UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v. **Case No: 6:12-cv-1618-Orl-22KRS**

HES MERCHANT SERVICES COMPANY, INC., BUSINESS FIRST SOLUTIONS, INC., VOICEONYX CORP., HAL E. SMITH, JONATHON E. WARREN, UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC and DEREK DEPUYDT,

Defendants.

ORDER

This cause comes before the Court on Plaintiff Federal Trade Commission's (the "FTC") Motion for Summary Judgment (Doc. No. 174), in response to which Defendant Universal Processing Services of Wisconsin, LLC ("UPS") filed a Memorandum in Opposition (Doc. No. 186) and Defendant Hal E. Smith ("Smith"), proceeding *pro se,* filed an Affidavit in Opposition (Doc. No. 188). The FTC filed a Reply to each of these responses (Doc. Nos. 191, 192). Of the thirteen defendants named in the Amended Complaint (Doc. No. 61), ten have reached settlement agreements with the FTC; only UPS, Smith, and HES Merchant Services Company, Inc. ("HES") remain.[1] The Court will grant the FTC's Motion for the reasons that follow.

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[1] HES, an inactive Florida corporation that apparently holds no assets, is also technically still a Defendant. Smith is the company's sole officer, director, and principal. The Magistrate Judge permitted the attorney representing Smith and HES to withdraw, but in conformity with the local rules of this Court, held that HES would not be permitted to defend itself in this case unless it was represented by an attorney. (Doc. No. 163.) No attorney has filed a notice of appearance on behalf of HES since the entry of that Order. Because the Court finds that HES was involved in a common

I. BACKGROUND

Over a nine-month period beginning in November 2011, a group of telemarketers obtained more than $2,500,000 from consumers through a fraudulent credit card interest rate reduction scheme called "Treasure Your Success" ("TYS"). This action began with a complaint and temporary restraining order against five original defendants: Willy Plancher, Valbona Toska, and three companies they controlled, including a company doing business as TYS. (Doc. No. 1.) After commencing discovery, the FTC filed an Amended Complaint naming eight additional Defendants: Smith and his company, HES; Jonathon E. Warren and his two companies, Business First Solutions, Inc. and VoiceOnyx Corp.; Ramon Sanchez-Ortega; and UPS and its president, Derek DePuydt ("DePuydt"). For ease of reference, the Court will refer to Plancher, Toska, Smith, Warren, and their companies collectively as the "TYS Defendants." The other Defendants—Sanchez-Ortega, UPS, and DePuydt—will be addressed individually. Unless noted otherwise, the following facts are undisputed.

A. TYS and the Telemarketing Boiler Room

The TYS Defendants operated a telemarketing scheme purporting to be a credit card interest rate reduction service in the following manner: first, the TYS Defendants used "robocalls" (precorded voice messages) to solicit consumers; typically, the robocall would tell consumers, "To lower your credit card interest rate, press one." (Pl.'s Exs. 4, 6 (Doc. Nos. 6-3, 6-4.) According to consumers who received them, the robocalls failed to disclose the identity of the person(s) responsible for placing them. (*Id.*) Many consumers received robocalls despite having registered

enterprise with the other corporate defendants in this case, and there are no issues of material fact to preclude summary judgment as to the violations attributed to various members of that enterprise, the Court will grant summary judgment against HES on Counts I through XI.

their numbers on the National Do Not Call Registry; these consumers testified that they had never had any previous dealings with the TYS Defendants. (*See, e.g.*, Pl.'s Exs. 4, 7, 8, 9 (Doc. Nos. 6-3, 6-4).) It is unsurprising that the TYS Defendants failed to remove the phone numbers of consumers who were on the Do Not Call Registry, as the TYS Defendants never paid the requisite fees to access it. (Pl.'s Ex. 1, (Doc. No. 6-1) ¶¶ 12-15.) The TYS Defendants also lacked an effective procedure for removing consumers' phone numbers from their call lists, (Pl.'s Ex. 18 (Doc. No. 6-7) ¶ 15), and called some consumers multiple times, even though the consumers had previously instructed the TYS Defendants not to call again. (Pl.'s Exs. 6, 9).

If a consumer responded favorably to the robocall, he or she would be transferred to a live person. (Pl.'s Ex. 31 (Plancher Dep.) (Doc. No. 174-1) 43:3-43:9.) A telemarketing training manual (a copy of which the FTC obtained after searching the telemarketing boiler room) explained how a successful call should proceed from the telemarketer's perspective:

> After speaking with a fronter [sic] who pushes the client into giving their credit card number, a closer who convinces them it's in their best interest to spend between $600-$1,000 in order to get out of debt, and a verifier who confirms they understand a charge will be placed on their account . . . the financial advisor [will] get on the phone with their lenders and get their rates lowered. If you had a hard time following that imagine how the client feels.

(Pl.'s Ex. 28 (Doc. No. 174-1).) The manual also discusses the process from a client's perspective:

> Most clients will originate from a live transfer. By this point the client has been through almost 30-40 minutes of people promising them the world. Most sales floors are vague as to who they are and how they are going to get the rates reduced. The main selling point is that the client will save $2,500 with the service but how the client will receive those savings isn't always clear.

(Pl.'s Ex. 29 (Doc. No. 174-1).) According to Defendants Toska and Plancher, they and their colleagues at TYS managed to create a "one-stop shop" telemarketing operation based on the

purported credit card interest rate reduction service. (Pl's. Ex. 27 (Toska Dep.) 60:17-76:18; Plancher Dep. 70:7-72:10.)

The TYS Defendants told some consumers that they could reduce the consumers' credit card interest rates dramatically—sometimes, to a specific rate, and other times, by "over" or "at least" half—while other consumers were told that the TYS Defendants' debt relief program would achieve thousands of dollars in guaranteed savings. (*See, e.g.*, Pl.'s Exs. 4, 6, 8, 10, 12, 13 (Doc. Nos. 6-3, 6-4, 6-5).) The TYS Defendants also promised some consumers that they would be able to repay their credit card debt significantly faster by enrolling with TYS. (Pl.'s Exs. 4, 24, 26 (Doc. Nos. 6-3, 6-9).) These representations did not materialize out of thin air—training manuals and telemarketing scripts used by the TYS Defendants recommended making these and similar offers. (Pl.'s Exs. 53, 56 (Doc. No. 174-2); Pl.'s Ex. 35 (Smith Admis.) ¶¶ 57, 58 (admitting that he (Smith) was "aware that the telemarketing sales scripts of TYS involved representing to consumers that the company could reduce significantly consumers' credit card interest rates through its debt relief services" and "could save consumers a significant amount of money through its debt relief services").) The TYS Defendants supported these representations by telling consumers about their "special relationships" with banks and credit card companies. (Pl.'s Ex. 10.)

Unsurprisingly, there is no evidence to show that the TYS Defendants actually had these relationships, nor is there any evidence of any customers of the TYS Defendants receiving the promised interest rate reductions or debt relief, or paying down their debt more quickly. In reality, these representations were false and fraudulent.[2] Nevertheless, consumers who agreed to purchase

[2] The FTC's expert witness, Lisa Wilhelm, opined that the TYS Defendants' claims and representations pertaining to interest rate reductions and faster debt repayment "were deceptive and neither credible nor feasible." (Pl.'s Ex. 46 (Wilhelm Expert Rep.) (Doc. No. 174-1) ¶ 6.)

the TYS Defendants' services, or whom the TYS Defendants thought had agreed to do so, were charged as much as $1,493.93 in fees. (*See, e.g.*, Pl.'s Exs. 4-8, 10, 12-15 (Doc. Nos. 6-3, 6-4, 6-5, 6-6).) Consumers were often told that they would not be charged until they achieved the promised savings, or that any fees would be refunded if the TYS Defendants did not deliver the promised results. (Pl.'s Exs. 5-7, 10.) These statements turned out to be misrepresentations, too, as the TYS Defendants routinely charged consumers the same day or the day after the telemarketing call, and well before consumers made any payments under new credit card account terms. (Pl.'s Exs. 4, 5, 7, 8.) When customers demanded refunds from the TYS Defendants, they were often refused. (*Id.*)

B. Smith's Role in the TYS Scheme

Hal Smith is the owner, officer, and operator of HES, which was an independent sales agent of UPS from 2002 until 2012. (Smith & HES Answer (Doc. No. 156) ¶ 14; Pl.'s Ex. 34 (Smith Dep.) (Doc. No. 174-1) 7:19-8:3, 9:20-9:25, 10:15-10:21, 116:23-117:4.) In that role, Smith assisted telemarketing companies, including TYS, in obtaining merchant accounts with UPS. (Pl.'s Ex. 33 (HES Admis.) ¶¶ 4, 11; Smith Admis. ¶¶ 5-6.) Prior to his involvement with the telemarketing scheme at issue in this case, Smith owned and operated a company that telemarketed debt relief services—until the Florida Department of Agriculture shut it down. (Smith Dep. 85:11-87:25.)

Smith helped TYS procure two merchant accounts with UPS; but for these accounts, TYS "would not have been able to process credit card payment charges made by consumers." (HES Admis. ¶¶ 12, 19, 27.) The centrality of the merchant accounts to the scheme, coupled with Smith's authority to have the accounts "shut off," (Smith Dep. 201:18-201:23), gave him effective control over the TYS Defendants' activities. Smith testified that he did not write the TYS Defendants'

telemarketing scripts, but that he reviewed their scripts, (Smith Admis. ¶ 55), sometimes required corrections, (Smith Dep. 150:1-150:18), and would not write a contract for a merchant account if he was unsatisfied with the scripts, (Smith Dep. 149:19-149:25; 157:11-157:21). Smith threatened to terminate the accounts if Toska and Plancher hired certain people of whom Smith did not approve, (*id.* at 203:3-203:9), and he also recommended that Toska and Plancher hire a specialist to defend TYS against consumers who sought chargebacks (*id.* at 109:25-112:3).[3] Smith admitted that he required Toska and Plancher to purchase Jonathon E. Warren's consulting services "according to [his] instruction." (Smith Admis. ¶ 13.) Smith, personally and through his associates, kept a close eye on Toska and Plancher. He admitted that he personally visited the business premises of TYS "to monitor the[ir] business practices." (Smith Admis. ¶¶ 47-48.) Smith also sent his employee, Leon Williams, to go "walking down two or three times a week, just listening" to the telemarketers at the TYS offices. (Smith Dep. 42:10-42:12.) In addition to exerting considerable leverage over the business, Smith testified that he charged a handsome percentage of TYS's sales—ten to twelve percent, minus what he paid UPS—as his fee for brokering the merchant accounts. (Smith Dep. 55:17-57:25.)

C. UPS, DePuydt, and the TYS Credit Card Processing Agreements

UPS, which also does business as Newtek, is a third-party credit card payments processor that provides the interface between banks and their merchant customers. (*See generally* Pl.'s Ex. 44 (DePuydt Dep. Vol. I) (Doc. No. 174-1) 7:22-8:12.) UPS relies significantly on independent

[3] In addition to Smith's testimony, Toska testified that Smith "required" TYS to hire Eaton. (Pl.'s Ex. 27 (Toska Dep.) 101:21-102:7.) In his Affidavit, Smith stated that he "had no control or role, conceiving, suggesting or hiring a Merchants' Specialist apparently being utilized by the TYS Defendants." (Doc. No. 188 ¶ 6.) Because the Court concludes that Smith's Affidavit is a sham, his assertion that he did not have a role in the TYS Defendants' hiring of Eaton does not establish a contradictory issue of material fact.

sales agents like Smith to generate business—the firm "had approximately 50 to 100 external sales agents," but only "around six" agents who were salaried employees. (*Id.* at 8:17-8:24.) UPS opened two merchant accounts for the TYS Defendants: TYS 1, opened on November 22, 2011; and TYS 2, opened on May 3, 2012. (UPS Answer (Doc. No. 153) ¶ 59; Smith Admis. ¶¶ 28, 34.)

Derek DePuydt served as UPS's president during the time period relevant to the alleged misconduct. (DePuydt Answer (Doc. No. 85) ¶ 17; UPS Answer ¶ 18.) DePuydt had "final review" of merchant account applications brought to the firm by Smith because Smith was an important and profitable source of referrals for UPS. (DePuydt Dep. Vol. I 10:8-10:16, 11:3-11:6; Pl.'s Ex. 47 (DePuydt Dep. Vol. II) (Doc. No. 174-1) 100:14-101:14.) DePuydt reviewed TYS's merchant account application and Plancher's and Toska's personal financial statements, tax returns, and credit reports in the course of approving the merchant application that eventually became TYS 1. (DePuydt Dep. Vol. I 31:15-35:24, 66:13-67:14; DePuydt Dep. Vol. II 97:8-100:6.) DePuydt personally approved TYS 1, (DePuydt Dep. Vol. I 56:7-56:15), even though the materials he reviewed noted "serious delinquencies" on Toska's credit report, $10,000 of past due debt and a credit score of just 494 for Plancher, and notations indicating "high risk fraud alert" for both Toska and Plancher. (DePuydt Dep. Vol. II 98:14-99:20.) DePuydt subsequently approved TYS 2, (DePuydt Dep. Vol. I 69:17-69:22), even though he knew by then that TYS 1 had chargeback problems and was "already on MasterCard's radar" for fraud, (*id.* at 45:5-45:13, 74:2-74:7).

II. LEGAL STANDARDS

Summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must satisfy this initial burden by "identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Norfolk S. Ry. Co. v. Groves*, 586 F.3d 1273, 1277 (11th Cir. 2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986)). In response, "a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) (citation and quotation marks omitted). Alternatively, the movant is entitled to summary judgment where "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323. When it conflicts, the court presumes the nonmoving party's evidence to be true and will draw all reasonable inferences in its favor. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir. 2003) (citation omitted). Ultimately, the standard for summary judgment is "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson*, 477 U.S. at 252. However, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255.

The Court is mindful of the fact that Smith is now proceeding without the assistance of counsel in this litigation. "A document filed *pro se* is to be liberally construed, and . . . must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200 (2007) (per curiam) (internal citations and quotation marks omitted). Nevertheless, *pro se* pleadings "must still comply with procedural rules governing the proper form of pleadings." *Hopkins v. St. Lucie Cnty. Sch. Bd.*, 399 F. App'x 563, 565 (11th Cir. 2010) (per curiam) (citing *McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 1984

(1993)).[4] The Court is under no obligation to rewrite a pleading for a *pro se* party. *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006) (citation omitted).

III. ANALYSIS

Section Five of the Federal Trade Commission Act ("FTC Act") prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The Telemarketing Sales Rule ("TSR"), established pursuant to the FTC's authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102, prohibits various "deceptive telemarketing acts or practices" or the substantial assistance thereof, 16 C.F.R. § 310.3; "abusive telemarketing acts or practices," 16 C.F.R. § 310.4; and failing to pay national registry fees in connection with telemarketing calls, 16 C.F.R. § 310.8. Neither Smith nor UPS disputes that the TYS Defendants who have previously settled with the FTC committed the alleged underlying violations of Section 5 of the FTC Act and the TSR. The Court finds that there are no issues of fact to preclude summary judgment in favor of the FTC on whether these violations occurred. *See FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630-34 (6th Cir. 2014) (affirming summary judgment in favor of the FTC on claims against telemarketers under Section 5 of the FTC Act and the TSR). The only remaining questions are: (1) whether Smith is liable for the violations he did not personally commit; and (2) whether UPS provided substantial assistance to the TYS Defendants.

A. Counts I through XI: Smith's Alleged Violations of the FTC Act and the TSR

1. Common Enterprise

The FTC Act ignores the individual identities of corporate defendants when assessing their role in deceptive practices if the structure, organization, and pattern of a business venture reveal

[4] Unpublished Eleventh Circuit decisions are persuasive, but not binding.

"an integrated business," "maze of interrelated companies," or common enterprise. *Del. Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (per curiam) (citation omitted). When corporations are found to be in a common enterprise, "each may be held liable for the deceptive acts and practices of the other." *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1182 (N.D. Ga. 2008) (citations omitted). There is not one universal or mandatory "factor test" to determine whether a common enterprise exists; instead, "the pattern and frame-work of the whole enterprise must be taken into consideration." *Del. Watch Co.*, 332 F.2d at 746 (citation omitted). Factors courts in this Circuit have considered include "common control; the sharing of office space and officers; whether business is transacted through a maze of interrelated companies; the commingling of corporate funds and failure to maintain separation of companies; unified advertising; and evidence that reveals that no real distinction exists between the corporate defendants." *Nat'l Urological Grp.*, 645 F. Supp. 2d at 1182; *see also FTC v. Washington Data Resources*, 856 F. Supp. 2d 1247, 1271 (M.D. Fla. 2012).

Here, it is clear that the various corporate Defendants were engaged in a common enterprise. Each company played a crucial role in the scheme, and no company could operate the scheme independently. They all worked out of the same office building. A relatively simple transaction—purchasing credit card interest rate reduction services—apparently required the collaboration of five interrelated companies to complete. In the absence of any conflicting evidence, the Court finds that the FTC has met its burden to establish a common enterprise among the corporate defendants in this case.

2. Smith's Individual Liability

An individual can be liable for deceptive practices that he did not personally perform. Once the FTC establishes corporate liability, an individual member of the corporation can be found liable

if he directly participated in the deceptive practices or acts or had authority to control them. *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (quoting *Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)). The FTC can prove that an individual defendant had control by showing that the individual "controlled the day-to-day affairs" of the operation. *Id.* at 467. If the FTC attempts to prove individual liability via control, the FTC must also "demonstrate that the individual had some knowledge of the practices." *Id.* at 470. Demonstrating that an individual had actual knowledge of the deceptive practices, reckless indifference to the truth or falsity of the material misrepresentations being made, or "an awareness of a high probability of fraud along with an intentional avoidance of truth" are all sufficient means of proving the knowledge element of individual liability. *Nat'l Urological Grp.*, 645 F. Supp. 2d at 1207 (citations omitted).

In this case, there can be no doubt that Smith had an ample degree of control over the entire operation and knowledge of its deceptive practices. The TYS Defendants "would not have been able to process credit card payment charges made by consumers" had Smith not arranged for merchant accounts at UPS. (HES Admis. ¶¶ 12, 19, 27.) Smith's authority to "shut off" those accounts, (Smith Dep. 201:18-201:23), coupled with the clear evidence of his strong influence in the TYS Defendants' hiring and business practices, easily meets the standard for authority to control deceptive practices. *FTC v. Gem Merch. Corp.*, 87 F.3d at 467, 470. Smith does not deny that he had knowledge that deceptive practices were occurring, and in any event the evidence presented by the FTC shows that he at least had "an awareness of a high probability of fraud along with an intentional avoidance of truth" by virtue of his personal visits to the business site, reports from his on-site agents, and receipt of information pertaining to chargebacks. The FTC is entitled to summary judgment against Smith and HES on Counts I through XI.

The three-page Affidavit (Doc. No. 188) that Smith filed in response to the FTC's Motion does not offer competent evidence to avoid this result. Many of Smith's statements in the affidavit are conclusory denials of the FTC's allegations, which are not probative evidence that would demonstrate the existence of a disputed issue of material fact. *Anderson*, 477 U.S. at 248. The remainder of the Affidavit is a sham, contradicted by Smith's statements in his own deposition. "[A] district court may find an affidavit which contradicts testimony on deposition a sham when the party merely contradicts its prior testimony without giving any valid explanation." *Van T. Junkins and Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 656 (11th Cir. 1984); *Bentley Motors Ltd. Corp. v. McEntegart*, 976 F. Supp. 2d. 1297, 1306 (M.D. Fla. 2013). Although the holding in *Van T. Junkins* should only be applied "sparingly," it remains good law where "an affidavit . . . 'contradicts, without explanation, previously given clear testimony.'" *Santhuff v. Seitz,* 385 F. App'x 939, 944 (11th Cir. 2010) (quoting *Lane v. Celotex Corp.*, 782 F.2d 1526, 1530 (11th Cir. 1986)).

Smith states in his Affidavit that he did not play a role in "any management or entity decisions by the TYS Defendants' [sic]," and that he did not "give advice to them in any official capacity." (Smith Aff. ¶ 2.) In his deposition, Smith testified that he "went over everything with them and told them what they could and couldn't do." (Smith Dep. 40:17-23.) Similarly, Smith's statement that he "played no part in hiring TYS Defendants' employees," (Smith Aff. ¶ 2), is contradicted by his testimony that he would terminate the TYS accounts if Toska and Plancher hired certain people of whom Smith did not approve. (Smith Dep. 203:3-203:9.) Smith states that he "had no control or role, conceiving, suggesting or hiring a Merchants' Specialist apparently being utilized by the TYS Defendants," (Smith Aff. ¶ 6), but he testified that he would "recommend [a chargeback specialist named Tara] to new clients," and "gave [Toska and

Plancher] Tara's name," (Smith Dep. 109:25-112:3). Although it might literally be true that Smith did not "make any direct suggestions or changes to any script being used by the TYS Defendants' employees," (Smith Aff. ¶ 4), he testified that he would not write a contract for a merchant account if he was unsatisfied with the scripts, (Smith Dep. 149:19-149:25; 157:11-157:21). Finally, Smith's statement to the effect that he only visited the TYS business premises on an infrequent basis, (Smith Aff. ¶ 4), is of no moment when he admitted, at his deposition, to paying two agents to monitor the premises for him, (Smith Dep. 40:24-41:6; 42:10-42:12). Smith does not address, let alone explain, these inconsistencies; thus, the Affidavit is a sham. Even if it were not, no reasonable juror could absolve Smith of liability for the conduct alleged in Counts I through XI based on his conclusory Affidavit—the sole piece of "evidence" he submitted in response to the FTC's Motion. *See Anderson*, 477 U.S. at 252.

B. Count XII: UPS's Alleged Substantial Assistance in Violation of the TSR

It is a deceptive telemarketing act or practice and a violation of the TSR for anyone "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" other portions of the TSR. 16 C.F.R. § 310.3(b). Count XII alleges that UPS provided substantial assistance to the TYS Defendants by processing all of their credit card transactions.

The threshold for substantial assistance is not nearly as high as UPS seems to believe. The FTC must identify something more than "'casual or incidental' help to the telemarketer," but does not have to show a "direct connection" between the assistance and the misrepresentation for an entity to be liable under § 310.3(b). *FTC v. Chapman*, 714 F.3d 1211, 1216 (10th Cir. 2013) (citation omitted). Thus, "cleaning a telemarketer's office" is not enough to support substantial assistance liability, *id.*, but "[p]roviding lists of contacts to a seller or telemarketer that identify

persons over the age of 55" could be, *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050 CIV, 2004 WL 5149998, at *41 (S.D. Fla. Feb. 20, 2004) (quoting Telemarketing Sales Rule Statement of Basis and Purpose, 60 Fed. Reg. 43,842, 43,852 (Aug. 23, 1995)). Here, providing TYS with two merchant accounts was essential to the success of the scheme. Absent these accounts, the TYS Defendants would have been unable to process credit card payments. Thus, as a matter of law, UPS substantially assisted the TYS Defendants.

The FTC has established that UPS, through DePuydt, knew or consciously avoided knowing that the TYS Defendants were violating the TSR. UPS does not dispute that DePuydt knew or avoided knowing of the violations[5]; instead, the company asserts that it is not liable under § 310.3(b) because DePuydt was acting as an "adverse agent." This poses a question of law that the Court must resolve, but there is no dispute as to the underlying facts of DePuydt's conduct.

It is a general tenet of agency law that an agent's knowledge is imputed to his principal when acting within the scope of his authority; since corporations act through their employees, the same presumption applies with respect to the employer-employee relationship. *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1369 (Fed. Cir. 2013) (citing *Meyer v. Holley*, 537 U.S. 280, 285, 123 S. Ct. 824, 829 (2003)); *LanChile Airlines v. Conn. Gen. Life Ins. Co. of N. Am.*, 759 F. Supp. 811, 814 (S.D. Fla. 1991) (citation omitted). However, there is an exception

[5] The FTC, through its expert witness, identified nine "red flags" that should have prompted DePuydt to investigate the TYS accounts. Pl.'s Ex. 46 (Wilhelm Report) (Doc. No. 174-1) ¶¶ 46-58.) The experts for both the FTC and UPS agree that if DePuydt had followed company protocols and ordered an investigation, UPS would not have approved the TYS Defendants' applications for merchant accounts. (Wilhelm Report ¶ 79; LeBoeuf Report (Doc. No. 186-8) 5 ("Had Mr. Depuydt [sic] not taken these applications submitted for TYS out of the normal flow, they most likely would have been declined for at least one of the 'red flag' indicators listed in Ms. Wilhelm's report.").) This is enough to show, at a minimum, that DePuydt consciously avoided knowing about the TYS Defendants' TSR violations.

to the general rule when an agent is "secretly . . . acting adversely to the principal and entirely for his own or another's purposes." *LanChile*, 759 F. Supp. at 814 (alteration in original) (quoting *Restatement (Second) of Agency*, § 282). Importantly, "the mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests." *Id.* (citing *Restatement* § 282, cmt. c). Thus, the adverse interest exception is a "narrow" one that only applies "when the agent's conduct is entirely in the agent's interest without even incidental benefit to the principal." *Kellogg*, 728 F.3d at 1369 (citation and quotation marks omitted).

In this case, UPS cannot show that DePuydt was acting entirely in his own interests. Smith, who had worked with UPS through DePuydt and his predecessor for approximately a decade, maintained one of the "largest, highest risk, most profitable, and highest maintenance accounts" in UPS's portfolio. (UPS Draft Report of Internal Investigation (Doc. No. 110-1) 1, 5.) According to DePuydt, UPS's relationship with Hal Smith produced a net profit of four to five million dollars for the company over a ten-year period. (Doc. No. 110-1 at p. 8.) There is also no evidence that DePuydt misappropriated any of the income from the Smith accounts for his own personal use, which is a common reason for the adverse agent exception to apply. *See Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1338-39 (11th Cir. 1997) (applying adverse agent exception where corporate president "stole company property and subsequently filed a fraudulent [insurance] claim for the loss" in order to pay his gambling debts). Finally, DePuydt did not act entirely in secret. Kim Olszewski, the chief operating officer, knew about DePuydt's relationship with Smith and thought it posed a risk to the company, but took no action other than to express her concerns to DePuydt. (Olszewski Aff. (Doc. No. 94-2) ¶¶ 16-18.) Another employee, Marcus Schaefer, also expressed concerns about the Smith accounts to

DePuydt, but took no further action. (Olszewski Aff. ¶ 19.) According to Olszewski, DePuydt assured her and Schaefer that "upper management knew" about the Smith accounts and that the revenue from them "was too important to the company." (*Id.*) Thus, while DePuydt's conduct was regrettable, and almost certainly in violation of company policy, he was not an adverse agent.

IV. CONCLUSION

Based on the foregoing, it is ordered as follows:

1. Plaintiff Federal Trade Commission's Motion for Summary Judgment (Doc. No. 174), filed June 30, 2014, is **GRANTED**.

2. The FTC's Motion *in limine* (Doc. No. 187), filed July 30, 2014, is **DENIED as moot**.

3. The FTC shall file Motions for Permanent Injunctions, including proposed injunctions, on or before December 5, 2014. If it seeks any other relief besides the injunctions, the FTC shall file a motion for final judgment to that effect on or before December 5, 2014.

DONE and **ORDERED** in Chambers, in Orlando, Florida on November 18, 2014.

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties