IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Federal Trade Commission, Plaintiff, v. Electronic Payment Solutions of America Incorporated, et al., Defendants.	No. CV-17-02535-PHX-SMM **ORDER**

Before the Court are Defendants John Dorsey and Thomas McCann's Motion for Summary Judgment (Doc. 313); Plaintiff Federal Trade Commission's Motion for Summary Judgment Against Defendants Electronic Payment Systems LLC, Electronic Payment Transfer LLC, John Dorsey, and Thomas McCann (Doc. 322); Defendants Electronic Payment Systems LLC and Electronic Payment Transfer LLC's Motion to Strike (Doc. 340); Electronic Payment Systems LLC and Electronic Payment Transfer LLC's Motion for Reconsideration of the Court's Ruling Regarding the FTC's Claim for Monetary Relief (Doc. 349); Plaintiff Federal Trade Commission's Motion to Withdraw (Doc. 350); and Defendants John Dorsey and Thomas McCann's Motion for Reconsideration of Order on Motion for Judgment on the Pleadings (Doc. 351). The motions have been fully briefed and are ripe for review.[1]

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[1] The Federal Trade Commission requests oral argument. (Doc. 322 at 1.) However, the parties have had the opportunity to submit briefing, and oral argument will not aid the Court's decision. Accordingly, the requests for oral argument are denied. See L.R. Civ. 7.2(f).

I. BACKGROUND

In 2013, Plaintiff Federal Trade Commission (the "FTC") brought suit against Money Now Funding ("MNF"), a telemarketing scheme that sold worthless business opportunities to consumers. See generally F.T.C. v. Money Now Funding LLC, et al., No. CV-13-01583-PHX-ROS (D. Ariz. 2013).[2] (Doc. 313 at 2; Doc. 317 at 12; Doc. 331 at 6.) That case was resolved in 2016 with the entry of permanent injunctions and monetary judgments. See generally Money Now Funding LLC, et al., No. CV-13-01583-PHX-ROS. The FTC brought this suit in 2017 as a follow-up to the 2013 MNF case, alleging that the defendants in this matter facilitated the MNF scheme by assisting the MNF principals in engaging in credit card laundering.

Credit card processing involves numerous entities including, on one side, the consumer and the consumer's bank, and on the other, the merchant and the merchant's bank. (Doc. 85 at 4-5.) In between the consumer and the merchant are the credit card networks and other third parties such as independent sales organizations ("ISOs"). (Id. at 5.) ISOs solicit merchants seeking to open merchant accounts and refer them to the ISOs' acquiring bank, which is the bank that has access to the credit card networks. (Id.) Merchant accounts are established to settle payment of credit card transactions. (Id.)

To facilitate the MNF scheme, the MNF principals used employees as nominee owners to apply for numerous merchant accounts. (Doc. 313 at 2; Doc. 317 at 12-13; Doc. 331 at 6.) MNF then processed fraudulent credit card charges through these merchant accounts, rather than through a merchant account associated with MNF. (Doc. 313 at 2; Doc. 317 at 12-13; Doc. 331 at 6.) This operation constituted credit card laundering. (Doc. 317 at 13; Doc. 329 at 3; Doc. 331 at 6.) The FTC brought this action against those it

[2] EPS Objects to the FTC's use of depositions and declarations from previous litigation. (Doc. 331 at 5.) However, the depositions are no longer relevant because EPS does not dispute that MNF perpetrated a fraud and engaged in credit card laundering. (See Doc. 331 at 6; Doc. 337 at 18.) Therefore, the Court does not consider them. The Court does, however, consider the declarations from the previous litigation because the FTC's counsel stated that the declarants were able and willing to testify under oath from personal knowledge. (Doc. 337 at 18; Doc. 337-2 at 15.)

contends helped MNF in its credit card laundering efforts.

Electronic Payment Systems LLC, Electronic Payment Transfer LLC, John Dorsey, and Thomas McCann are the sole remaining defendants in this matter.[3] Electronic Payment Systems LLC and Electronic Payment Transfer LLC share the same office space and are owned and controlled by the same two principals, John Dorsey ("Dorsey") and Thomas McCann ("McCann"). (Doc. 317 at 10; Doc. 329 at 2; Doc. 331 at 5.) They are closely affiliated with each other and often referred to interchangeably as the same company. (Doc. 317 at 10; Doc. 329 at 2; Doc. 331 at 5.) Electronic Payment Transfer LLC uses the d/b/a names Electronic Payment Systems and EPS. (Doc. 317 at 10; Doc. 329 at 2; Doc. 331 at 5.) Therefore, the Court will consider Electronic Payments Systems LLC and Electronic Payment Transfer LLC as a single entity, known collectively as "EPS."[4]

From 2011 to 2013, EPS served as the ISO to 43 merchants that were involved in the MNF scheme and used to launder money for MNF (the "Subject Merchants").[5] (Doc. 317 at 8-9.). An overview of how EPS functioned during the relevant time period is useful to understanding its role in the Subject Merchants' credit card laundering activities. EPS, as an ISO, had a number of independent contractors, commonly called sales agents, who marketed EPS's services to merchants who wanted to access the credit card system. The sales agents were responsible for gathering a merchant's information into a merchant application. The applications sought information on, among other things: (1) the business's address, phone number, and email address, as well as that of the owner; (2) the service or goods offered by the merchant; (3) whether the business had a storefront or sold its product online or over the phone; (4) how credit cards would be charged, i.e. "Card Swipe," "Manually Keyed," "Mail Order," or "Telephone Order"; and (4) the merchant's expected

[3] EPS has asserted third-party claims and those third-party defendants also remain.

[4] The FTC moves for summary judgment on its claim that Electronic Payment Systems LLC and Electronic Payment Transfer LLC constitute a "common enterprise." (Doc. 322 at 12.) EPS does not dispute that they are a common enterprise. (Doc. 331 at 5.) Accordingly, the Court will grant summary judgment on the claim that Electronic Payment Systems LLC and Electronic Payment Transfer LLC constitute a common enterprise.

[5] The parties agreed on the list of Subject Merchants during discovery. (Doc. 317 at 8-9.)

charging patterns—i.e., average, low and high ticket amounts, as well as the average and high amounts the merchant expected to charge every month. (See Doc. 317-14 at 1-3 (example merchant application).) As discussed in more detail below, all of this information was relevant to determining the legitimacy and risk level of the business.

Once complete, the agent signed an application and submitted it to EPS, where EPS's data entry team reviewed the application and ensured it was complete and accurate. (Doc. 317-7 at 126.) This process typically included checking credit scores and ensuring the business was licensed with the state and had a valid tax ID. (Id.) If any information was missing, EPS worked with the supplying agent to fill in the missing information. (Id. at 147.)

During this time, EPS's acquiring bank was Merrick Bank ("Merrick"). (Id. at 95.) Merrick's ISO Credit Policy, which governed the relationship between EPS and Merrick,[6] stated that, in reviewing applications, an ISO was required to verify "that each merchant is a bona fide business and that the transactions of such merchant will reflect bona fide business between the merchant and the cardholder." (Doc. 317-9 at 19.) It was further required to "examine the credit history and financial capacity of each potential merchant and/or its principals to assess the credit and financial strength of that merchant and/or its principals." (Id.)

After reviewing an application, the data entry team then presented the application to either McCann or Dorsey, the principals and owners of EPS, for approval. (Doc. 317-7 at 114, 118, 273.) If McCann and Dorsey were not available Anthony Maley ("Maley"), the Chief Operating Officer and Chief Financial Officer of EPS, could approve the application. (Id.)

If approved, a merchant application could go one of two routes. If a merchant qualified for Merrick's Auto-Approval Program, EPS could board the merchant

[6] It is disputed whether the Merrick ISO Credit Policy was binding on EPS. According to Anthony Maley, EPS's Chief Operating Officer, the Merrick ISO Credit Policy served more as "guidelines, rather than hard and fast requirements." (Doc. 331-1 at 40.) "The Policy was not 'written in stone,' and . . . Merrick Bank worked with their ISO to find ways to understand and support the merchants that came to them seeking an ability to process card transactions." (Doc. 331-1 at 40-41.)

immediately, before receiving Merrick's approval. (Doc. 317-9 at 32.) The Court understands boarding to be the process by which a merchant account is created, and a merchant is provided access to the credit card system.

Merchants engaged in outbound or inbound telemarketing were categorically ineligible for the Auto-Approval Program. (Id. at 32.) EPS was responsible for determining if a merchant was engaged in telemarking when it assigned a Merchant Category Code ("MCC") to each merchant. (Doc. 317-7 at 5.) An MCC is a four-digit number describing a merchant's primary line of business or sales approach. (Doc. 317-13 at 7.) If a merchant had an MCC of 5966 (Outbound Telemarketing) or 5967 (Inbound Telemarketing), it could not participate in the Auto-Approval program. (Doc. 317-9 at 32.)

Any merchant that did not qualify for the Auto-Approval Program had to receive Merrick's approval before the merchant could be boarded and begin charging credit cards. (Doc. 317-9 at 32.)

Once a merchant was boarded, EPS and Merrick worked together to monitor merchant accounts. The Merrick ISO Credit Policy required an ISO to monitor each merchant "for compliance with all Card Brand policies, rules and regulations" and "to detect unusual or unacceptable trends in such Merchant's processing activity, inquiries from cardholders relating to such Merchant or chargebacks relating to such Merchant." (Doc. 317-9 at 13.) Chargebacks are financial transactions initiated by card issuers to return funds from merchants to cardholders. (Doc. 317-13 at 6.) Chargebacks are commonly initiated where the cardholder did not authorize the charge, the products or services were not as advertised or not received, or the merchant promised a refund that was not received. (Id.)

With that background in mind, the Court turns now to how EPS handled the 43 Subject Merchants. The 43 Subject Merchants' applications were all submitted to EPS through Defendants Jay Wigdore ("Wigdore"), Michael Abdelmesseh ("Abdelmesseh"), and Nikolas Mihilli, and companies associated with these Defendants (collectively, the

"KMA-Wigdore Defendants") between 2010 and 2013.[7] (Doc. 317-7 at 12; Doc. 329 at 3; Doc. 331 at 6.) The KMA-Wigdore Defendants were independent contractors, or sales agents, who marketed EPS's services to merchants during the relevant time period. While the KMA-Wigdore Defendants referred many legitimate merchants to EPS, it is undisputed that they were actively involved in MNF's credit card laundering and load balancing activities with the 43 Subject Merchants. (Doc. 331 at 13; Doc. 331-1 at 38.) Load balancing is a technique by which merchants spread sales volume among different merchant entities to evade scrutiny for high chargeback rates. (Doc. 317-13 at 8 (defining "load balancing").)

The Subject Merchant applications, as submitted by the KMA-Wigdore Defendants, were incomplete and each showed characteristics of unreliable merchants. (Doc. 317-13 at 10-15.) Such indicators include: "all sales final" policies, lack of prior credit card processing, being new in business, low credit scores, outstanding debt, terse and vague product descriptions, lack of marketing materials and websites, self-printed checks, and empty bankcard volumes and minimum, average, and maximum ticket sizes. (Id. at 10-12.) Many of the applications also stated that all sales were conducted over the phone, indicating that the merchant could be engaged in telemarketing and should be subject to greater scrutiny. (Id. at 10.)

Many of the applications were also submitted in batches that contained similar information. (Id. at 12-15.) For example, on May 17 and 18, 2012, the KMA-Wigdore Defendants submitted nine applications, all off which were new in business, had no website, promoted their company through word of mouth, took orders over the phone, and were assigned the same MCC. (Id. at 12-13.) They were all from the greater Phoenix area (two applicants had the same residence address), all stated, "All Sales Final," and all submitted self-created checks with the same bank name. (Id. at 13.) None of these applications provided ticket sizes, which EPS filled in with identical amounts. (Id. at 12.)

[7] The Court mirrors the parties in referring to the KMA-Wigdore Defendants as a whole, as the Court has not been provided sufficient evidence to distinguish between the actions of individual defendants. Each of the KMA-Wigdore Defendants has settled the FTC's claims against them in this matter. (Docs. 108, 131, 213, 341-42.)

Four of these applications contained no email address, which EPS filled in with email addresses containing some version of "KMA Merchant Services," one of the merchant accounts used to launder money for MNF.[8] (Id. at 13.) According to the FTC's expert, EPS should have declined all 43 Subject Merchants as unacceptable under Merrick's ISO Credit Policy based on these factors. (Id. at 16.) EPS also should have realized the accounts were related. (Id. at 12-15.)

EPS did not decline the Subject Merchants. Rather, EPS completed and altered the applications after they were received from the KMA-Wigdore Defendants but before they were submitted to Merrick. (Doc. 317 at 15-16; Doc. 329 at 4; Doc. 331 at 8.) For example, someone at EPS altered the application for Elite Marketing Strategies, one of the Subject Merchants, in several ways that would subject the application to less scrutiny when submitted to Merrick. The original version of the application submitted to EPS said that Elite Marketing Strategies took payments 100% by "telephone order," and that it advertised "over the phone," took orders "over the phone," and had a "Warranty, Return, and Refund Policy" of "All Sales Final." (Doc. 317-17 at 1, 3.) The application approved by EPS and submitted to Merrick was altered to read that payments were 100% "manually keyed," and the line indicating "All Sales Final," was whited out and replaced with an "N/A." (Doc. 317-28 at 131, 135.) Someone had also filled in the average, low, and high tickets, as well as the average and high monthly processing volumes, all of which had been left blank in the original application. (Compare Doc. 317-17 at 1, with Doc. 317-28 at 131.)[9] Similar patterns can be seen across nearly all of the applications. (Doc. 317-13 at 27-30.) In one instance, Michael Peterson ("Peterson"), the head of risk management, informed Chonda Pearson, who was in charge of agent relations, that "Wigdore's office . . . will get the missing information to you with the exception of the volume amounts, avg. ticket etc....

[8] According to Maley, Michael Abdelmesseh told EPS the Subject Merchants listed the same email address so that he could assist them in addressing chargebacks. (Doc. 331-1 at 45-46.) The email address referred chargebacks to him. (Id.)

[9] There is testimony that an EPS employee on occasion signed Wigdore's name on applications when the sales-agent signature line was left blank. (Doc. 317-7 at 264-67.) The parties dispute whether Wigdore approved this practice. (Doc. 330 at 4; Doc. 337-1 at 1-2.) However, the Court finds the dispute has little bearing on the claims at issue.

[sic] When they have provided all other required items will you please let me know and then I will add the other information." (Doc. 332-1 at 358.)

After altering the Subject Merchant applications, EPS then boarded them through Merrick's Auto-Approval Program. (Doc. 317-13 at 16.) According to the FTC's expert, each merchant was conducting outbound telemarketing and should have been assigned MCC 5966, which would have excluded the merchant from the Auto-Approval Program. (Id.) EPS did not assign the Subject Merchants a 5966 MCC, allowing them to be boarded through the Auto-Approval Program and begin processing without approval from Merrick. (Id. at 25.)

The FTC contends these review and boarding practices are evidence of EPS's intentional efforts to board the Subject Merchants without scrutiny in order to facilitate the MNF scheme. However, EPS offers evidence of a more innocuous explanation. Both McCann and Dorsey testified via declaration that EPS's business model is focused on smaller, new, and less well-heeled businesses. (Doc. 331-1 at 27, 55.) These businesses typically have lower credit scores and higher debt and lack credit card processing history. (Id.) There is also testimony that EPS often worked with sales agents to complete and correct applications before they were submitted to Merrick. (Doc. 317-7 at 147; Doc. 331-1 at 39, 44-45, 73.) Maley also stated via declaration that the mere fact that the Subject Merchants sold their goods over the phone, as stated on the applications, was not a clear indication of telemarketing or the need to assign MCC 5966. (Id. at 41-42.) He also testified that while the applications may appear clearly grouped when viewed in isolation, they were actually submitted among hundreds of other applications. (Id. at 38.) For example, between February 2013 and September 2013, EPS approved 1,501 merchant applications, including 1,020 from the KMA-Wigdore Defendants and 17 Subject Merchant applications. (Id.)

The boarded Subject Merchants created concern for Merrick as early as May 2012. (Doc. 317-8 at 10-11, 30.) For example, in May and June of 2012, Merrick declined several of the Subject Merchant accounts on an initial review because it found the business models and a perceived link to KMA Merchant Services, one of the earliest Subject Merchant

accounts, concerning.[10] (Id. at 10-11.) Merrick continued to express concern about accounts from the KMA-Wigdore Defendants well into 2013. (See, e.g., id. at 141-145, 148-51.) In May 2012, a Merrick representative told Peterson via email that he believed a Subject Merchant account was load balancing and credit card laundering. (Id. at 3.) Then again in September 2012, a Merrick representative told Peterson that he believed a Subject Merchant account was "deceiving cardholders," and asked Peterson to sit down and discuss the "marketing accounts." (Id. at 12.)

EPS was slow to act on this information from Merrick. It regularly permitted Subject Merchant accounts that Merrick had declined to continue processing credit cards after being declined. (Doc. 317-8 at 8-9, 146-47; Doc. 317-9 at 1-6, 104-105; Doc. 317-11 at 64-67.) When Merrick's representatives inquired why accounts it had declined were still processing, EPS, through Peterson, was slow to respond and slow to close the accounts. (Doc. 317-8 at 3-7, 158-59; Doc. 317-9 at 7-10; Doc. 317-11 at 63-67.) On at least one occasion, Peterson insisted EPS was comfortable with the declined accounts and would like to move forward. (Doc. 317-11 at 63.)

This evidence is tempered, however, by the fact that EPS took the same approach with non-Subject Merchant accounts that Merrick had also declined. (See Doc. 317-9 at 7-10 (discussing a mixture of Subject Merchant and non-Subject Merchant accounts); Doc. 317-11 at 63-65 (same).) It appears to have been a somewhat common practice for a declined account to continue processing while EPS and Merrick discussed the account and investigated it further. (Doc. 317-7 at 118; Doc. 331-1 at 2.)

Merrick's representatives communicated concerns about the Subject Merchant accounts primarily to Peterson and Travis Bellet ("Bellet") of EPS's risk department. (Doc. 331-1 at 2-3.) There are indications throughout the record that Peterson and Bellet were aware that the KMA-Wigdore Defendants and the Subject Merchant accounts were engaged in credit card laundering and were actively assisting them. In April, 2012, a

[10] The relevant emails discuss "KMA Marketing," which the Court understands to refer to either KMA Merchant Services or KMA Merchant Marketing, which were the first two Subject Merchant accounts established in 2010 and 2011. (See Doc. 317-13 at 25.)

Merrick representative sent Bellet and Peterson an email identifying a number of large-dollar chargebacks received by a Subject Merchant account. (Doc. 317-9 at 73.) Bellet then replied to Peterson, "Way to stay of the radar Stewart.... [sic] WTF?!?!" (Id.) "Stewart" refers to Abdelmesseh of the KMA-Wigdore Defendants. Bellet testified that Wigdore and Peterson had discussed ways to "fly under the radar" – meaning escape scrutiny from Merrick – by keeping the amount of money processed on each account below a certain threshold. (Doc. 317-7 at 46.) He testified further that its was the directive from "management" – Peterson, McCann, Dorsey, and Maley – to assist accounts associated with Wigdore in spreading charges across multiple accounts to keep the volume low, or in other words, to engage in load balancing. (Id.)

In September 2012, Bellet sent Peterson an email noting that all the supporting documentation for a chargeback dispute related to the Subject Merchant KMA Merchant Services indicated that the sale came from a different Subject Merchant, Rose Marketing LLC. (Doc. 317-9 at 78.) Peterson then informed Abdelmesseh that they would have to let the consumer win the chargeback because the evidence of "factoring" – another term for credit card laundering – was too great. (Doc. 317-9 at 79; Doc. 317-13 at 8 (indicating factoring is another word for credit card laundering).)

Later that month, Peterson sent Bellet and Abdelmesseh an email with a chart identifying the status of a number of Subject Merchant accounts and stating: "Please see my notes below for the accounts that are on hold. We need to spread this out more, I am trying to cap each individual account in the $30-$40K range, so if you need to build a couple more accounts to reach your volume, please do so." (Doc. 317-9 at 90-91.) This appears to be an instruction to create more accounts to engage in load balancing for the Subject Merchants. However, Peterson testified he was speaking to the KMA-Wigdore Defendants' goal to have a book of business that was processing $2 million to $3 million a month. (Doc. 317-7 at 191-92.) If these accounts were capped at $30,000 to $40,000, the KMA-Wigdore Defendants would need to bring in more merchant accounts to reach that volume. (Id.)

Bellet testified that he and others in the risk department were aware the KMA-Widgore Defendants' marketing accounts were "definitely sketchy and likely fraudulent." (Doc. 317-7 at 44.) He testified that he noted the similarities between the accounts. (Id. at 43-44.) Based on his conversations with cardholders disputing charges from these accounts, he "was concerned that [Jay] Wigdore was exploiting the elderly and . . . ripping them off and [EPS was] processing for him." (Id. at 44.) When he brought these concerns to Peterson, they were dismissed, with Peterson saying, "This is an agreement between Wigdore's office and Tom [McCann] and John [Dorsey] and . . . we just have to deal with it." (Id.)

EPS concedes that Peterson and Bellet "were aware of the scam and the relationship between the Subject Merchants." (Doc. 331 at 9.) EPS also asserts that the KMA-Widgore Defendants paid Peterson "kickbacks" for assisting with the MNF fraud. (Id. at 11-12.)[11] Peterson did testify that he had "made a deal" with Abdelmesseh "to help him get [the Subject Merchant accounts] added as quickly as possible and in a way that would keep them under the radar." (Doc. 331-1 at 101.) He also testified that beginning in November 2012 and continuing into spring 2013, Wigdore and Abdelmesseh paid him around $40,000. (Id. at 87, 97.) Peterson's testimony about the purpose of the payments is contradictory. He initially testified the payments were repayment for a debt Abdelmesseh owed him. (Id. at 76.) He later recanted that testimony and testified they were payment for "counseling" on chargebacks. (Id. at 87, 100.) And while Peterson referred to the payments as "kickbacks" and testified that because of the payments he had a personal interest in keeping the KMA-Wigdore merchant accounts processing, Peterson also denied that the payments were for any purpose other than assisting with chargebacks. (Compare Doc. 337-3 at 76, with id. at 71-72.) Furthermore, Wigdore denied making any payments altogether. (Id. at 91.)

Based on these facts, the FTC now moves for summary judgment on Counts II, III,

[11] The Court notes that many of the citations to the record here and throughout EPS's Statement of Facts are incorrect or incomplete, or the cited material is missing. (See generally Doc. 331.) The Court did its best to decipher each citation but did not always succeed.

and VI of the First Amended Complaint (the "FAC") against EPS, Dorsey, and McCann. (See generally Doc. 322.) Count II alleges that EPS, Dorsey, and McCann engaged in credit card laundering on behalf of Money Now Funding, which constitutes unfair acts or practices in violation of § 5 of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. §§ 45(a) and (n). (Doc. 85 at 52-53.) Count III alleges that EPS, Dorsey, and McCann employed, solicited, or otherwise caused others to engage in credit card laundering in violation of the Telemarketing Sales Rule ("TSR"). 16 C.F.R. § 310.3(c)(2). (Id. at 55-56.) And Count VI alleges that EPS, Dorsey, and McCann also provided substantial assistance or support to others engaged in credit card laundering in violation of the TSR. 16 C.F.R. § 310.3(b). (Id. at 57.) The FTC's motion for summary judgment also seeks equitable monetary and injunctive relief under § 13(b) of the FTC Act, 15 U.S.C. § 53(b), against EPS, Dorsey, and McCann. (Doc. 322 at 19-24.) However, the FTC later filed a motion to withdraw all portions of its motion for summary judgment seeking equitable monetary relief in light of the Supreme Court's decision in AMG Capital Management LLC v. FTC, 141 S.Ct. 1341 (2021). (Doc. 350.)

EPS has filed a motion for reconsideration, asking the Court to reconsider its previous ruling that equitable monetary relief was authorized under § 13(b) of the FTC Act and to dismiss such claims with prejudice. (Doc. 349.) It has also filed a motion to strike portions of the appendix to the FTC's reply in support of its motion for summary judgment. (Doc. 340.)

Additionally, Dorsey and McCann have moved for summary judgment dismissing all claims against them, including the claims for equitable monetary and injunctive relief. (Doc. 313.) They have also filed a motion for reconsideration, asking the Court to reconsider its previous holding that the FTC could seek a permanent injunction under § 13(b) of the FTC Act. (Doc. 351.)

The Court will first address EPS's motion to strike. It will next turn to the FTC's motion for summary judgment against EPS and then its motion for summary judgment against Dorsey and McCann. The Court will address the remaining motions as they become

relevant to this discussion.

II. EPS'S MOTION TO STRIKE

As an initial matter, EPS moves to strike two documents attached the FTC's reply in support of its motion for summary judgment. (Doc. 340.) The first is a 17-page appendix (the "Appendix"), which provides a table identifying statements made by EPS in its response to the motion for summary judgment and why those statements lack foundation. (Doc. 337-1.) The second is a 17-page declaration provided by the FTC's attorney (the "Declaration"), in which the FTC's attorney identifies and summarizes portions of the record and testifies to the FTC's past actions in this case as related to the defendants who have previously settled. (Doc. 344-1.) EPS argues that the two documents constitute additional argument designed to circumvent the Court's order limiting the reply brief to twelve pages. (Doc. 340; see also Doc. 311 at 4 (setting a 12-page limit to the FTC's reply).)

The FTC contends the Appendix is nothing more than an aid to the Court in checking the citations in EPS's response brief. (Doc. 345 at 8-9.) The Court agrees. As the FTC notes, many of EPS's factual allegations in its response lack citation to the record or rely on incorrect or incomplete citations. (Doc. 345 at 8-9; see generally Doc. 337-1.) The Appendix provides the Court only a reference sheet in reviewing EPS's factual assertions and will not be stricken.

The FTC argues that the Declaration introduces evidence, not argument. (Doc. 345 at 16-17.) It is "well established that an attorney's affidavit can be used, in connection with a summary judgment motion, to place documents produced in discovery before the Court." Pace v. Air & Liquid Sys. Corp., 171 F.Supp.3d 254, 272 (S.D.N.Y. 2016) (quoting Harrison-Hoge Indus., Inc. v. Panther Martin S.R.L., No. 05-CV-2851 (JFB) (ETB), 2008 WL 905892, at *27 (E.D.N.Y. Mar. 31, 2008)). As the FTC notes, the Declaration consists of 13 pages of charts and summaries of record evidence; and the remaining five pages provide facts, in the declarant's personal knowledge, about the course of the litigation. (Doc. 345 at 17; see generally Doc. 344-1.) "[T]he Court is capable of discerning from [the

Declaration] what statements were made on the basis of [the declarant's] firsthand knowledge; what statements are summaries of evidence in the record; and what documents the Court should review in determining the accuracy of those summaries." Pace, 171 F.Supp.3d at 272. Therefore, the Court will not strike the Declaration.

Having reviewed both the Appendix and the Declaration, the Court finds that both documents are admissible and EPS's Motion to Strike (Doc. 340) will be denied.

III. THE FTC'S MOTION FOR SUMMARY JUDGMENT AGAINST EPS

The Court now turns to the FTC's motion for summary judgment against EPS on Counts II, III, and VI of the FAC.

A. Legal Standard

"A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." Fed. R. Civ. P. 56(a). A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, show "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Id.; see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); see also Jesinger, 24 F.3d at 1130. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. The dispute must also be genuine, that is, the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." Id.; see Jesinger, 24 F.3d at 1130.

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." Celotex, 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir.

1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial; instead, the moving party may identify the absence of evidence in support of the opposing party's claims. See Celotex, 477 U.S. at 317, 323-24. The party opposing summary judgment need not produce evidence "in a form that would be admissible at trial in order to avoid summary judgment." Id. at 324. However, the opposing party "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e) (1963) (amended 2010)).

B. Analysis

1. Count II: Unfair Acts or Practices in Violation of § 5 of the FTC Act

Count II of the FAC alleges that EPS engaged in unfair acts or practices in violation of § 5(a) of the FTC Act, 15 U.S.C. §§ 45(a) and (n). (Doc. 85 at 52-53.) The alleged violative conduct was: "(1) submit[ing] merchant account applications for the MNF fictitious merchants to Merrick that misrepresented the true identity of the merchant, (2) approv[ing] and open[ing] accounts for the MNF fictitious merchants, and (3) allow[ing] those accounts to continue processing." (Doc. 322 at 16.)

Section 5(a) "empowers the FTC to prevent the use of 'unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.'" F.T.C. v. Neovi, Inc., 604 F.3d 1150, 1153 (9th Cir. 2010) (quoting 15 U.S.C. § 45(a)(1)). An act or practice is unfair or deceptive if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

EPS concedes that the MNF scheme caused substantial injury to consumers but contends that EPS did not cause that injury and that any such injury is outweighed by the countervailing benefits its services provided competition. (Doc. 330 at 14-15.) The Court discusses causation and countervailing benefits separately.

a. Causation

Section 5 of the FTC Act provides that an act or practice is unfair or deceptive if it "causes or is likely to cause" substantial consumer injury. Here, EPS is not the most immediate or obvious cause of consumer injury. It is undisputed that MNF and its related entities and principals orchestrated and perpetrated the fraud. Thus, the question is what the FTC must show to also hold EPS liable for the harm.

In its opening brief, the FTC argues that EPS can be held liable as a cause of the consumer injury resulting from the MNF scheme because the MNF scheme could not have functioned "but for" the Subject Merchant accounts EPS boarded and maintained. (Doc. 322 at 16-17 (citing F.T.C. v. HES Merch. Servs. Co., Inc., No. 6:12-CV-1618-ORL-22KRS, 2016 WL 10880223, at *3 (M.D. Fla. Oct. 26, 2016)).) This standard is not supported by logic or case law. "But-for" causation cannot be sufficient to hold a person liable under § 5 for the simple reason that it would impose liability on any person who was utilized in pursuit of an illegal act or practice. For example, under the FTC's reductive "but-for" standard, Merrick would be just as liable as MNF because the MNF scheme could not have functioned without Merrick's access to the credit card system. Surely, the law demands more.

Furthermore, the case in which the FTC finds this "but-for" standard simply does not create such a rule. In Federal Trade Commission v. HES Merchant Services, Inc., the court analyzed the defendants' liability under § 310.3(b) of the TSR. 16 C.F.R. § 310.3(b). 2016 WL 10880223, at *4-5. Section 310.3(b) prohibits providing "substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates" the TSR. Thus, knowledge or conscious avoidance of knowledge were a key element of finding a violation, and the court did in fact find that the defendants had knowledge or consciously avoided knowledge of the scheme they assisted. HES Merchant Services, 2016 WL 10880223, at *4-5. The sentence regarding "but-for" causation was a simple summary of the relevant facts, not a statement of the legal standard. Therefore, the FTC's "but-for"

standard for causation is wholly without support.

In its reply brief, the FTC provides a more substantive, yet still unsatisfactory, response. (Doc. 337 at 12-13.) It argues that EPS is a cause of the consumer injury because its conduct is similar to that of the defendants in Federal Trade Commission v. Neovi, Inc., 604 F.3d 1150, who were found to cause consumer harm even though others actively perpetrated the fraud. (Id.) In Neovi, the defendants, collectively known as Qchex, marketed a series of software programs that allowed registered users to create and send checks by post or email. 604 F.3d at 1153-55. The system was extensively abused by fraudsters. "Because the information necessary to set up an account was relatively public and easy to come by, it was a simple matter for unscrupulous opportunists to obtain identity information and draw checks from accounts that were not their own." Id. at 1154. The FTC brought suit, alleging Qchex had engaged in an unfair practice or act under § 5. Id. at 1155. Qchex disputed that it was the cause of consumer injury under § 5 because it was the users who perpetrated the fraud. Id. The Ninth Circuit Court of Appeals rejected the argument. It found that "Qchex created and controlled a system that facilitated fraud and that the company was on notice as to the high fraud rate." Id. Therefore, "Qchex engaged in behavior that was, *itself*, injurious to consumers. . . . Qchex caused harm through its own deeds—in this case creating and delivering unverified checks—and thus § 5 of the FTC Act easily extends to its conduct." Id. at 1157 (emphasis in original).

EPS's conduct is clearly distinguishable from Qchex's. There is no argument that EPS's entire service facilitated and was widely used to perpetrate fraud, but the FTC's evidence shows only that 43 Subject Merchant accounts among thousands were illegitimate. Thus, the question is what standard the Court should apply in determining when a defendant that is not the most immediate cause of consumer injury may still be held liable as a cause under § 5. In Neovi, the Ninth Circuit hinted toward a standard.

In analyzing whether Qchex was liable under § 5, the Ninth Circuit discussed two relevant district court cases. Neovi, 604 F.3d at 1156. In Federal Trade Commission v. Windward Marketing, Ltd., the court held a defendant liable under § 5 for maintaining

several bank accounts used to collect the invoices of victims of a telemarketing scheme. No. CIV. A. 1:96-CV-615F, 1997 WL 33642380, at *12 (N.D. Ga. Sept. 30, 1997). While the defendant did not make the misrepresentations or initiate the fraudulent scheme, the defendant was "on notice of a high probability of fraud and/or unfairness." Id. at *13. Similarly, in Federal Trade Commission v. Accusearch, Inc., the court held liable under § 5 a defendant that purchased illegally obtained confidential phone records from vendors and resold the information on the internet. No. 06-CV-105-D, 2007 WL 4356786, at *6-7 (D. Wyo. Sept. 28, 2007), aff'd, 570 F.3d 1187 (10th Cir. 2009). Notably, the court found that the defendant was aware that the confidential phone records were illegally obtained. Id. at *7.

After discussing these cases, the Ninth Circuit stated that "Courts have long held that consumers are injured for purposes of the 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." Neovi, 604 F.3d at 1156 (collecting cases). When this statement is read in conjunction with the two cases stated above, it appears that a defendant can be held liable as a cause of consumer injury under § 5 if the relevant practice facilitates or contributes to a deceptive scheme, *and* the defendant has (a) notice of the deception or (b) the injury was a predictable consequence of the practice. Id. at 1155-56.

Here, EPS's boarding and maintenance of the Subject Merchant accounts clearly facilitated the MNF scheme by allowing the MNF principals to continue processing credit card sales through fraudulent accounts. The FTC has not argued, and the Court will not consider, whether the injury was a predictable consequence of the practice. Thus, the question is whether EPS had notice of MNF's scheme.

It is undisputed that Peterson had notice that the Subject Merchant accounts were engaged in credit card laundering to hide MNF's consumer fraud. Peterson, as an employee of EPS, was acting as an agent of EPS. Typically, under common law, an agent's knowledge is imputed to the principal "if knowledge of the fact is material to the agent's

duties to the principal." Restatement (Third) Of Agency § 5.03 (2006). However, EPS argues that Peterson's knowledge cannot be attributed to EPS, even though he was an employee and the facts regarding the Subject Merchant accounts were material to his duties as head of risk management, because Peterson was acting as an adverse agent by receiving kickbacks from the KMA-Wigdore Defendants. (Doc. 330 at 16-17.)

The adverse-agent rule provides that an agent's knowledge is not imputed to a principal "if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person." Restatement (Third) Of Agency § 5.04 (2006).[12] Notably, the rule requires that the adverse agent act "*solely*" in his own interest or the interest of another. As a result, "for the adverse interest exception to apply, the agent must have *totally abandoned* his principal's interests and be acting entirely for his own or another's purposes." In re Maui Indus. Loan & Fin. Co., Inc., 88 F.Supp.3d 1175, 1185 (D. Haw. 2015) (internal quotations and alterations omitted) (emphasis in original) (quoting Kirschner v. KPMG LLP, 938 N.E.2d 941, 953 (N.Y. 2010)); see also Funk v. Tifft, 515 F.2d 23, 26 n.4 (9th Cir. 1975) (adverse interest rule "is applicable only in cases where an agent is stealing from the corporation or otherwise defrauding it"); Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co., 964 F.Supp.2d 1128, 1144-45 (N.D. Cal. 2013) ("The adverse interest exception is narrow and generally requires 'an agent to *completely* abandon the principal's interests and act *entirely* for his own purposes.'" (quoting USACM Liquidating Trust v. Deloitte & Touche LLP, 764 F.Supp.2d 1210, 1218 (D. Nev. 2011)) (emphasis in original)). The exception does not apply where there is "even incidental benefit to the principal." Kellogg Brown & Root Servs., Inc. v. U.S., 728 F.3d 1348, 1369 (Fed. Cir. 2013) (citing Long Island Sav. Bank, FSB v. U.S., 503 F.3d 1234, 1249-50 (Fed. Cir. 2007)).

Here, assuming, without finding, that Peterson was in fact receiving kickbacks as payment for boarding and protecting the Subject Merchant accounts, there is simply no

[12] There are exceptions to this adverse interest rule that are not relevant here.

evidence that Peterson was acting wholly adverse to EPS's interests. There is evidence that Dorsey and McCann wanted "Wigdore accounts" boarded and maintained no matter how high-risk or suspicious the account. (Doc. 317-7 at 46, 80, 182-83.) Furthermore, EPS derived its income from a percentage of the money charged by its merchants. The fact that the Subject Merchants ended up being a bad investment for EPS in the long run does not eliminate the incidental benefit of maintaining boarded merchants for EPS.

As additional evidence of adversity, EPS highlights the fact that Peterson stole money from EPS by transferring money in diverted accounts into his own bank accounts. (Doc. 331 at 33; see also Doc. 331-1 at 22, 89-90, 92-93, 103.) However, there is no evidence that Peterson's theft was in any way associated with his handling of the Subject Merchant accounts. Peterson's theft does not automatically negate Peterson's role as EPS's agent in areas unrelated to the theft. Therefore, Peterson was not an adverse agent and his knowledge is imputed to EPS.

Furthermore, Bellet, who worked in EPS's risk department with Peterson, also testified to having notice that the Subject Merchant accounts were engaged in credit card laundering and fraud. (Doc. 317-7 at 43-44.) EPS does not provide any evidence that Bellet was acting as an adverse agent. Accordingly, Bellet's knowledge as an employee of EPS is also imputed to EPS.

Therefore, it is clear from the record that EPS's actions in boarding and maintaining the 43 Subject Merchant accounts facilitated the MNF scheme, and EPS, through its employees, had notice that MNF was engaged in credit card laundering and fraud. Accordingly, EPS was a cause of a consumer injury under § 5 of the FTC Act.

b. Countervailing Benefits

EPS argues that it is nevertheless not liable under § 5 because its business provides a countervailing benefit that outweighs any consumer harm. (Doc. 330 at 15.) Section 5 provides that an act or practice is unfair or deceptive only if the consumer harm is not "outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). EPS argues that by providing merchants with poorer credit, limited processing

history and high debt balances access the credit card system, EPS provided a benefit to competition that outweighed any consumer harm. (Doc. 330 at 15.)

The FTC contends that EPS's argument incorrectly defines the relevant act or practice for which the countervailing benefits should be measured. (Doc. 337 at 13.) The Court agrees. It is not EPS's business practices as a whole that are the subject of this action. Rather the relevant act or practice is that outlined in the FAC and the Motion for Summary Judgment: namely, "(1) submit[ing] merchant account applications for the MNF fictitious merchants to Merrick that misrepresented the true identity of the merchant, (2) approv[ing] and open[ing] accounts for the MNF fictitious merchants, and (3) allow[ing] those accounts to continue processing." (Doc. 322 at 16; see also Doc. 85 at 53.) There is no evidence that facilitating the Subject Merchant accounts in laundering credit card charges for a fraudulent telemarketing scheme has any countervailing benefit to consumers or competition.

Accordingly, the Court finds that EPS violated § 5 of the FTC Act by engaging in an act or practice that caused substantial injury to consumers which was not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or to competition. See 15 U.S.C. § 45(n).

2. Count III: Employ, Solicit, or Otherwise Cause Another to Engage in Credit Card Laundering in Violation of 16 C.F.R. § 310.3(c)(2)

The FTC also moves for summary judgment on Count III, which claims that EPS engaged in credit card laundering in violation of section 310.3(c)(2) of the TSR, 16 C.F.R. § 310.3(c)(2). Under section 310.3(c)(2), it is a violation of the TSR:

> to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant.

The FTC argues that "by editing and approving" the Subject Merchant applications and opening the Subject Merchant accounts, EPS "caused" the Subject Merchant accounts to engage in credit card laundering. (Doc. 322 at 18.)

EPS does not dispute that the MNF schemers charged to the Subject Merchant accounts telemarking transactions that did not result from a transaction between the cardholders and the Subject Merchants, which is to say that they engaged in credit card laundering. However, EPS argues that it did not "employ, solicit, or otherwise cause" the Subject Merchants to engage in such conduct. (Doc. 330 at 10-12.) The FTC argues that by simply providing the means by which MNF engaged in credit card laundering, EPS itself caused the Subject Merchants to engage in credit card laundering. (Doc. 337 at 13.) The FTC does not cite any legal support for this argument, and it goes against the plain language of the regulation.

Section 310.3(c)(2) of the TSR provides that it is a violation "to employ, solicit, or otherwise cause" another person – a merchant, or an employee, representative, or agent of the merchant – to engage in an act of credit card laundering. Thus, the regulation is concerned with whether EPS employed, solicited, or otherwise caused the Subject Merchants themselves to act, not whether EPS generally facilitated credit card laundering. It is an established interpretative canon that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Washington State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler, 537 U.S. 371, 384, (2003) (internal alterations and quotations omitted) (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001)). Therefore, "employ" and "solicit" direct the meaning of "otherwise cause." Webster's New World Dictionary defines "employ" to mean "to make use of" or "to engage the services or labor of for pay." Webster's New World Dictionary 445 (3d College Ed. 1988). It defines "solicit" to mean "to ask or seek earnestly or pleadingly; appeal to or for," or "to tempt or entice (someone) to do wrong." Id. at 1276. These words are active, not passive. They suggest that to "otherwise cause" requires a person to actively encourage or request or use the services of a merchant in laundering credit card sales drafts.

There is simply no evidence that EPS acted upon the Subject Merchants in any way

to encourage or request or use or obtain their services for credit card laundering. Therefore, the FTC's motion for summary judgment as to Count III is denied.

3. Count VI: Substantial Assistance or Support of Credit Card Laundering in Violation of 16 C.F.R. 310.3(b)

The FTC next moves for summary judgment on Count VI of the FAC, arguing that that EPS violated § 310.3(b) of the TSR by assisting and facilitating credit card laundering. (Doc. 322 at 18-19.) Under § 310.3(b) it is illegal "for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates [the TSR]." 16 C.F.R. § 310.3(b). There is no dispute that EPS's boarding and maintenance of the Subject Merchant accounts provided substantial assistance to the Subject Merchant accounts. (Doc. 330 at 16-18.) Yet, EPS argues that it did not know or consciously avoid knowing that the Subject Merchant accounts were engaged in credit card laundering – a violation of the TSR. (Doc. 330 at 17-18.) This argument fails because EPS does not dispute that Peterson knew that the Subject Merchant accounts were engaged in credit card laundering. For the reasons outlined above, Peterson's knowledge is imputed to EPS. See Restatement (Third) Of Agency § 5.03 (2006). Accordingly, the FTC has shown that EPS violated § 310.3(b) of the TSR by providing substantial assistance to the Subject Merchant accounts, while knowing that the Subject Merchants were engaged in violations of the TSR.

4. EPS's Affirmative Defenses

EPS contends that summary judgment nevertheless cannot be granted because there are material issues of fact regarding their affirmative defenses of laches and unclean hands.[13] (Doc. 330 at 21-22.)

EPS's laches affirmative defense fails as a matter of law. The government is not subject to the defense of laches when it is enforcing its rights, as it is here. U.S. v. Menatos, 925 F.2d 333, 335 (9th Cir. 1991). The Ninth Circuit has suggested that a laches defense

[13] EPS asserted other affirmative defenses in its Amended Answer, but the Court only considers those asserted in its response to the FTC's motion for summary judgment. (See Doc. 93 at 46-51.)

may be available against the government where there is a showing of "affirmative misconduct." U.S. v. Ruby Co., 588 F.2d 697, 705 n.10 (9th Cir. 1978). However, EPS has not offered any evidence of affirmative misconduct by the government in this case. (See Doc. 330 at 21; Doc. 331 at 10.)

EPS's affirmative defense of unclean hands fails for lack of evidence. "[T]he doctrine of unclean hands requires that a plaintiff 'shall have acted fairly and without fraud or deceit as to the controversy in issue.'" Northbay Wellness Grp., Inc. v. Beyries, 789 F.3d 956, 959 (9th Cir. 2015) (quoting Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1097 (9th Cir. 1985)).[14] The only evidence EPS offers in support of its affirmative defense is the deposition of Bikram Bandy, an FTC attorney. (Doc. 330 at 21-22.) In the deposition, Bandy stated that the FTC had reached settlement agreements with other defendants in this case and the FTC had entered suspended judgments against them. (Doc. 331-1 at 11-16.) As a result, the defendants were not required to pay any of the judgment because the defendants lacked the ability to pay at the time of the settlement agreement. (Id.) It is wholly unclear to the Court what is unfair or fraudulent about these settlement agreements other than the fact that they work to EPS's disadvantage. Therefore, the Court finds that there is no material issue of fact as to EPS's unclean hands affirmative defense.

Because EPS has failed to raise a material issue of fact as to either of its affirmative defenses and the Court has found no material issues of fact remain as to Counts II and VI of the FTC's FAC, the Court finds that summary judgment should be granted against EPS as to Counts II and VI.

5. The FTC's Requested Relief

The FTC's motion for summary judgment seeks both equitable monetary relief and

[14] Courts have suggested that unclean hands is limited when asserted against the government, but the exact contours of those limitations are unclear. See E.E.O.C. v. Recruit U.S.A., Inc., 939 F.2d 746, 752-53 (9th Cir. 1991) (holding the "unclean hands" doctrine applies to the government but "should not be strictly enforced when to do so would frustrate a substantial public interest"); SEC v. Sands, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995) (quoting SEC v. Musella, 38 Fed.R.Serv.2d 426, 428 (S.D.N.Y.1983)) (holding, "the defendant must show such egregiousness that 'the resulting prejudice to defendant rises to a constitutional level'"); see also Carson v. Golz, 829 F.App'x 853, 856 (10th Cir. 2020) (noting ambiguity). However, the Court need not resolve the issue here, as EPS has not proffered enough evidence to satisfy even the most basic requirements of the doctrine.

a permanent injunction. (Doc. 322 at 19-24.) The Court discusses each in turn.

a. Monetary relief

The FTC's motion for summary judgment seeks equitable monetary relief in the amount of $4,677,935.75 under § 13(b) of the FTC Act, 15 U.S.C. § 53(b). (Doc. 322 at 21.) EPS previously filed a motion to dismiss the FTC's claim for equitable monetary relief, arguing that the FTC did not have authority to seek monetary relief under § 13(b). (Doc. 153.) The Court denied the motion based on the Ninth Circuit's decision in Federal Trade Commission v. AMG Capital Management, in which the court reaffirmed the FTC's authority to seek equitable monetary relief. (Doc. 212 at 5-6 (relying on F.T.C. v. AMG Capital Mgmt., 910 F.3d 417, 427 (9th Cir. 2018)).) In April 2021, the Supreme Court reversed the Ninth Circuit decision this Court relied on, holding in AMG Capital Management LLC v. Federal Trade Commission that the FTC does not have authority to seek equitable monetary relief under § 13(b). 141 S.Ct. 1341 (2021). EPS now moves the Court to reconsider its previous ruling and dismiss the FTC's claim for equitable monetary relief with prejudice. (Doc. 349.) The Court held a hearing on the motion to reconsider and the Supreme Court's ruling on June 14, 2021. (Doc. 358.)

The parties agree that the FTC can no longer obtain equitable monetary relief under AMG Capital. (See Doc. 350 at 1.) However, the FTC contends the claims should not be dismissed with prejudice. (Id. at 2 n.2.) The Court agrees. In AMG Capital, the Supreme Court noted that the FTC is "free to ask Congress to grant it further remedial authority." 141 S.Ct. at 1352. And it appears that the FTC has done just that. (See Doc. 350 at 2-3.) Since there is a possibility that Congress may grant the FTC the remedial authority it has exercised for the last thirty years, the Court believes the most prudent path is to dismiss the FTC's claim for equitable monetary relief *without* prejudice. See AMG Cap. Mgmt., 141 S.Ct. at 1346-47 (outlining the FTC's historical use of equitable monetary relief under § 13(b)).

The FTC has also filed a motion to withdraw those portions of its motion for summary judgment and its opposition to the Dorsey and McCann's motion for summary

judgment that seek equitable monetary relief. (Doc. 350.) EPS does not oppose the motion and Dorsey and McCann did not file a response. (Doc. 353 at 1.) Accordingly, the motion to withdraw will be granted.

b. Injunctive Relief

The FTC also asks that the Court issue a permanent injunction under § 13(b) of the FTC Act to prohibit further illegal conduct by EPS. (Doc. 322 at 19-21.) The Court previously addressed the FTC's request for injunctive relief when Dorsey and McCann moved for judgment on the pleadings, contending the FTC failed to allege sufficient facts in the FAC to establish that they are "violating" or "about to violate" under § 13(b) the FTC Act. (See Doc. 173; Doc. 212 at 14.) The Court denied the motion, holding that the FTC need only allege facts demonstrating that past conduct is "likely to recur" in order to state a claim for a preliminary injunction under § 13(b). (Doc. 212 at 15-17.)

McCann and Dorsey now move for reconsideration of the Court's order on injunctive relief. (Doc. 351.) They argue that, in discussing whether § 13(b) authorized equitable monetary relief, the Supreme Court in AMG Capital made clear that the FTC may seek a permanent injunction only where "the FTC has sought preliminary injunctive relief and does not seek a monetary award." (Doc. 351-1 at 7.) The Court ordered briefing on Dorsey and McCann's motion for reconsideration, which was completed July 16, 2021. (Docs. 359-60, 362.)

> Section 13(b) of the FTC Act reads, in relevant part:
>
> Whenever the Commission has reason to believe--
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public--
>
> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action

> would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

15 U.S.C. § 53(b) (emphasis in original). In AMG Capital, the Supreme Court quoted this language and highlighted various phrases within it to conclude "that the provision addresses a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness." 141 S.Ct. at 1348. The Supreme Court continued:

> And the appearance of the words "permanent injunction" (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction. They might also be read, for example, as granting authority for the Commission to go one step beyond the provisional and ("in proper cases") dispense with administrative proceedings to seek what the words literally say (namely, an *injunction*).

Id. (emphasis in original). Dorsey and McCann appear to hang their entire argument on the first sentence of the block quote, which they read to hold that a permanent injunction is only appropriate where a preliminary injunction has already been issued. (Doc. 351-1 at 6-7.) The argument puts too much weight on a sentence whose active verb is "suggests." The Supreme Court is presenting one potential reading of the provision. The Supreme Court then immediately presents an alternative reading, stating that the "permanent injunction" provision "might also be read" to provide a mechanism by which the FTC skips administrative proceedings entirely to seek a permanent injunction. To this Court it appears, the Supreme Court is simply exploring possible interpretations as part of their inquiry into whether equitable monetary relief is authorized. AMG Capital, 141 S.Ct. at 1348 (stating that whatever the interpretation of permanent injunction provision, it does not authorize equitable monetary relief). This Court will not ignore Ninth Circuit precedent without a clearer holding of law from the Supreme Court.

The Ninth Circuit has long understood the provision of § 13(b) authorizing the FTC to seek a permanent injunction to operate separately from the provision authorizing the FTC to seek a preliminary injunction while pursuing administrative proceedings. See F.T.C. v. Evans Prod. Co., 775 F.2d 1084, 1086 (9th Cir. 1985) (discussing § 13(b)'s permanent-injunction proviso as distinct from the other provisions of § 13(b)); F.T.C. v. H. N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir. 1982) (same). The permanent-injunction provision "gives the Commission the authority to seek, and gives the district court the authority to grant, permanent injunctions in proper cases even though the Commission does not contemplate any administrative proceedings." H. N. Singer, 668 F.2d at 1111; see also F.T.C. v. Hoyal & Assocs., Inc., No. 19-35668, 2021 WL 2399707, at *2 (9th Cir. June 11, 2021) (citing H.N. Singer, 668 F.2d at 1110) ("We have long held that the FTC can obtain injunctive relief without initiating administrative proceedings."). Where the FTC chooses not to pursue an administrative proceeding, as is the case here, the authority to issue a preliminary injunction comes not from the preliminary injunction provision of § 13(b), but from the Court's equitable powers in issuing a permanent injunction. See H. N. Singer, 668 F.2d at 1111 (citing Porter v. Warner Holding Co., 328 U.S. 395, 397-98 (1946)) ("It is clear that, because the district court has the power to issue a permanent injunction to enjoin acts or practices that violate the law enforced by the Commission, it also has authority to grant whatever preliminary injunctions are justified by the usual equitable standards."); see also Evans Prod. Co., 775 F.2d at 1086 (citing H.N. Singer, 668 F.2d at 1111). Therefore, where the FTC has not initiated administrative proceedings, the FTC's authority to seek a preliminary injunction is derived from and attendant to its authority to seek a permanent injunction. It would be putting the cart before the horse to then hold that a preliminary injunction is a prerequisite to a permanent injunction. Therefore, Dorsey and McCann's motion for reconsideration will be denied.

However, the mere fact that the FTC has authority to seek a permanent injunction does not dictate that one is appropriate here. Section 13(b) "cannot be used to remedy past violations" of the FTC Act; thus, a permanent injunction can issue under § 13(b) "only if

the wrongs are ongoing or likely to recur." Evans Prod. Co., 775 F.2d at 1087 (citing Enrico's, Inc. v. Rice, 730 F.2d 1250, 1253 (9th Cir. 1984)); see also F.T.C. v. Qualcomm Inc., 969 F.3d 974, 1005 (9th Cir. 2020) (finding insufficient evidence that wrongdoing was likely to recur). There is no evidence that EPS has violated the FTC Act since 2013. Therefore, the Court considers whether there is evidence that the violative conduct is "likely to recur."

In favor of a granting a permanent injunction, the record shows that the violative conduct did not cease until after the FTC gave EPS notice of the lawsuit against MNF in August 2013. This suggests that the cessation of unlawful activity was not wholly unrelated to the anticipation of action by the FTC, although EPS denies there is any relationship. (See Doc. 331 at 10; Doc. 331-1 at 37.) As the Court has previously noted, "courts should be wary of a defendant's termination of illegal conduct when a defendant voluntarily ceases unlawful conduct in anticipation of formal intervention." (Doc. 212 at 16 (citing U.S v. W. T. Grant Co., 345 U.S. 629, 632 n.5 (1953)).) EPS also remains in the same business, with the same leadership—Dorsey and McCann. See, e.g., F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1202 (10th Cir. 2009) (finding past conduct likely to recur where the defendant remained in the same industry such that it had the capacity to engage in similar unfair acts or practices in the future). And EPS has only made minor changes to its processes for boarding merchants, suggesting that the potential for misconduct still exists. (Doc. 317-7 at 98, 126, 170; Doc. 331-1 at 47-48.)

On the other hand, EPS has changed how it runs risk management: giving more review authority to the Chief Operating Officer, preventing risk managers from speaking to agents, and requiring the risk manager, rather than the agent, to do investigations. (Doc. 317-7 at 111.) And, most importantly, EPS has ended its relationship with the KMA-Wigdore Defendants, Michael Peterson and Travis Bellet. (Doc. 317-7 at 34; Doc. 331-1 at 37, 110.) They were the nucleus of the violative conduct at EPS. Because the Court rests its summary judgment conclusion on Bellet's and Peterson's roles in the violative conduct,

their removal from EPS vitiates strongly against granting injunctive relief here.[15]

However, the FTC also argues that the violations are likely to recur because defendants in eleven unrelated FTC actions had opened merchant accounts with EPS. (Doc. 317 at 18-19 (citing Doc. 303-1 at 2-18).) This evidence is insufficient on many counts. Most notably, only one of the eleven cases identified alleges credit card laundering – the primary misconduct in this suit. (See Doc. 303-1 at 2 (discussing F.T.C. v. Top Shelf Marketing Corp. et al., No. 1:16-cv-00206 (S.D.N.Y 2016)).) The merchant account associated with this lone case was referred to EPS in 2013 through Abdelmesseh. (Id. at 23.) Therefore, it does little to show the violative conduct will recur.

In eight of the eleven cases, EPS opened only one related merchant account for the defendants, and there is no indication in the record that EPS handled those applications and accounts in any way materially similar to the manner in which EPS boarded and managed the 43 Subject Merchant accounts. (See id. at 2-6.) Therefore, they provide no evidence that EPS is likely to facilitate credit card laundering among multiple merchants in the future. In the three cases in which EPS opened more than one merchant account for the related defendants, the relevant accounts were boarded in 2012, 2013, and 2015. (Id. at 6-18.) All of the relevant conduct in these cases occurred two years before the FTC filed suit against EPS in 2017. It is now 2021. The FTC has not identified any additional evidence indicating that EPS is likely to repeat the violative behavior since 2015. Moreover, the FTC did not move to obtain a temporary restraining order or preliminary injunction at the inception of this suit; there simply was no misconduct to enjoin.

Because EPS has ended its relationship with the KMA-Wigdore Defendants, as well as Bellet and Peterson, and because there is no indication in the record of even potential misconduct in the last six years, the Court finds permanent injunctive relief inappropriate based on the summary judgment record. See F.T.C. v. Merch. Servs. Direct, LLC, No. 13-CV-0279-TOR, 2013 WL 4094394, at *3 (E.D. Wash. Aug. 13, 2013) (finding insufficient

[15] While there is evidence in the record that the misconduct may have extended beyond Bellet and Peterson, the Court finds there remain material issues of fact as to other parties' knowledge of the MNF scheme and the credit card laundering conducted by the 43 Subject Merchants.

evidence that misconduct is likely to recur where evidence was "substantially outdated," and the defendant had terminated agents that were the subjects of repeated customer complaints). Accordingly, the FTC's request for a permanent injunction is denied.

IV. THE FTC'S MOTION FOR SUMMARY JUDGMENT AGAINST DORSEY AND MCCANN

The FTC has also moved for summary judgment against Dorsey and McCann to hold them individually liable for EPS's conduct. (Doc. 322 at 12-14.) Dorsey and McCann have also filed a motion for summary judgment seeking dismissal of all claims against them, including the FTC's requests for injunctive and equitable monetary relief.[16] (Doc. 313.) As discussed above, the FTC is no longer entitled to equitable monetary relief under AMG Capital. 141 S.Ct. 1341. Accordingly, the claims for equitable monetary relief against Dorsey and McCann will be dismissed without prejudice.

The FTC is now limited to seeking injunctive relief against Dorsey and McCann. While the Court has already concluded that it will not grant injunctive relief against EPS on the motion for summary judgment, the FTC's request for injunctive relief in the FAC remains pending. Therefore, the Court will resolve on summary judgment whether Dorsey and McCann may be held individually liable for injunctive relief for EPS's violations.

An individual may be held individually liable for injunctive relief for a corporation's violations of the FTC Act if the FTC can prove that the individual "participated directly in the acts or practices or had authority to control them." F.T.C. v. Publ'g Clearing House,

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[16] The FTC argues that Dorsey and McCann's motion for summary judgment should be denied because it fails to comply with Local Rule of Civil Procedure 56.1. (Doc. 324 at 6-7.) A footnote in the Court's scheduling order states:

> In cases filed after January 1, 2018 the Court is participating in a pilot project that prohibits the parties from filing separate statement of facts or controverting statements of facts in support of a summary judgment motion and response. . . . Although this case was filed prior to 2018, the parties may jointly elect to proceed in this manner. If so jointly elected, the parties shall file a Joint Notice advising the Court.

(Doc. 78 at 6 n.4.) This case was filed before January 1, 2018 and the parties did not file a Joint Notice electing to do away with separate statements of facts. However, the Court created some confusion regarding the rule, when it stated in a separate order that "[t]he Scheduling Order . . . prohibits a party from filing a separate statement of facts." (Doc. 311 at 2.) Because the Court misstated the rule, Dorsey and McCann will not be penalized for electing not to file a separate statement.

Inc., 104 F.3d 1168, 1170 (9th Cir. 1997) (quoting F.T.C. v. American Standard Credit Systems, Inc., 874 F.Supp. 1080, 1087 (C.D.Cal. 1994)). Evidence that the individual co-owned the corporate entity, was a corporate officer, and signed documents is sufficient to show the requisite authority to control. Id.; see also F.T.C. v. Marshall, 781 F.App'x 599, 601-02 (9th Cir. 2019) (discussing Publ'g Clearing House, 104 F.3d at 1170).

Dorsey and McCann own EPS. (Doc. 313 at 2; Doc. 329 at 2.) During the relevant time period, Dorsey was the President and CEO of EPS, and McCann was a Managing Member. (Doc. 93 at 10.) Both had authority to direct the day-to-day operations of EPS. (Doc. 317-7 at 74, 86, 95, 112, 127.) Dorsey and McCann also had authority to approve merchant account applications. (Doc. 317-7 at 73, 75, 118, 166; Doc. 317-12 at 97.) Dorsey approved seven of the Subject Merchants and McCann approved ten. (Doc. 317-12 at 101-02, 107.) This is sufficient to show that Dorsey and McCann had authority to control the actions of EPS and hold them liable for injunctive relief. Therefore, the Court will grant the FTC summary judgment as to Dorsey's and McCann's liability for EPS's conduct as it relates to injunctive relief. Dorsey and McCann's motion for summary judgment will be granted as to the FTC's request for equitable monetary relief but denied on all other counts.

V. CONCLUSION

Based on the foregoing,

IT IS HEREBY ORDERED denying Defendants Electronic Payment Systems LLC and Electronic Payment Transfer LLC's Motion to Strike. (Doc. 340.)

IT IS FURTHER ORDERED granting in part and denying in part the FTC's Motion for Summary Judgment Against Defendants Electronic Payment Systems LLC, Electronic Payment Transfer LLC, John Dorsey, and Thomas McCann. (Doc. 322.)

IT IS FURTHER ORDERED holding that Electronic Payment Systems LLC and Electronic Payment Transfer LLC are a common enterprise.

IT IS FURTHER ORDERED entering judgment against Defendants Electronic Payment Systems LLC, Electronic Payment Transfer LLC, John Dorsey, and Thomas McCann on Counts II and VI of the First Amended Complaint.

IT IS FURTHER ORDERED denying the FTC's request for injunctive relief.

IT IS FURTHER ORDERED granting in part and denying in part Defendants John Dorsey and Thomas McCann's Motion for Summary Judgment. (Doc. 313.)

IT IS FURTHER OREDERED granting in part and denying in part Electronic Payment Systems LLC and Electronic Payment Transfer LLC's Motion for Reconsideration of the Court's Ruling Regarding the FTC's Claim for Monetary Relief. (Doc. 349.)

IT IS FURTHER ORDERED dismissing without prejudice the FTC's claim for equitable monetary relief against Electronic Payment Systems LLC, Electronic Payment Transfer LLC, John Dorsey and Thomas McCann.

IT IS FURTHER ORDERED granting the FTC's Motion to Withdraw. (Doc. 350.)

IT IS FURTHER ORDERED striking § III.B of the FTC's motion for summary judgment (Doc. 322), § 9 of it reply in support thereof (Doc. 337), and §§ II.B and III of its opposition to Defendants Dorsey and McCann's motion for summary judgment (Doc. 324)

IT IS FURTHER ORDERED denying Defendants John Dorsey and Thomas McCann's Motion for Reconsideration of Order on Motion for Judgment on the Pleadings. (Doc. 351.)

Dated this 11th day of August, 2021.

Honorable Stephen M. McNamee
Senior United States District Judge