No. 16-17727

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC,
Defendant-Appellant.

On Appeal From the United States District Court
for the Middle District of Florida

BRIEF OF THE FEDERAL TRADE COMMISSION

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Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Pursuant to 11th Cir. R. 26.1-2, Plaintiff-appellee Federal Trade Commission certifies that the following persons or entities are known to have an interest in the outcome of this appeal:

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Brill, Julie, Former FTC Commissioner

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Federal Trade Commission, Appellee

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Wilshire Louisiana Capital Management Fund, LLC, Affiliate of Universal

Wilshire Louisiana Partners II, LLC, Affiliate of Universal

Wilshire Louisiana Partners III, LLC, Affiliate of Universal

Wilshire Louisiana Partners IV, LLC, Affiliate of Universal

Wilshire New York Advisers II, LLC, Affiliate of Universal

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STATEMENT REGARDING ORAL ARGUMENT

The FTC believes oral argument may assist the Court in its consideration of this appeal and therefore requests oral argument.

C. Joint And Several Liability Does Not Require A Common Enterprise. 38

D. Universal's Remaining Arguments Against Joint And Several Liability Are Incorrect. 40

II. There Is No Basis For Remand....................43

Conclusion 46

Statutory Addendum

TABLE OF AUTHORITIES

CASES

* *FTC v. Washington Data Res., Inc.*,
704 F.3d 1323 (11th Cir. 2013) 26, 27, 35, 36, 37

FTC v. Windward Marketing, Inc.,
1997 WL 33642380 (N.D. Ga. Sept. 30 1997) 39

Jackson v. Smith, 254 U.S. 586 (1921). 35

MacMillan Bloedel, Ltd. v. Flintkote Co.,
760 F.2d 580 (5th Cir. 1985)..30

Mazankowski v. Harders, 293 N.W.2d 869 (Nev. 1980) 30

Original Brooklyn Water Bagel Co. v. Bersin Bagel Grp., LLC, 817 F.3d 719 (11th Cir. 2016) 22

Project Hope v. Neptune Orient Lines, Ltd., 250 F.3d 67
(2d Cir. 2001) 33

SEC v. AbsoluteFuture.com, 393 F.3d 94 (2d Cir. 2004) 35

SEC v. Hughes Capital Corp.,
124 F.3d 449 (3d Cir. 1997).. 32, 40

SEC v. Monterosso, 756 F.3d 1326 (11th Cir. 2014) 41

SEC v. Whittemore, 659 F.3d 1 (D.C. Cir. 2011) 40

United States v. Alcon Alum. Corp.,
964 F.2d 252 (2d Cir. 1992)...33

STATUTES AND REGULATIONS

15 U.S.C. § 45 .... 16, 17

15 U.S.C. § 45(a) 44

15 U.S.C. § 57a 44, 45

15 U.S.C. § 6101 13

15 U.S.C. § 6102 .... 13, 14, 44, 45

15 U.S.C. § 6105 45

16 C.F.R. § 310 16

16 C.F.R. § 310.1 .... 18, 44

16 C.F.R. § 310.2.. 14, 17

16 C.F.R. § 310.3 .... 4, 10, 14, 15, 17, 18, 42

16 C.F.R. § 310.4 .... 10, 15, 17

QUESTION PRESENTED

The Telemarketing Sales Rule makes it illegal for a person "to provide substantial assistance or support" to a telemarketer violating the Rule if he "knows or consciously avoids knowing" of the illegal conduct. 16 C.F.R. § 310.3. The district court held that Universal Processing Services violated the Rule by providing credit card services that were critical to the operations of a fraudulent telemarketing operation while ignoring obvious signs of the fraud. On the basis of that violation, the court held Universal jointly and severally liable with the other defendants and ordered Universal to disgorge the full amount stolen from consumers (deducting charges already repaid to them).

The question presented is whether the district court abused its discretion in awarding that relief.

The district court reasonably exercised its discretion in ordering the remedy in this case. Universal violated the law in its own right. Because it acted in concert with Treasure Your Success to cause a single, indivisible harm to consumers, Universal is properly liable for the entire harm under standard legal principles. Joint and several liability does not, as Universal contends, make it liable for the conduct of others. Universal is liable only for *its own* violation of the law, but because the consequences of its illegal conduct cannot be separated from that of the other actors', Universal must repay all of the money that it helped take from consumers. That Universal's liability is "joint and several" simply means that the other defendants are also liable for the same amount.

STATEMENT OF THE CASE

The economy runs on credit cards. American consumers rely more on credit cards as their primary means of payment for goods and services than any other method. In 2015, U.S. consumers made over 103 billion credit and debit card purchases totaling nearly $6 trillion—almost one third of the country's gross domestic product.[1] Such sums make the credit card system not just vital to our economy but

[1] Federal Reserve, *2016 Payments Study* 5 (Dec. 2016), www.federalreserve.gov/newsevents/press/other/2016-payments-study-20161222.pdf; World Bank, *World Development Indicators database*, *Gross Domestic Product* 1 (Feb. 2017), databank.worldbank.org/data/download/GDP.pdf.

also an attractive target for fraud: $3.5 billion worth in 2010.[2] Recognizing that the ability to accept credit cards can make fraudulent businesses appear legitimate, Congress and the FTC have worked to restrict access to the credit card system to legitimate businesses and prevent access by those engaged in telemarketing fraud. *See* S. Rep. 103-80 at 10 (June 29, 1993); 60 Fed. Reg. 43842, 43853 (Aug. 23, 1995).

Fraudulent telemarketers' access to the credit card system is at the heart of this case. Appellant Universal Processing Se

account application that the company would be fraudulent, but that was no obstacle under Universal's back-channel process. Universal opened a merchant account and then handled a flood of illegal credit card charges for the company—$2.5 million worth in 8 months—all the while ignoring ongoing signs that those charges were fraudulent. Universal even opened a second merchant account to help the business expand. Universal's conduct violated the Telemarketing Sales Rule, 16 C.F.R. § 310.3, by providing substantial assistance to Treasure Your Success while knowing or intentionally avoiding knowledge that the operation was engaged in telemarketing fraud.

A. A Brief Introduction To Processors And Merchant Accounts

A business can establish a merchant account either directly with an "acquiring bank" that is a member of a credit card network (like MasterCard or Visa), or with an intermediary company that has contracted with an acquiring bank to sell credit card processing services. App. Vol. 4 at JA-683; 60 Fed. Reg. 43842, 43852 (Aug. 23, 1995).

These intermediary companies, called "processors," effect credit card transactions between their merchant customers and an acquiring bank. *Id.* When a processor receives a credit card transaction from one of its merchants, it submits the transaction to the acquiring bank for authorization and payment. Once the transaction is authorized, the acquiring bank credits the payment to the processor's account.

business, and determines whether the processor will require a reserve account as a hedge against refunded payments. App. Vol. 1 at JA-119, JA-126–32; Vol. 4 at JA-683. Red flags in the underwriting process signal a higher level of risk, which can lead processors to monitor an account for signs of fraud or to deny the application altogether. App. Vol. 4 at JA-683–84.

B. Universal Processing Services

Universal Processing Services is a credit card processor. According to its underwriting standards, Universal applies typical industry underwriting principles to new merchant account applications. *See* App. Vol. 1 at JA-119, JA-126, JA-131–32. At a minimum, Universal's guidelines require that applications be complete and provide both proof that the business exists and credit reports for all persons listed on the application. *Id.* at JA-126. The guidelines distinguish between low- and high-risk applicants and mandate greater documentation requirements for riskier businesses, including in particular those that operate by telephone or the internet. *Id.* at JA-127–31. Some types of businesses, such as "debt consolidation," "credit repair," and telemarketing sales are deemed "unacceptable business types." *Id.* at JA-120, JA-132.

Despite its ostensibly rigorous underwriting standards, Universal did not apply them to its highest-volume and most profitable accounts. Those accounts, like most of Universal's business, came from independent sales agents (rather than

in-house sales people). The largest and most profitable accounts came through one particular agent (who is also one of Universal's codefendants in this case): Hal E. Smith, and his company HES Merchant Processing Services. *Id.* at JA-145, JA-149. Over the course of ten years, Smith and HES brought Universal more than 100 accounts, earning the company about $4 to $5 million in total profits. *Id.* at JA-152; App. Vol. 9 at JA-1668.

While ordinary applications were processed through Universal's underwriting and risk department and subject to its credit standards, the Smith/HES accounts were not. Instead, the company's President, Derek DePuydt, bypassed the ordinary process and personally handled those accounts. App. Vol. 1 at JA-120, JA-145. The reason for that special treatment is clear: Smith's accounts would not have passed the ordinary underwriting process. The accounts typically involved phone sales by shady operations offering services such as loan modification, debt reduction, and timeshare-resale advertising—services that are rarely legitimate and would have been deemed unacceptable under Universal's guidelines. *Id.* at JA-120. Universal charged a hefty premium for that special treatment. Rather than the 2.5% discount rate typical for card-not-present businesses, Smith's accounts through Universal carried discount rates up to 15.5 percent. And because the Smith businesses' dubious (and likely fraudulent) services posed a high risk of chargebacks,

Universal kept up to 30 percent of every charge in reserve.[4] App. Vol. 1 at JA-145–46; Vol. 4 at JA-693. Universal thus kept as much as 45 cents of every dollar that some Smith accounts charged to consumers' credit cards. *See id.* No legitimate business could afford (or would tolerate) such fees.

Several of Universal's officers and employees thought Smith's accounts were too risky and that Universal should not do business with him. For example, Kim Olszewski—the company's Chief Operating Officer responsible for risk assessment and underwriting—called Smith's accounts "garbage" and refused to underwrite them. App. Vol. 1 at JA-118, JA-120, JA-147. Others at Universal shared her concerns. *Id.* at JA-120–21. Olszewski told investigators how (before Smith's accounts bypassed the underwriting department and were underwritten by DePuydt directly) she had on several occasions rejected applications brought in by Smith only to be overruled by DePuydt. *Id.* at JA-120, JA-145; App. Vol. 3 at JA-443. He told her that the income from Smith's accounts "made it worth the risk" and their revenue "was too important to the company." App. Vol. 1 at JA-147; Vol. 9 at JA-1668. DePuydt assured employees that "upper management

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[4] Under Universal's service contract with the acquiring banks, it must refund money directly to card holders if the merchant cannot do so. Processors usually require reserves only for new or risky merchants. In such cases, processors typically withhold no more than 5 to 10 percent of transactions, with the funds released on a six-month rolling basis. *See* chargebacks911.com/knowledge-base/what-is-a-merchant-account-reserve/.

knew" about his handling of the Smith accounts. App. Vol. 1 at JA-120–21; Vol. 9 at JA-1668.

C. The Treasure Your Success Merchant Accounts

This case concerns two merchant accounts that Smith brought to Universal for what turned out to be the fraudulent operation known as "Treasure Your Success." Like other Smith accounts, Treasure Your Success's merchant account application would have failed any processor's (including Universal's) ordinary underwriting process. It was rife with signs that the business would be a fraud. *See* App. Vol. 4 at JA-684. The principals of the company had no meaningful income or assets; their credit scores were worse than even the "very high risk" category; and their credit reports showed serious delinquencies, quite literally warning of a "high risk of fraud." *Id.* at JA-685–86; App. Vol. 5 at JA-813, JA-815; Vol. 9 at JA-1668. The application also claimed—without any track record or substantiation—a suspiciously high volume of anticipated sales for a new company: $2.7 million in the first year. App. Vol. 4 at JA-686; Vol. 5 at JA-773. Further, all of these sales were to come from outbound telemarketing, "card-not-present," tele-
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transaction in reserve to repay chargebacks, each of which would carry a $35 fee. *Id.* DePuydt approved the application as he did other questionable Smith accounts, and Universal began processing credit card transactions for Treasure Your Success.

Almost immediately, Treasure Your Success began to incur chargebacks at a rate that Universal's own expert witness agreed showed a "very high likelihood of fraud." App. Vol. 5 at JA-831–32; Vol. 4 at JA-693. The FTC's expert likewise concluded that Universal "must have known" that Treasure Your Success "was engaged in merchant fraud." App. Vol. 4 at JA-698. And Treasure Your Success's high chargeback rate could have been no surprise. By the time DePuydt approved the account, Smith's other merchant accounts with Universal were already incurring extremely high chargeback rates. *Id.* at JA-693–94; App. Vol. 1 at JA-145. An average chargeback rate for internet businesses is about two chargebacks out of a thousand credit card charges (0.2%); for other industries the average is much lower (0.01 to 0.04%). App. Vol. 4 at JA-693–95. MasterCard and Visa have set 1%—one chargeback out of a hundred charges—as the threshold where merchants can be placed in a risk monitoring and compliance program. *Id.* at JA-694–95; App. Vol. 1 at JA-119. Yet of nineteen active Smith accounts with Universal, *fourteen* had chargeback ratios over 19%, with the highest at a remarkable 67.6%—meaning that consumers disputed two of every three charges on that account. App. Vol. 4 at JA-690. At those levels, it was apparent that when DePuydt approved the Treasure

Your Success application, most of Smith's accounts were *already* engaged in fraud. *Id.* at JA-690–91.

Although from its first month Treasure Your Success generated chargeback activity at levels indicating fraud, and although it continued to do so every month after that, five months later Universal opened a second account. By then, DePuydt himself noted that Treasure Your Success was "already on MasterCard's radar" for fraud. App. Vol. 9 at JA-9ngaged in08l0eadywi00holdind 42%ithTc -0.0004 Tw -21.944 -2.3 [(r

promulgated the Telemarketing Sales Rule in 1995, *see* 60 Fed. Reg. 43842 (Aug. 23, 1995), and revised it in 2003, 68 Fed. Reg. 4580 (Jan. 29, 2003).

Congress was particularly concerned that third parties be prohibited from assisting and facilitating telemarketing fraud by giving fraudulent telemarketers access to merchant accounts and the credit card system. As an example of the type of assistance Congress had in mind, the Telemarketing Act cited "credit card laundering"—the practice of using one company's merchant account to process payments to another company. 15 U.S.C. § 6102(a). As the Commission noted in issuing the Telemarketing Sales Rule, "most deceptive telemarketers are unable to establish a merchant account." 60 Fed. Reg. 43842, 43853. "Credit card laundering facilitates deceptive telemarketing . . . by providing telemarketers engaged in fraud with ready access to cash through the credit card system." *Id.*; *see also id.* at 43851 ("Credit card laundering is a pernicious practice because it enables deceptive

§ 310.4(a)(5)(i). It likewise prohibits making robocalls without prior written permission, *id.* § 310.4(b)(1)(v)(A), calling consumers who have signed up for the Do Not Call List, *id.* §§ 310.4(b)(1)(iii)(B)(i) and (ii), and calling consumers after they ask not to be called again, *id.* § 310.4(b)(1)(iii)(A).

In addition to prohibiting such practices outright, the Rule also forbids third parties from assisting and facilitating them, stating that "[i]t is a deceptive telemarketing act or practice and a violation of this Rule 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 §§ 3.10.3(a) or (c), or § 3.10.4 of this Rule." 16 C.: 0 Td[x, er

standard "where a person's liability to pay redress or civil penalties for a violation of this Rule depends upon the wrongdoing of another").

E. The Telemarketing Sales Rule Violations Of Treasure Your Success And Universal

Much of the conduct prohibited by the Telemarketing Sales Rule was standard operating procedure for Treasure Your Success. The company contacted consumers with unlawful robocalls in which "Rachel" from "Card Services," instructed them to "press one" to "lower your credit card interest rate." App. Vol. 6 at JA-1037, JA-1106–07. Consumers who did so were connected to telemarketers who, consistent with the operation's script (*see supra* n.5), falsely promised to reduce their credit card interest rates to as low as three percent, save them thousands of dollars in payments, and help them pay off their debt two to three times faster. *Id.* at JA-1007–09, JA-1038–39. When consumers signed up, the company promptly and illegally charged substantial up-front fees to their credit cards, while falsely promising the consumers that it would *not* charge those fees until it obtained results. *Id.* at JA-1007–08, JA-1040. Unsurprisingly, the company never delivered on its promises, which were not even feasible in the first place. *See id.* at JA-1008–09; App. Vol. 4 at JA-678–83.

These practices violated the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.*, in numerous ways. The company's misrepresentations about its so-called credit card interest rate reduction services violated

the net proceeds of Treasure Your Success. *See id.* The judgments were largely suspended because the defendants demonstrated (through financial statements and sworn testimony) an inability to pay; however, the suspension may be lifted if they materially misstated or failed to disclose their assets. *E.g.*, App. Vol. 1 at JA-162–63. The FTC moved for summary judgment against Smith, HES, and Universal. *Id.* Vol. 4 Tab 174.

The district court granted summary judgment for the Commission. App. Vol. 6 Tab 208. After summarizing Treasure Your Success's undisputed violations, the court found Smith (and HES) liable because Smith was intimately involved with and had "effective control" over the operation, and because HES was part of a "common enterprise" with the other corporate defendants (not including Universal). *Id.* at JA-1046, JA-1036–37 n.1.

The court held that Universal independently violated the Telemarketing Sales Rule by assisting and facilitating the Treasure Your Success defendants' violations. *Id.* at JA-1048. Universal's conduct satisfied the "substantial assistance" element of an assisting and facilitating violation because its merchant accounts were "essential to the success of the scheme." *Id.* at JA-1049. "Absent these accounts, the [Treasure Your Success] defendants would have been unable to process credit card payments," and thus, "as a matter of law, [Universal] substantially assisted the [Treasure Your Success] defendants." *Id.*

decision in *FTC v. IAB Marketing Associates, LP*, 746 F.3d 1228, 1234 (2014). The court ordered that Universal's liability was joint and several with Smith, HES, and the Treasure Your Success defendants. *Id.* at JA-1594–95.

G. Appeal and Remand

Universal, Smith, and HES appealed to this Court. Universal challenged only the dollar amount of the judgment; it did not challenge either the district court's judgment that it violated the Telemarketing Sales Rule by assisting and facilitating the Treasure Your Success fraud or the district court's injunction. In a per curiam opinion, the Court "affirmed in all respects," except for the district court's monetary award against Universal, which it vacated. App. Vol. 9 at JA-1655, JA-1657. The Court remanded to the district court for findings regarding "whether and why [Universal] is jointly and severally liable for restitution and in what amount." *Id.* at JA-1657.

On remand, the district court recounted its earlier holding (which Universal had not appealed) that Universal had violated the Telemarketing Sales Rule by providing substantial assistance to Treasure Your Success while knowing or consciously avoiding knowledge that the operation was engaged in telemarketing fraud. *Id.* at JA-1665, JA-1670. The court noted that "substantial assistance" must be "more than 'casual or incidental'" but that there need not be a "direct connection between the assistance and the misrepresentation." *Id.* at JA-1670–71.

sal's liability is "joint and several" simply means that the other defendants are also responsible for the same harm.

1.a. Multiple parties are jointly and severally liable when, acting in concert, they cause a single harm. Each of them is liable not for the others' conduct, but for its own behavior in causing the injury. By contrast, vicarious liability arises when the law attributes one party's misconduct to a second party, as in an agency relationship. Here, Universal violated the law by knowingly enabling Treasure Your Success's fraudulent telemarketing scheme and it was held responsible for the entirety of the injury caused by its own illegal acts.

This case fits hand-in-glove with the longstanding joint-and-several liability principle described in Section 876 of the Second Restatement of Torts. Each defendant's conduct harmed consumers and it is not possible to calculate their respective shares of the harm. In other words, the defendants "acted in concert" to create a single harm. Restatement 2d of Torts § 876. One way to act in concert is to knowingly give substantial assistance to another's wrongdoing. Indeed, the FTC expressly invoked that that principle when it defined assisting and facilitating as a violation of the Telemarketing Sales Rule.

Universal acted in concert with Treasure Your Success by providing essential credit card processing services to a plainly fraudulent scheme. There is no rational way to separate Universal's contribution to the harm from the other defendants'

shares. Without Universal, the other defendants could not have defrauded consumers; and without the other defendants, there would have been no fraud. Together, they all caused the same harm. Universal is wrong that harm can be apportioned by who kept what part of the proceeds of the scheme; apportionment is appropriate when the share of *harm* can be divided, not the share of the *proceeds*.

b. The district court properly ordered Universal to disgorge its net revenue. There is no dispute that Universal itself received over $2.5 million in illegal credit card charges from Treasure Your Success. Of that amount, $800,000 was deducted to account for refunds, leaving $1.7 million in illegal charges. Universal is not entitled to additional subtractions for payments to Treasure Your Success, Smith, and other "costs associated with committing [its] illegal acts." *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) .

c. Universal's argument that joint and several liability is appropriate only when defendants act as a "common enterprise" is wrong. A common enterprise is one example of how defendants can "work in concert" to create a single harm, but it is not the only way to do so. No court has ever held that finding a common enterprise is necessary, as opposed to sufficient in a particular case, to impose joint and several liability.

d. Universal's remaining arguments fail to show that the district court abused its discretion. A finding that defendants "collaborated" is equivalent to a finding

that they worked in concert to cause a single harm. Like a common enterprise—or a finding that one defendant knowingly provided substantial assistance to the other—such a finding is sufficient, but not necessary, for joint and several liability. Nor is there any requirement that a defendant receive a "substantial benefit" to be held jointly and severally liable; this Court has held the opposite. Universal's argument that joint and several liability is not necessary to deter it from further violations is likewise unpersuasive; it still fails to own up to its own misconduct. Moreover, the need for deterrence is a matter squarely within the district court's discretion.

2. There is no basis to remand this case. Universal claims that it lacked notice that the district court could impose joint and several liability, a remedy it agrees is available for violations of the FTC Act, to a violation of the Telemarketing Sales Rule. But a violation of the Rule *is* a violation of the Act. In the Telemarketing Act, Congress directed the FTC to define telemarketing practices that violate Section 5(a) of the FTC Act, which is what the Telemarketing Sales Rule does. Conduct that violates the Rule thus also violates the FTC Act.

STANDARD OF REVIEW

The Court reviews "a district court's order granting equitable monetary relief for an abuse of discretion." *FTC v. Washington Data Res., Inc.*

made a clear error of judgment or has applied an incorrect legal standard." *Doe v. Chiles*, 136 F.3d 709, 713 (11th Cir. 1998).

ARGUMENT

ation of the harm according to each defendant's share of it. As a result, Universal need not have been part of a common enterprise for its liability to be joint and several with its codefendants. Nor is its unjust enrichment limited to the amount it retained after paying other defendants and its own business expenses. Under the law, Universal's knowing contribution to the illegal activities that harmed consumers renders it liable to disgorge the full amount that it helped to take from them.

I. THE DISTRICT COURT PROPERLY HELD UNIVERSAL JOINTLY AND SEVERALLY LIABLE.

A. Joint and Several Liability Is Not Vicarious Liability.

The central theme of Universal's brief, beginning with the first sentence of the summary of the argument and continuing throughout, is that by holding Universal jointly and severally liable, the district court improperly held it "liable for the misconduct of the [other] defendants in this case." Br. 28. Universal contends that joint and several liability is a form of *vicarious* liability that the court could impose only if Universal was part of a common enterprise (a finding the court did not make). *E.g.*, Br. 27, 28, 33–36. beginning with momLY Y

act of the other,"—*i.e.*, vicariously—"but because his own act is regarded in law as a cause of the injury." *Mazankowski v. Harders*, 293 N.W.2d 869, 871 (Nev. 1980).[7]

carrying out the scheme and that resulted in a single harm to consumers. *See supra* pp. 6–13. It opened not just one, but two merchant accounts for Treasure Your Success, and it created a special process for Hal Smith's accounts to evade ordinary fraud controls. Universal does not dispute that it acted in concert with Treasure Your Success, and such a contention would fail on the record.

2. Universal's conduct caused a single harm that cannot be apportioned.

Universal also meets the second requirement for joint and several liability because the cause of the harm inflicted on consumers cannot be apportioned among

(2d Cir. 2001). Treasure Your Success could not have carried out its scheme without access to credit card processing services provided by Universal. Without Universal, there could have been no harm at all. There is no meaningful or rational way to determine what proportion of the harm was caused by Universal versus other defendants; Universal's merchant accounts and processing services were as essential to harm as Treasure Your Success's telemarketing violations and its deceptive pitch. In such situations, where multiple parties cause a single harm "which neither would have caused alone," they each are responsible for the full amount of the harm. Prosser, *supra* n.7 at 432.

Universal's contrary argument (Br. 42–44) rests on an incorrect understanding of apportionment. Universal argues that liability can apportioned based on "the amount [of money it] retained." Br. 43. But allocation is appropriate when the defendants' respective contribution to the cause of *harm* can be allocated—not their shares of the *proceeds*. *United States v. Alcon Alum. Corp*., 964 F.2d 252, 268–69 (2d Cir. 1992). Under traditional principles, harm can be apportioned among more than one defendant only when each one caused a "distinct" harm or "there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement 2d of Torts § 433A(1)(a) & (b).

Thus, apportionment might be appropriate here if Universal had processed only some of Treasure Your Success's illegal charges and another company had

processed the rest. In that case, Universal could argue that there was a reasonable basis to apportion the Treasure Your Success harm by the amount each processor handled, or that the harm each caused was distinct. But there was no other processor here. And the Restatement makes clear that without distinct harms or a basis to divide responsibility "damages for . . . harm cannot be apportioned." Restatement

that *Verity* placed on the district court's remedial authority was the requirement that any monetary award be limited to funds that actually were paid to the defendants." *Bronson Partners*, 654 F.3d at 374. There is no dispute that *all* of the funds here were paid to Universal; that Universal then "remitted" part to others is of no moment.

C. Joint And Several Liability Does Not Require A Common Enterprise.

The foregoing discussion shows that Universal is wrong to posit that joint and several liability can be imposed only when a defendant acts as part of a "common enterprise."[12] Br. 33-36. In fact, no court has ever held a common enterprise to be necessary for joint and several liability; it is but one scenario in which multiple defendants can cause a single harm.

The very cases Universal cites to buttress its claim that "many courts" have found joint and several liability appropriate "only where the facts show a common enterprise or a maze of integrated business entities," Br. 33 (citations omitted), simply do not support that proposition. Those cases involved common enterprises but not one of them held that a common enterprise is necessary—rather than suffic-

[12] Courts typically find that defendants operate as a common enterprise when the corporate entities ignore corporate formalities and share overlapping officers, employees, office space, and resources. *See, e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 637 (6th Cir. 2014). The existence of a common enterprise permits the court to disregard the ostensibly separate corporate identities. *Id.*, *FTC v. Washington Data Res.,* 856 F. Supp. 2d 1247, 1271 (M.D. Fla. 2012). Here, the district court held that several corporate entities—but not Universal—ran the Treasure Your Success credit reduction scheme as a common enterprise.

common-enterprise cases in which multiple defendants cause a single harm for which there is no reasonable basis for apportionment. At bottom, a common-enterprise test for joint and several liability cannot be squared with the long-settled principle, reflected in countless cases, that joint wrongdoers who cause a single harm are each liable for the entire harm.

That is why courts regularly hold defendants' jointly and severally liable in the absence of a common enterprise. Some of those circumstances include parties who "join together to evade a judgment," *FTC v. Leshin*, 618 F.3d 1221, 1236–37 (11th Cir. 2010), and individuals who know of corporate violations and participate in or have the authority to control them, *IAB Mktg. Assocs.*, 746 F.3d at 1228. The same is true in other federal law enforcement contexts; for example, schemes to violate the Securities Act. *E.g.*, *SEC v. Whittemore*, 659 F.3d 1, 10 (D.C. Cir. 2011); *Hughes Capital*, 124 F.3d at 455.[14]

D. Universal's Remaining Arguments Against Joint And Several Liability Are Incorrect.

In tension with its principal argument, Universal recognizes that courts have imposed joint and several liability even *without* a common enterprise, but argues that the facts of those cases are different from those here. Br. 36–42. Its arguments

[14] Universal argues that "aiding and abetting" SEC cases are inapposite because knowingly providing substantial assistance to Telemarketing Sales Rule violations does not rise to the level of "knowingly and substantially assisting" securities fraud violations. Br. 37–38. The failure of that distinction speaks for itself.

from the inflated fees it was able to charge those businesses as a premium for providing services that would not have been approved by a legitimate underwriter. *Id.* at JA-152, JA-120. Indeed, for Smith's accounts only, Universal bypassed its ordinary underwriting process and set up a special pipeline to its President, who opened merchant accounts that were highly likely to be engaged in fraud. *Id.* at JA-120, JA-145. And when the mounting chargebacks turned into losses for Universal, its first response was not to take action to stop facilitating the fraud, but to ask whether Smith could repay losses through his other fraudulent accounts. *Id.* at JA-137, JA-146. Thus, to the degree that joint and several liability serves in part as a deterrent against future misconduct, Universal's firing of DePuydt does not by itself remove any need for such deterrence or demonstrate that the district court improperly exercised its discretion. *See*, *e.g.*, *Fox v. Acadia State Bank*, 937 F.2d 1566, 1571 (11th Cir. 1991); *Automatic Liquid Packaging, Inc. v. Dominik*, 909 F.2d 1001, 1006 (7th Cir. 1990).

II. THERE IS NO BASIS FOR REMAND.

Universal asks the court to remand and direct additional briefing because it supposedly violated only the Telemarketing Sales Rule and not the FTC Act and thus did not have notice that it could be subject to FTC Act remedies, "including joint and several liability." Br. 54. According to Universal, the district court made

a "novel extension" of joint and several liability from a remedy available for FTC Act violations to violations of the Telemarketing Sales Rule. *Id.*

At the outset, Universal is wrong to describe joint and several liability as a "remedy." The remedy in this case was injunctive relief under Section 13(b) of the FTC Act and an order that Universal disgorge the amounts it illegally received as a result of its unlawful conduct. As explained in Part I, joint and several liability is a shorthand for describing the liability of defendants who are responsible for the same harm.

Universal is also wrong to claim (Br. 55) that "no FTC Act violation was alleged or proven with respect to [Universal]." In fact, a violation of the Telemarketing Sales Rule *is* a violation of the FTC Act. Under the FTC Act, the Commission is authorized to issue rules that define specific conduct that violates the Act's prohibition on "unfair or deceptive acts or practices." 15 U.S.C. § 57a(1)(B); 15 U.S.C. § 45(a).[15] In the Telemarketing Act, Congress directed the Commission to issue a rule that defines deceptive *telemarketing* practices; that is, a subset of the "unfair or deceptive acts or practices" prohibited by the FTC Act. 15 U.S.C. § 6102(a). The rule that resulted is Telemarketing Sales Rule. *See* 16 C.F.R. § 310.1. Thus, conduct prohibited by the Telemarketing Sales Rule is conduct that

[15] The cited portions of the FTC Act and the Telemarketing Act are reproduced in the statutory appendix to this brief.

violates the FTC Act's prohibition on unfair or deceptive acts or practices. And a violation of the Telemarketing Sales Rule is likewise a violation of the FTC Act.

The statutes provide ample notice that a Telemarketing Sales Rule violation triggers FTC Act remedies. When Congress directed the Commission to promulgate what would become the Telemarketing Sales Rule, it specified that violations of the rule would be "treated as a violation" of a Commission rule promulgated

In sum, the finding that Universal is jointly and severally liable to disgorge the amount it illegally received from consumers after deducting refunds falls squarely within precedent and the district court's authority. Universal suggests nothing that further proceedings in the district court would accomplish.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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April 17, 2017

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STATUTORY ADDENDUM

Section 5 of the FTC Act, 15 U.S.C. § 45(a), provides:

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

Section 18 of the FTC Act, 15 U.S.C. § 57a , provides:

> (a) Authority of Commission to prescribe rules and general statements of policy.
>
> (1) Except as provided in subsection (h), the Commission may prescribe—
>
> * * *
>
> (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)). * * *. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

The Telemarketing Act provides, at 15 U.S.C. § 6102:

> (a) In general.
>
> (1)

> (c) Violations. Any violation of any rule prescribed under subsection (a)—
>
> (1) shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act regarding unfair or deceptive acts or practices

The Telemarketing Act further provides, at 15 U.S.C. § 6105(b):

> Actions by the Commission. The Commission shall prevent any person from violating a rule of the Commission under section 3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) were incorporated into and made a part of this Act. Any person who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) were incorporated into and made a part of this Act.

The Telemarketing Sales Rule provides, at 16 C.F.R. § 310.3(b):

> *Assisting and facilitating*. It is a deceptive telemarketing act or practice and a violation of this Rule 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 §§ 3.10.3(a) or (c), or § 3.10.4 of this Rule.

CERTIFICATE OF SERVICE

I certify that on April 17, 2017 I served the foregoing on counsel for the appellants using the Court's electronic case filing system. All counsel of record are registered ECF filers.

April 17, 2017

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