TRACY S. THORLEIFSON
tthorleifson@ftc.gov
MARY T. BENFIELD
mbenfield@ftc.gov
Federal Trade Commission
915 Second Avenue, Suite 2896
Seattle, WA 98174
Phone: (206) 220-6350
Fax: (206) 220-6366

BLAINE T. WELSH
Assistant United States Attorney
333 Las Vegas Blvd, South, Suite 5000
Las Vegas, NV 89101
Phone (702) 388-6336

Attorneys for Plaintiff
Federal Trade Commission

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

INTERBILL, LTD., and THOMAS WELLS, individually and as an officer or director of InterBill,

Defendants.

INTERBILL, LTD., and THOMAS WELLS, individually and as an officer or director of InterBill,

Third-Party Plaintiffs,

v.

WELLS FARGO BANK NATIONAL ASSOCIATION,

Third-Party Defendant.

CV-S-06-01644-JCM-PAL

Plaintiff FTC's Reply to Defendants' Opposition to FTC's Motion for Summary Judgment

I. INTRODUCTION

Comes now plaintiff Federal Trade Commission ("FTC"), by and through the undersigned attorneys, and replies to the defendants' Opposition to Plaintiff's Motion for Summary Judgment. [Doc. No. 26, "Defs' Opp."] Defendants' limited opposition fails to dispute any material fact and provides no legal reason why summary judgment should not enter.

The FTC argues that defendants InterBill, Ltd. ("InterBill"), and Thomas Wells violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), by making unauthorized debits from consumers' checking accounts, while knowing or consciously avoiding knowing that the debits were unauthorized. To prevail on its claim that defendants acted unfairly, the FTC must show that defendants' practices caused substantial injury to consumers, that the injury was not reasonably avoidable by consumers themselves, and not outweighed by countervailing benefits to consumers or to competition. *FTC v. Windward Marketing, Ltd.*, 1997 U.S. Dist. LEXIS 17114, *29-30 (N.D. Ga. Sept. 30, 1997) (summary judgment granted to FTC finding liability for unfair practices where payment processor knew or consciously avoided knowing it was making unauthorized debits).

In their Opposition, defendants do not discuss or dispute the first two prongs of the unfairness test – that their practice of unauthorized debiting 1) causes substantial consumer injury that is 2) not reasonably avoidable by consumers. Their argument essentially focuses on the third prong of the unfairness test, which requires an analysis of the extent to which the injury caused by the unfair practice is outweighed by countervailing benefits to consumers or competition. Defendants rely on the same key piece of evidence cited by the FTC, the transcript of the June 2, 2005 testimony of Thomas Wells, and introduce no other evidence. They assert only that 1) they engaged in reasonable due diligence and 2) they could not have known, based on the high return rates, that the Pharmacycards business was a scam. These facts, according to defendants, raise a material dispute and preclude summary judgment. Defendants' legal analysis misses the point and their incomplete characterization of the evidence does not create a triable issue of fact.

The "reasonableness" of defendants' due diligence is not at issue. Rather, the question is whether defendants' due diligence put them on notice of problems associated with the Pharmacycards business proposal that should have caused them to pause and reconsider. Defendants' unauthorized debiting of some consumers' bank accounts provided no benefits to those consumers or others. As well, their unauthorized debiting of consumers' bank accounts provided no benefit to competition, but rather negatively impacted competition by, among other things, increasing costs to consumers' financial institutions and reducing those consumers' confidence in the integrity of the funds transfer systems. Regardless of the reasonableness of their due diligence, defendants' practice of debiting consumers' accounts while knowing or consciously avoiding knowing that they were processing unauthorized debits was unfair and violates Section 5 of the FTC Act.

Moreover, defendants' narrow focus on whether high return rates alone can demonstrate defendants' knowledge that the Pharmacycards matter was a scam ignores the substantial additional evidence of defendants' knowledge discussed at length by the FTC. This evidence includes, for example, the proposed negative option business model (whereby consumers would be charged unless they demanded not to be), the early consumer complaints about unauthorized debiting that defendants received, the lack of indicia of a legitimate business, and the tone and tenor of Wells' email correspondence with Pharmacycards. The projected – and later realized – high return rates are simply one factor among many, the totality of which show that defendants knew or consciously avoided knowing that the Pharmacycards debits were unauthorized. Defendants do not discuss these other facts showing knowledge and conscious avoidance.

II. NO DISPUTED FACTS

The parties do not genuinely disagree on the facts in this case. The FTC and defendants both quote and cite to the transcript of Wells' oral testimony and the accompanying exhibits, but defendants focus on only two aspects of Wells' testimony – due diligence and return rates. Crediting this testimony completely, but in light of the additional testimony neither cited to nor disputed by the Opposition, the undisputed facts support a finding of liability.

A. Due Diligence Put Wells on Notice

Defendants claim to have engaged in reasonable due diligence because they obtained certain information from the Pharmacycards operators, including a verbal description of the business scheme (that caused them to anticipate a 20 to 30% return rate[1]), a 2002 income statement for HelmCrest, Ltd. (the Cyprus company ostensibly responsible for the Pharmacycards marketing scheme),[2] a three month recap of processing volumes for an unknown product allegedly telemarketed by HelmCrest,[3] and the articles of incorporation from Cyprus for HelmCrest.[4] Additionally, defendants received a copy of the passport of the supposed owner of HelmCrest, David Graham Turner,[5] and a copy of a fulfillment package that ostensibly was provided to consumers.[6] There is no dispute that defendants received these documents.

The FTC also does not dispute that Wells deemed this information adequate for due diligence purposes, in part because neither E Value Check nor Wells Fargo asked for additional information beyond that provided. The protection, in defendants' view, lay in establishing reserves high enough to protect the bank and InterBill from financial loss. Indeed, Wells' description of the role played by reserves explains his indifference to the documents provided by the Pharmacycards operators: "[T]he protection throughout the whole thing is the reserve. Whether or not the guy made up his information when he turned it in, the operation is controlled by the funds."[7]

---

[1] SJ Exh. 2, p. 22.

[2] SJ Exh. 3, pp. 100-01, authenticated at SJ Exh. 2, p. 26.

[3] SJ Exh. 3, pp. 102-04, authenticated at SJ Exh. 2, p. 29. See also SJ Exh. 2, p. 30 (Wells did not ask what product was sold in connection with these processing records.

[4] SJ Exh. 3, pp. 105-121, authenticated at SJ Exh. 2, pp. 34-35.

[5] SJ Exh. 3, p. 123, authenticated at SJ Exh. 2, p. 38.

[6] SJ Exh. 11 (SJ Exh. 11 is filed herewith).

[7] SJ Exh. 2, p. 50. While the bank and InterBill were protected by the reserves, there was no protection guarding consumers against unauthorized withdrawals from their bank accounts.

The question, however, is not whether the due diligence undertaken to protect Wells and InterBill from financial loss was reasonable, but whether that due diligence should have put them on notice that Pharmacycards was a questionable enterprise that required further scrutiny to ensure that consumers' bank accounts would not be debited without authorization. That question can be answered – affirmatively – by looking at the undisputed facts.

1. Information & documents received by interbill raised red flags

Defendants ignored red flags that should have put them on notice that the proposed Pharmacycards business was a scam. Foremost, the negative option business model (about which there is no dispute) should have alerted them to the likelihood of unauthorized debits. Indeed, it appears that Wells contemplated a substantial level of unauthorized debits because he projected a return rate of 20 - 30% when discussing the project with the bank.[8] (Privately, Wells spoke with Pharmacycards' Steve Pearson of tolerating return rates as high as 40 to 45 percent.[9]) His solution for such problematically high returns was to establish high reserves.[10]

The documents defendants received about HelmCrest did not answer any questions about the proposed Pharmacycards business model, as they appeared to relate to a telemarketing venture selling an unknown product via credit cards.[11] Although Wells claimed to look at these documents as evidence of the company's operational capacities, the operational capacities required for a telemarketing firm would presumably be quite different from those required of a company engaged in the Pharmacycards business of direct mail marketing. Moreover, to the extent that he looked at the recap of processing volumes for information about refunds and chargebacks (the credit card equivalent to a return rate), as his deposition testimony suggests, that document portrays a vastly different business operation, with chargebacks of less than one

---

[8] SJ Exh. 2, p. 22.

[9] SJ Exh. 3, p. 150, authenticated at SJ Exh. 2, p. 81.

[10] SJ Exh. 2, pp. 23, 50.

[11] SJ Exh. 2, p. 30.

percent for each month of processing.[12] (The chargeback rate is derived by dividing the number of chargebacks by the total number of sales.)

The purported fulfillment package that defendants received should have raised more questions.[13] That package is for a product called Medications4Less, a Canadian discount mail order prescription benefit program with a Montreal return address and a toll free number completely unrelated to any address or phone number associated with Pharmacycards.[14] Nowhere in the fulfillment package is the name "Pharmacycards" mentioned. Moreover, the Medications4Less package does not mention an offer of a discount card for use at retail pharmacies in the U.S., which is the product described on the Pharmacycards website. There is no evidence that defendants questioned the legitimacy of this so-called sample fulfilment package, asked how Medications4Less related to Pharmacycards, or inquired how the mail order program described in the fulfillment package related to the retail benefits card program described on the Pharmacycards website. Even the passport information received by defendants about the purported HelmCrest owner, David Graham Turner, should have created more questions than answers, given that they were later provided with a completely different passport number for Turner.[15]

2. Documents not received raised additional concerns

If the documents and information that defendants received raised red flags about the legitimacy of the Pharmacycards operation, the documents that defendants did NOT receive raised even more questions. It is undisputed that defendants never received a signed contract

---

[12] SJ Exh 3 at pp. 102-04, authenticated at SJ Exh. 2, p. 29.

[13] SJ Exh. 2, p. 43. Wells testified that he sent the package he received to FTC investigator Laureen France. A copy of the package received by Ms. France is attached hereto as SJ. Exh. 11.

[14] SJ Exh. 11.

[15] Compare SJ Exh. 3, pp. 122-123 with SJ Exh. 3, p. 124E.

from the Pharmacycards operators[16] or a copy of the negative option postcard that consumers supposedly received.[17] Nor did they receive a credible fulfillment package for a Pharmacycards product,[18] or shipping or fulfillment records from Pharmacycards indicating that products were shipped to consumers.[19]

While Defendants argue that Wells was "merely a business owner" who relied on the information supplied by his customers [Defs' Opp. at 14], Wells was, in fact, an experienced businessperson familiar with checking the background and business references of prospective clients.[20] Indeed, InterBill had a standard application for processing services that sought a host of background information from customers.[21] Wells, however, did not seek such information from the Pharmacycards operators.[22] For example, he did not seek business or personal references – or talk to any past vendor or supplier of Pharmacycards or its principals. He did not request marketing or supplier information describing the Pharmacycards product or its benefits, or how such an offer was fiscally possible. Rather, believing himself to be protected from financial loss by the reserve account, Wells turned a blind eye to these obvious red flags.

B. Totality of Circumstances Establishes Knowledge or Conscious Avoidance

Defendants argue that evidence of high return rates, alone, cannot prove that Wells knew or should have known that Pharmacycards was a scam. [Defs' Opp. at 15, 16.] The Court need not look at high return rates alone, however, because numerous facts not disputed by defendants support a finding that defendants knew or consciously avoided knowing that they were

---

[16] SJ Exh. 2, p. 56. *See also* SJ Exh. 3. pp. 124A-124D, authenticated at SJ Exh. 2, pp. 45-46; *see also* SJ Exh. 3, p. 126 (Feb. 2, 2004 email noting the need for a signed contract), authenticated at SJ Exh. 2, pp. 54C-55.

[17] SJ Exh. 2, p. 43.

[18] SJ Exh. 11.

[19] SJ Exh. 3, p. 140, authenticated at SJ Exh. 2, pp. 69-70.

[20] SJ Exh. 2, pp. 53A-54.

[21] SJ Exh. 3, pp. 124F-124J, authenticated at SJ Exh. 2, p. 53A.

[22] SJ Exh. 2, p. 54.

processing unauthorized debits on behalf of Pharmacycards. Consider the undisputed facts of which defendants were aware:

- the negative option business model and the 20 to 30% return rate Wells projected because of it;[23]
- the consumer complaints specifically describing unauthorized debits that started immediately after processing began;[24]
- complaints from Bank of America and Wells Fargo about unauthorized debits and high return rates;[25]
- the lack of any indicia of a legitimate business, from the multiplicity of foreign business addresses to the principal's use of free untraceable email and facsimile accounts, to the failure to provide basic business documents;[26]
- the tone and tenor of the emails received from Pharmacycards demanding payment and ignoring obvious customer service issues;[27]

---

[23] SJ Exh. 2, p. 22; *see also* SJ Exh. 3, p. 150, authenticated at SJ Exh. 2, p. 81 (email discussion suggesting that return rates of 40 to 45% might be tolerated).

[24] *See* SJ Exh. 4, p. 186, ¶ 3, pp. 190-209.

[25] SJ Exh. 2, p. 62; SJ Exh. 3, pp. 132, 137-38, 140, 141 (email re: bank discussions), authenticated at SJ Exh. 2, pp. 60, 66-67, 69-70, 74-75.

[26] SJ Exh 9, pp. 286, 288-289 (¶¶ 3, 10, 12-13) and pp. 305-308, 310-312 (business addresses in London with no connection to Pharmacycards); SJ Exh. 3, pp. 127 (pharmacycards@mailforce.net; pharmacycards@ziplip.com), authenticated at SJ Exh. 2, pp. 54C-55; SJ Exh. 9, p. 288 (¶¶ 10, 15), pp. 305-308, 313-314 (untraceable free email accounts); SJ Exh. 4, p. 187 (¶ 8), pp. 234-36 and SJ Exh. 7, p. 274 (¶ ¶ 5-6) (website hosted by ISP from India, listing fake British Columbia address); SJ Exh. 2, p. 56 (no signed contract).

[27] SJ Exh. 2, p. 72 (Wells commenting that getting paid appeared to be the most important thing in Pearson's life, rather than addressing the issues of high return rates and consumer complaints).

- the proposed "fixes" for reducing return rates that focused exclusively on improving the data submitted for processing and never discussed contacts with consumers;[28]
- the escalating return rate, characterized by Wells as "this just smells."[29]

These undisputed facts unequivocally demonstrate that Wells knew, or consciously avoided knowing that Pharmacycards was a scam and that the debits InterBill processed were not authorized by consumers.

C. Return Rates Evidence Fraud

While the Court need not consider evidence concerning high return rates as the ***only*** factor demonstrating defendants' knowledge or conscious avoidance of knowledge of Pharmacycards' fraudulent operations, the high return rates projected and later realized are indeed indicia of a fraudulent enterprise that, at a minimum, should have triggered a stronger response from defendants. Defendants do not dispute the fact of high returns associated with the Pharmacycards transactions, but instead take a variety of potshots at the measurement and significance of return rates generally.

Defendants' claim that the FTC has produced no evidence that high return rates are strongly indicative of fraud. They also argue that ACH transactions and credit card processing are not comparable to demand draft processing because those forms of payment processing are regulated. [Defs' Opp. at 15.] The FTC did, however, present evidence about the problems associated with high ACH return rates in the declaration of Elliot McEntee, president of the National Automated Clearinghouse Association ("NACHA"), the private body that regulates

---

[28] This included the unusual step of scrubbing out all transactions involving Bank of America and Wells Fargo accounts because the number of returns and complaints from these banks was causing increased scrutiny. *See* SJ Exh. 2, p. 62.

[29] SJ. Exh. 3, p. 140, authenticated at SJ Exh. 2, pp. 69-70. Defendants do not dispute the fact of the high return rates, only that such return rates alone cannot support a finding of knowledge.

ACH transactions.[30] While no such body regulates demand drafts like those used here by InterBill, which are treated by the banking system like paper checks, there is no principled reason to argue that returns associated with demand drafts have a different significance than returns associated with ACH transactions. As demonstrated by the McEntee declaration, NACHA is concerned about high ACH return rates because of complaints to NACHA about, among other things, unauthorized debits of consumer's checking accounts.[31] Return rates over 2.5% should, according to McEntee, put a third-party processor on notice that there is a problem with the Originator's practices.[32] Wells, a payment processing professional, knew of and understood the rules regarding return rates and chargebacks imposed by NACHA and credit card processors.[33] Indeed, he recognized that he could not secure or maintain credit card or ACH processing for the Pharmacycards venture because of the projected high return rate.[34]

Courts, too, have regularly found high return rates or high chargeback rates as evidence of fraudulent transactions. In *Windward Marketing*, an FTC case involving demand drafts, the court found that a return rate of 40% supported a finding that defendants engaged in processing unauthorized transactions. *Id.* at *34-35. In *FTC v. Crescent Publishing Group, Inc.*, 129 F. Supp. 2d 311 (S.D. N.Y 2001), the court specifically discussed at length the company's history of excessive chargebacks, *id.* at 315-316, and then found that "the material submitted by plaintiffs [the FTC and the state of New York], supported by the high volume of charge backs and credits, suggests that they [defendants] also have deceived many others." *Id*. at 322 (emphasis added). Similarly, in *FTC v. J.K. Publications*, 99 F. Supp. 2d 1176 (C.D. Cal.

---

[30] SJ Exh. 8, pp. 276-284. The declaration filed by the FTC was made by Mr. McEntee in December 2003. Although the FTC could readily have updated this declaration, the information provided about the payment processing industry and issues regarding return rates are reflective of the state of the industry contemporaneous to the time that Mr. Wells was making decisions about processing on behalf of Pharmacycards.

[31] SJ Exh 8, p. 280 at ¶ 21.

[32] SJ Exh. 8, p. 281, ¶ 24.

[33] SJ Exh. 2, pp. 31-34.

[34] SJ Exh. 2, pp. 33-34.

2000), the Court specifically found that the fact that 7.3% of VISA card transactions resulted in chargebacks was a key fact demonstrating that defendants "participated in a billing scheme by submitting unauthorized charges." *Id.* at 1203.

Defendants also assert that the actual rate of return is "very difficult to determine." [Defs' Opp. at 16.] They make this assertion without suggesting or citing to any evidence that Wells had difficulty determining the return rates experienced by Pharmacycards. It does not appear from the uncontroverted evidence that at the time Wells had any difficulty calculating the ever-increasing return rate. Numerous emails from Wells explicitly discuss the return rate, including, for example:

- February 2, 2004 email from Wells forwarded to Steve Pearson: "I will have further data on the returns which are running quite high (over 33%) overall as of this morning"[35]
- February 21, 2004 email from Wells to Pearson: "Take a look, it's easy to see why I'm concerned about the return rates, the reserve on this sheet is figured at 40%, actual return rate is now 41.1%, and your position is already some $82,000 out of whack."[36]
- February 27, 2004 email from Wells to Pearson with the subject line "This is Ugly" stating, "Well today you hit the big 51.5% on returns. . . ."[37]

From these emails it is clear that Wells monitored the return rates on an ongoing basis, whether they were difficult to calculate or not.

Defendants also claim that return rates are not "a perfect measure to determine whether transactions were or were not authorized" because transactions are returned "for a myriad of reasons including closed accounts, non-sufficient funds, erroneous bank routing numbers, erroneous account numbers, and failure to receive the product." [Defs' Opp. at 16.] They do not,

---

[35] SJ Exh. 3, p. 128, authenticated at SJ Exh. 2, pp. 58-59.

[36] SJ Exh. 3, p. 138, authenticated at SJ Exh. 2, pp. 66-67.

[37] SJ Exh. 3, p. 140, authenticated at SJ Exh. 2, pp. 69-70.

however, cite to any evidence or document that suggests that the Pharmacycards transactions were authorized (Wells has admitted that they were not[38]), or that the high return rates were not the result of unauthorized debiting. Moreover, while it is true that demand drafts are returned for many reasons, those defendants mention are all likely to occur frequently in connection with fraudulent transactions. For example, such returns may indicate bad data derived from lists of misappropriated account numbers that are being charged without authorization, and not from legitimate transactions in which consumers provide the seller with account information.[39]

Finally, defendants imply, without specifically arguing the point, that the projected return rate should not have been a concern because Wells Fargo and E Value Check both agreed to accept a 20-30% return rate and because, according to Wells, some banks would accept a return rate as high as 70%.[40] [Defs' Opp. at 15.] Defendants themselves, however, provide the explanation for banks' willingness to associate with high-return rate ventures – high reserves held back from the seller protect the bank and payment processor alike from financial loss. [*See* Defs' Opp. at 7-8.][41] Using reserves to insure against loss, however, does not excuse injuring consumers (who are financing the insurance pool) or violating the law.[42]

---

[38] SJ Exh. 2, p. 98.

[39] Unlike the ACH context, where unauthorized returns have a specific definition, there is no shared lexicon for describing or coding the reasons related to returned demand drafts. For example, the court in *Windward Marketing* noted that the 40% return rate for unauthorized bank drafts included checks returned for insufficient funds and checks returned because of stop payment requests. 1997 U.S. Dist. LEXIS 17114 at *34-35

[40] Defendants provide no evidence in support of this assertion.

[41] Indeed, servicing the Pharmacycards business was a lucrative proposition for the bank – according to Thomas Wells' records, Wells Fargo was paid $415,694. SJ Exh. 4, pp. 188-89, 246.

[42] Mr. Wells himself blamed the allure of profit for the slow reaction of InterBill and Wells Fargo, explaining at his deposition:

> I suspect we could have reacted a lot quicker, okay? But we had a client, we had processing, we had the opportunity of revenue, the bank had the opportunity of revenue, the bank realized tremendous revenue. E-Value(check) had revenue, Neil (Strategic Commercial Solutions) had revenue coming in. So . . . if this thing gets straightened out it's going to be good for everybody.

SJ Exh. 2, pp. 73-74.

III. UNDISPUTED FACTS & LAW SUPPORT SUMMARY JUDGMENT

A. No Genuine Factual Controversy

To oppose a motion for summary judgment successfully, a non-moving party must set forth specific facts showing that a genuine issue remains for trial. Fed. R. Civ. P. 56(c). The non-moving party, however, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio* Corp., 475 U.S. 574, 586 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 587; *see also FTC v. Keith Gill, et al.,* 71 F. Supp. 2d 1030, 1035 (C.D. Cal. 1999) (where operative facts are substantially undisputed and heart of controversy is legal effect of facts, dispute is properly decided on summary judgment) *aff'd* 265 F.3d 944 (9th Cir 2001).

Defendants have raised no genuine issue of material fact precluding entry of summary judgment. Uncontroverted evidence establishes that the defendants have engaged in unfair acts and practices prohibited by Section 5(a) of the FTC Act. InterBill debited consumers' bank accounts without the consumers' authorization, causing substantial consumer injury, not reasonably avoided by consumers themselves, and not outweighed by countervailing benefits to consumers or competition. The Commission is entitled to judgment as a matter of law.

There is no dispute that thousands of consumers were substantially injured when defendants took $139 from their bank accounts without authorization. *See Windward,* 1997 U.S. Dist. LEXIS 17114 at *31-32 (injury may be considered sufficiently substantial if it causes a small harm to a large class of people). There is also no dispute that consumers could not reasonably have avoided this injury – money was taken from their checking accounts without their knowledge or permission. Nor is there any genuine question, factual or legal, that under circumstances like these, where defendants knew or consciously avoided knowing that they were engaged in such unauthorized debiting, there are no countervailing benefits to consumers or competition that outweigh the harm to consumers. A host of undisputed facts proves defendants' knowledge, the only real issue discussed by defendants in their Opposition. When taken

together, these facts demonstrate that InterBill and Thomas Wells either knew that Pharmacycards was a scam and made unauthorized debits to consumers' accounts anyway, or, protected from financial loss by high reserve accounts, deliberately turned a blind eye to the red flags warning that they were participating in a scheme to defraud consumers.

B. No Opposition to Individual Liability, the Need for Injunctive Relief, or the Calculation of Redress

Defendants did not respond to or provide facts to dispute the need for injunctive relief, the FTC's calculation of the appropriate redress amount, or whether Thomas Wells should be found individually liable. Ample evidence supports the requested relief.

1. Injunctive relief necessary and appropriate

Defendants do not address the issue of injunctive relief. Such relief is necessary and appropriate here. The FTC brings this action in federal court pursuant to Section 13(b) of the FTC Act. Section 13(b) provides that when the FTC has reason to believe that violations of the FTC Act are occurring, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b) (second proviso). A "proper case" includes any matter involving a violation of a law enforced by the FTC. *FTC v. H.N. Singer, Inc.,* 668 F.2d 1107, 1113 (9th Cir. 1982). In actions brought under Section 13(b), the Court may exercise the full breadth of its equitable authority, including the imposition of additional relief "necessary to accomplish complete justice."

Here, an injunction is necessary to prevent defendants from injuring consumers in the future. Thus it is important that the scope of the injunction cover all forms of payment processing, including ACH and credit card transactions. Defendants mistakenly suggest that the FTC seeks to ban defendants from all forms of processing. [Defs' Opp. at 1.] That is not the case. The FTC simply requests that whatever injunctive relief is imposed cover all forms of payment processing.

2. Monetary redress equals amount lost by consumers

Defendants do not dispute that $1,779,700 is the total amount of consumer injury caused by their unlawful practices. The FTC relied exclusively on financial information provided by InterBill in calculating the requested redress.[43] Not only is the redress amount uncontested, legal precedent supports entering a judgment for the full amount lost by consumers. *FTC v. Gill*, 265 F.3d 944, 958 (9th Cir. 2001) (finding that the district court properly used the amount consumers paid as the measure for the amount Defendants should be ordered to pay for their wrongdoing); *see also Windward,* 1997 U.S. Dist. LEXIS 17114, *44-45 (specifically rejecting the defendants' argument that the monetary relief ordered be limited to the profits that defendants earned).

3. Wells individually liable

Defendants also do not address the issue of Thomas Wells' individual liability. Undisputed facts demonstrate that Wells participated in and controlled the acts of InterBill, while knowing that it was engaged in unauthorized debiting of consumers' bank accounts. Such conduct supports finding individual liability for FTC Act violations. *FTC v. Cyberspace.com,* 453 F.3d 1196, 1202 (9th Cir. 2006), *accord Windward* 1997 U.S. LEXIS 17114 at *39.

C. Defendants' Only Two Issues Fail to Create a Triable Issue of Fact

Defendants' Opposition argues only two points, neither of which raises a genuine issue of material fact. Although they suggest that the "reasonableness" of defendants' due diligence is a disputed fact-dependent determination, that reasonableness is not at issue. As discussed above, the issue – whether the due diligence defendants undertook *put them on notice* of problems with the proposed Pharmacycards' operation, problems that they failed to address – is not disputed. *See First Alliance Mortgage Co. v. Lehman Commercial Paper, Inc.*, 471 F.3d 977, 999 (9th Cir.

[43] SJ Exh. 4, pp. 188-89, ¶ 10 and p. 246.

2006) (finding that lender's knowledge of fraudulent practices was based on discoveries made during due diligence).[44]

Defendants' other issue, whether defendants knew or should have known that the Pharmacycards operation was a scam, based on high return rates alone, also fails to create a disputed issue. First, defendants do not dispute that the return rates were actually high, or that they knew about them, but only question the legal significance that can be accorded such knowledge. Equally important, however, defendants' mischaracterize the FTC's argument about knowledge, which focuses on the totality of the circumstances and not high return rates alone. Substantial undisputed evidence shows that high return rates were just one factor among many that put defendants on notice that they were debiting consumers' accounts without authorization.

IV. CONCLUSION

For the above-stated reasons, plaintiff respectfully asserts that no genuine issue of material fact exists. Having provided undisputed evidence that defendants engaged in unfair practices in violation of Section 5 (a), (n) of the FTC Act, the FTC is entitled to judgment as a matter of law.

Respectfully submitted this 4th day of March, 2008.

/s/ Tracy S. Thorleifson

Tracy S. Thorleifson
Mary T. Benfield
Federal Trade Commission
BLAINE T. WELSH
Assistant United States Attorney
Attorneys for Plaintiff
Federal Trade Commission

[44] Even if the Court needed to assess defendants' due diligence, the reasonableness of such due diligence "becomes a question of law and loses its triable character if the undisputed facts leave no room for a reasonable difference." *Software Toolworks, Inc., v. Dannenberg,* 50 F.3d 615, 621-22 (9th Cir. 1994). Here, the undisputed facts show that the diligence defendants undertook put them on notice that the Pharmacycards operation was possibly a scam that merited further investigation before they provided access to consumers' bank accounts. Under strikingly similar circumstances, the Court in *Windward Marketing* found that summary judgment was appropriate. 1997 U.S. Dist. LEXIS 17114.

CERTIFICATE OF ELECTRONIC SERVICE

I, Tracy Thorleifson, hereby certify that on this 4th day of March, 2008, a true copy of the foregoing Plaintiff FTC's Reply to Defendants' Opposition to Summary Judgment was filed and served electronically via the CM/ECF to the following:

Lawrence J. Semenza, Esq.
3025 East Post Road
Las Vegas, NV 89120
lsemenza@semenzalawfirm.com,
attorney for defendants and third party plaintiffs InterBill, Ltd., and Thomas Wells

Stewart C. Fitts, Esq.,
SMITH LARSEN & WIXOM
Hills Center Business Park
1935 Village Center Circle,
Las Vegas, Nevada 89134
scf@slwlaw.com
attorneys for third party defendant Wells Fargo Bank, N.A.

/s/ Tracy Thorleifson
Tracy Thorleifson