

FILED

2015 MAY 19 PM 2:17

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Civ. No. 6:12-cv-1618-Orl-22-KRS

WV UNIVERSAL MANAGEMENT, LLC;
GLOBAL FINANCIAL ASSIST, LLC;
LEADING PRODUCTION, LLC; WILLY
PLANCHER; VALBONA TOSKA; HES
MERCHANT SERVICES COMPANY,
INC.; BUSINESS FIRST SOLUTIONS,
INC.; VOICEONYX CORP.; HAL E.
SMITH; JONATHON E. WARREN;
RAMON SANCHEZ-ORTEGA;
UNIVERSAL PROCESSING SERVICES
OF WISCONSIN, LLC; DEREK
DEPUYDT,

Defendants.

**PERMANENT INJUNCTION AS TO DEFENDANT UNIVERSAL
PROCESSING SERVICES OF WISCONSIN, LLC., also d/b/a NEWTEK MERCHANT
SOLUTIONS**

Plaintiff Federal Trade Commission (“Commission” or “FTC”) filed its *First Amended Complaint for Permanent Injunction and Other Equitable Relief* (“Amended Complaint”) against Defendant Universal Processing Services of Wisconsin, LLC, also d/b/a Newtek Merchant Solutions (“UPS”), for a permanent injunction and other equitable relief pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108. On November 18, 2014, this Court granted the FTC’s Motion for Summary Judgment, holding UPS liable for assisting and facilitating telemarketing violations in violation of Section 310.3(b) of the Telemarketing Sales Rule (“TSR”) (the “November 18 Order,” Doc. 208). On February 11, 2015, this Court granted the FTC’s Motion for Equitable

Monetary Relief against UPS, Hal E. Smith, and HES Merchant Services Company, Inc. (the “February 11 Order,” Doc. 242) subjecting UPS and other defendants to equitable monetary relief. The Court has entered a monetary judgment against Hal E. Smith and HES Merchant Services Company, Inc., but has not entered a monetary judgment as to UPS. The FTC and UPS stipulated to the entry of this permanent injunction, imposing certain injunctive relief to narrow the issues remaining in litigation to the monetary judgment (and any attendant provisions for monetary relief) against UPS. The Court hereby enters this *Order for Permanent Injunction as to Universal Processing Services of Wisconsin, LLC, also d/b/a Newtek Merchant Solutions* (“Order”).

THEREFORE, IT IS ORDERED as follows:

FINDINGS

1. This Court has Jurisdiction over this matter.
2. UPS neither admits nor denies any of the allegations in the Amended Complaint, except as specifically stated in this Order. Only for purposes of this action, UPS admits that the Court has jurisdiction over it with regard to the claims asserted in the Amended Complaint.
3. UPS waives all rights to seek appellate review or otherwise challenge the validity of this Order, including its injunctive relief. UPS does not waive any rights to seek appellate review of any final monetary judgment (and any attendant financial provisions) that may be entered in this matter against UPS on any grounds, including that the November 18 Order and/or the February 11 Order are erroneous as they relate to monetary relief – but not as to injunctive relief.
4. UPS further waives and releases any claim it may have against Plaintiff, its employees, representatives, or agents, through the date of this Order.
5. UPS waives any claim that it may hold under the Equal Access to Justice Act, 28 U.S.C.

§ 2412, concerning the prosecution of this action through the date of this Order, and UPS agrees to bear its own costs and attorney's fees.

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

- A. **"ACH Debit"** means any completed or attempted debit to a Person's account at a financial institution that is processed electronically through the Automated Clearing House Network.
- B. **"Card-Not-Present Transactions"** means a debit or credit card transaction whereby the Person's debit or credit card is not physically swiped, scanned or imprinted.
- C. **"Chargeback"** means a procedure whereby an issuing bank or other financial institution charges all or part of an amount of a Person's credit or debit card transaction back to the acquiring or merchant bank.
- D. **"Chargeback Rate"** means the proportion (expressed as a percentage) of Chargebacks out of the total number of credit or debit card sales transactions, calculated separately for each payment card association (*e.g.*, American Express, Discover Card, MasterCard, Visa, etc.).
- E. **"Client"** means any Person for which UPS provides Payment Processing.
- F. **"Covered Client"** means any Client that processes, or is anticipated to process, Card-Not-Present Transactions exceeding two hundred thousand dollars (\$200,000) annually, as measured by a single merchant account or by the aggregate of all merchant accounts held by the Client.
- G. **"Restricted Client"** means any Person engaged in the following types of businesses: (a) Lead Source Provider; (b) pay day loans; (c) Money Making Opportunities; (d) mortgage loan modification; or (e) Debt Relief Product or Service.

H. **“Debt Relief Product or Service”** means any product, service, plan or program represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a Person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a Person to an unsecured creditor or debt collector.

I. **“Lead Source Provider”** means any Person that provides, in exchange for consideration, consumer information to a seller or telemarketer for use in the marketing of any goods or services.

J. **“Money Making Opportunities”** means any good or service represented to enable or to assist consumers in: (i) earning income through a work-from-home business opportunity; (ii) obtaining training or education on how to establish a business or earn money or other consideration through a business; (iii) obtaining employment for an upfront fee; or (iv) obtaining government grants or other such government income, benefits, or scholarships.

K. **“Payment Processing”** means providing a Person, directly or indirectly, with the means used to charge or debit accounts through the use of any payment mechanism, including, but not limited to, Remotely Created Payment Orders, Remotely Created Checks, ACH Debits, or debit, credit, prepaid, or stored value cards. Whether accomplished through the use of software or otherwise, Payment Processing includes, among other things: (a) reviewing and approving merchant applications for payment processing services; (b) providing the means to transmit sales transaction data from merchants to acquiring banks or other financial institutions; (c) clearing, settling, or distributing proceeds of sales transactions from acquiring banks or financial institutions to merchants; or (d) processing Chargebacks or returned Remotely Created Payment Orders, Remotely Created Checks, or ACH Debits.

L. **“Person”** means an individual, partnership, corporation, entity, association or organization.

M. **“Remotely Created Check”** or **“RCC”** means a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the Person on whose financial account the check is drawn. An RCC is often also referred to as a “demand draft,” “telephone check” or “preauthorized draft.” For purposes of this definition, an RCC originates as a paper-based transaction, but can be processed subsequently through electronic means (such as through check imaging or scanning) or through non-electronic means.

N. **“Remotely Created Payment Order”** or **“RCPO”** means a payment instruction or order drawn on a Person’s financial account that is initiated or created by the payee and that does not bear a signature applied, or purported to be applied, by the Person on whose financial account the order is drawn, and which is deposited into or cleared through the check clearing system. For purposes of this definition, unlike an RCC, an RCPO does not originate as a paper-based transaction. An RCPO is created when a payee directly or indirectly enters financial account and routing numbers into an electronic check template that is converted into an electronic file for deposit into the check clearing system.

O. **“Total Return Rate”** means the proportion (expressed as a percentage) of all attempted ACH Debit, RCC or RCPO transactions that are returned through the banking system for any reason, whether before or after payment, out of the total number of such attempted transactions, calculated separately for each transaction type.

I.

PROHIBITION AGAINST PAYMENT PROCESSING FOR RESTRICTED CLIENTS

IT IS ORDERED that UPS, UPS's officers, agents, employees, and all other Persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are permanently restrained and enjoined from Payment Processing for any Client that they know, or should know, is a Restricted Client.

II.

SCREENING OF PROSPECTIVE COVERED CLIENTS

IT IS FURTHER ORDERED that UPS, UPS's officers, agents, employees, and all other Persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are permanently restrained and enjoined from Payment Processing for any prospective Covered Client without first engaging in reasonable screening of the prospective Covered Client to determine whether its business practices are likely to be deceptive, unfair, or abusive acts or practices prohibited by Section 5 of the FTC Act or the TSR. Such reasonable screening shall include, but not be limited to:

A. Obtaining from the prospective Covered Client, including any corporate name, trade name, fictitious name or aliases under which such prospective Covered Client does or has done business during the preceding six months:

1. a description of the nature of the prospective Covered Client's business, including a description of the nature of the goods and services sold for which UPS would provide Payment Processing;

2. a list of all business and trade names, fictitious names, DBAs, and Internet websites under or through which the prospective Covered Client has marketed during the

preceding two years, or intends to market the goods and services for which UPS would provide Payment Processing;

3. each physical address at which the prospective Covered Client has conducted, during the preceding two years, or will conduct the business(es) identified pursuant to Section II.A.1 of this Order;

4. the name and address of every acquiring bank, originating depository financial institution, and payment processor used by the prospective Covered Client during the preceding two years, and all merchant identification numbers used by any such acquiring banks, originating depository financial institution, or payment processors in connection with the prospective Covered Client;

5. the prospective Covered Client's past Chargeback Rate and Total Return Rate for the preceding six months, and estimates of future Chargeback Rates and Total Return Rates;

6. whether the prospective Covered Client has had a Total Return Rate above 2.5% or Chargeback Rate above 1% in any month during the past two years;

7. the names of trade and bank references; and

8. whether the prospective Covered Client, including the principal(s) and controlling Person(s) of the prospective Covered Client, Person(s) who have a majority ownership interest in the prospective Covered Client, and any corporate name, trade name, fictitious name or aliases under which such Person(s) do or have done business, has ever been:

(a) placed in a payment card association's compliance monitoring program;

or

(b) the subject of a legal action or investigation relating to consumer protection or telemarketing laws or regulations.

B. Taking reasonable steps to assess the accuracy of the information provided pursuant to Sections II.A and II.C of this Order, including but not limited to reviewing the Internet websites used by the prospective Covered Client to market its goods or services, and obtaining and reviewing copies of monthly statements issued by any acquiring bank, originating depository financial institution or payment processor used by the prospective Covered Client during the preceding three months; and

C. Obtaining and reviewing representative samples of current marketing materials for goods or services related to the offer for which UPS would provide the prospective Covered Client with Payment Processing.

Nothing in this Section II shall be read to insulate any Person from liability for violations of Section 5 of the FTC Act, the TSR, or this Order.

III.

MONITORING OF CLIENTS

IT IS FURTHER ORDERED that UPS, UPS's officers, agents, employees, and all other Persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are permanently restrained and enjoined from the following conduct when Payment Processing for any Client:

A. Failing to monitor the sales activity of all current Clients to identify those Clients that should be designated as Restricted Clients subject to termination or as Covered Clients subject to the additional screening required by Section II of this Order.

B. Failing to reasonably monitor each Covered Client's transactions to ensure that it is likely not engaged in practices that are deceptive, unfair, or abusive in violation of Section 5 of the FTC Act or the TSR. Such reasonable monitoring shall include, but not be limited to, regularly

reviewing the Covered Client's websites, regularly reviewing the Covered Client's Chargeback Rates, Total Return Rates, and reasons provided for these rates, as well as examining any unusual or suspect transaction patterns, values, and volume;

C. Failing to calculate and update at least on a month-by-month basis for each Covered Client the Chargeback Rate and Total Return Rate. The Chargeback Rate and Total Return Rate shall be calculated separately for each payment mechanism processed, including ACH Debits, credit and debit card transactions, and any other transactions conducted via alternative payment mechanism. For any Covered Client with multiple processing accounts, the calculation of the Chargeback Rate and Total Return Rate shall be made for each of the Covered Client's individual processing accounts, and in the aggregate for each Covered Client;

D. Failing to immediately conduct a reasonable investigation of the cause of Total Return Rates or Chargeback Rates for:

1. Any Covered Client whose monthly Total Return Rate exceeds two-and-one-half percent (2.5%) in two of the past six months; and

2. Any Covered Client whose monthly Chargeback Rate exceeds one percent (1%) and whose total number of chargebacks exceeds thirty-five (35) per month in two of the past six months.

3. Such reasonable investigation shall include:

(a) Verifying and updating the truth and accuracy of information gathered in compliance with Section II of this Order and a representative sampling of advertising by the Covered Client; (b) confirming that the Covered Client has obtained required consumer authorizations for the transactions; (c) contacting financial institutions and Better Business Bureaus to gather detailed information, including complaints and other

relevant information, regarding the Covered Client; (d) searching publicly available sources for legal actions taken by the Commission or other state or federal law enforcement agencies against the Covered Client; (e) obtaining an explanation from the Covered Client as to the reason(s) for the Total Return Rate exceeding 2.5% or Chargeback Rate exceeding 1% in any two months within a six-month period; (f) performing a site visit of the Covered Client's main business location; and (g) conducting "test" shopping to determine the Covered Client's sales practices, where possible;

4. Within sixty (60) days of commencing the investigation, UPS shall suspend Payment Processing for the Covered Client unless UPS has prepared a written report that establishes facts that demonstrate, by clear and convincing evidence, that the Covered Client's business practices, related to the offer(s) for which UPS provides Payment Processing, are not deceptive, unfair, or abusive acts or practices in violation of Section 5 of the FTC Act or the TSR.

Nothing in this Section III shall be read to insulate any Person from liability for violations of Section 5 of the FTC Act, the TSR, or this Order.

IV.

PROHIBITION AGAINST ASSISTING AND FACILITATING

IT IS FURTHER ORDERED that UPS, UPS's officers, agents, employees, and all other Persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are permanently restrained and enjoined from providing Payment Processing to any Client that they know, or should know, is engaged in:

A. Misrepresenting, directly or by implication, any material aspect of the performance,

efficacy, nature, or central characteristics of any goods and services;

- B. Misrepresenting, directly or by implication, any material aspect of the nature or terms of any refund, cancellation, exchange, or repurchase policies;
- C. The unauthorized debiting or charging of consumer bank or credit card accounts; or
- D. Any deceptive, unfair, or abusive act or practice prohibited by Section 5 of the FTC Act or by the TSR.

V.

PROHIBITIONS REGARDING CONSUMER INFORMATION

IT IS FURTHER ORDERED that UPS, UPS's officers, agents, employees, and all other Persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are permanently restrained and enjoined from:

- A. Disclosing, using, or benefitting from the TYS Defendants' customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including, but not limited to, a credit card, bank account, or other financial account), of any Person, which UPS obtained prior to entry of this Order; and
- B. Failing to dispose of such customer information in all forms in UPS's possession, custody, or control within thirty (30) days of this Order. Disposal shall be by means that protect against unauthorized access to the customer information, such as by burning, pulverizing, or shredding any papers, and by erasing or destroying any electronic media, to ensure that the customer information cannot practicably be read or reconstructed.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by a law, regulation, or court order.

VI.

ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that UPS obtain acknowledgments of receipt of this Order:

- A. Within seven (7) days of entry of this Order, UPS must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.
- B. For fifteen (15) years after entry of this Order, UPS must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who have decision-making authority with respect to the conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within seven (7) days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.
- C. From each individual or entity to which UPS delivered a copy of this Order, UPS must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

VII.

COMPLIANCE REPORTING

IT IS FURTHER ORDERED that UPS make timely submissions to the Commission:

- A. One (1) year after entry of this Order, UPS must submit a compliance report, sworn under penalty of perjury: UPS must (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with UPS; (b) identify all of UPS's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each UPS business identified in VII.A(b), including the goods and services offered, the means

of advertising, marketing, and sales, and the involvement of any other Defendant (which UPS must describe if it knows or should know due to its own involvement); (d) describe in detail whether and how UPS is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

B. For fifteen (15) years following entry of this Order, UPS must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (a) any designated point of contact; or (b) the structure of UPS or any entity that UPS has an ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. UPS must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against UPS within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington,

DC 20580. The subject line must begin: FTC v. WV Universal Management, Inc., et al. (X130007).

VIII.

RECORDKEEPING

IT IS FURTHER ORDERED that UPS must create the following records for fifteen (15) years after entry of the Order, and retain each such record for five (5) years:

- A. accounting records showing the revenues from Covered Clients;
- B. personnel records showing, for each person involved in compliance with Sections II and III of this Order, whether as an employee or otherwise, that person's name, addresses, telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;
- C. records of all refund and Chargeback requests made with respect to Covered Clients, whether received directly or indirectly, such as through a third party, and any response; and
- D. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

IX.

COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring UPS's compliance with this Order, and any failure to transfer any assets as required by this Order:

- A. Within fourteen (14) days of receipt of a written request from a representative of the Commission, UPS must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents, for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil

Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

B. For matters concerning this Order, the Commission is authorized to communicate directly with UPS. UPS must permit representatives of the Commission to interview any employee or other person affiliated with any UPS who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives, as consumers, suppliers, or other individuals or entities, to UPS or any Person affiliated with UPS, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

X.

SEVERABILITY

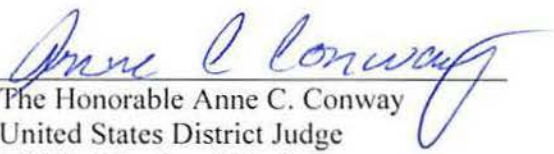
IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in full force and effect.

XI.

JURISDICTION


IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED, this 19th day of May, 2015.


The Honorable Anne C. Conway
United States District Judge
Middle District of Florida

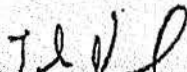
SO STIPULATED:

FEDERAL TRADE COMMISSION


Christopher D. Panek, Attorney
Federal Trade Commission
1111 Superior Avenue, Suite 200
Cleveland, OH 44114
216.263.3406 (telephone)
216.263.3426 (facsimile)
cpanek@fto.gov

Date: 4/20/2015

DEFENDANT:


Thomas Harkins, as Chief Operating Officer of
UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC,
d/b/a Newtek Merchant Services

Date: 3/23/15


MARK L. ROSENBERG, ESQ.
Attorney for Universal Processing Services of Wisconsin, LLC
Bregman, Berbert, Schwartz & Gilday, LLC
7315 Wisconsin Avenue
Suite 800 West
Bethesda, Maryland 20814
(301) 656-2707 (telephone)
(301) 961-6525 (facsimile)
mrosenberg@bregmanlaw.com

Date: 3/23/15