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10 UNITED STATES DISTRICT COURT
11 DISTRICT OF NEVADA
12

13 FEDERAL TRADE COMMISSION,

14 Plaintiff,

15 v.

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

18 Defendants.

19 _____
20 INTERBILL, LTD., and THOMAS
WELLS, individually and as an officer or
21 director of InterBill,

22 Third-Party Plaintiffs,

23 v.

24 WELLS FARGO BANK NATIONAL
ASSOCIATION,

25 Third-Party Defendant.
26
27

CV-S-06-01644-JCM-PAL

Plaintiff's Motion for Summary
Judgment and Memorandum of
Points and Authorities in Support

1 **MOTION FOR SUMMARY JUDGMENT**

2 Comes now plaintiff, Federal Trade Commission, by and through the undersigned
3 attorneys, and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this
4 Court for summary judgment against defendants InterBill, Ltd., and Thomas Wells.
5 Material undisputed facts demonstrate that the defendants debited consumers' checking
6 accounts without the consumers' authorization and thus engaged in unfair acts and
7 practices in violation of Section 5(a) of the FTC Act. Judgment should therefore be
8 entered in favor of the Federal Trade Commission, including entry of a permanent
9 injunction to prevent future violations of the law, and an award of monetary relief in the
10 amount of \$1,779,700 to redress injured consumers.

11 This motion is supported by the memorandum of points and authorities and the
12 exhibits attached hereto.

13
14 Respectfully submitted this 17th day of January, 2008.

15
16 /s/ Tracy S. Thorleifson

17 Tracy S. Thorleifson
18 Mary T. Benfield
19 Attorneys
20 Federal Trade Commission

21 BLAINE T. WELSH
22 Assistant United States Attorney

23 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Federal Trade Commission (“FTC” or “Commission”) hereby submits
4 this memorandum of points and authorities and attached exhibits in support of its motion
5 for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.
6 Defendant InterBill, Ltd. (“InterBill”), a payment processor, through its sole owner and
7 officer, defendant Thomas Wells, debited the bank accounts of thousands of U.S.
8 consumers while knowing or consciously avoiding knowing that the debits were done
9 without the consumers’ authorization. In total, InterBill attempted to take \$139 each from
10 72,240 consumers’ accounts. While most of these attempted debits were refused and
11 returned by the consumers’ banks, or otherwise refunded to consumers, many transactions
12 were consummated and, as a result of InterBill’s actions, consumers lost \$1.77 million.

13 InterBill made these unauthorized debits without adequately investigating a client
14 calling himself Steve Pearson, who represented to InterBill that he owned a company
15 named Helmcrest, Ltd., incorporated in Cyprus, with customer service operations in
16 Canada, and a website hosted by an ISP in India. Helmcrest was in fact a stolen company
17 name fronting a scam, doing business as “Pharmacycards,” that ostensibly marketed to
18 consumers a discount medical benefits program using a negative option mailing (the
19 business will be collectively referred to as “Pharmacycards” hereafter).¹ Consumers were
20 to receive a direct mail offer for the medical benefits program and their bank accounts
21 would be debited unless they called and opted out of the program. The discount medical
22 benefits program did not exist. What did exist was a list of consumer names and bank
23 account numbers that Pharmacycards provided to InterBill.

24 Engaging in only a cursory background check of Pharmacycards, its principals,
25 and the legitimacy of the medical discount card offering, InterBill granted the scam and

26 ¹ The FTC sued the Pharmacycards perpetrators and obtained a default judgment. *FTC v. Third*
27 *Union Card Services, Inc., d.b.a. Pharmacycards*, CV-S-04-0712-RCJ-RJJ (D. Nev., complaint filed May
24, 2004).

1 its operators open access to U.S. consumers' checking accounts. InterBill made
2 arrangements with a bank (Wells Fargo) willing to process the Pharmacards demand
3 drafts, established a bank account, and began debiting consumer accounts without notice
4 to or permission from the consumers. (Demand drafts are paper checks imprinted by a
5 third party with the name and bank account number of a consumer, but not signed by that
6 consumer. Such drafts are deposited into the banking system and processed like ordinary
7 checks.) InterBill controlled the bank account and the disbursement of the fraudulently
8 obtained funds.

9 When InterBill agreed to process demand drafts on behalf of the Pharmacards
10 scam it expected that as many as 20 - 30% of the attempted drafts would be returned by
11 consumers' banks, because of the proposed negative option marketing model. This
12 expectation was realized, and more, when immediately after processing began return rates
13 sky rocketed, ultimately reaching 70%. (In the payment processing industry, return rates
14 higher than one to two percent typically trigger enhanced scrutiny and are often
15 associated with fraudulent transactions.) At the same time, InterBill received numerous
16 consumer complaints, both directly and from the bank, asserting that the drafts on the
17 consumers' accounts were not authorized. Despite these indicia of fraud, InterBill took
18 no steps to stop the theft of consumers' money. Instead, it acted to protect itself by
19 maintaining high reserves in the Pharmacards bank account it controlled. Processing
20 was finally ended by Wells Fargo more than eight weeks after the scam's inception.

21 InterBill's actions in debiting consumers' bank accounts, while knowing or
22 consciously avoiding knowing that the debits lacked the consumers' authorization, are
23 unfair and violate Section 5 of the FTC Act. 15 U.S.C. §§ 45 (a) and (n). Such
24 unauthorized debiting meets the legal test for unfairness because it caused substantial
25 injury to consumers that was not reasonably avoidable by consumers themselves and not
26 outweighed by countervailing benefits to consumers or to competition. *FTC v. Windward*
27 *Marketing, Ltd.*, 1997 U.S. Dist. LEXIS 17114, *29-30 (N.D. Ga. Sept. 30, 1997)

1 (unauthorized debiting by payment processor found unfair); *see also FTC v. J.K.*
2 *Publications*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000) (unauthorized debiting found
3 unfair).

4 Summary judgment should be granted for the FTC.

5 **II. STATEMENT OF FACTS**

6 **A. The Parties**

7 Plaintiff FTC is an independent agency of the U.S. Government created by statute.
8 15 U.S.C. § 41. It enforces Section 5(a) of the FTC Act, 15 U.S.C § 45(a), which
9 prohibits unfair or deceptive acts or practices in or affecting commerce, and Section 5(n)
10 of the FTC Act, which articulates the standard of proof to be applied in unfairness cases.
11 Section 13(b) of the FTC Act authorizes the FTC to initiate federal district court
12 proceedings to enjoin violations of the FTC Act and to secure such equitable relief as is
13 appropriate in each case, including restitution and disgorgement. 15 U.S.C § 53(b).

14 Defendant InterBill, Ltd. (“InterBill”), is a British Virgin Islands corporation
15 registered to do business in Nevada.² It has provided payment processing services to
16 merchants, including those considered “high risk” by the payment processing industry,
17 such as online merchants.³ The processing solutions it has offered clients include credit
18 card processing, ACH electronic payment processing, and, at least for Pharmacycards,
19 demand drafts.⁴ InterBill’s principal place of business is located at 3770 Bombastic
20 Court, Las Vegas, Nevada, 89147. Thomas Wells, the sole owner and director of
21 InterBill, Ltd., controls InterBill’s actions.⁵
22
23

24 ² SJ Exh. 1, p. 3, ¶ 5.

25 ³ *Id.*

26 ⁴ SJ Exh. 3, p. 160, (response to Interrog. 3), authenticated at SJ Exh. 2, p. 97A.

27 ⁵ SJ Exh. 1, p. 3, ¶ 6.

1 **B. The Unauthorized Debiting Scheme**

2 Between January and March 2004, InterBill debited, or tried to debit, more than
3 \$9.9 million from U.S. consumers' bank accounts without the consumers' authorization.⁶
4 It did so in connection with providing payment processing services to a fraudulent
5 enterprise known as "Pharmacycards."⁷ Using consumers' names and bank account
6 information provided by the Pharmacycards perpetrators, InterBill arranged for the
7 production of "remotely created checks," or "demand drafts," in the amount of \$139 each,
8 and submitted them for deposit into a designated account in InterBill's name at Wells
9 Fargo Bank.⁸

10 InterBill's participation in the Pharmacycards scheme began when its president,
11 Thomas Wells, received a call from one of the Pharmacycards perpetrators in the fall of
12 2003.⁹ Pharmacycards was seeking a payment processor for a business that purportedly
13 provided medical discount cards to consumers using a negative option direct mail
14 program.¹⁰ Wells sent Pharmacycards an application and asked for more information
15 about the company's business.¹¹

16 Over the course of the next few weeks, Wells would fail to conduct more than
17 cursory due diligence that might have warned him that Pharmacycards was a questionable
18 enterprise that demanded further review.¹² He would forego receipt of InterBill's normal

19
20 ⁶ SJ Exh. 2, p. 98 (Wells admits drafts were not authorized.); SJ Exh. 4, pp. 188, 246. *See also*
21 SJ Exh. 3, pp. 158-59, authenticated at SJ Exh. 2, p. 92-93.

22 ⁷ *See generally* *FTC v. Third Union Card Services, Inc., d.b.a. Pharmacycards, supra*, note 1.

23 ⁸ SJ Exh. 2, pp. 19-25 (Wells discusses process of creating and depositing demand drafts); *see*
24 *also* SJ Exh. 3, p. 125 (sample demand draft), authenticated at SJ Exh. 2, p. 54A.

25 ⁹ SJ Exh. 2, pp. 11-16. Wells dealt with an individual calling himself Steve Pearson, but that
26 appears to have been an alias.

27 ¹⁰ SJ Exh. 2, pp. 12-13.

¹¹ SJ Exh. 2, pp. 19, 26-27, 43; *see also* SJ Exh. 3, pp. 124A-124D (contract), authenticated at SJ
Exh. 2, p. 45.

¹² SJ Exh. 2, pp. 12-18, 26-44.

1 processing application documents (including receipt of a signed contract),¹³ and ignore
2 several red flags that should have raised questions about the Pharmacards business
3 deal.

4 One red flag ignored by Wells was the proposed Pharmacards business model.
5 Wells' initially understood that Pharmacards would mail consumers a negative option
6 postcard, and if the consumers did *not* respond, their accounts would be charged and they
7 would subsequently receive the Pharmacards fulfillment package.¹⁴ Wells did not
8 receive or review a copy of the postcard.¹⁵ More importantly, he did not question the
9 underlying lack of consumers' authorization to debit their accounts inherent in this
10 scheme.¹⁶ Nor did he investigate whether taking money from consumers' accounts
11 without first obtaining their permission is even legal (it's not, it's simple theft).

12 Mr. Wells must have sensed some problems associated with this marketing model,
13 however, because in discussions with the bank he projected that the proposed business
14 might generate return rates in the 20 to 30 percent range.¹⁷ (And in a private email
15 exchange with the Pharmacards perpetrators he discussed tolerating return rates as high
16
17

18 ¹³ SJ Exh. 2, pp. 53-56. *See also* SJ Exh. 3, pp. 124F- 124J, authenticated at SJ Exh. 2, p.53A-
19 53B; SJ Exh. 3, p. 126 (Feb. 2, 2004 email noting the need for a signed contract), authenticated at SJ Exh.
2, p. 54C-55; and SJ Exh. 3, p. 174 (response to Interrogs 13, 14), authenticated at SJ Exh. 2, p. 97A.

20 ¹⁴ SJ Exh. 2, pp. 22, 64. In fact, most consumers debited by InterBill never even received the
21 postcard explaining that their accounts would be debited. SJ. Exh. 4, pp. 187 (¶ 7), 228-233.

22 ¹⁵ SJ Exh. 2, p. 43.

23 ¹⁶ *See* SJ Exh. 2, pp. 22, 64 (Well's unquestioning acceptance of the business model). In the
24 telemarketing context, the FTC's Telemarketing Sales Rule ("TSR") prohibits charging consumers' bank
25 accounts without first obtaining consumers' express verifiable authorization. 16 C.F.R. § 310.3(a)(3).
While the proposed Pharmacards business model did not involve telemarketing and thus the TSR was
neither novel nor difficult to grasp.

26 ¹⁷ SJ Exh. 2, p. 22 ("I can't recall the exact details which led us to forecast 20 to 30 percent
27 [return rates]. However, it must have had something to do with a negative opt out on the postcard
mailing.").

1 as 40 to 45 percent.¹⁸) By way of comparison, in 2003 the average rate of returned checks
2 (including demand drafts like those processed by InterBill) was only .58%.¹⁹

3 High return rates are strongly indicative of fraud or deception in the underlying
4 transaction, and are strictly monitored and regulated by both the credit card and ACH
5 electronic payment processing industries, as Wells knew.²⁰ Indeed, Mr. Wells has
6 acknowledged that, given the projected return rates, InterBill could not have obtained
7 either credit card processing or ACH processing for the Pharmacycards offer.²¹ These
8 industries try to achieve a return rate of less than 0.5%, and scrutinize heavily any
9 merchant whose return rates exceed 2.5%.²² Unlike these other forms of payment
10 processing, however, no private, voluntary associations set rules or thresholds for
11 unacceptable return rates on demand drafts. Rather, during the time that Pharmacycards
12 debits were processed, demand drafts were treated by the banking system just like
13 ordinary paper checks. As Mr. Wells described the system, it was up to the payment
14 processor and the bank handling the account to determine acceptable return rates.²³
15 (Federal reserve rules governing demand drafts changed slightly in 2006.²⁴)

16 ¹⁸ SJ Exh. 2, pp. 81, 84-85 and SJ Exh. 3, p. 150 (“Going into this project we discussed 40-45%
17 being the max we could tolerate with this project.”).

18 ¹⁹ SJ Exh. 5, p. 262 (“Returned ACH Payments”) Spring 2005 Federal Reserve Board Bulletin.

19 ²⁰ See, e.g., SJ Exh. 8, pp. 282-84 (noting the steps NACHA took to reduce the return rate for
20 telephone initiated ACH payments when those rates reached 2.5%). SJ Exh. 2, p. 34 (Wells points out
that credit card industry threshold return rate is 1 to 2.5%) .

21 ²¹ SJ Exh. 2, pp. 33-34.

22 ²² *Id.* See also SJ Exh. 8, pp. 281, 283-84.

23 ²³ SJ Exh. 2, pp. 33-34.

24 ²⁴ Effective July 2006, the Federal Reserve Board (FRB) amended Regulation CC, the regulation
25 that defines "remotely created checks"(a/k/a “demand drafts”) and creates transfer and presentment
warranties for them. The FRB amendments shifted liability for unauthorized remotely created checks to
26 the institution where they are first deposited. “Collection of Checks and Other Items By Federal Reserve
Banks and Funds Transfers Through Fedwire and Availability of Funds and Collection of Checks,” 70
27 Fed. Reg. 227 (November 28, 2005) pp. 71218-71226. Prior to these amendments, there existed a state-
by-state approach to the adoption of remotely created check warranties which complicated the
determination of liability for remotely created checks collected across state lines, because the bank that

1 Wells ignored other indicia of trouble, as well, including the apparent lack of a real
 2 business. The Pharmacards principals provided a London, England mailing address
 3 that had no apparent link to Pharmacards or them.²⁵ They also conducted their business
 4 by pre-paid, virtually untraceable cellular phones and free, anonymous email and
 5 facsimile accounts.²⁶ They used the identity of a Cyprus corporation and directed that
 6 their funds be wired to a Cyprus bank account.²⁷ The Pharmacards website, which was
 7 hosted by an ISP in India, listed the company's address at a fake location in British
 8 Columbia, Canada.²⁸ In addition, the proposed business plan called for outsourcing
 9 customer service to a Canadian company. According to Mr. Wells, such outsourcing was
 10 not normal for the industry.²⁹ While any one or two of these might have a legitimate
 11 business explanation, the totality at least demanded further inquiry.

12 Such inquiry by InterBill prior to debiting consumers' accounts would have
 13 revealed that the proposed Pharmacards business was a fraud, designed solely to steal
 14 money from consumers' checking accounts. The individuals operating Pharmacards
 15 did so using fake identities and aliases.³⁰ The product that Pharmacards purported to
 16 sell did not exist.³¹ Nearly the only legitimate information that InterBill received from the

17
 18
 19 presented the check was not subject to the same rules as the paying bank.

20 ²⁵ SJ Exh 9, pp. 286, 288-289 (¶¶ 3, 10, 12-13) and pp. 305-308, 310-312.

21 ²⁶ SJ Exh. 3, pp. 127 (pharmacards@mailforce.net; pharmacards@ziplip.com),
 authenticated at SJ Exh. 2, pp. 54C-55; SJ Exh. 9, p. 288 (¶¶ 10, 15), pp. 305-308, 313-314.

22 ²⁷ SJ Exh. 3, pp. 105-121, authenticated at SJ Exh. 2, pp. 35-36; SJ Exh. 3, p. 124, authenticated
 at SJ Exh. 2, pp. 39-40; and SJ Exh. 9, pp. 287-88 (¶ 9) and 292-304.

23 ²⁸ SJ Exh. 4, p. 187 (¶ 8), pp. 234-36 and SJ Exh. 7, p. 274 (¶¶ 5-6).

24 ²⁹ SJ Exh. 2, p. 40 (not the norm for payment processor to directly pay an outsourced customer
 25 service company), and p. 68 ("normally it's the client that runs their own customer service").

26 ³⁰ SJ Exh. 9, pp. 287-88 (¶¶ 9-13) and 292-312.

27 ³¹ SJ Exh. 2, p. 98. Even the marketing material for the product indicating participation of large
 retailers was done without the retailers' permission. SJ Exh. 6, p. 271.

1 Pharmacycards operators was the account information necessary to wire transfer funds to
2 the corporate bank account in Cyprus.³²

3 InterBill failed even to follow its own due diligence guidelines regarding the
4 information to be collected from new merchants.³³ For example, Mr. Wells, acting on
5 InterBill's behalf, neither asked for nor checked business or individual references.³⁴ He
6 ignored Pharmacycards' failure to provide InterBill with requested documentation
7 concerning the proposed business,³⁵ or even to return a signed contract authorizing the
8 processing.³⁶ Wells never received a copy of the purported negative option postcard, and
9 did not receive or review the proposed fulfillment package prior to processing.³⁷ Wells
10 also did not receive any documentation suggesting that anyone associated with the
11 Pharmacycards scheme had experience with direct mail marketing or the discount
12 prescription benefit business.³⁸ The only business background documents he received
13 were a two-page income statement for a Cyprus company supposedly showing business
14 operations for a telemarketer in England (but providing no supporting documentation and
15 failing to identify the product being marketed), and a three-page document purporting to
16 show credit card processing volumes for the Cyprus company for three months, August

17 ³² SJ Exh. 2, pp. 39-44; SJ Exh. 3, p. 124, authenticated at SJ Exh. 2, pp. 39-40; and SJ Exh. 4,
18 pp. 187 (¶ 5), 219-227.

19 ³³ SJ Exh. 2, pp. 41-45, 53A-54; SJ Exh. 3, pp.124F-124J, authenticated at SJ Exh. 2, p. 53A.

20 ³⁴ SJ Exh. 2, p. 42.

21 ³⁵ SJ Exh. 2, pp. 50, 54, 54C-55, 78; SJ Exh. 3, pp. 126, 140, 146, authenticated by SJ Exh. 2,
pp. 54C-55, 69-70, 78.

22 ³⁶ SJ Exh. 2, pp. 55-56, 80; *see also*, SJ Exh. 3, pp. 124A-124D (unsigned contract),
23 authenticated at SJ Exh. 2, p. 45.

24 ³⁷ Because the product did not exist and consumers did not receive a fulfillment package from
Pharmacycards, it is not surprising that Wells was not provided a package for review prior to beginning
25 processing. *See* SJ Exh. 4, pp. 187 (¶ 7) and 228-33. Even as late as February 27, 2004, five weeks after
beginning processing, Wells was still asking Pharmacycards for the fulfillment product. SJ Exh. 3,
26 p. 140, authenticated at SJ Exh. 2, pp. 69-70.

27 ³⁸ *See* SJ Exh. 2, pp. 26-27, 29-31, 34 and SJ Exh. 3, pp. 100-124, authenticated at SJ Exh. 2, pp.
26, 29, 35, 37, 38, 39-40.

1 through October 2003, again with no description of the product sold.³⁹ Rather than delay
2 processing until he received the missing documents, Wells accepted the limited
3 information he was provided. Even that received little or no scrutiny, and Wells ignored
4 discrepancies in the limited information that he did receive.⁴⁰

5 Most importantly, Wells made no effort to verify that the charges InterBill was to
6 process were in fact authorized by consumers. By the end of the scheme, Wells would
7 admit that he had no reason to believe that any consumer authorized a debit to his or her
8 account.⁴¹

9 Despite failing to make such inquiries, InterBill took the steps necessary to debit
10 consumers' bank accounts for the Pharmacycards scheme. Initially, InterBill hired a
11 company, E-Valucheck, to physically produce the paper demand drafts to be deposited
12 into the banking system.⁴² Then it located a bank, Wells Fargo, willing to accept and
13 process the high volume of paper demand drafts generated by the business. Mr. Wells
14 met with Wells Fargo representatives and discussed the proposed business.⁴³ Ultimately,
15 an account was established at Wells Fargo in InterBill's name and under InterBill's
16 control.⁴⁴ Mr. Wells was the individual in charge of this bank account.⁴⁵

17 ³⁹ SJ Exh. 2, pp. 27, 30. Wells never asked what product was sold using this credit card
18 processing; nor did he seek a more extensive history of Helmcrest's previous business transactions. SJ
19 Exh. 2, p.42. Nor did he check the alleged credit card processor – a quick Internet search would have
20 revealed that its website was registered to one of the Pharmacycards' principals, Steve Pearson. SJ Exh.
21 4, pp. 188 (¶ 9), 244-45.

22 ⁴⁰ InterBill received a copy of a passport, purportedly for David Graham Turner, a supposed
23 owner of Helmcrest in December 2003. In January 2004, Steve Pearson, the individual with whom Wells
24 dealt from Pharmacycards, asked Wells to provide credit cards for himself, Turner, and another
25 individual. The passport number he provided for Turner does not match the passport number previously
26 provided. Compare SJ Exh. 3, pp. 122-123 with SJ Exh. 3, p. 124E.

27 ⁴¹ SJ Exh. 2, p. 98.

⁴² SJ Exh. 2, pp. 19-20.

⁴³ SJ Exh. 2, pp. 22-24.

⁴⁴ SJ Exh. 2, pp. 24-25.

⁴⁵ SJ Exh. 4, pp. 186 (¶ 4), 210-216.

1 InterBill's proposed contract protected it from financial losses, regardless of the
2 legitimacy of the Pharmacards business. Under the contract, InterBill was to keep 8%
3 of the \$139.00 taken from each consumer's account, and it was also to receive \$12 per
4 returned draft and \$12 per consumer credit.⁴⁶ In addition, InterBill was protected from
5 losses because, to cover the costs of returns and associated bank fees, it maintained high
6 cash reserves in the bank account it controlled. As Mr. Wells explained, "[T]he
7 protection throughout the whole thing, is [the] reserve. Whether or not the guy made up
8 his information when he turned it in, the operation is controlled by the funds."⁴⁷ While
9 InterBill and Wells Fargo may have been protected by the reserves, consumers, whose
10 stolen money funded the reserves, were not protected from loss.

11 InterBill began debiting consumers' checking accounts for the Pharmacards
12 scheme in mid January 2004, only a few weeks after it received the initial call from
13 Pharmacards.⁴⁸ The demand drafts InterBill submitted for processing looked exactly
14 like checks – checks made out to InterBill, but with the notation "Authorized by your
15 customer. No signature required."⁴⁹

16 Throughout the next two months, InterBill ignored clear indications that the debits
17 were not authorized by the consumers from whose accounts the funds were taken. From
18 astronomical return rates to consumer complaints, bank complaints, and evasive and
19 unhelpful responses from Pharmacards, InterBill had little reason to believe that it was
20 collecting legitimate payments from consumers for a real product.⁵⁰ Despite this, it took

21 ⁴⁶ SJ Exh. 2, pp. 45, 47-48, 77-78, 92-93, 96; SJ Exh. 3, pp. 124A-124D, authenticated at SJ
22 Exh. 2, p. 45.

23 ⁴⁷ SJ Exh. 2, p. 50.

24 ⁴⁸ SJ Exh. 2, pp. 44-45.

25 ⁴⁹ SJ Exh. 3, p. 125, authenticated at SJ Exh. 2, p. 54A.

26 ⁵⁰ At one point, InterBill and Pharmacards tried to reduce the return rate by scrubbing out all
27 transactions involving consumer accounts at Bank of America and Wells Fargo. SJ Exh. 2, pp. 54C,
62-63; SJ Exh. 3, pp. 126-127, authenticated at SJ Exh. 2, pp. 54C-55. These banks, alerted to a large
number of complaints from customers, were returning all the debits submitted to them. *Id.* Mr. Wells

1 no steps to suspend or end processing so as to protect consumers from this theft. Rather,
2 to protect itself, InterBill's principal response was to increase the cash reserves it
3 retained.⁵¹

4 Almost immediately after processing began, the return rates "started to escalate to
5 a point of danger," in the words of Mr. Wells.⁵² Consumers also started emailing InterBill
6 about unauthorized debits.⁵³ The first of more than forty such customer complaints came
7 to InterBill as early as January 28, 2004. This email stated:

8 . . . I have a question about an unauthorized transaction that occurred on my
9 account. I am writing you, because the name of your company appears on
10 the check, that I am sure I didn't authorize. . . . Please reply to this email
promptly, as I don't recognize the payment and am suspicious of fraud
activity.⁵⁴

11 Subsequent consumer emails were in the same vein:

12 . . . [I have never] heard of InterBill until today. Someone has removed
13 \$139.00 from my account without any permission or authorization from
myself.⁵⁵

14 My bank account has been debited \$139.00 Check # 612 by your company,
for something I did not authorize.⁵⁶

15 I received a debit from my bank account recently for \$139.00 paid to
16 InterBill Ltd. with my wife's name on it. She has been deceased for 2 years
now. . . . Please notify me asap if your company is involved.⁵⁷

17
18
19
20 viewed the scrubbing as a "preventative measure to . . . keep the project going." SJ Exh. 2, pp. 62-63. He
21 recognized, however, that scrubbing out all processing of accounts from two major bank was "not
routine." SJ Exh. 2, pp. 56-57.

22 ⁵¹ SJ Exh. 2, pp. 49-50.

23 ⁵² SJ Exh. 2, pp. 51-52.

24 ⁵³ SJ Exh. 4, pp. 186 (¶ 3), 190-209.

25 ⁵⁴ SJ Exh. 4, pp. 186 (¶ 3), 190.

26 ⁵⁵ SJ Exh. 4, pp. 186 (¶ 3), 194.

27 ⁵⁶ SJ Exh. 4, pp. 186 (¶ 3), 198.

⁵⁷ SJ Exh. 4, pp. 186 (¶ 3), 204.

1 [I] am writing to get some information on a check that was withdrawn from
 2 my checking account for 139.00 dollars . . . [I] do not recognize this check
 or the company which is getting paid this money.⁵⁸

3 In the face of this direct evidence of unauthorized transactions, InterBill did not
 4 suspend processing to investigate the underlying transactions – about which it still had no
 5 real information. Rather, it simply asked, again, for a sample fulfillment package and
 6 continued to debit consumers’ checking accounts, and increased the cash reserves to
 7 protect its financial interest.⁵⁹

8 By February 5, 2004, a little over two weeks into the processing, InterBill warned
 9 Pharmacards’ Pearson that the return rates were running over 33%, noting in an email
 10 that “the returns to date alone total almost half a million dollars, this is exceptionally high
 11 for any program.”⁶⁰ Shortly thereafter, Mr. Wells began meeting with Wells Fargo to
 12 discuss the complaints of unauthorized debiting that the bank was receiving.⁶¹

13 Less than two weeks later, in mid-February, with returns escalating ever-higher,
 14 Pearson sent Wells an email begging for payment so that he could start shipping product
 15 to people before they were billed, or as Pearson put it “I want to get out of the ‘GREY’
 16 and into the pearl white zone and start shipping before we bill. . . .”⁶² At his deposition,
 17 Wells explained:

18 I had told him that . . . because the return rates were so high, he needed to
 19 either ship the product immediately or even prior to when . . . he was billing
 20 clients. . . . As I recall, a lot of the returns . . . had reason codes next to
 21 them. Never received the product, never received the product, never
 22 received the product.⁶³

22 ⁵⁸ SJ Exh. 4, pp. 186 (¶ 3), 202.

23 ⁵⁹ SJ Exh. 2, pp. 52-53; *see also* SJ Exh. 3, pp. 128-29, authenticated at SJ Exh. 2, pp. 58-59.

24 ⁶⁰ SJ Exh. 3, pp. 128-129, authenticated at SJ Exh. 2, pp. 58-59.

25 ⁶¹ SJ Exh. 2, pp. 60, 62, 66-67, 69-70, 73-75; SJ Exh. 3, pp. 132, 137-38, 140, 141 (email re:
 26 bank discussions), authenticated at SJ Exh. 2, pp. 60, 66-67, 69-70, 74-75.

26 ⁶² SJ Exh. 3, pp. 135-136, authenticated at SJ Exh. 2, pp. 65-66.

27 ⁶³ SJ Exh. 2, pp. 60-61.

1 With its client admitting to operating in a gray zone, and despite evidence that consumers
2 were reversing the unauthorized debits to their accounts because they “never received the
3 product,” InterBill continued to debit consumers’ accounts.

4 Return rates continued to escalate, reaching 41% on February 23, 2004, and 51.5%
5 by February 27, 2004.⁶⁴ Email traffic from Pearson of Pharmacycards to Wells became
6 increasingly shrill, with Pearson constantly pleading for release of reserved funds.⁶⁵ Such
7 pleas for quick payment, coupled with Pharmacycards’ complete lack of concern for
8 customer satisfaction, also should have put InterBill on notice that Pharmacycards was
9 not likely engaged in a legitimate business.⁶⁶ Despite this, Mr. Wells stayed in
10 Pharmacycards’ corner and promised that he would “do what [he could] to avoid [being
11 shut-down], but it may already be out of my control.”⁶⁷

12 InterBill actively advocated with Wells Fargo on behalf of Pharmacycards to
13 continue processing debits to consumer accounts. As late as March 10, 2004, Mr. Wells
14 reported in an email to Pharmacycards that he “convinced” the bank that the return rate
15 was only 56.5%, not 62%, and, while cautioning that the program was in jeopardy if
16 return rates did not come down, he remarked that “the project can be controlled.”⁶⁸

17 InterBill continued debiting consumers until March 17, 2004, when Wells Fargo
18 ended the banking relationship. Mr. Wells described why InterBill did not stop sooner:

19 I suspect we could have reacted a lot quicker, okay? But we had a client,
20 we had processing, we had the opportunity of revenue, the bank had the

21 ⁶⁴ SJ Exh. 2, pp. 66-70; SJ Exh. 3, pp. 137-138. In an email to Pearson on February 27, 2004,
22 with the subject line, “This is Ugly,” Wells described the return situation as “this just smells.” He asked
23 for evidence that packages had been delivered to consumers that were billed, and closed the email with
the admonishment, “It is time to get serious with providing me information.” SJ Exh. 3, p. 140,
authenticated at SJ Exh. 2, pp. 69-70. Even so, processing continued.

24 ⁶⁵ SJ Exh. 2, pp. 66-67, 72, 74-75, 90-91; SJ Exh. 3, pp. 137-138, 141-148, 152-157.

25 ⁶⁶ 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).

26 ⁶⁷ SJ Exh. 3, p. 140, authenticated at SJ Exh. 2, pp. 69-70.

27 ⁶⁸ SJ Exh. 3, pp. 149-50, authenticated at SJ Exh. 2, pp. 81-83; *see also* SJ Exh. 2, pp. 86-87.

1 opportunity of revenue, the bank realized tremendous revenue. E-
 2 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.⁶⁹

3 Good for everybody, that is, but the consumers from whom the money was stolen.

4 **C. The Substantial Consumer Injury Resulting from Defendants' Business**

5 Altogether, InterBill attempted to debit more than \$9.9 million from consumers'
 6 accounts and successfully debited approximately \$2,529,000.⁷⁰ Of that amount, \$749,400
 7 has been returned to consumers in one form or another.⁷¹ That leaves approximately
 8 \$1,779,700 taken from consumers' accounts by InterBill and not refunded.

9 **III. ARGUMENT**

10 **A. Summary Judgment Standard**

11 Summary judgment is appropriate where there is no genuine issue of material fact
 12 and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

13 The party seeking summary judgment has the initial burden of showing that there is no
 14 genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.
 15 Ct. 1598 (1970); *Zozlow v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982).

16 Once the moving party has met its burden by presenting evidence that would entitle the
 17 moving party to a directed verdict at trial, the burden shifts to the responding party to set
 18 forth specific facts demonstrating that there is a genuine issue of material fact for trial.

19 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *see also Cal. Arch. Bldg.*
 20 *Prod., Inc., v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

21 A material fact is one that affects the outcome of the litigation and requires a trial
 22 to resolve the differing versions of the truth. *Anderson*, 477 U.S. at 248 - 249; *see also*
 23 *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). Where the record taken as

24 ⁶⁹ SJ Exh. 2, pp. 73-74.

25 ⁷⁰ SJ Exh. 4, pp. 188-189 (¶ 10), 246.

26 ⁷¹ InterBill refunded \$161,379.00 to consumers. In addition, Wells Fargo turned over
 27 \$588,034.15 from InterBill's account to the FTC as a result of the Pharmacycards judgment. SJ Exh. 10,
 p. 323. That money was returned to consumers. SJ Exh. 4, pp. 188-189 (¶ 10), 246.

1 a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
2 “genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
3 574, 586 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S.
4 253, 289 (1968)).

5 Here, there is no genuine issue of material fact that the defendants have engaged in
6 unfair acts and practices prohibited by Section 5(a) of the FTC Act, and the Commission
7 is entitled to judgment as a matter of law. Undisputed evidence establishes that InterBill
8 debited consumers’ bank accounts without the consumers’ authorization, causing
9 substantial consumer injury, not reasonably avoided by consumers themselves, and not
10 outweighed by countervailing benefits to consumers or competition. It is similarly
11 undisputed that Thomas Wells is liable for the corporation’s violations because he was
12 the sole owner, director, and officer of InterBill and knowingly participated in and
13 controlled its unlawful acts.

14 **B. InterBill’s Unauthorized Debiting of Bank Accounts Is Unfair**

15 Section 5(a) of the FTC Act prohibits unfair acts or practices in or affecting
16 commerce. 15 U.S.C. § 45(a). For an act or practice to be “unfair” it must satisfy a three
17 prong test: (1) it must cause substantial consumer injury; (2) it must be injury that
18 consumers themselves could not reasonably have avoided; and (3) it must not be
19 outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).
20 *See also Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988)
21 (citing FTC’s 1980 Policy Statement); *J.K. Publications*, 99 F. Supp. 2d at 1201;
22 *Windward Marketing*, 1997 U.S. Dist. LEXIS 17114, *29-30. Additionally, the
23 unfairness standard, focusing as it does upon consumer injury, does not require the court
24 to take into account the mental state of the party accused of a Section 5 violation. “The
25 purpose of the Federal Trade Commission Act is to protect the public, not punish the
26 wrongdoer.” *Regina Corp. v. F.T.C.*, 322 F.2d 765, 768 (3d Cir.1963). Consequently,
27 the “Commission has traditionally focused on the effects of conduct in order to afford the

1 most protection possible for the public.” *In re: International Harvester*, 104 F.T.C. 949,
2 1085 (1984). A practice may be found unfair to consumers without a showing that the
3 offending party intended to cause consumer injury. *Orkin*, 849 F.2d at 1368.

4 Knowingly debiting consumers’ accounts without authorization is a classic unfair
5 practice. Every court that has considered this practice has found it unfair, in violation of
6 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). *Windward*, 1997 U.S. Dist. LEXIS
7 17114 at *29-31; *J.K. Publications*, 99 F. Supp. 2d at 1201; *FTC v. Crescent Publishing*
8 *Group, Inc.*, 129 F. Supp. 2d 311, 321 (S.D. N.Y 2001).⁷² *Windward*, in particular, is
9 directly on point, involving unauthorized debiting by a payment processor. *J.K.*
10 *Publications* and *Crescent*, although involving merchants and not processors, are also
11 instructive because they illustrate the factors that courts looked to in determining whether
12 defendants have engaged in unauthorized debiting.

13 In *Windward*, the processor defendant, like InterBill, used unsigned demand drafts
14 (referred to as “bank drafts” by the court) to make unauthorized debits to consumers’
15 accounts in connection with a fraudulent telemarketing operation. The *Windward* court
16 held the payment processor liable on Section 5 unfairness grounds for this conduct,
17 finding it particularly significant that the processor defendant had notice that it was
18 processing payments for which consumers had not given their informed consent. The
19 court found that the defendant knew that the bank drafts sent by the merchant for
20 collection were not authorized by the consumers, or, at the very least, that the defendant
21 was on notice of a high probability of fraud and/or unfairness and consciously avoided
22 learning the truth. 1997 U.S. Dist LEXIS 17114 at *37 - 38.

23
24 ⁷² The Commission has also found the practice of unauthorized debiting to be unfair both in
25 recently filed federal court complaints, *see, e.g., FTC v. Global Marketing Group, et al.*, Civ. No. 08:06-
26 cv-2272-T-30TGW (M.D. Fla.) (1st amended complaint filed 3/19/07), and in numerous settlements
27 authorized for filing by the Commission and approved by district courts, *see, e.g., FTC v. Universal*
Processing, Civ. Action No. 05-6054(FMC) (C.D. Cal) (stipulated final order entered 8/22/05). The
Commission’s approval of such settlements represents its express position that unauthorized debiting is an
unfair practice. That position is owed “some deference.” *Windward*, 1997 U.S. Dist LEXIS 17114 at *31
(citing *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986)).

1 The *Windward* court identified several facts that should have indicated to the
2 defendant that he was processing unauthorized drafts. These included 1) that 40% of the
3 bank drafts were returned; 2) that the depositing bank notified the defendant of numerous
4 consumer complaints; and 3) that the defendant had notice of other consumer complaints
5 about unauthorized bank drafts. *Id.* at *33 - 34. The *Windward* court found that issuing
6 bank drafts on consumers' accounts under such circumstances caused substantial injury,
7 not reasonably avoidable by the consumers themselves, not outweighed by any benefits to
8 consumers or competition, and thus was an unfair practice. *Id.* at *37- 38. Each of those
9 factors is also present in this case.

10 In *J.K. Publications*, the court found that defendants engaged in unfair business
11 practices by submitting unauthorized credit card charges for processing. *J.K.*
12 *Publications*, 99 F. Supp. 2d at 1191. The defendants, owners of adult content websites,
13 billed customers who had neither visited defendants' websites nor had authorized the
14 billing of their credit cards. (Many consumers who were charged in this scheme, which
15 operated in 1998, complained that they did not even own a computer.) In finding that the
16 defendants processed Visa card numbers without authorization, the court noted that the
17 absence of the ordinary indicia of a legitimate business was evidence that the merchant's
18 operations were fraudulent. *Id.* at 1203. The court also looked to the high chargeback
19 rate (the credit card equivalent of a return rate) and the large number of consumer
20 complaints as evidence of unauthorized billing. *J.K. Publications*, 99 F. Supp. 2d at
21 1192. The court held that debiting and charging card numbers without the cardholders'
22 authorization was an unfair practice that resulted in substantial consumer injury and was
23 not outweighed by any benefits to consumers or competition. *Id.* at 1203.

24 In *Crescent*, a preliminary injunction action against owners of adult content
25 websites, the court similarly found that billing consumers' credit card accounts without
26 the consumers' clear authorization was an unfair practice. Lack of consumer
27 authorization was evidenced by, among other things, a "'strikingly high' charge back

1 level that averaged approximately 10.51 percent” *Crescent*, 129 F. Supp. 2d at 316.
2 The court found that the Commission was likely to prevail on its unfairness claim because
3 such unauthorized billing caused substantial consumer injury and was not reasonably
4 avoidable by consumers, and because the benefits did not offset the harm caused by the
5 practice. *Id.* at 322.

6 InterBill’s practices fit squarely with these cases. It engaged in unfair practices by
7 debiting consumers’ accounts without the consumers’ authorization. As with the
8 defendants in the cases described above, it was on notice that the charges were
9 unauthorized because of high return rates, complaints from consumers, communications
10 from its bank, and the absence of any indicia of a legitimate business associated with
11 Pharmacards. Tens of thousands of unauthorized charges to consumers’ accounts of
12 \$139 each caused substantial consumer injury that could not have been reasonably
13 avoided by consumers and is not outweighed by any benefit to consumers or competition.

14 Each of the elements of unfairness is discussed in further detail below.

15 1. Interbill Caused Substantial Consumer Injury

16 The first prong of the unfairness test requires a finding that the defendant caused
17 substantial consumer injury. The FTC can make this showing by, among other things,
18 establishing that consumers were injured by a practice for which they did not bargain.
19 *Orkin*, 849 F.2d at 1364-65. The injury may be considered sufficiently substantial if it
20 causes a small harm to a large class of people. *Windward*, 1997 U.S. Dist. LEXIS 17114
21 at *31-32.

22 Here, InterBill substantially harmed thousands of consumers by debiting their
23 accounts, without authorization, \$139. Monetary injury caused by InterBill totals
24 \$1,779,712.⁷³

25 ⁷³ Although not readily quantifiable, many consumers were further injured when they bounced
26 checks as a result of the unauthorized withdrawals. SJ Exh. 4, pp. 187 (¶ 7), 228-233; SJ Exh. 7, p. 273
27 (¶ 2). In addition, the time and energy consumers spent trying to reverse these transactions was often
considerable, as well as the concern and discomfort associated with knowing that a stranger had access to
their checking account information. *See* SJ Exh. 8, p. 282.

1 InterBill was an integral partner in the Pharmacards scam. While the
2 Pharmacards perpetrators proposed the scheme and supplied the consumers' account
3 numbers, they found a willing partner in InterBill. Indeed, without InterBill, the
4 Pharmacards principals would not have been able to gain access to the more than
5 72,000 consumer accounts it attempted to debit. The fact that Pharmacards shares
6 responsibility for causing this consumer injury does not excuse InterBill from liability for
7 its own acts. It was InterBill that located the printer who printed the paper drafts; it was
8 InterBill that located a bank willing to establish a draft account; it was InterBill to whom
9 the drafts were made payable; it was InterBill that monitored the return rates; it was
10 InterBill that actively negotiated with the bank to keep processing going even after the
11 bank notified InterBill of concerns about unauthorized debits; it was InterBill that
12 responded to consumer complaints about unauthorized debits; it was InterBill in whose
13 account the proceeds were deposited; it was InterBill that controlled all pay-outs from
14 that account; and it was InterBill that stood to profit from continued processing. These
15 direct acts by InterBill caused substantial injury to consumers.

16 2. Consumers Could Not Reasonably Have Avoided Injury

17 The second element of the unfairness standard examines whether consumers
18 reasonably could have avoided the injury. This prong focuses on whether the consumers
19 had a free and informed choice that would have enabled them to avoid the unfair practice.
20 *J.K. Publications*, 99 F. Supp. 2d at 1201, *accord International Harvester*, 104 F.T.C. at
21 1061; *Orkin*, 849 F.2d at 1365.

22 Consumers whose accounts were debited by InterBill did not have notice that their
23 accounts would be debited; nor did consumers authorize the debits. As a result, the
24 consumers had no free or informed choice to avoid the injury. Like consumers in other
25 unauthorized billing cases, the consumers in this case could not reasonably have avoided
26 the injury. *Windward*, 1997 U.S. Dist. LEXIS 17114, *29-30; *J.K. Publications*, 99
27 F. Supp. 2d at 1201; *Crescent*, 129 F. Supp. 2d at 322.

1 3. The Injury to Consumers' Is Not Outweighed by Countervailing
2 Benefits to Consumers or Competition

3 The third prong of the unfairness standard requires that the adverse consequences
4 to consumers are “not outweighed by countervailing benefits to consumers or to
5 competition.” 15 U.S.C § 45(n). While many business practices can create a mixture of
6 both beneficial and adverse consequences, when a practice produces clear adverse
7 consequences for consumers that is not accompanied by an increase in services or
8 benefits to consumers or by benefits to competition, the injury to consumers is not
9 outweighed and the practice is unfair. *Windward*, 1997 U.S. Dist. LEXIS 17114 at *32
10 (*citing Orkin Exterminating Co.*, 849 F.2d at 1365). (Note that this test focuses on the
11 effects on competition generally, and not on the benefits to one particular business.)

12 The practice at issue here, making unauthorized debits to consumers' bank
13 accounts, while knowing or consciously avoiding knowing that such debits were
14 unauthorized, causes injury to consumers that is not outweighed by any countervailing
15 benefits to consumers or competition. Indeed, there are no benefits whatsoever to
16 consumers or competition created by the practice of knowingly making unauthorized
17 debits to consumers' accounts. Avoiding the costs associated with taking reasonable
18 steps to verify consumer authorization of payments would only minimally benefit
19 payment processors, and only if such actions were unnecessary to prevent fraud. Given
20 the inherent potential for demand drafts to be used to perpetrate fraud, the monitoring
21 costs associated with fraud prevention are a reasonable cost of doing business, and
22 indeed, requiring processors to take such steps benefits competition because otherwise the
23 high number of returns created by unauthorized transactions imposes costs on banks,
24 especially consumers' banks, and undermines consumer confidence in such payment
25 mechanisms.⁷⁴

26 It is undisputed that InterBill debited consumers' accounts without authorization.
27 It is equally indisputable that it did so while knowing or consciously avoiding knowing

⁷⁴ SJ Exh. 8, pp. 281-282.

1 that the demand drafts it created and deposited were not authorized by consumers.
2 Minimal due diligence and monitoring would have revealed that the proposed
3 Pharmacycards business was a fraud. Most significantly, the projected – and later
4 realized – return rates strongly signaled that the debits were unauthorized. As Mr. Wells
5 observed at one point about the high return rate, “this just smells.”⁷⁵ InterBill saw these
6 red flags, but chose to protect itself financially, by maintaining an unusually high reserve
7 account, while facilitating the continuing theft. From the lack of indicia of a legitimate
8 business, like the defendants in *J.K. Publications*, to notice of consumer complaints and
9 warnings from its bank, like the defendants in *Windward*, to the projected and actual
10 astronomically high return rates, like the defendants in *Windward*, *J.K. Publications*, and
11 *Crescent*, InterBill knew, or consciously avoided knowing, that its actions were causing
12 substantial harm to consumers. Under these circumstances, there are no countervailing
13 benefits to consumers or competition that outweigh the harm caused by knowingly
14 making unauthorized debits to consumers’ accounts.

15 Like previous unauthorized debiting cases considered by the courts and the
16 Commission, InterBill’s practice of knowingly making unauthorized debits to
17 consumers’ accounts was unfair and violates Section 5 of the FTC Act.

18 **C. Equitable Relief is Appropriate**

19 Section 13(b) of the FTC Act authorizes the court to grant a permanent injunction
20 against violations of any provision of law enforced by the Commission. 15 U.S.C.
21 § 53(b); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982). The authority to
22 grant such relief includes the power to grant any ancillary relief necessary to accomplish
23 complete justice, including ordering equitable monetary relief to redress consumer injury
24 or disgorgement of unjust enrichment. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1101-03
25 (9th Cir. 1994); *see also FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Gem*
26 *Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996).

27 ⁷⁵ SJ Exh. 3, p. 140, authenticated at SJ Exh. 2, pp. 69-70.

1 1. Injunctive Relief is Necessary to Protect Consumers

2 A permanent injunction may properly be issued when there is a “cognizable danger
3 of recurrent violation, or some reasonable likelihood of future violations.” *United States*
4 *v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894 (1953). The mere discontinuance of
5 an unlawful practice prior to law enforcement action does not deprive a court of the
6 power to grant injunctive relief. *Id.*; *see also FTC v. Affordable Media*, 179 F.3d 1228,
7 1238 (9th Cir. 1999); *FTC v. Sharp*, 782 F. Supp. 1445, 1454 (D. Nev. 1991).

8 An injunction is needed here to protect consumers and to prevent defendants from
9 processing payments for some new scam. Although InterBill has ceased processing
10 demand drafts, it has continued to process other types of payments.⁷⁶ There is nothing to
11 prevent the Defendants from processing unauthorized charges for some new scam
12 whether via demand drafts or through some other payment mechanism. Thus, an
13 injunction is necessary. *See FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1204
14 (10th Cir. 2005) (the FTC need only show the “possibility” that unlawful conduct will
15 recur). Additionally, the FTC need not show that the defendants are likely to engage in
16 law violations involving the same precise conduct, but rather that similar violations are
17 likely to occur. *W.T. Grant Co.*, 345 U.S. at 633-34 (authorizing injunctive relief aimed
18 at similar conduct); *TRW, Inc., v. FTC*, 647 F.2d 942, 953 (9th Cir. 1981) (in determining
19 whether a case is moot, the concern is with repeated violations of the same law, and not
20 merely with repetition of the same offensive conduct).

21 The scope of the injunction should cover all forms of payment processing,
22 including demand drafts, credit cards, ACH debits, and any other method by which
23 payments might be processed. Such “fencing in” is reasonably related to the injury
24 defendants caused, and is not legally objectionable. *See Zenith Radio Corp. v. Hazeltine*
25 *Research, Inc.*, 395 U.S. 100, 132, 89 S. Ct. 1562 (1969) (“A federal court has broad
26 power to restrain acts which are of the same type or class as unlawful acts which the court

27

⁷⁶ SJ Exh. 1, p. 3 (¶ 5); SJ Exh. 2, p. 97A, SJ Exh. 3, p. 160 (response to Interrog. 3).
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1 has found to have been committed or whose commission in the future, unless enjoined,
2 may fairly be anticipated from the defendant's conduct in the past."); *see also Trans*
3 *World Accounts, Inc., v. FTC*, 594 F.2d 212, 215 (9th Cir. 1979) ("fencing in" provisions
4 are needed to prevent similar and related violations from occurring in the future).

5 2. Monetary Relief is Necessary to Redress Consumer Injury

6 Section 13(b)'s grant of authority is not limited to the power to issue an injunction;
7 it includes the "authority to grant any ancillary relief necessary to accomplish complete
8 justice." *H.N. Singer, Inc.*, 668 F.2d at 1113 (emphasis added). "This power includes the
9 power to order restitution." *Pantron*, 33 F.3d at 1102. The proper measure of restitution,
10 as defined by the Ninth Circuit, "is the amount that will restore the victims to the status
11 quo ante, not what [the defendants] received." *FTC v. Gill*, 265 F.3d 944, 958 (9th Cir.
12 2001) (finding that the district court properly used the amount consumers paid as the
13 measure for the amount Defendants should be ordered to pay for their wrongdoing). The
14 full amount lost by consumers was also deemed the appropriate equitable remedy for the
15 processor defendants to pay in *Windward*, 1997 U.S. Dist. LEXIS 17114, *44-45
16 (specifically rejecting the defendants' argument that the monetary relief ordered be
17 limited to the profits that defendants earned).

18 There is no genuine issue of material fact regarding the amount InterBill debited
19 from consumers without authorization. The FTC relies exclusively on documents and
20 information provided by InterBill. These figures show that the total amount deposited in
21 the InterBill bank account was approximately \$9,999,938.00.⁷⁷ Of that approximately
22 \$7,470,811 were returns that were not ultimately debited against consumers' accounts.
23 Another approximately \$749,400 was indirectly returned to consumers by InterBill or
24 Wells Fargo bank.⁷⁸ Thus, the remaining amount directly debited from consumer bank

25
26 ⁷⁷ SJ Exh. 4, pp. 188-189 (¶ 10) and 246.

27 ⁷⁸ *Id.*

1 accounts by InterBill is approximately \$1,779,700. Monetary relief should be entered
2 against defendants in that amount.

3 **D. Thomas Wells Is Individually Liable for InterBill's Unlawful Conduct**

4 An individual defendant may be held liable for injunctive relief for a corporate
5 defendant's violations of the FTC Act if the individual participated directly in the
6 wrongful acts or practices or had authority to control the corporation. *FTC v. Publishing*
7 *Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). Corporate officers are
8 presumed to control small, closely-held corporations. *Id. See also FTC v. Amy Travel*
9 *Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). It is undisputed that Thomas Wells,
10 InterBill's sole corporate officer and owner, participated in and controlled the acts of
11 InterBill. In connection with InterBill's business dealings with Pharmacards,
12 Mr. Wells exchanged telephone calls and emails with the Pharmacards perpetrators,
13 located a business to print the draft checks, negotiated with Wells Fargo bank to establish
14 InterBill's demand draft account, monitored return rates, and reviewed and responded to
15 the numerous consumer complaints InterBill received.⁷⁹ Indeed, at all times he was
16 directly responsible for the actions of InterBill. Thus, he shares liability for injunctive
17 relief with InterBill.

18 An individual defendant is also liable for equitable monetary relief if he had the
19 authority to control the business and knew or should have known that the corporation
20 engaged in the wrongful acts or practices. *Publishing Clearing House*, 104 F.3d at 1170;
21 *see also J.K. Publications*, 99 F. Supp. 2d at 1204; *Windward*, 1997 U.S. Dist. LEXIS
22 17114 at *31-32. The FTC is not required to show that a defendant intended to defraud
23 consumers in order to hold that individual personally liable. *Publishing Clearing House*,
24 104 F.3d at 1170.

25 An individual has the requisite knowledge if he either: (1) had actual knowledge of
26 the wrongful acts or practices; (2) was recklessly indifferent to whether or not the

27 ⁷⁹ See generally *supra*, pp. 4-13.

1 corporate acts or practices were fraudulent; or (3) had an awareness of a high probability
2 that the corporation was engaged in fraudulent practices along with an intentional
3 avoidance of the truth. *FTC v. Cyberspace.com*, 453 F.3d 1196, 1202 (9th Cir. 2006),
4 *accord Windward* 1997 U.S. LEXIS 17114 at *39.

5 It is undisputed that Mr. Wells knew or consciously avoided knowing that the
6 Pharmacards scheme was fraudulent and that the charges processed by InterBill were
7 not authorized. His response to the highly suspect business model proposed by
8 Pharmacards was to establish high reserves to cover the anticipated high return rates.
9 Once processing began, Mr. Wells received direct confirmation of what he should have
10 known all along -- consumers complained that the demand drafts made out to InterBill
11 and debited from their accounts were not authorized. In addition to the consumer
12 complaints, Mr. Wells learned of problems with unauthorized debits from the bank and
13 because of the ever-escalating return rate. Given Mr. Wells' knowing participation in this
14 fraudulent scheme he should be held jointly and severally liable with InterBill for
15 equitable monetary relief in the amount of \$1,779,712. *Sharp*, 782 F. Supp. at 1453-54
16 (individuals held jointly and severally liable with corporate wrongdoers); *see also*
17 *Windward*, 1997 U.S. LEXIS 17114 at *39.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the FTC respectfully requests that its motion for
20 summary judgment be granted, and that an order be entered enjoining defendants from
21 future violations of Section 5 of the FTC Act and requiring defendants to pay monetary
22 relief to redress consumer injury in the amount of \$1,779,700.

23 Respectfully submitted this 17th day of January, 2008.

24 /s/ Tracy S. Thorleifson

25 Tracy S. Thorleifson
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CERTIFICATE OF ELECTRONIC SERVICE

I, Tracy Thorleifson, hereby certify that on this 17th day of January, 2008, a true copy of the foregoing Plaintiff's Motion for Summary Judgment and Memorandum of Points and Authorities was filed and served electronically via the CM/ECF to the following:

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