

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

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

**HES MERCHANT SERVICES
COMPANY, INC., HAL E. SMITH and
UNIVERSAL PROCESSING SERVICES
OF WISCONSIN, LLC,**

Defendants.

ORDER

This cause comes before the Court on Plaintiff Federal Trade Commission's ("FTC") Motion for Equitable Monetary Relief Judgment (Doc. No. 213) against Defendants Hal E. Smith and HES Merchants Services Company, Inc. ("Smith") and Defendant Universal Processing Services of Wisconsin, LLC ("UPS") (collectively, "Defendants"). Both Smith and UPS filed Responses in Opposition to the Motion, (Doc. Nos. 232 and 225, respectively), and the FTC replied with leave of Court (Doc. Nos. 239, 236). For the reasons that follow, the Court will grant the FTC's Motion and direct judgment for equitable monetary relief.

I. BACKGROUND

This is the final stage of an FTC action to dismantle a telemarketing boiler room and recover consumer funds from the various companies and individuals who facilitated the scam. Ten defendants settled, but two did not: the credit card processing company (UPS), whom the FTC accused of violating the Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310.3(b), by assisting and facilitating the boiler room's unlawful business practices, and a key participant in the venture

(Smith), whom the FTC accused of violating the TSR and Section 5 of the FTC Act, 15 U.S.C. § 45. On November 18, the Court granted summary judgment in favor of the FTC and against UPS and Smith, (Doc. No. 208), and ordered the FTC to file motions for permanent injunctions and monetary relief in the form of a requested final judgment. The FTC did so on December 5.

II. LEGAL STANDARDS AND ANALYSIS

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), grants district courts the authority to order restitution and disgorgement for violations of the FTC Act and the TSR. *FTC v. Lalonde*, 545 F. App'x 825, 841 (11th Cir. 2013) (per curiam) (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996)). “Disgorgement and restitution are measured by a defendant’s unjust enrichment,” which is the amount of “[n]et revenue (gross receipts minus refunds)” the defendants received. *Id.* (citing *FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1326-27 (11th Cir. 2013) (per curiam)).

The FTC seeks to obtain \$1,734,972 in equitable monetary relief from UPS, Smith, and Smith’s eponymous company, jointly and severally. This amount constitutes the undisputed net revenue of the TYS enterprise, and is based on UPS’ own records. Under Eleventh Circuit precedent, this the proper amount to be disgorged. Both UPS and Smith direct the Court’s attention to the Second Circuit’s decision in *FTC v. Verity International, Ltd.*, which holds that the amount of restitution must not exceed the amount that the actual defendants gained, even if consumers lost more because nonparty middlemen took some of the proceeds. 443 F.3d 48, 67-68 (2d Cir. 2006). The Eleventh Circuit has already distinguished *Verity International* such that it is of no moment in the instant dispute. In *FTC v. IAB Marketing Associates, LP*, the panel explained that the key issue in *Verity* “was the appropriate amount of restitution where multiple nonparty middlemen retained a significant portion of the total revenues.” 746 F.3d 1228, 1234 (11th Cir. 2014)

(emphasis added) (citing *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 68 (2d Cir. 2006)). In *IAB Marketing*, as is also the case here, the entities claiming to be “middlemen” were named parties in the suit. Because the holding in *Verity* is limited to nonparty middlemen, it does not apply to named defendants subject to joint and several liability.


The Court finds that a judgment ordering HES, Smith, and UPS to pay \$1,734,972 in equitable monetary relief is necessary and appropriate to relieve the substantial and undisputed consumer losses in this case.

III. CONCLUSION

Based on the foregoing, it is ordered as follows:

1. The Federal Trade Commission’s Motion for Equitable Monetary Relief Judgment (Doc. No. 213), filed December 5, 2014, is **GRANTED**. Judgments against each Defendant shall issue separately as attachments to the Court’s orders on the motions for permanent injunctions (Doc. Nos. 211, 212).

DONE and ORDERED in Chambers, in Orlando, Florida on February 11, 2015.


ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties