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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Federal Trade Commission,

Plaintiff,

v.

Electronic Payment Solutions of America, Inc., et al.,

Defendants.

No. CV-17-02535-PHX-SMM

Reply in Support of the FTC's Motion for Summary Judgment Against Defendants Electronic Payment Systems, LLC, Electronic Payment Transfer, LLC, John Dorsey, and Thomas McCann

Oral Argument Requested

In its Motion for Summary Judgment (Doc. 322) and Statement of Facts (Doc. 317), the FTC demonstrated that there are no genuine disputes of material fact and that it is entitled to judgment as a matter of law against corporate Defendants Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC (collectively, "EPS"), and individual Defendants John Dorsey and Thomas McCann, EPS's owners. In their Oppositions and Counterstatements of Fact, EPS (Docs. 330 & 331), Dorsey, and McCann (Docs. 328 & 329)[1] failed to demonstrate otherwise. The FTC is mindful that "a reply should be narrowly tailored" to address the defendants' oppositions (Doc. 311, at 3)—thus the following Reply concisely addresses Defendants' key points. Additionally, the Appendix highlights, without argument, other significant unsupported assertions that permeate Defendants' oppositions.

[1] Many of Dorsey and McCann's additional facts asserted in opposition are the same as the facts they submitted in support of their own motion (Doc. 313), to which the FTC has responded (Doc. 325). *See* Evans Dec. (attached) ¶ 14 (chart listing corresponding facts).

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LIST OF DOCUMENTS AND EXHIBITS REFERENCED

The FTC cites the following docket entries herein:

Docket Number	Document	Cited/Labeled As
85	FTC's First Amended Complaint for Permanent Injunction and Other Equitable Relief	**FAC**
89	Defendant John Dorsey's Answer to Plaintiff's First Amended Complaint	**Dorsey Ans.**
91	Defendant Thomas McCann's Answer to Plaintiff's First Amended Complaint	**McCann Ans.**
93	Defendants Electronic Payment Systems LLC's and Electronic Payment Transfer LLC's Amended Answer, Cross-Claims, Third-Party Claims in Response to Plaintiff's First Amended Complaint	**EPS Ans.**
270	Defendants Electronic Payment Systems LLC's and Electronic Payment Transfer LLC's Statement of Undisputed Facts in Support of Their Motion for Summary Judgment	**EPS MSJ Facts*** (only undisputed facts sharing the same fact number in both filings will be cited)
275	FTC's Counterstatement of Facts in Opposition to EPS's Motion for Summary Judgment	
317	Statement of Undisputed Material Facts in Support of the FTC's Motion for Summary Judgment Against Defendants Electronic Payment Systems, LLC, Electronic Payment Transfer, LLC, John Dorsey, and Thomas McCann	**FTC SF***
317—Attachments	Declarations, Transcripts, Exhibits, Discovery Papers, and Expert Report (with attachments) in Support of the FTC's Motion for Summary Judgment Against Defendants Electronic Payment Systems, LLC, Electronic Payment Transfer, LLC, John Dorsey, and Thomas McCann	(see labels assigned to these materials in Doc. 317, at ii–vii)
322	FTC's Motion for Summary Judgment Against Defendants Electronic Payment Systems, LLC, Electronic Payment Transfer, LLC, John Dorsey, and Thomas McCann	**FTC MSJ**
328	Defendants John Dorsey and Thomas McCann's Opposition to FTC's Motion for Summary Judgment	**D-M Opp.**
329	Defendants John Dorsey and Thomas McCann's Counterstatement of Undisputed Material Facts in Opposition to FTC's Motion for Summary Judgment	**D-M CSF***

Docket Number	Document	Cited/Labeled As
330	Defendants Electronic Payment Systems, LLC's, Electronic Payment Transfer, LLC's Response to FTC's Motion for Summary Judgment	**EPS Opp.**
331	Defendants Electronic Payment Systems, LLC, Electronic Payment Transfer, LLC's Controverting Statement of Facts in Opposition to FTC's Motion for Summary Judgment	**EPS CSF***

* Citations to various statements of fact are made by Fact Number, rather than by page.

The FTC also attaches, in this order, the following additional exhibits cited herein:

Deposition Transcript Excerpts from
Electronic Payment Systems, LLC v.
Electronic Payment Solutions of America, Inc.

Exhibit	Cited/Labeled As
Deposition of Jay Wigdore, July 2, 2019	**Wigdore Colo. Tr.**

Deposition Transcript Excerpts from
Discovery in This Case

Exhibit	Cited/Labeled As
Deposition of James Alberici, Merrick Bank, Apr. 30, 2019	**Alberici Tr.**
Deposition of Travis Bellet, former EPS employee, May 14, 2019	**Bellet Tr.**
Deposition of Robert Johnson, EPS data entry manager, Aug. 7, 2019	**Johnson Tr.**
Deposition of Kevin Killingsworth, FTC expert witness, August 27, 2020	**Killingsworth Tr.**
Deposition of Nikolas Mihilli, former Wigdore employee, July 24, 2019	**Mihilli Tr.**
Deposition of Michael Peterson, former EPS employee, April 21, 2016	**Peterson CID Tr.**
Deposition of Michael Peterson, former EPS employee, May 16, 2019	**Peterson Tr. vol. 1**
Deposition of Michael Peterson, former EPS employee, May 17, 2019	**Peterson Tr. vol. 2**
Deposition of Sean Singh, former Merrick Bank employee, May 2, 2019	**Singh Tr.**
Deposition of Jay Wigdore, July 23, 2019	**Wigdore Tr.**
Exhibits from the above-listed deposition transcripts*	**EPS Dep. Ex.**

* Exhibits 56, 138, and 139 are attached hereto; all others are attached to Doc. 317.

FTC'S REPLY IN SUPPORT OF SUMMARY JUDGMENT

Instead of creating genuine disputes, Defendants' oppositions offer the Court a plethora of unsupported assertions and fallacious arguments. As the Court recently reminded the parties, "argument alone is insufficient" to prove a conclusion. *FTC v. EPSA*, No. CV-17-02535-PHX-SMM, 2020 WL 7385466, at *4 (D. Ariz. Dec. 11, 2020) ("*EPSA III*"). Rather, Defendants "must identify specific record evidence and explain how that material defeats summary judgment." *Id.* at *6 (quotation marks omitted); *see also* Fed. R. Civ. P. 56(c)(1). The following argument addresses Defendants' legal arguments and some of their most significant factual errors.[1]

1. EPS employees' knowledge is imputed to EPS. "EPS does not dispute that [its then-Risk Manager, Michael Peterson, and his subordinate, Travis Bellet] were aware of the [Money Now Funding] scam and the relationship between the Subject Merchants." EPS CSF 16.[2] But EPS repeatedly asserts that Peterson (though not Bellet) was an "adverse agent," and thus his knowledge cannot be imputed to EPS. *See, e.g.*, EPS Opp. at 13–15; EPS CSF 14. Defendants ignore that employees other than Peterson knew about problems with the Subject Merchants, and they wrongly conclude that under agency law, Peterson was "adverse" to them.

Defendants tacitly recognize that, in general, an agent's knowledge is imputed to his principal when the agent is acting within the scope of his apparent authority. EPS Opp. at 14. EPS's employees are its agents. *See* Restatement (Third) of Agency § 7.07. EPS's knowledge does not hang solely upon imputed knowledge from Peterson; he was just one of several employees who knew about problematic merchant applications and Merrick's related concerns. Travis Bellet, Robert Johnson, Lorrinda Dyer, and even COO Anthony Maley received emails from Merrick expressing "risk concerns" about the Subject Merchants' accounts, including several that were "processing without approval."

[1] The Court granted the FTC twelve pages to reply to Defendants' oppositions (Doc. 311). The Appendix lists, without argument, some of Defendants' unsupported assertions that there is not space to address herein. The FTC intends the Appendix to aid the Court's review; an independent review of the same citations would uncover the same issues.

[2] See the List of Documents and Exhibits Referenced, pg. v, for document citations.

See Evans Dec (attached) ¶ 3(a)–(u) (citing exhibits). It was Bellet, not Peterson, who noted: (1) when he called Subject Merchant AJ Marketing Group, the phone was answered "Miller Marketing," FTC SF 16; and (2) a chargeback on a KMA account contained paperwork showing that the sale was actually made by Rose Marketing, *see* Appendix item 16. Defendants were on notice—or consciously avoided knowing—that the Subject Merchants' accounts were likely being used for credit card laundering.

Moreover, even when an agent is a bad actor and the principal is unaware of his conduct, the agent's knowledge is typically still imputed to the principal: "[N]otice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal, unless the agent (a) acts adversely to the principal …." Restatement (Third) of Agency § 5.03. Relying on § 5.03(a), Defendants argue that Peterson was an "adverse agent" because he took "kickbacks" from EPS sales agent Jay Wigdore and his associates, and stole funds from EPS. The facts and applicable case law, however, belie that theory.

Under the Restatement, an agent "acts adversely" when he "intend[s] to act solely for the agent's own purposes or those of another person." Restatement (Third) of Agency § 5.04; *see also Costa Brava P'ship III LP v. ChinaCast Educ. Corp.*, 809 F.3d 471, 476 (9th Cir. 2015) (imputing knowledge to principal where agent was not acting solely in his own interest). Though Peterson admitted to accepting money from Wigdore and stealing money from EPS, he is not the inside operative or thief that Defendants make him out to be. *See* Appendix items 3–7, 13, 23–27. Even if Peterson stole from EPS, he did not act solely in his own interest. As risk manager, Peterson communicated and maintained relationships with Wigdore's office and Merrick Bank and kept merchant accounts processing, all to EPS's benefit. He also communicated regularly with Maley (daily), McCann (daily or "semi-daily"), and Dorsey (once or twice a week). Peterson Tr. vol. 1, 33:1–34:6. He managed the risk department, monitoring daily transactions and chargebacks—"making sure the process [ran] smoothly." *Id.* 16:2–10, 17:13–18:14. Peterson also sought to protect EPS's interests with Merrick. Sean Singh of Merrick

testified that, as early as June 7, 2012, Peterson was wary of Wigdore's accounts, telling Singh "privately, off the record, that he wouldn't mind if [Merrick] took action on the [Wigdore] sales channel." Singh Tr. 54:3–5 & EPS Dep. Ex. 89.

Furthermore, even when an agent is adverse to his principal, an exception to the adverse inference rule applies: "[N]otice is imputed (a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or (b) when the principal has ratified or knowingly retained a benefit from the agent's action." Restatement (Third) of Agency § 5.04. Both prongs apply here: Imputing knowledge to EPS would be necessary to protect the rights of third parties, such as Merrick Bank, which dealt with EPS in good faith; and EPS both ratified and retained a benefit from Peterson's conduct, which kept funds flowing from consumers' payments to EPS.

2. The Subject Merchant applications were not the needles in haystacks that EPS suggests. EPS asserts that the Subject Merchant applications were "intermingled with thousands of other[s]" from multiple agents. EPS Opp. at 2; *see also id.* at 5–6; EPS CSF 5, 11, & 25.[3] But the evidence shows that, in many instances, they were unmistakably grouped. For example, EPS received nearly identical paperwork on groups of Subject Merchants in batches attached to the same email messages. *See, e.g.*, EPS Dep. Exs. 145, 146, & 152. EPS also communicated with Wigdore's office about batches of Subject Merchants in single emails. *See, e.g.*, EPS Dep. Exs. 144 & 148. Employees at Merrick also picked up on the patterns quickly. For example, as early as May 25, 2012, Merrick told EPS it had declined a Subject Merchant because it was "[a]nother home based marketing solutions [business], no information on file." EPS Dep. Ex. 87. By September 2012, Merrick was referring to them collectively as "marketing accounts" in correspondence with EPS. *See, e.g.*, EPS Dep. Ex. 68.[4] Further, the FTC's expert, Kevin

[3] The FTC objects to EPS's unauthenticated evidence in support of this assertion—four documents that purport to be lists of merchants that EPS approved during the relevant time period (EPS's Exhibits A–D). EPS did not produce these documents in discovery, *see* Evans Dec ¶ 4, and does not cite anything to authenticate them, *see* Fed. R. Civ. P. 56(c)(2); Fed. R. Evid. 901(a).

[4] Merrick also connected the dots between these merchants in internal communications.

Killingsworth,[5] opined that certain applications received together either: (1) "had such similar characteristics that the applications should have raised suspicions of being related, indicating the underlying merchant's intent to load balance and launder sales transactions, and warranting EPS to conduct additional investigation"; or (2) "had such similar characteristics that *any reviewer* should have realized these accounts were related, indicating the underlying merchant's intent to load balance and launder sales transactions" (Doc. 317-13, at ECF pgs. 12–14, 18 (emphasis added)).

3. EPS incorrectly assigned non-telemarketing MCCs to the Subject Merchants. EPS asserts that it assigned the Subject Merchants MCCs "based on their primary business in accordance with [Visa/MasterCard] directives." EPS Opp. at 2–3; *see also id.* at 5; EPS CSF 11 & 26. But the evidence EPS cites does not support this. EPS cites its Exhibit E, a four-page excerpt from a 472-page MasterCard document (Doc. 331-2, at ECF pgs. 127–30).[6] EPS seizes on one line: "An accurate MCC is defined as a valid MCC that most reasonably and fairly describes the merchant's primary business." This line leads EPS's COO, Anthony Maley, to conclude that "[t]elemarketing is a method of selling, not the merchant's primary business," and thus the Subject Merchants were not given telemarketing MCCs (Maley Dec. ¶ 17, Doc 331-1, at ECF pg. 44). By Maley's logic, no merchant could *ever* be assigned a telemarketing MCC because telemarketing is a "method of selling"—rendering the telemarketing MCCs superfluous. As the FTC's expert explained, Maley is wrong (Doc. 317-13, at ECF pgs. 7, 16–17).[7] EPS also uses its Exhibit E to assert that "[s]hort, succinct descriptions of a merchant's business are standard in the industry." EPS Opp. at 5; *see also* EPS CSF 11. This conclusion is a

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See, e.g., EPS Dep. Exs. 98, 99, & 103. Though these emails didn't go to EPS, they show that others were able to detect problems EPS purportedly missed.

[5] EPS has not submitted contradictory expert opinion. *See* Evans Dec (attached) ¶ 5.

[6] The full document is available at https://www.mastercard.us/content/dam/mccom/global/documents/quick-reference-booklet-merchant.pdf.

[7] EPS cannot use Maley to counter the FTC's expert witness. EPS never disclosed him (or anyone else) as an expert, and thus the FTC did not treat him as an expert in discovery or attempt to obtain rebuttal expert testimony regarding his opinions. Evans Dec ¶ 5. Maley's opinions based on "technical, or other specialized knowledge" pertaining to the payments industry constitute improper expert opinions. Fed. R. Evid. 701(c), 702(a).

dramatic leap from the evidence, as EPS is citing to a *table of contents* of *merchant category codes* in MasterCard's document. Naturally, a *category* is given a succinct title—that is the point of categorization. Looking at the whole 472-page document, *see supra* note 6, one finds that the table of contents points the reader to pages with much more descriptive information about the merchant categories.

4. Defendants are liable on Count II. EPS's main argument[8] on Count II is that it did not engage in the acts or practices alleged in FAC ¶ 169. Regarding FAC ¶ 169(a), EPS states that personnel in the office of its sales agent, Wigdore, filled out the applications and that information EPS added to them was "generally" supplied by Wigdore's office (or, EPS admits, by Peterson). EPS Opp. at 10–11. EPS stops there, ignoring that it then approved the applications and forwarded them to Merrick, thus owning the representations therein. As EPS's then-operating contract with Merrick (and the applications themselves) reflect, the merchant agreements have three parties: the merchant, Merrick, and EPS. Evans Dec (attached) ¶¶ 7, 9(b). Under the contract, EPS represented to Merrick that "[t]he information submitted on the Merchant is complete, true and accurate" to the best of EPS's knowledge. *Id.* ¶ 9(a). EPS did so, despite patterns of red flags that merited, at the very least, additional investigation. *See supra* ¶ 2. EPS was not just a conduit for paperwork to the Bank. *See* Evans Dec. ¶ 9. EPS added to, adopted, and warranted those representations as its own, but failed to verify them. Regarding FAC ¶ 169(b), Defendants do not refute that EPS (and Dorsey and McCann personally, in part) approved the Subject Merchants. The FTC alleged that, in doing so, Defendants "thereby conceal[ed] the true identity of the underlying merchant"—Money

[8] EPS's Opposition addresses Count III before Count II, and then argues that Count II must fail in light of its arguments on Count III. EPS's incorrect arguments on Count III are discussed below in ¶ 5, and in any event, the two counts do not rise or fall together. In ¶ 169 of the FAC, the FTC alleges that EPS engaged in three acts or practices that are unfair under § 5(n) of the FTC Act, 15 U.S.C. § 45(n). While those acts or practices may be referred to with the shorthand name "credit card laundering," and may be reminiscent of the definition of credit card laundering in the FTC's Telemarketing Sales Rule ("TSR"), the FTC Act is an independent basis of liability from the TSR; liability for unfair acts or practices under the FTC Act is not contingent on whether those acts or practices violate the TSR. Count II must stand on its own for analysis.

Now Funding. FAC ¶ 169(b). EPS states that "[t]he only concealment was by the fraudsters, not EPS," EPS Opp. at 11, which ignores that such concealment was the natural consequence of approving and opening the accounts.

Lastly, regarding FAC ¶ 169(c), EPS states that it did not "process[]" transactions; rather, its role was to monitor active merchants, and "[u]nfortunately, monitoring merchants at EPS was the responsibility of the Risk Department headed by Peterson …." EPS Opp. at 11. Such monitoring is included in the FTC's broader meaning of "processing." *See* Docs. 108, at 5; 131, at 5; & 213, at 4–5 (defining payment processing); *see also* FAC ¶ 8 (noting that ISOs like EPS "process consumer credit card payments on behalf of their acquirer, either directly or through the services of payment processors"—the latter being the case here as noted in FAC ¶ 11; *accord* EPS CSF 34). EPS admits Peterson's knowledge of "the true nature of the Subject Merchants and their accounts," but says he did not "share that knowledge with EPS." *Id.* However, as discussed above, Peterson's knowledge is EPS's knowledge; and in any event, Peterson was not the only person at EPS who knew the true nature of the Subject Merchants. *See supra* ¶ 1. EPS's argument that it did not engage in the acts and practices discussed in FAC ¶ 169 is not supported by evidence.

Next, EPS addresses the elements of unfairness under the FTC Act. EPS misstates the first, arguing that the FTC must show that EPS caused injury, ignoring that the statute also covers conduct "likely to cause" injury. *Compare* EPS Opp. at 12 *with* 15 U.S.C. § 45(n). Regardless, EPS agrees that consumers were harmed—but it quibbles with causation. EPS Opp. at 12. The Ninth Circuit, however, has recognized that: "Courts have long held that consumers are injured for purposes of the [FTC] Act not solely through the machinations of those with ill intentions, but also through the actions of those whose practices facilitate, or contribute to, ill intentioned schemes if the injury was a predictable consequence of those actions." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1156 (9th Cir. 2010). Like the defendant in *Neovi*: "[EPS] engaged in behavior that was, itself, injurious to consumers. [EPS's] business practices might have served to assist others in illicit or

deceptive schemes, but the liability under the FTC Act that attaches to [EPS] is not mediated by the actions of those third parties. [EPS] caused harm through its own deeds—in this case [approving and opening fraudulent merchant accounts and allowing them to process]—and thus § 5 of the FTC Act easily extends to its conduct." *Neovi*, 604 F.3d 1150, 1157.[9] Finally, while EPS agrees that there are no countervailing benefits from fraud and credit card laundering, it seeks to reframe the inquiry by claiming, without evidence, that it has provided benefits to "tens of thousands of valid merchants." EPS Opp. at 13. But the FTC has not charged EPS with engaging in unfair business practices with regard to its purported "valid" merchants—this case is about the Subject Merchants. The question is not whether EPS has ever done anything beneficial—the question is whether the acts and practices described in FAC ¶ 169 have countervailing benefits to consumers or competition that outweigh the substantial consumer injury they caused or were likely to cause. 15 U.S.C. § 45(n). As noted, EPS agrees that they did not.

5. Defendants are liable on Count III. EPS looks to the language of the TSR—that it is illegal for a person "to employ, solicit, or otherwise cause a merchant" to launder a credit card sales draft, 16 C.F.R. § 310.3(c)(2)—and argues, without citation to authority, that *otherwise causing* must be confined to covering actions comparable to *employing* and *soliciting*. EPS Opp. at 9–10. In support, EPS cites the "plain meaning" of the word "cause," quoting the *second* definition of the verb form from Merriam-Webster.[10] EPS skips the first definition, "to serve as a cause or occasion of," because EPS *did* serve as a cause of MNF's credit card laundering, as discussed above in ¶ 4. EPS, Dorsey, and McCann did "otherwise caus[e]" MNF to launder credit card sales drafts by providing it with the means to do so.[11] EPS's interpretation is wrong.[12]

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[9] The Ninth Circuit also noted Neovi's "reason to believe" it was engaging "in a practice that facilitated and provided substantial assistance to a multitude of deceptive schemes." *Neovi*, 604 F.3d 1150, 1157. Given the red flags on the Subject Merchants' applications and the warnings from Merrick (including about high chargeback rates, as in *Neovi*), EPS also had reason to believe it was facilitating fraud. *See, e.g.*, *supra* ¶¶ 1–3.

[10] *See* https://www.merriam-webster.com/dictionary/caused.

[11] Dorsey and McCann do not address § 310.3(c)(2), arguing only that they didn't "present any credit card sales draft … to any payment system," which seems to address

6. Defendants are liable on Count VI. EPS does not refute that it provided substantial assistance or support to MNF. Rather, it argues that it did not know or consciously avoid knowing that MNF was engaged in credit card laundering. EPS Opp. at 13–16.[13] While EPS admits that Peterson possessed actual knowledge, it argues that the FTC has not shown that anyone else at EPS had such knowledge, and that Peterson's knowledge cannot be imputed to EPS. As discussed in ¶ 1, neither point is correct.[14]

7. Dorsey and McCann are individually liable. Dorsey and McCann admit that they "did operate EPS," but argue that they lacked "authority to control" because Peterson took "kickbacks" from Wigdore's associates and stole from EPS, and they could not control that activity. D-M Opp. at 5; D-M CSF 1, 3. But the FTC did not sue Dorsey and McCann because their former employee took money. This case is about credit card laundering, which Dorsey and McCann had authority to control. *See* FTC MSJ 7–9.[15]

8. Injunctive relief is necessary and appropriate. Providing a list of "[n]onexhaustive factors" courts weigh in granting injunctions, EPS appears to address three of them. EPS Opp. at 16–17. First, regarding scienter, EPS says it was a victim, "deceived by the fraudsters and an inside, adverse agent." *Id.* As discussed above in ¶ 1, this is not correct because Peterson was not an adverse agent and because others at EPS knew or consciously avoided knowing that EPS was furthering credit card laundering.

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§ 310.3(c)(1)—a provision not at issue in this case. D-M Opp. at 5; D-M CSF 36.

[12] Neither the FTC's abbreviated commentary in the TSR's 1995 Statement of Basis and Purpose, nor its online guide for telemarketers alters this plain meaning.

[13] EPS opens its argument by asserting that there are two issues that the FTC is avoiding. EPS Opp. at 14. First, regarding EPS's motives and risk exposure (*see also* CSF 36, 37), EPS overlooks that Wigdore agreed to cover all potential losses to EPS arising from merchant accounts that he referred to EPS, so when EPS acted, it believed it was insulated from risk. FTC SF 9. EPS disingenuously disputes this, *see* EPS CSF 9, contrary to EPS's assertions in its Answer in this case and its complaint in related litigation, *see* Evans Dec. ¶ 13. Second, the allegation that people in Wigdore's office bribed Peterson is factually flawed. *See* Appendix item 5.

[14] The self-serving disavowals of Dorsey, McCann, and Maley on this point—and on every point—are due little weight. *See SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.")).

[15] As to Dorsey and McCann's self-serving disavowals of the requisite knowledge, *see supra* note 14.

Second, regarding the isolated or recurrent nature of the violation, EPS says "the violative conduct has not recurred," stating (1) that the FTC has not sued EPS again in a subsequent case, (2) that it has cut ties with Wigdore, and (3) that it has cut ties with Peterson.[16] EPS Opp. at 16–17. EPS, however, approved the Subject Merchants' applications over a period of years (*see* Doc. 317-13, at ECF pg. 21), thus the violations were recurrent in the past. "[A]n inference arises from illegal past conduct that future violations may occur." *FTC v. EPSA*, No. 17-cv-2535-PHX-SMM, 2019 WL 4287298, at *9 (D. Ariz. Aug. 28, 2019) ("*EPSA I*") (alterations and quotation marks omitted); *see also FTC v. OMICS Grp. Inc.*, 374 F. Supp. 3d 994, 1014 (D. Nev. 2019) (defendants engaged in "sustained and continuous conduct over the course of years," warranting an injunction), *aff'd*, 827 F. App'x 653 (9th Cir. 2020). And courts rightfully view defendants' cessation of violations as a result of government intervention—such as the FTC's filing *Money Now Funding* in 2013—with skepticism. *See* FTC MSJ, at 15 (citing cases, including this Court). Wigdore and Peterson may be out, but others remain—most notably Maley, who "was the person at EPS primarily responsible for compliance" during the relevant time, Maley Dec. ¶ 16 (Doc. 331-1, at ECF pg. 40), and is still the COO, *id.* ¶ 1 (ECF pg. 36). The FTC need not show recurrence from 2014 to the present; it needs to show "some reasonable likelihood of future violations," *OMICS*, 374 F. Supp. 3d at 1013–14, and it has. Finally, EPS appears to address the likelihood of future violations; while it still engages in the same line of business as in 2012-13, EPS says it has made changes to its processes.[17] While a positive—and long overdue—development, the steps EPS outlines do not make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *OMICS*, 374 F. Supp. 3d at 1014. This is especially true in light of EPS's continuing failure to recognize the wrongful nature of its conduct (which EPS does not address). Under the factors that this Court has articulated, *EPSA I*,

[16] EPS asserts that it fired Peterson, but Peterson testified that he quit, Peterson vol.1 12:12–23; vol.2 160:10–162:13, and EPS has not provided any evidence that it fired him.

[17] For example, Maley says that now "EPS seeks to better understand a merchant's business model …." Maley Dec. ¶ 25 (Doc. 331-1, at ECF pg. 47).

2019 WL 4287298, at *9–10, an injunction is warranted.

9. Monetary relief is necessary and appropriate. EPS begins its argument on monetary relief, once again, with the incorrect assertion that equitable monetary relief is not available under the FTC Act. EPS Opp. at 17. *But see EPSA I*, 2019 WL 4287298, at *2–3, *reconsideration denied*, 2019 WL 7486852 (D. Ariz. Oct. 23, 2019). Next, EPS seizes on the Court's holding that "to the extent the FTC is entitled to a disgorgement award, a disgorgement award must be limited to EPS's net profits and awarded to victims," *FTC v. EPSA*, No. CV-17-02535-PHX-SMM, 2020 WL 6199414, at *5 (D. Ariz. Aug. 31, 2020) ("*EPSA II*"), and exaggerates it, saying that *any* monetary relief must be limited to net profits, regardless of the theory of recovery, EPS Opp. at 17. But that is not what this Court held. The FTC's primary request for equitable monetary relief is restitution, not disgorgement, and as this Court has held:

> In the eyes of the law, restitution and disgorgement are distinguishable. Restitution and disgorgement are different remedies, governed by different standards, that are intended to achieve different objectives. … In the Ninth Circuit, all defendants may be held jointly and severally liable for consumer losses. As a result, a restitution or disgorgement award need not be limited to the funds each defendant personally received from the wrongful conduct. Defendants held jointly and severally liable for payment of restitution are liable for the unjust gains the defendants collectively received, even if that amount exceeds (as it usually will) what any one defendant pocketed from the unlawful scheme.

EPSA II, 2020 WL 6199414, at *3, *5 (citations and quotation marks omitted). The Court held that the equitable principles of *Liu v. SEC*, 140 S. Ct. 1936 (2020) apply here, and the FTC has applied them, but the background FTC Act law summarized by the Court above remains good law. EPS's attempt to put words in the Court's mouth is wrong.

Defendants also argue that they are not collectively liable with others for the full amount of consumer loss. EPS Opp. at 17–19; D-M Opp. at 11–13. But Defendants ignore that, in support of its holding that equity courts "have awarded profits-based remedies against *individuals or partners* engaged in concerted wrongdoing" (emphasis added), *Liu* invokes *Ambler v. Whipple*, 87 U.S. 546 (1874), noting that the Court in

Ambler "order[ed] an accounting against a partner who had 'knowingly connected himself with and aided in ... fraud.'" *Liu*, 140 S. Ct. at 1945 (quoting *Ambler*, 87 U.S. at 559). By establishing that those who knowingly connect themselves with and aid in fraud can be held collectively liable for equitable remedies, the reasoning in *Liu* aligns squarely with the reasoning behind principles such as those articulated in the Restatement (Second) of Torts § 876(b), the assisting and facilitating provision of the TSR, 16 C.F.R. § 310.3(b), *see also* 60 Fed. Reg. 43,842, 43,851 (Aug. 23, 1995) (citing Restatement § 876), and cases such as *FTC v. WV Universal Mgmt., LLC*, 877 F.3d 1234, 1240–41 (11th Cir. 2017). *See* FTC MSJ, at 17–19. *Liu* recognized a "wide spectrum of relationships between participants and beneficiaries of unlawful schemes—from equally culpable codefendants to more remote, unrelated tipper-tippee arrangements." 140 S. Ct. at 1949. It reads too much into the decision to insist that collective liability in equity can only exist between those who have formed a legal partnership under state law, especially when *Liu* talks about "remedies against *individuals or partners* engaged in concerted wrongdoing" and recognizes "some flexibility to impose collective liability" in equity. *Id.* at 1945, 49. The FTC's proposed framework, which draws on *Liu*'s discussion of knowing connection to, and aid in, fraud—avoiding liability for "profits … which have accrued to another, *and in which [defendants] have no participation*," 140 S. Ct. at 1949 (quoting *Belknap v. Schild*, 161 U.S. 10, 26 (1896)) (emphasis added)—is an appropriate and equitable exercise of the Court's power to "order[] the return to a victim of any monies that the victim is legally entitled," *EPSA II*, 2020 WL 6199414, at *4 (citing *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016)).

10. Defendants have abandoned their affirmative defenses. EPS only opposes summary judgment on two of its affirmative defenses: laches and unclean hands.[18] *See* EPS Opp. at 19–20. But EPS ignores critical case law on both. *See* FTC MSJ, at 20

[18] Dorsey and McCann deferred to EPS to oppose summary judgment on their affirmative defenses, even though they assert some that EPS did not. *See* D-M Opp. at 15; *compare* Dorsey Ans., at 29–33 *and* McCann Ans., at 31–35 *with* EPS Ans., at 45–51.

(citing cases).[19] Defendants have not even tried to meet the applicable standards. They "fail to make a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial," *EPSA II*, 2020 WL 6199414, at *2 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

11. EPS's objections to evidence from *Money Now Funding* are unfounded. EPS objects to deposition transcript excerpts (Rule 32(a)(8) objection) and declarations (hearsay objection) from *Money Now Funding*. EPS CSF, at preamble. The depositions are now superfluous, because EPS has admitted that MNF was a scam. EPS CSF 6–7; D-M CSF 22.[20] The declarations are now only relevant to the chargeback process. EPS CSF 8. The Court may consider them because the declarants all said that they were testifying under oath from personal knowledge, *see* Evans Dec ¶ 10; the witnesses could be called to testify at trial, *id.*; they are competent to testify about their own personal experiences; and the facts they set out would be admissible. Fed. R. Civ. P. 56(c)(4).[21]

* * *

"In order to avoid summary judgment, a nonmovant must show a genuine issue of material fact by presenting *affirmative evidence* from which a jury could find in his favor. [B]ald assertions or a mere scintilla of evidence … are both insufficient to withstand summary judgment." *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (emphasis in original) (citations omitted). EPS, Dorsey, and McCann have not presented affirmative evidence that creates a genuine dispute. The Court should grant summary judgment to the FTC.

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[19] As *United States v. Ruby Co.*, cited by EPS, EPS Opp. at 19, notes: "The traditional rule is that the doctrine of laches is not available against the government in a suit by it to enforce a public right or protect a public interest." 588 F.2d 697, 705 n.10 (9th Cir. 1978). Thus, EPS's CSF 20 is immaterial—though it is also unfounded. "Unclean hands is only available if a defendant alleges 'egregious' or 'outrageous' agency conduct that results in prejudice that 'rises to a constitutional level.'" FTC MSJ, at 20 (quoting cases).

[20] If the depositions were relevant on summary judgment, they would be admissible as affidavits rather than depositions. *See Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966–67 (9th Cir. 1981).

[21] Any hearsay within the declarations is not offered for the truth of the matter asserted, but only for the fact that it was said to the declarant. Fed. R. Evid. 801(c)(2).

Respectfully submitted,

Dated: January 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021, I electronically filed the foregoing Reply in Support of the FTC's Motion for Summary Judgment Against Defendants Electronic Payment Systems, LLC, Electronic Payment Transfer, LLC, John Dorsey, and Thomas McCann with the Clerk of the Court using CM/ECF, which will cause a copy of the same to be served on the following parties entitled to service:

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