Among other things, the Rule prohibits specific conduct regarding the telemarketing of purported credit card interest-rate-reduction services, 16 C.F.R. §§ 310.2(m), 310.3(a)(2)(x), such as misrepresenting any aspect of the service, *id.* § 310.3(a)(2)(x), and charging up-front fees for the service, *id.*

§ 310.4(a)(5)(i). It likewise prohibits making robocalls without prior written permission, *id.* § 310.4(b)(1)(v)(A), calling consumers who have signed up for the Do Not Call List, *id.* §§ 310.4(b)(1)(iii)(B)(i) and (ii), and calling consumers after they ask not to be called again, *id.* § 310.4(b)(1)(iii)(A).

In addition to prohibiting such practices outright, the Rule also forbids third parties from assisting and facilitating them, stating that "[i]t 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." 16 C.F.R. § 310.3 (the three cited sections define a wide range of prohibited practices). When it defined the assisting and facilitating violation, the Commission drew upon Section 876(b) of the Restatement of Torts, which imposes liability on a defendant for the harm caused by another defendant's tortious conduct if the former knows the conduct is "a breach of duty and gives substantial assistance or encouragement to the other." Restatement 2d of Torts § 876(b). The Telemarketing Sales Rule follows the same principle; knowingly providing substantial assistance to another's wrongdoing renders the enabler liable for the full consequences of the wrongdoing. *See* 60 Fed. Reg. 43842, 43851–52 (concluding that "conscious avoidance" is the correct standard "where a person's liability to pay redress or civil penalties for a violation of this Rule depends upon the wrongdoing of another").

E. The Telemarketing Sales Rule Violations Of Treasure Your Success And Universal

Much of the conduct prohibited by the Telemarketing Sales Rule was standard operating procedure for Treasure Your Success. The company contacted consumers with unlawful robocalls in which "Rachel" from "Card Services," instructed them to "press one" to "lower your credit card interest rate." App. Vol. 6 at JA-1037, JA-1106–07. Consumers who did so were connected to telemarketers who, consistent with the operation's script (*see supra* n.5), 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. *Id.* at JA-1007–09, JA-1038–39. When consumers signed up, the company promptly and illegally charged substantial up-front fees to their credit cards, while falsely promising the consumers that it would *not* charge those fees until it obtained results. *Id.* at JA-1007–08, JA-1040. Unsurprisingly, the company never delivered on its promises, which were not even feasible in the first place. *See id.* at JA-1008–09; App. Vol. 4 at JA-678–83.

These practices violated the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.*, in numerous ways. The company's misrepresentations about its so-called credit card interest rate reduction services violated specific Telemarketing Sales Rule provisions for such services, 16 C.F.R. §§ 310.2(m), 310.3(a)(2)(x), and were also deceptive acts or practices under section 5 of the FTC Act, 15 U.S.C. § 45(a). In addition, the charges to consumers' credit cards were illegal because they were unauthorized (an unfair practice under section 5), because the Telemarketing Sales Rule prohibits up-front charges for interest rate reduction services, 16 C.F.R. § 310.4(a)(5)(i), and because the telemarketers lied to consumers about how they would be charged, *id.* § 310.2(a)(2)(x). The robocalls by which Treasure Your Success initiated contact with consumers were likewise illegal in multiple respects. *Id.* § 310.4(b)(1)(i)–(iii), (v); 310.4(b)(1); 310.8; *see* App. Vol. 6 at JA-1008–09; JA-1044.

Of course, Treasure Your Success would not have been able to make any illegal credit card charges or collect any money from its victims without Universal. Universal independently violated the Telemarketing Sales Rule when it provided "substantial assistance or support" to Treasure Your Success while knowing or consciously avoiding knowledge that the operation was violating the Rule. 16 C.F.R. § 310.3(b). Universal's conduct was "substantial assistance" because Treasure Your Success could not have defrauded consumers without it. Universal's merchant accounts also were the specific means by which Treasure Your Success made illegal up-front charges to consumers' credit cards for interest-rate-reduction services. *See id.* § 310.4(a)(5)(i). Universal knew or shut its eyes to the violations because it provided its services despite the obvious signs that Treasure Your Success would be and was engaged in telemarketing fraud.

F. The FTC's Enforcement Action

The FTC initially sued Treasure Your Success, two of its principals, and several related businesses. App. Vol. 1 at JA-36. The FTC charged them with having 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. § 310.1 *et seq.*

During discovery, the Commission learned the identities of other individuals and companies integral to the Treasure Your Success operation, including (among others) Universal, DePuydt, Smith, and HES. The Commission then amended the complaint to add these defendants. App. Vol. 1 at JA-55. The amended complaint charged Universal with providing substantial assistance to Treasure Your Success while knowing or consciously avoiding knowledge of its violations of the Telemarketing Sales Rule. *Id.* at JA-85–86; *see* 16 C.F.R. § 310.3. It also charged Smith and HES with being part of a common enterprise with the other defendants running Treasure Your Success. App. Vol. 1 at JA-64–66.

The FTC subsequently settled with all of the defendants except Universal, Smith, and HES. *See* App. Vol. 1 Tab 112; Vol. 6 Tabs 203, 209, 210. The district court entered stipulated judgments holding each of the settling defendants liable for the net proceeds of Treasure Your Success. *See id.* The judgments were largely suspended because the defendants demonstrated (through financial statements and sworn testimony) an inability to pay; however, the suspension may be lifted if they materially misstated or failed to disclose their assets. *E.g.*, App. Vol. 1 at JA-162–63. The FTC moved for summary judgment against Smith, HES, and Universal. *Id.* Vol. 4 Tab 174.

The district court granted summary judgment for the Commission. App. Vol. 6 Tab 208. After summarizing Treasure Your Success's undisputed violations, the court found Smith (and HES) liable because Smith was intimately involved with and had "effective control" over the operation, and because HES was part of a "common enterprise" with the other corporate defendants (not including Universal). *Id.* at JA-1046, JA-1036–37 n.1.

The court held that Universal independently violated the Telemarketing Sales Rule by assisting and facilitating the Treasure Your Success defendants' violations. *Id.* at JA-1048. Universal's conduct satisfied the "substantial assistance" element of an assisting and facilitating violation because its merchant accounts were "essential to the success of the scheme." *Id.* at JA-1049. "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.*

Universal satisfied the knowledge element of a substantial assistance violation because it "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" whose knowledge therefore could not be imputed to the firm. *Id.* The court rejected this argument because DePuydt was neither "acting entirely in his own interests" nor "entirely in secret." *Id.* at JA-1049–50. Further, Smith's relationship with Universal began *before* DePuydt became President; his accounts were the company's largest and most profitable; and other officers of Universal, including its Chief Operating Officer, knew that the special process for Smith's accounts posed a risk to the company but took no action. *Id.* at JA-1050. The court thus entered summary judgment in favor of the Commission and against Universal. *Id.* at JA-1051.

After further briefing, the district court granted the Commission's motions for an injunction and monetary relief of $1,734,972—the net amount of credit card charges that Universal processed for Treasure Your Success (after deducting refunds made to complaining customers). App. Vol. 9 Tabs 242, 264. The court held that "the undisputed net revenue" of Treasure Your Success was "the proper amount to be disgorged." *Id.* at JA-1593. 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). The court ordered that Universal's liability was joint and several with Smith, HES, and the Treasure Your Success defendants. *Id.* at JA-1594–95.

G. Appeal and Remand

Universal, Smith, and HES appealed to this Court. Universal challenged only the dollar amount of the judgment; it did not challenge either the district court's judgment that it violated the Telemarketing Sales Rule by assisting and facilitating the Treasure Your Success fraud or the district court's injunction. In a per curiam opinion, the Court "affirmed in all respects," except for the district court's monetary award against Universal, which it vacated. App. Vol. 9 at JA-1655, JA-1657. The Court remanded to the district court for findings regarding "whether and why [Universal] is jointly and severally liable for restitution and in what amount." *Id.* at JA-1657.

On remand, the district court recounted its earlier holding (which Universal had not appealed) that Universal had violated the Telemarketing Sales Rule by providing substantial assistance to Treasure Your Success while knowing or consciously avoiding knowledge that the operation was engaged in telemarketing fraud. *Id.* at JA-1665, JA-1670. The court noted that "substantial assistance" must be "more than 'casual or incidental'" but that there need not be a "direct connection between the assistance and the misrepresentation." *Id.* at JA-1670–71.

On that understanding, the district court observed that Universal had provided substantial assistance because its merchant accounts were "essential to the success of the scheme"; without them, Treasure Your Success would have been unable to process credit card payments. *Id.* at JA-1671. The court further recited that through its President, Universal "knew or consciously avoided knowing" that Treasure Your Success was violating the Telemarketing Sales Rule.[6] *Id.*

Turning to the calculation of equitable monetary relief, the court noted that a violation of the Telemarketing Sales Rule "constitutes an unfair or deceptive act or practice . . . in violation of Section 5 of the FTC Act," and that a defendant's unjust enrichment in such cases is measured by the "'net revenue (gross receipts minus refunds)' the defendants received," which in this case was $1,734,972. *Id.* at JA-1672 (quoting *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469–70 (11th Cir. 1996) and *FTC v. Lalonde*, 545 F. App'x 825, 841 (11th Cir. 2013) (citations and brackets omitted)).

[6] Universal accuses the district court of "improperly" concluding that earlier findings of fact are law of the case. Br. 27 n.12. But this Court "affirmed in all respects" other than the vacated monetary award, incorporating "the reasons set out in the district court's several orders," which necessarily include its findings of fact. App. Vol. 9 at JA-1657. Because the law of the case doctrine "applies to issues decided explicitly and by necessary implication," those issues are "binding in all subsequent proceedings in the same case in the trial court or on a later appeal." *Original Brooklyn Water Bagel Co. v. Bersin Bagel Grp., LLC*, 817 F.3d 719, 728 (11th Cir. 2016).

The court rejected Universal's argument that it should be held liable for less than the full amount it processed for Treasure Your Success. The court first observed that finding Universal's liability is joint and several is squarely within its discretion. *Id.* at JA-1673 (collecting cases). Examining the equitable principles that underlie disgorgement in FTC cases, the court observed that the same principles also govern disgorgement in SEC cases and that numerous courts have therefore looked to SEC cases as precedent. *Id.* at JA-1674. Reviewing those authorities, the court held that under the Restatement of Torts (on which the Commission expressly relied when it promulgated the Telemarketing Sales Rule) knowingly providing substantial assistance to another's wrongdoing is a sufficient reason to hold the assister responsible for all of the harm that results from the wrongdoing. *Id.*; Restatement 2d of Torts § 876(b). Moreover, when multiple parties cause the same harm, the default rule is that they are each liable for the full amount of damage unless the harm can be reasonably apportioned. *Id.* at JA-1675. But when there is no reasonable basis to divide responsibility among the wrongdoers, they are each jointly and severally liable for the entire amount. *Id.*

The court then observed that Universal's assistance was essential to all of the illegal charges. *Id.* at JA-1676. The court also invoked principal-agent liability, holding that because Hal Smith was Universal's agent, Universal had the same control over the operation that this Court previously affirmed as sufficient to hold

Smith jointly and severally liable for the full proceeds of Treasure Your Success. *Id.* Accordingly, the court found Universal jointly and severally liable and ordered the company to disgorge $1,734,972 in equitable monetary relief. *Id.*

This appeal followed.

SUMMARY OF THE ARGUMENT

Universal admits that it violated the Telemarketing Sales Rule by helping Treasure Your Success defraud consumers. The only issue on appeal is whether the district court abused its discretion when it ordered Universal to repay the net amount of the fraudulent credit card charges rather than just the profit that Universal itself made on the scheme. There was no abuse of discretion.

The essence of Universal's argument is that by subjecting it to "joint and several liability," the district court improperly held Universal liable for not for its own conduct but for that of the other defendants. In other words, Universal equates joint and several liability with *vicarious* liability. But the two are not the same. Universal was held liable for its own conduct, which independently violated the Telemarketing Sales Rule and caused a single, indivisible harm to consumers. Under settled Eleventh Circuit precedent, Universal thus is properly liable for the net amount that it illegally collected from consumers and it is not entitled to deduct either its payments to other defendants or its cost of doing business. That Universal's liability is "joint and several" simply means that the other defendants are also responsible for the same harm.

1.a. Multiple parties are jointly and severally liable when, acting in concert, they cause a single harm. Each of them is liable not for the others' conduct, but for its own behavior in causing the injury. By contrast, vicarious liability arises when the law attributes one party's misconduct to a second party, as in an agency relationship. Here, Universal violated the law by knowingly enabling Treasure Your Success's fraudulent telemarketing scheme and it was held responsible for the entirety of the injury caused by its own illegal acts.

This case fits hand-in-glove with the longstanding joint-and-several liability principle described in Section 876 of the Second Restatement of Torts. Each defendant's conduct harmed consumers and it is not possible to calculate their respective shares of the harm. In other words, the defendants "acted in concert" to create a single harm. Restatement 2d of Torts § 876. One way to act in concert is to knowingly give substantial assistance to another's wrongdoing. Indeed, the FTC expressly invoked that that principle when it defined assisting and facilitating as a violation of the Telemarketing Sales Rule.

Universal acted in concert with Treasure Your Success by providing essential credit card processing services to a plainly fraudulent scheme. There is no rational way to separate Universal's contribution to the harm from the other defendants' shares. Without Universal, the other defendants could not have defrauded consumers; and without the other defendants, there would have been no fraud. Together, they all caused the same harm. Universal is wrong that harm can be apportioned by who kept what part of the proceeds of the scheme; apportionment is appropriate when the share of *harm* can be divided, not the share of the *proceeds*.

b. The district court properly ordered Universal to disgorge its net revenue. There is no dispute that Universal itself received over $2.5 million in illegal credit card charges from Treasure Your Success. Of that amount, $800,000 was deducted to account for refunds, leaving $1.7 million in illegal charges. Universal is not entitled to additional subtractions for payments to Treasure Your Success, Smith, and other "costs associated with committing [its] illegal acts." *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) .

c. Universal's argument that joint and several liability is appropriate only when defendants act as a "common enterprise" is wrong. A common enterprise is one example of how defendants can "work in concert" to create a single harm, but it is not the only way to do so. No court has ever held that finding a common enterprise is necessary, as opposed to sufficient in a particular case, to impose joint and several liability.

d. Universal's remaining arguments fail to show that the district court abused its discretion. A finding that defendants "collaborated" is equivalent to a finding that they worked in concert to cause a single harm. Like a common enterprise—or a finding that one defendant knowingly provided substantial assistance to the other—such a finding is sufficient, but not necessary, for joint and several liability. Nor is there any requirement that a defendant receive a "substantial benefit" to be held jointly and severally liable; this Court has held the opposite. Universal's argument that joint and several liability is not necessary to deter it from further violations is likewise unpersuasive; it still fails to own up to its own misconduct. Moreover, the need for deterrence is a matter squarely within the district court's discretion.

2. There is no basis to remand this case. Universal claims that it lacked notice that the district court could impose joint and several liability, a remedy it agrees is available for violations of the FTC Act, to a violation of the Telemarketing Sales Rule. But a violation of the Rule *is* a violation of the Act. In the Telemarketing Act, Congress directed the FTC to define telemarketing practices that violate Section 5(a) of the FTC Act, which is what the Telemarketing Sales Rule does. Conduct that violates the Rule thus also violates the FTC Act.

STANDARD OF REVIEW

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). 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).

ARGUMENT

Universal does not dispute that it violated the Telemarketing Sales Rule. The only issue before this Court is whether the district court chose an appropriate amount of equitable monetary relief, and Universal's sole challenge to the judgment is that the court improperly applied joint and several liability that made Universal liable for more than what it claims was its "unjust enrichment."

Universal makes this argument in two variations: first, that joint and several liability is a form of vicarious liability that can be imposed under the FTC Act only on a person who is part of a "common enterprise"; and second, that the district court improperly ordered Universal to pay more than its purported "unjust enrichment" because the proceeds of the Treasure Your Success scheme can be "apportioned" by dividing it according to how Universal itself distributed the illegal credit card charges it collected for the scheme.

Both claims suffer from a fundamental misunderstanding of joint and several liability and unjust enrichment. Under long-established law, the district court properly found that the defendants' liability was joint and several because Universal's admittedly illegal conduct, combined with that of the other defendants, caused a single, indivisible harm to consumers with no reasonable basis to divide the causation of the harm according to each defendant's share of it. As a result, Universal need not have been part of a common enterprise for its liability to be joint and several with its codefendants. Nor is its unjust enrichment limited to the amount it retained after paying other defendants and its own business expenses. Under the law, Universal's knowing contribution to the illegal activities that harmed consumers renders it liable to disgorge the full amount that it helped to take from them.

I. THE DISTRICT COURT PROPERLY HELD UNIVERSAL JOINTLY AND SEVERALLY LIABLE.

A. Joint and Several Liability Is Not Vicarious Liability.

The central theme of Universal's brief, beginning with the first sentence of the summary of the argument and continuing throughout, is that by holding Universal jointly and severally liable, the district court improperly held it "liable for the misconduct of the [other] defendants in this case." Br. 28. Universal contends that joint and several liability is a form of *vicarious* liability that the court could impose only if Universal was part of a common enterprise (a finding the court did not make). *E.g.*, Br. 27, 28, 33–36.

But joint and several liability is not vicarious liability. The essence of joint and several liability is that "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." Restatement 2d of Torts § 875. Parties are held jointly and severally liable "not because [one] is responsible for the act of the other,"—*i.e.*, vicariously—"but because his own act is regarded in law as a cause of the injury." *Mazankowski v. Harders*, 293 N.W.2d 869, 871 (Nev. 1980).[7] The "universal common-law rule" in such cases is that "each may, therefore, be sued separately and held liable for all of the damage." *MacMillan Bloedel, Ltd. v. Flintkote Co.*, 760 F.2d 580, 584–85 (5th Cir. 1985). The FTC could have sued Universal alone and been entitled to the same judgment against it.

By contrast, vicarious liability is where one defendant's conduct is attributed to another who has not acted unlawfully. *See* Restatement 2d of Torts § 875 cmt. a. For example, a principal is vicariously liable for the acts of its agent even though the principal himself did not directly cause the harm. The agent's actions are attributed to the principal, and both are liable. *See* Restatement 2d of Agency §§ 219, 249. Although the practical result is the same—both are liable for the entire harm—the rationale is fundamentally different. Vicarious liability leads to joint and several liability; but joint and several liability is not vicarious liability.

Here, the district court held Universal liable for its own conduct, which was a discrete violation of the law, not for the conduct of others, and it ordered Universal to pay the full amount that it helped take from consumers. That judgment was a proper exercise of the court's discretion. Whether multiple defendants' liability is

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[7] *See also*, *e.g.*, J.H. Wigmore, *Joint Tortfeasors and Severance of Damages*, 17 Ill. L. Rev. 458 (1923); William L. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 429 (1937); Restatement 2d of Torts § 875.

joint and several turns on (1) whether each one's conduct is a "legal cause" of the harm and (2) whether their respective shares of the harm can be reasonably determined. Restatement 2d of Torts § 875; *Azure v. Billings*, 596 P.2d 460, 469–70 (Mont. 1979) ("The true distinction between actions of multiple tortfeasors which result in imposition of joint liability and those which do not is between injuries which are divisible and those which are not divisible."). Universal met both requirements.

1. Universal acted in concert with the other defendants.

With respect to the first prong, multiple parties can be the legal cause of a single injury when they "act in concert," when they breach a "common duty" to prevent harm, or when they cause a single harm "which neither would have caused alone." Prosser, *supra* n.7 at 429–36; Restatement 2d of Torts §§ 875, 876, 878. Defendants "act in concert" when one of them "knows that the other's conduct constitutes a breach of duty and gives *substantial assistance*" to the other. Restatement 2d of Torts § 876(b) (emphasis added).[8] There is no dispute that Universal knew (or consciously avoided knowing) that Treasure Your Success was an unlawful business defrauding consumers, yet it still provided service that was essential to

[8] Section 876 of the Restatement is particularly relevant here because the Commission drew a direct analogy with tort liability for knowingly providing substantial assistance when it defined assisting and facilitating telemarketing fraud as a prohibited telemarketing practice that independently violates the Telemarketing Sales Rule. *See* 60 Fed. Reg. 43842, 43851 & n.96.

carrying out the scheme and that resulted in a single harm to consumers. *See supra* pp. 6–13. It opened not just one, but two merchant accounts for Treasure Your Success, and it created a special process for Hal Smith's accounts to evade ordinary fraud controls. Universal does not dispute that it acted in concert with Treasure Your Success, and such a contention would fail on the record.

2. Universal's conduct caused a single harm that cannot be apportioned.

Universal also meets the second requirement for joint and several liability because the cause of the harm inflicted on consumers cannot be apportioned among the defendants. Apportionment is appropriate when the harm each defendant caused is "distinct" or "there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement 2d of Torts § 433A(1)(a) & (b). It is the defendant's burden to show a reasonable basis for apportionment. *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997). Where "there is any doubt at all as to how much each caused," a court should "take the burden of proof off the innocent sufferer; make any one of them pay for the whole, and then let them do their own figuring among themselves as to what is the share of blame for each." Wigmore, *supra* n.7 at 458.

Here, Universal and the other defendants caused an "indivisible harm" for which "a fair allocation of liability cannot be made" among them. Restatement 2d of Torts § 875 cmt. b; *Project Hope v. Neptune Orient Lines, Ltd.*, 250 F.3d 67, 76

(2d Cir. 2001). Treasure Your Success could not have carried out its scheme without access to credit card processing services provided by Universal. Without Universal, there could have been no harm at all. There is no meaningful or rational way to determine what proportion of the harm was caused by Universal versus other defendants; Universal's merchant accounts and processing services were as essential to harm as Treasure Your Success's telemarketing violations and its deceptive pitch. In such situations, where multiple parties cause a single harm "which neither would have caused alone," they each are responsible for the full amount of the harm. Prosser, *supra* n.7 at 432.

Universal's contrary argument (Br. 42–44) rests on an incorrect understanding of apportionment. Universal argues that liability can apportioned based on "the amount [of money it] retained." Br. 43. But allocation is appropriate when the defendants' respective contribution to the cause of *harm* can be allocated—not their shares of the *proceeds*. *United States v. Alcon Alum. Corp.*, 964 F.2d 252, 268–69 (2d Cir. 1992). Under traditional principles, harm can be apportioned among more than one defendant only when each one caused a "distinct" harm or "there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement 2d of Torts § 433A(1)(a) & (b).

Thus, apportionment might be appropriate here if Universal had processed only some of Treasure Your Success's illegal charges and another company had processed the rest. In that case, Universal could argue that there was a reasonable basis to apportion the Treasure Your Success harm by the amount each processor handled, or that the harm each caused was distinct. But there was no other processor here. And the Restatement makes clear that without distinct harms or a basis to divide responsibility "damages for . . . harm cannot be apportioned." Restatement 2d of Torts § 433A(2). The amount Universal or the other defendants ultimately retained from their illegal conduct does not justify apportionment.[9]

B. The District Court Properly Ordered That Universal Disgorge The Net Proceeds From Treasure Your Success.

Under the principles above, Universal was properly held jointly and severally liable for the full amount of the harm that it helped Treasure Your Success inflict on consumers. Although Universal argues that it can only be held liable for its own profits, the district court had discretion to order disgorgement of the net revenue of the entire Treasure Your Success scam without regard to which defendant ultimately received the proceeds. Universal's attempt to draw a distinction

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[9] Universal's reliance on *FTC v. Chapman*, 714 F.3d 1211 (10th Cir. 2013), is misplaced. Universal claims that *Chapman* is factually similar and that the court elected not to "impose joint and several liability." Br. 43–44 & nn.16–17. But the FTC did not seek joint and several liability against Chapman. *See FTC v. Affiliate Strategies, Inc.*, 2011 U.S. Dist. LEXIS 105072, at *38-*39 (D. Kan. Sept. 16, 2011) (granting FTC request "to award damages in the amount of the gross revenue collected by Chapman in the course of assisting and facilitating the [other] Defendants").

between the consumers' losses and its unjust gains fails because the two amounts are the same here.

It has long been a rule of equity that a person liable for illegal conduct must disgorge not only the amount he personally received but also the amount received by "those who were associated with him in the matter." *Jackson v. Smith*, 254 U.S. 586, 589 (1921). Those who "knowingly join" in the illegal conduct "likewise become jointly and severally liable." *Id.*; *see also Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 414 (1944) (receiver must disgorge "any profits that might have resulted from a breach . . . including the profits of others who knowingly joined him in an illegal course of action").

These principles apply equally to government law-enforcement cases like this one. A district court has discretion to order that each defendant disgorge the "combined profits" of them all, and it may order that their liability is joint and several. *E.g.*, *SEC v. AbsoluteFuture.com*, 393 F.3d 94, 97 (2d Cir. 2004). Courts in FTC enforcement actions (and other federal law enforcement actions) thus regularly hold defendants jointly and severally liable for the amounts they collectively obtain from defrauded consumers. *E.g.*, *Washington Data Res.*, 704 F.3d at 1325; *FTC v. Gem Merchandising 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).

In FTC cases, the "correct measure of unjust gains" is "the amount of net revenue (gross receipts minus refunds) rather than the amount of profit (net revenue minus expenses)." *Washington Data Res.*, 704 F.3d at 1327. As this court has held, "defendants in a disgorgement action are *not* entitled to deduct costs associated with committing their illegal acts." *Id.* at 1326 (emphasis added) (quoting *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011)).

The district court therefore properly exercised its discretion both when it ordered disgorgement equal to the "net revenue (gross receipts minus refunds)" of Treasure Your Success, and when it required Universal to disgorge the amount that it and the other defendants received collectively. *Id.* at 1327; App. Vol. 9 at JA-1672–73.

Moreover, contrary to its repeated assertions that it was unjustly enriched only by how much it "retained" (which it claims is about $7000, *see, e.g.*, Br. 42, 43, 49, 50, 51), that figure improperly subtracts Universal's own expenses and what it purportedly paid to other defendants. *See* Br. 17; App. Vol. 8 at JA-1529. But it is undisputed that Universal itself received and controlled *all* of the fraudulent Treasure Your Success credit card charges, which it partly distributed to other defendants. *See id.* Other than refunds to consumers, all of Universal's subsequent payments were simply "costs associated with committing [Universal's] illegal acts," and Universal is not entitled to deduct them from its unjust enrichment. *Washington Data Res.*, 704 F.3d at 1326.

For the same reason, Universal's argument (Br. 42-52) that the district court's order was improperly based on "consumer loss" is unavailing. While the Court has held defendants' unjust gain is the proper measure of unjust enrichment, where, as here, payments go directly from the consumer to the defendant, "the defendant's gain will be equal to the consumer's loss." *Id.*

Universal nevertheless contends that consumer loss was *not* equal to unjust enrichment here because Universal "retained only a small portion of consumer's payments in exchange for its legitimate services," whereas the "vast majority of the funds collected from consumers were remitted to" the other defendants. [10] Br. 49. It relies on *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 68 (2d Cir. 2006), to support that claim. As described above, however, Universal's payments to its codefendants do not reduce its unjust enrichment.[11] *Washington Data Res.*, 704 F.3d at 1326. *Verity* requires no different result, as the Second Circuit clarified: "[t]he only limitation

[10] While providing merchant accounts and processing credit card payments may generally be a "legitimate service," what Universal provided in this case does not fit that description. Universal's "service" to Treasure Your Success included knowingly providing substantial assistance to a fraudulent telemarketing operation in violation of the Telemarketing Sales Rule.

[11] Universal's claim that *Verity* requires that the Court always distinguish funds paid to a "middleman" (Br. 49) gives it no help here because the middleman in *Verity*, unlike Universal, was innocent and did not assist and facilitate the fraud. *See IAB Mktg. Assocs.*, 746 F.3d at 1234; *Bronson Partners*, 654 F.3d at 374.

that *Verity* placed on the district court's remedial authority was the requirement that any monetary award be limited to funds that actually were paid to the defendants." *Bronson Partners*, 654 F.3d at 374. There is no dispute that *all* of the funds here were paid to Universal; that Universal then "remitted" part to others is of no moment.

C. Joint And Several Liability Does Not Require A Common Enterprise.

The foregoing discussion shows that Universal is wrong to posit that joint and several liability can be imposed only when a defendant acts as part of a "common enterprise."[12] Br. 33-36. In fact, no court has ever held a common enterprise to be necessary for joint and several liability; it is but one scenario in which multiple defendants can cause a single harm.

The very cases Universal cites to buttress its claim that "many courts" have found joint and several liability appropriate "only where the facts show a common enterprise or a maze of integrated business entities," Br. 33 (citations omitted), simply do not support that proposition. Those cases involved common enterprises but not one of them held that a common enterprise is necessary—rather than suffic-

[12] Courts typically find that defendants operate as a common enterprise when the corporate entities ignore corporate formalities and share overlapping officers, employees, office space, and resources. *See, e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 637 (6th Cir. 2014). The existence of a common enterprise permits the court to disregard the ostensibly separate corporate identities. *Id.*, *FTC v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1271 (M.D. Fla. 2012). Here, the district court held that several corporate entities—but not Universal—ran the Treasure Your Success credit reduction scheme as a common enterprise.

ient in that particular case—to find that defendants' liability is joint and several. *See, e.g.*, *FTC v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1271 (M.D. Fla. 2012); *E.M.A.*, 767 F.3d at 636–37. Indeed, several cases that Universal claims "suppor[t] the legal theory that only common enterprise defendants should be found jointly and severally liable" did not involve common enterprises at all, as Universal's own description of them shows. Br. 35–36 (citing *FTC v. Windward Marketing, Inc.*, 1997 WL 33642380 (N.D. Ga. Sept. 30 1997) (unpublished) and *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247 (S.D. Fla. 2007)).[13]

That a common enterprise is sufficient but not necessary for joint and several liability flows directly from the principles set forth above. Members of a common enterprise "act in concert" to cause a single harm. *See* Restatement 2d of Torts § 876(a). But so do many other joint wrongdoers (such as a company that supplies essential services to a known fraud scheme). Yet Universal offers no reason why common enterprise defendants should be jointly and severally liable while others who also act in concert to cause a single harm in different ways should not be. Nor does Universal explain how courts would apportion liability in the many non-

[13] Universal discusses two district court decisions, *Windward Marketing* and *FTC v. Global Marketing Group*, 594 F. Supp. 2d 1281 (M.D. Fla. 2008), which it says are factually distinguishable from this case. Br. 52–53. Even if they were, it would not show that this district court's order was an abuse of discretion. In fact, both cases involved defendants that knowingly provided assistance similar to Universal's and in both cases they were held jointly and severally liable.

common-enterprise cases in which multiple defendants cause a single harm for which there is no reasonable basis for apportionment. At bottom, a common-enterprise test for joint and several liability cannot be squared with the long-settled principle, reflected in countless cases, that joint wrongdoers who cause a single harm are each liable for the entire harm.

That is why courts regularly hold defendants' jointly and severally liable in the absence of a common enterprise. Some of those circumstances include parties who "join together to evade a judgment," *FTC v. Leshin*, 618 F.3d 1221, 1236–37 (11th Cir. 2010), and individuals who know of corporate violations and participate in or have the authority to control them, *IAB Mktg. Assocs.*, 746 F.3d at 1228. The same is true in other federal law enforcement contexts; for example, schemes to violate the Securities Act. *E.g.*, *SEC v. Whittemore*, 659 F.3d 1, 10 (D.C. Cir. 2011); *Hughes Capital*, 124 F.3d at 455.[14]

D. Universal's Remaining Arguments Against Joint And Several Liability Are Incorrect.

In tension with its principal argument, Universal recognizes that courts have imposed joint and several liability even *without* a common enterprise, but argues that the facts of those cases are different from those here. Br. 36–42. Its arguments

[14] Universal argues that "aiding and abetting" SEC cases are inapposite because knowingly providing substantial assistance to Telemarketing Sales Rule violations does not rise to the level of "knowingly and substantially assisting" securities fraud violations. Br. 37–38. The failure of that distinction speaks for itself.

all fail because none of them grapples with the actual reasons that defendants' liability is held to be joint and several. *See supra* part I.A.

Universal's argument (Br. 36–37, 39) that joint and several liability "is only appropriate when the defendant collaborated in the prohibited conduct" fails for the same reason as its common-enterprise theory: collaboration is just another way that defendants can "work in concert" to cause a single harm. Universal fails to explain why collaborating defendants should be jointly and severally liable whereas defendants who cause a single harm in other ways (such as when one knowingly offers substantial assistance to another) should not.

Universal argues further that a defendant must "substantially benefit" from the scheme to face joint and several liability. Br. 39–40. But this Court has rejected that very claim, holding instead that "a personal financial benefit is not a prerequisite for joint and several liability." *SEC v. Monterosso*, 756 F.3d 1326, 1337–38 (11th Cir. 2014). As we have explained, the relevant factors for joint and several liability are present here: Universal and the other defendants caused a single harm that is incapable of reasonable apportionment. Moreover, Universal's denial that it obtained any substantial benefit ignores that the company made millions by approving merchant accounts and processing payments for shady businesses through Hal Smith and that Universal gave the Treasure Your Success accounts special treatment precisely because it expected that benefit to continue.

Universal next accuses the district court of applying a "but for" standard under which innocent third-party vendors such as an employment agency, a landlord, or an internet service provider could be held liable for assisting and facilitating a fraudulent telemarketing operation. Br. 40–41. Untrue. Third parties are liable under the Telemarketing Sales Rule only if they *both* provide substantial assistance to fraudulent telemarketing *and* do so while knowing or consciously avoiding knowledge of the fraud. 16 C.F.R. § 310.3. Landlords and public utilities could not be liable unless they knew that they were providing substantial services to someone engaged in fraudulent telemarketing. By contrast, Universal is not an innocent party because it provided its services to a company it knew (or consciously avoided knowing) was engaged in an illegal activity.

Finally, Universal argues that joint and several liability is inappropriate here because it "took corrective action before the FTC got involved." Br. 41–42. Even if after-the-fact remedial measures could have affected the district court's exercise of discretion, they alone cannot prove that the court abused its discretion. In any event, the record reflects less favorably on Universal's conduct than the company suggests. Its largest and most profitable accounts came from Hal Smith, for whom Universal had opened more than a hundred accounts over ten years. App. Vol. 1 at JA-152; Vol. 9 at JA-1668. Many of those accounts were used to process payments from dubious and fraudulent businesses, earning Universal millions of dollars in profits from the inflated fees it was able to charge those businesses as a premium for providing services that would not have been approved by a legitimate underwriter. *Id.* at JA-152, JA-120. Indeed, for Smith's accounts only, Universal bypassed its ordinary underwriting process and set up a special pipeline to its President, who opened merchant accounts that were highly likely to be engaged in fraud. *Id.* at JA-120, JA-145. And when the mounting chargebacks turned into losses for Universal, its first response was not to take action to stop facilitating the fraud, but to ask whether Smith could repay losses through his other fraudulent accounts. *Id.* at JA-137, JA-146. Thus, to the degree that joint and several liability serves in part as a deterrent against future misconduct, Universal's firing of DePuydt does not by itself remove any need for such deterrence or demonstrate that the district court improperly exercised its discretion. *See, e.g.*, *Fox v. Acadia State Bank*, 937 F.2d 1566, 1571 (11th Cir. 1991); *Automatic Liquid Packaging, Inc. v. Dominik*, 909 F.2d 1001, 1006 (7th Cir. 1990).

II. THERE IS NO BASIS FOR REMAND.

Universal asks the court to remand and direct additional briefing because it supposedly violated only the Telemarketing Sales Rule and not the FTC Act and thus did not have notice that it could be subject to FTC Act remedies, "including joint and several liability." Br. 54. According to Universal, the district court made a "novel extension" of joint and several liability from a remedy available for FTC Act violations to violations of the Telemarketing Sales Rule. *Id.*

At the outset, Universal is wrong to describe joint and several liability as a "remedy." The remedy in this case was injunctive relief under Section 13(b) of the FTC Act and an order that Universal disgorge the amounts it illegally received as a result of its unlawful conduct. As explained in Part I, joint and several liability is a shorthand for describing the liability of defendants who are responsible for the same harm.

Universal is also wrong to claim (Br. 55) that "no FTC Act violation was alleged or proven with respect to [Universal]." In fact, a violation of the Telemarketing Sales Rule *is* a violation of the FTC Act. Under the FTC Act, the Commission is authorized to issue rules that define specific conduct that violates the Act's prohibition on "unfair or deceptive acts or practices." 15 U.S.C. § 57a(1)(B); 15 U.S.C. § 45(a).[15] In the Telemarketing Act, Congress directed the Commission to issue a rule that defines deceptive *telemarketing* practices; that is, a subset of the "unfair or deceptive acts or practices" prohibited by the FTC Act. 15 U.S.C. § 6102(a). The rule that resulted is Telemarketing Sales Rule. *See* 16 C.F.R. § 310.1. Thus, conduct prohibited by the Telemarketing Sales Rule is conduct that

[15] The cited portions of the FTC Act and the Telemarketing Act are reproduced in the statutory appendix to this brief.

violates the FTC Act's prohibition on unfair or deceptive acts or practices. And a violation of the Telemarketing Sales Rule is likewise a violation of the FTC Act.

The statutes provide ample notice that a Telemarketing Sales Rule violation triggers FTC Act remedies. When Congress directed the Commission to promulgate what would become the Telemarketing Sales Rule, it specified that violations of the rule would be "treated as a violation" of a Commission rule promulgated under Section 18 of the FTC Act. 15 U.S.C. § 6102(c). Section 18 authorizes the Commission to define unfair or deceptive acts or practices "within the meaning of" Section 5 of the FTC Act. 15 U.S.C. § 57a(a)(1)(B). If there were any doubt, Congress provided further that: "Any person who violates" a Commission rule under the Telemarketing Act "shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act." 15 U.S.C. § 6105(b).

In other words, Congress first authorized the Commission to define practices that violate the FTC Act and then *directed* the Commission to define such practices specifically for telemarketing. The Telemarketing Act gives notice that Telemarketing Sales Rule violations will subject the violator to remedies under the FTC Act by grounding the Rule in the FTC Act itself and by stating directly that the FTC may enforce the rule under the FTC Act.

In sum, the finding that Universal is jointly and severally liable to disgorge the amount it illegally received from consumers after deducting refunds falls squarely within precedent and the district court's authority. Universal suggests nothing that further proceedings in the district court would accomplish.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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April 17, 2017

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STATUTORY ADDENDUM

Section 5 of the FTC Act, 15 U.S.C. § 45(a), provides:

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

Section 18 of the FTC Act, 15 U.S.C. § 57a , provides:

> (a) Authority of Commission to prescribe rules and general statements of policy.
>
> (1) Except as provided in subsection (h), the Commission may prescribe—
>
> * * *
>
> (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)). * * *. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

The Telemarketing Act provides, at 15 U.S.C. § 6102:

> (a) In general.
>
> (1) The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.
>
> (2) The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.
>
> * * *

> (c) Violations. Any violation of any rule prescribed under subsection (a)—
>
> (1) shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act regarding unfair or deceptive acts or practices

The Telemarketing Act further provides, at 15 U.S.C. § 6105(b):

> Actions by the Commission. The Commission shall prevent any person from violating a rule of the Commission under section 3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) were incorporated into and made a part of this Act. Any person who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) were incorporated into and made a part of this Act.

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

> *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 11,207 words.

April 17, 2017

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CERTIFICATE OF SERVICE

I certify that on April 17, 2017 I served the foregoing on counsel for the appellants using the Court's electronic case filing system. All counsel of record are registered ECF filers.

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