IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16179

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

INTERBILL, LTD., and THOMAS WELLS,
individually and as an officer or director of Interbill,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Nevada

District Court No. 2:06-cv-01644-JCM-PAL

BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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STATEMENT OF JURISDICTION

The Federal Trade Commission ("Commission" or "FTC") initiated this action in the United States District Court for the District of Nevada seeking relief under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), for unfair acts or practices that violated Section 5 of the FTC Act, 15 U.S.C. § 45. The district court's jurisdiction derives from 28 U.S.C. §§ 1331, 1337(a), and 1345; and from 15 U.S.C. §§ 45 and 53(b).

This Court's jurisdiction to review the permanent injunction entered against appellants derives from 28 U.S.C. § 1291. The district court entered the Final Judgment and Order for Permanent Injunction and Other Equitable Relief on April 30, 2009. Appellants filed a notice of appeal on May 30, 2009, and that notice was timely under Fed. R. App. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether appellants' processing of unauthorized debits to consumers' bank accounts constituted an unfair practice in violation of the FTC Act, where appellants failed to verify that consumers had authorized those debits, and appellants knew or consciously avoided knowing that those debits were unauthorized.

2. Whether the district court abused its discretion when it imposed

injunctive relief and entered a monetary judgment for the full amount of consumers' losses resulting from appellants' unfair practices.

STATEMENT OF THE CASE

A. Nature Of The Case, The Course Of Proceedings, And The Disposition Below

In this appeal, defendants in the action below, Interbill, Ltd. and its sole owner and officer Thomas Wells ("Wells") (hereinafter referred to collectively as "Interbill"), challenge a summary judgment order entered against them. The Commission initiated its action in December 2006 by filing a complaint alleging that Interbill had violated Section 5 of the FTC Act[1] by debiting millions of dollars from consumers' bank accounts without the consumers' authorization. Interbill made these unauthorized debits in connection with payment processing services it provided to a fraudulent enterprise known as "Pharmacycards," which purported to market prescription drug discount cards to consumers but in reality was nothing more than a scheme to steal money from consumers. Ignoring numerous red flags alerting it to the probability that Pharmacycards was a fraudulent business, and

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[1] Section 5 of the FTC Act prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C § 45(a). An act or practice is "unfair" under the FTC Act if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C § 45(n).

despite receiving actual notice that consumers had not authorized the debits, Interbill granted Pharmacycards open access to U.S. consumers' checking accounts. Between January and March 2004, Interbill attempted to take over $9.9 million from consumers' accounts in connection with this scheme, and while most of these debits were rejected and returned by consumers' banks or otherwise refunded to consumers, many transactions were consummated, resulting in consumer losses of approximately $1.78 million.

The district court held that the uncontroverted evidence established that Interbill had committed an unfair act or practice in violation of the FTC Act, because its activities caused substantial injury to consumers, consumers could not reasonably avoid that injury, and that injury was not outweighed by countervailing benefits to consumers or competition. The court entered permanent injunctive relief and a monetary judgment against Interbill and Wells to compensate injured consumers for the harm caused by Interbill's unlawful conduct.

B. Facts And Proceedings Below

1. Background

Pharmacycards was a fraudulent enterprise that purported to sell prescription drug discount cards that consumers could use at major retail pharmacies. In fact, this business was a fiction – there were no participating pharmacies and, indeed,

there was no product at all. E. R. 469. Pharmacycards' real "business" consisted of nothing more than obtaining bank account numbers from sources unknown (most likely stolen, E.R. 270) and enlisting the help of U.S. payment processors to debit these accounts. The success of this scheme depended on the payment processors, who, in exchange for a share of the proceeds, turned a blind eye to the suspect nature of the enterprise. Interbill was one such payment processor.

Interbill is in the business of providing payment processing services to merchants, including those considered "high risk" by the payment processing industry. E.R. 179 (¶ 5). Its participation in the Pharmacycards scheme began in late 2003, when its president and sole owner, Wells, received a telephone call from one of the Pharmacycards perpetrators, a man identifying himself as Steve Pearson. Pearson asked whether Interbill could arrange for the production of "remotely created checks," also known as "demand drafts," to bill U.S. consumers in connection with the purported sale of prescription drug discount cards.[2] E.R. 191-93. Pearson explained that Pharmacycards was being operated by a Cyprus

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[2] Demand drafts are deposited into the banking system and processed like ordinary checks. They look like ordinary checks, but, in lieu of a customer signature, they contain the a notation indicating that the customer has authorized the debit. *See*, *e.g.*, E.R. 323..

corporation (Helmcrest), E.R. 195, 293;[3] and provided a London, England, mail drop as a business address, E.R. 313.[4] Pearson conducted all business with Wells by cell phone and free, anonymous e-mail accounts. E.R. 328-29, 352-53. Pearson informed Wells that the prescription drug discount cards were being marketed by direct mail to consumers, who would be enrolled in the program (at a cost of $139 dollars) unless they called to cancel (*i.e.*, "negative option" debiting). E.R. 196-97, 201, 251, 471 (¶ 3).

After conducting only a cursory check of Pharmacycards and its principals, Wells agreed to make all the necessary arrangements to process demand drafts for Pharmacycards. E.R. 198, 220-21.[5] Wells retained another company, E-Value Check, to produce the paper drafts to be deposited into the banking system; located

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[3] There was a real Helmcrest incorporated in Cyprus, but it turned out to have nothing to do with Pharmacycards' business. E.R. 490-92.

[4] Pharmacycards also had a website, which gave a false Canadian business address. E.R. 472 (¶¶ 5-6).

[5] Wells had never heard of Pharmacycards or its principals and did not ask for any references. E.R. 196, 221, 236. The only business background documents Wells received from Pharmacycards were a two-page income statement for Helmcrest supposedly showing business operations for a telemarketer in England (but providing no supporting documentation and failing to identify the product being marketed), and a three-page document purporting to show credit card processing volumes for three months, August through October 2003 (again with no indication of the product sold). E.R. 288-92. Wells never asked what product was sold using this credit card processing, nor did he seek a more extensive history of Helmcrest's previous transactions. E.R. 205-10.

a bank,Wells Fargo, willing to accept and process the high volume of demand drafts generated by the scheme; and opened a bank account in Interbill's name into which the drafts – made out to Interbill – were to be deposited. E.R. 198-99, 203, 323, 384 (¶ 4), 408-16. Wells exercised sole control over this account – he payed each participants' fees (including Interbill's own) from this account, and wired the funds Interbill collected (minus processing fees) to Pharmacycards' Cyprus bank account. E.R. 204, 283-84, 314, 328-29, 385 (¶ 5), 417-25.

From the beginning, there were numerous red flags – that Wells ignored – indicating that the Pharmacycards enterprise was of questionable legitimacy. To begin, there was the negative option business model described by Pearson, by which consumers' bank accounts would be charged if consumers did ***not*** respond to the Pharmacycards' direct mail solicitation. Wells did not question the lack of authorization by consumers to debit their accounts inherent in this model, nor did he bother to inquire whether taking money from consumers' accounts without first obtaining their permission is even legal.[6] E.R. 201-02. Wells was equally untroubled by Pearson's failure to provide documentation that he asked for repeatedly, including a signed contract authorizing the payment processing, E.R.

[6] It is not legal; it is simple theft. In the telemarketing context, for example, the FTC's Telemarketing Sales Rule prohibits charging consumers' bank accounts without first obtaining consumers' express verifiable authorization. 16 C.F.R. § 310.3(a)(3).

242-43, 267, a copy of the Pharmacycards direct mail solicitation, E.R. 222, and a copy of the fulfillment package that consumers who supposedly purchased the Pharmacycards' discount card were to receive, E.R. 231-32, 257.

Based on Pearson's description of the manner in which the purported pharmacy discount card was being marketed, Wells projected at the outset that 20 to 30% of the Pharmacycards demand drafts submitted for processing would be returned unpaid. E.R. 201. (By way of comparison, in 2003 the average rate of returned checks, including demand drafts like those processed by Interbill, was only 0.58%. E.R. 460.) Indeed, Wells indicated to Pearson that he would be willing to tolerate return rates as high as 40 to 45%. E.R. 272, 348. These anticipated high return rates did not deter Wells from providing payment processing services to Pharmacycards, however, because Interbill would be paid in any event: in addition to receiving 8% of the $139 debited from each consumer's account, Interbill was to receive $12 per returned draft. E.R. 225-27, 313.

Interbill began debiting consumers' checking accounts for Pharmacycards in January 2004. E.R. 223. The demand drafts submitted for processing on Pharmacycards' behalf were made out to Interbill and looked exactly like regular checks, but with the notation "Authorized by your customer. No signature required." E.R. 323. Almost immediately after processing began, the return rates –

in Wells' own words – "started to escalate to a point of danger." E.R. 230-31.

Interbill also received numerous complaints from consumers about unauthorized debits to their bank accounts. For example, on January 28, 2004, a consumer e-mailed Interbill:

> I have a question about an unauthorized transaction that occurred on my account. I am writing to you because the name of your company appears on the check, that I am sure I didn't authorize. * * * Please reply to this email promptly, as I don't recognize the payment and am suspicious of fraud activity.[7]

Interbill received many other similar consumer complaints, including:

> I need to file a complaint re: a company using your check services, PharmacyCards.com. On January 28, InterBill Ltd. helped facilitate an unauthorized debit transaction for $139 to my checking account on behalf of PharmacyCards.com. * * * [Y]ou may want to investigate your relationship with this company since you're inadvertently facilitating fraudulent transactions on their behalf.[8]

> Subject: FRAUD * * * Someone has removed $139.00 from my account without any permission or authorization from myself. * * * I don't know how someone obtained my financial information to do this kind of thing. * * * Your immediate attention to this matter is requested.[9]

> Subject: False Charges * * * My bank account has been debited $139.00 Check #612 by your company for something I did not authorize. * * * [T]hese are unsolicited charges for what looks like a

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[7] E.R. 388.

[8] E.R. 390-91.

[9] E.R. 392.

Pharmacy card.[10]

I received a debit from my bank account recently for $139.00 paid to InterBill Ltd. with my wife's name on it. She has been deceased for 2 years now. * * * Please notify me asap if your company is involved.[11]

Have a bank account that was debited for $139.00 and made payable to Interbill Ltd. This debit was not authorized by my mother as stated on the copy of the check! I need a explanation.[12]

Interbill merely referred complaining consumers to Pharmacycards' customer service number and continued to process the demand drafts.[13]

Meanwhile, the return rates continued to escalate, going from over 33% by February 5, E.R. 326, to 41% by February 23, E.R. 335-36, and over 51% by February 27, 2004, E.R 338. Wells complained to Pearson that "this just smells," and asked for evidence that the product had been delivered to consumers who were billed. E.R. 257-58, 338. When Pearson finally sent him a copy of the fulfillment package purportedly sent consumers, however, it was for another business altogether and contained no mention of Pharmacycards or a prescription drug

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[10] E.R. 396.

[11] E.R. 402.

[12] E.R. 406.

[13] Pharmacycards had arranged for its customer service function to be handled by Strategic Commercial Solutions ("SCS"), a Canadian company. E.R. 197.

discount card. E.R. 86-113. Nonetheless, Interbill continued unabated to debit consumers' accounts on behalf of Pharmacycards.

When Wells Fargo expressed concerns about the exceptionally high return rates and complaints of unauthorized debiting that the bank was receiving, Wells met with bank officials and persuaded the bank to continue processing debits to consumer accounts. E.R. 249, 330, 339, 351. Wells's proposed solution was to set higher reserves, E.R. 229, and to "scrub" the data (bank account and routing numbers) to eliminate transactions from banks that had the highest levels of returned drafts (*i.e.,* banks that were especially vigilant of unauthorized transaction), in the hopes that this would lower the return rates somewhat and assuage Wells Fargo's concern, E.R. 249-50, 348.[14] But the return rates continued to escalate, even as the Pharmacycards' principals became more and more insistent that Interbill immediately wire them the money being collected from consumers' accounts. Interbill still took no steps to verify that consumers had authorized these debits, but instead continued debiting consumers' accounts until mid-March 2004, when Wells Fargo finally ended the banking relationship.

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[14] Wells also asked the data be run through the STAR/PPS network to eliminate invalid bank routing or account numbers. E.R. 268-69, 347-48. But Wells turned a blind eye to the fact that such high levels of invalid data are strongly indicative that the data has been obtained from questionable sources (*not* from consumers' themselves).

All told, Interbill attempted to debit $9.9 million from consumers' accounts in connection with the Pharmacycards scheme. E.R. 386 (¶ 10), 444. Most of these debits were returned by consumers' banks or otherwise refunded to consumers, but many transactions were consummated, resulting in consumer losses of approximately $1.78 million. *Id.* Wells later explained why Interbill did not stop payment processing for Pharmacycards sooner:

> I suspect we could have reacted a lot quicker, okay? But we had a client, we had processing, we had the opportunity for revenue, the bank had the opportunity of revenue, the bank realized tremendous revenue. E-Value had revenue, Neil [of SCS] had revenue coming in. So * * * if this thing gets straightened out it's going to be good for everybody.

E.R. 260-61. Good for everybody, that is, except the consumers from whom the money was stolen.

2. The Proceedings Below

The Commission brought several actions against the persons responsible for perpetrating this scheme, including, on December 26, 2006, filing a complaint in the United States District Court for the District of Nevada against Interbill and Wells. E.R. 528-34.[15] The complaint alleged that Interbill had arranged for the

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[15] In May 2004, the FTC brought an action in the District of Nevada against the Pharmacycards perpetrators to enjoin their unfair practices in violation of the FTC Act, but they could not be located. *FTC v. 3rdUnion Card Services Inc., dba Pharmacycards*, No. CV-S-04-0712-RCJ-RJJ (D. Nev.). The court entered a default judgment in favor of the FTC and ordered third parties holding

processing of demand drafts on behalf of Pharmacycards despite having information indicating that its prescription drug discount card business was likely fictitious and that payments submitted for processing by Pharmacycards were not authorized by consumers. The complaint further alleged that this practice caused substantial injury to consumers whose bank accounts were debited; that this injury could not be reasonably avoided by consumers; and that the injury was not outweighed by benefits to consumers or competition. Accordingly, the complaint alleged that Interbill's practices were unfair, and violated Section 5 of the FTC Act, 15 U.S.C. § 45. Interbill filed a third-party complaint against Wells Fargo, who moved to dismiss for failure to state a claim upon which relief can be granted; and the district court dismissed Interbill's third-party complaint.

The Commission moved for summary judgment, based principally on documents produced by Interbill showing, among other things, Wells's e-mail communications with the Pharmacycards' perpetrators throughout the duration of the scam and Wells' own testimony, in which he admitted all necessary facts to

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funds derived from this unauthorized debiting scheme to turn over that money to the FTC to be used for consumer redress. In accordance with this order, Wells Fargo turned over the remaining money in Interbill's bank account which held funds that Interbill had debited from consumers as part of this scheme. In August 2005, the FTC filed an action in the Central District of California against another payment processor involved in the Pharmacycards scheme. *FTC v. Universal Processing, Inc.*, No. CV05-6054FMC(VBKx). That case settled.

establish liability. In its opposition to the motion, Interbill did not dispute the Commission's facts, but merely disputed the conclusions that could be drawn from those facts and cited no evidence other than that submitted by the Commission in support of its motion.

On April 30, 2009, after conducting a hearing at which both sides were heard, the district court granted the Commission's motion, finding that the uncontroverted evidence established that Interbill's conduct in processing debit transactions to consumers' bank accounts, while knowing or consciously avoiding knowing that those transactions were unauthorized by consumers, constituted unfair acts or practices in violation of the FTC Act, because it caused substantial injury to consumers, consumers could not reasonably avoid that injury, and that injury was not outweighed by countervailing benefits to consumers or competition. E.R. 1-13. The court entered a permanent injunction prohibiting Interbill from providing payment processing services on behalf of any client without first conducting a reasonable investigation to ensure that consumers have authorized the charges to their accounts. The court also entered a monetary judgment against Interbill and Wells in the amount of $1,779,700 for consumer redress.

Interbill filed its notice of appeal on May 30, 2009. E.R. 14-15.

SUMMARY OF ARGUMENT

Interbill's practice of debiting consumers' bank accounts, while knowing or consciously avoiding knowing that those debits were unauthorized by consumers satisfied all of the statutory criteria of an unfair practice under the FTC Act: it caused substantial injury to consumers, consumers could not reasonably avoid the injury, and the injury was not offset by benefits to consumers or competition. (Part I.A, *infra*.)

The Commission's evidence showed that Interbill played a pivotal role in the debiting scheme at issue here: it made all the necessary arrangements to obtain payment processing services for the scheme; it established a bank account to collect the unauthorized withdrawals from consumers' accounts; and it disbursed those ill-gotten gains to its partners in this scheme. The Commission's evidence also showed that Interbill continued to debit consumers' accounts notwithstanding that it discovered that consumers had not authorized these debits. Interbill cited no evidence to contravene these facts, which show that Interbill is responsible for causing the injury to the consumers victimized by this scheme. (Part I.B, *infra*.)

Interbill does not dispute that consumers could not reasonably avoid the harm caused by Interbill's conduct. In addition, the undisputed evidence shows that Interbill's practice of debiting consumers' accounts, while knowing or

avoiding knowing that consumers have not authorized those transactions, has no countervailing benefits. Although Interbill advances various arguments to justify its conduct, it presented no evidence that would warrant a conclusion that its practices at issue benefitted consumers or legitimate commerce in any way. (Part I.C, *infra*.)

There is also no merit to Interbill's contention that the district court erred in the relief that it granted. Interbill argues that entry of a permanent injunction was error because it did not violate the FTC Act, but the undisputed evidence shows otherwise. (Part II.A, *infra*.) Furthermore, although Interbill argues that the district court erred in entering a monetary judgment for the full amount of consumer loss resulting from Interbill's unlawful practices, it is settled law in this Circuit that this is an appropriate measure of restitution under the FTC Act. (Part I.B, *infra*.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. This Court must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 898 (9th Cir. 2006). This

Court reviews the district court's choice of remedies for abuse of discretion. *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008). That is, this Court should not disturb the district court's choice unless that court failed to apply the correct law, *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1102 (9th Cir. 2008), or this Court has "a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors," *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT INTERBILL'S CONDUCT WAS AN UNFAIR PRACTICE, IN VIOLATION OF THE FTC ACT.

A. The Unfairness Standard

The district court correctly determined that Interbill's practice of debiting consumers' bank accounts, while knowing or consciously avoiding knowing that those debits were unauthorized by consumers, was an unfair practice, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. For an act or practice to be "unfair," three elements must be satisfied: (1) the practice must cause or be likely to cause substantial injury to consumers; (2) the injury must be one that consumers themselves could not reasonably have avoided; and (3) the injury must not be

outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n). *See Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-64 (11th Cir. 1988); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1112 (S.D. Cal. 2008); *FTC v. J.K. Publications*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000).

The inquiry under the unfairness standard thus is whether a commercial practice causes unjustified harm to consumers, not whether particular transactions are fraudulent or deceptive. Furthermore, this standard, "focusing as it does on consumer injury, does not take into account the mental state of the party accused of a section 5 violation." *Orkin*, 849 F.2d at 1368. *See Regina Corp. v FTC*, 322 F.2d 765, 768 (3rd Cir. 1963) ("The purpose of the [FTC] Act is to protect the public, not punish the wrongdoer."). Accordingly, "a practice may be found to be unfair to consumers without a showing that the offending party intended to cause consumer injury." *Orkin*, 849 F.2d at 1368.

Debiting consumers' accounts, while knowing or avoiding knowing that the debits are unauthorized, is a classic unfair practice. In *FTC v. Windward Marketing, Ltd.*, No. 1:96-CV-615F, 1997 WL 33642380 (N.D. Ga. Sept. 30, 1997), for example, the court considered a scheme – very similar to the one at issue here – in which telemarketers obtained consumers' bank account numbers by deceptive means and sent unauthorized demand drafts to a payment processor, defendant

Wholesale, who deposited the drafts into commercial bank accounts that it maintained and then remitted the funds it collected (minus its fee) to its client. The court held that Wholesale had engaged in unfair practices in violation of the FTC Act because it deposited demand drafts that it knew or should have known were not authorized by consumers. Wholesale was aware, for instance, that at least 40% of the drafts sent to it by its client were being returned, and that consumers had complained about unauthorized debits to their accounts, 1997 WL 33642380, at *6-7; but, despite this knowledge, Wholesale "*continued unabated to deposit the unauthorized and unsigned bank drafts on the consumer accounts* * * *." *Id*. at *7 (emphasis supplied by the court).

In *J.K. Publications*, *supra*, the court held that defendants, owners of adult content websites, were liable for unfair business practices because they submitted credit card charges for processing without the cardholders' authorization. Among other things, the court looked at the "exceedingly high" chargeback rate (the credit card equivalent of a return rate) of 7.3% and the large number of consumer complaints as evidence that these charges were unauthorized. 99 F. Supp. 2d at 1192, 1203.

Similarly, in *FTC v. Crescent Publishing Group, Inc.*, 129 F. Supp. 2d 311 (S.D.N.Y. 2001), the court found that defendants' practices of billing consumers'

credit card accounts without the consumers' clear authorization was an unfair practice. Lack of consumer authorization was evidenced by, among other things, a "strikingly high" chargeback rate of 10.5%. 129 F. Supp. 2d at 316.

More recently, in *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104 (S.D. Cal. 2008), *appeal pending*, No. 09-55093 (9th Cir.), the court found that the operator of an internet service (Qchex) that customers could use to create and send checks to third parties engaged in unfair practices in violation of the FTC Act by providing others with the means to issue unauthorized checks. The court held that, even though Qchex itself had not itself made unauthorized debits, it was responsible for the harm to consumers, because its service "significantly facilitated fraudulent activity;" Qchex created and delivered the checks "without a reasonable level of verification" that the checks created by its service were authorized; and, moreover, Qchex "knew of the high level of fraud" but "chose to continue to operate without sufficient verification measures." 598 F. Supp. 2d at 1114-15. (In the instant case, of course, Interbill itself was the entity making unauthorized debits to consumers' accounts.)

In each of these cases, the court found that the practice in question violated of the FTC Act because it caused substantial consumer injury that was not reasonably avoidable by consumers, and the harm was not offset by benefits to consumers or competition. Interbill's practices likewise satisfy each of these elements of

unfairness.

B. Interbill's Conduct Caused Substantial Injury To Consumers.

Interbill does not dispute that consumers were substantially injured by the unauthorized debiting of their bank accounts, but takes issue only with the district court's conclusion that Interbill is responsible for causing this injury. Interbill's various efforts to evade responsibility are without merit, however, because the undisputed evidence shows that Interbill's own practices – its debiting of consumers' bank accounts, while knowing or consciously avoiding knowing that those debits were unauthorized – caused substantial injury to consumers.

Interbill attempts to distinguish its conduct from the debiting practices found to be unlawful in *Windward*, arguing that, unlike the defendant in that case, Interbill was not the payment processor here (but instead just served as a "middleman" introducing its client to financial institutions and other service providers, Br. at 9),[16] and had no notice that consumers did not authorize the debits to their accounts. Br. at 22. But the undisputed evidence shows otherwise. The Commission

[16] Interbill's argument seems to be that it cannot be deemed to have functioned as a payment processor here because it did not physically deliver the demand drafts to the bank (rather, E-Value Check did, after printing them, E.R. 203). But the *Windward* decision turned not on the fact that the defendant physically delivered the drafts to the bank, but rather on the fact that it collected the money debited from consumers' accounts and sent those fund to its client, despite being on notice that consumers had not authorized those debits.

demonstrated that Interbill was not merely a marginal player, but in fact played a pivotal role in bringing the Pharmacycards debiting scheme to fruition. It was Interbill who made all the necessary arrangements to obtain payment processing for the scheme; it was Interbill (not the Pharmacycards principals or E-Value Check or anyone else) who contracted with and communicated directly with the bank to process these demand drafts; and it was Interbill to whom the demand drafts were made payable. *See* pp. 5-7, 10, *supra*. Interbill established a bank account in its name, deposited the unauthorized demand drafts into its account, and disbursed those ill-gotten receipts to its partners in this scheme. E.R. 203-04, 384-85 (¶¶ 4-5), 408-25. Like the defendant processor in *Windward*, Interbill collected these funds, notwithstanding that it was aware of the extremely high return rates of its client's demand drafts and knew that consumers had complained that the debits to their accounts were unauthorized. *See*, *e.g.*, E.R. 326, 335-36, 338, 388-407. Thus, like the defendant processor in *Windward*, Interbill is responsible for the resulting injury to consumers. In its brief, Interbill cites no evidence that contravenes these facts (and it introduced no such evidence below).

Failing the argument that it did not function as a payment processor here, Interbill argues that, regardless of its involvement, it cannot be deemed to have been on notice that the debits to consumers' accounts were unauthorized. Interbill notes

that another entity, SCS in Toronto, was responsible for handling consumer complaints for Pharmacycards. Br. at 25. But who was responsible for resolving consumer complaints is beside the point. The important fact – which Interbill does not dispute – is that it had actual knowledge that many consumers complained that they did not authorize the Pharmacycards debits to their bank accounts.[17]

Nor is there any merit to Interbill's argument that no meaning can be attributed to the exceedingly high return rates for the Pharmacycards demand drafts, because there are no regulations that dictate maximum acceptable return rates for demand draft processing (unlike for credit card and Automated Clearing House, or "ACH," processing).[18] Br. at 22, 33. The fact that demand drafts are less regulated than other forms of payment processing does not mean that anything goes – that any return rate, no matter how high, is reasonable, so long as it is acceptable to the parties to the transaction (except the consumer, of course). Interbill cites nothing that would support this proposition.

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[17] The fact that SCS may have coded many of the consumer complaints as "no product received" rather than "unauthorized charge" does not, as InterBill contends, justify Interbill's turning a blind eye to the consumer complaints that it itself received, which stated unequivocally that the debits to the consumers' accounts were unauthorized.

[18] ACH transactions are not an entirely different animal than demand draft debiting – both draw against consumers' bank accounts, but ACH debiting is a purely electronic transaction, while demand drafts involve paper checks. E.R. 474-75 (¶¶ 4, 6).

The evidence and the case law indicate otherwise. In the proceedings below, the Commission presented a declaration by the president of the National Association of Automated Clearing House Association ("NACHA"), who explained that return rates in excess of 2.5% are indicative of fraudulent activity. E.R. 482 (¶ 42). Interbill presented no evidence (as opposed to mere unsupported argument) that high return rates – much less the exceedingly high return rates for the Pharmacycards program – are any less indicative of fraud in the case of demand drafts. Indeed, the case law demonstrates that high return rates (or chargebacks, in the credit card context) are deemed to be strongly indicative of fraudulent activity, regardless of the type of payment processing. *See Windward* (40% return rate for demand draft processing indicated lack of consumer authorization for debits); *Crescent Publishing Group*, 129 F. Supp. 2d at 316 ("strikingly high" chargeback rate of 10.51% indicated lack of consumer authorization); *J.K. Publications*, 99 F. Supp. 2d at 1192, 1203 ("exceedingly high" chargeback rate of 7.3% and large number of consumer complaints indicated unauthorized billing).

Interbill's argument also ignores the undisputed evidence demonstrating that Interbill had actual knowledge of numerous consumer complaints that the debits made in connection with the Pharmacycards program were unauthorized (lest there be any doubt about the significance of Pharmacy cards' soaring return rates). *See*

pp. 8-9, *supra*. Interbill disregarded these complaints and other clear signs that Pharmacycards was not a legitimate business, and continued unabated to process these unauthorized debits, causing substantial injury to consumers.

Thus, based on the case law discussed above and the uncontradicted evidence presented to it, the district court correctly held that Interbill's practices satisfied the first element of the unfairness test.

C. The Injury Caused By Interbill's Unauthorized Debiting Of Consumer's Accounts Is Not Outweighed By Benefits To Consumers Or To Competition.

Interbill does not dispute that the second element of the unfairness test under the FTC Act – that consumers could not reasonably avoid the harm caused by Interbill's conduct – is satisfied here. It argues, however, that the third and last element – injury that is not outweighed by countervailing benefits to consumers or competition – is not satisfied, because the payment processing services that Interbill provides enable commerce between merchants and consumers. Br. at 27.

The question here is not whether payment processing services in general are beneficial, as Interbill contends, but rather whether the practice of debiting consumers' accounts, while knowing or avoiding knowing that consumers have not authorized those transactions, has countervailing benefits. The Commission presented evidence that unauthorized transactions have a substantial economic

costs, beyond the obvious direct economic losses to consumers victimized by such transactions. Among other things, financial institutions receiving those transactions incur substantial costs to handle returns, and these costs often get passed on to consumers in the forms of fees for basic checking account products, and to businesses in the form of fees for a variety of banking products. E.R. 480. Based on this record, the district court found that the harm caused by this practice was not offset by countervailing benefits, and Interbill points to no evidence (as opposed to unsupported argument) that would warrant a different conclusion.

Interbill argues, however, that the due diligence it performed at the outset was adequate, and suggests that requiring anything more would be unduly onerous. Br. at 30-31.[19] This argument is belied by the evidence showing unequivocally that Interbill did nothing to verify the information provided to it by the Pharmacycards principals and knew from the outset that consumers would be charged for Pharmacycards' supposed product in the absence of their knowledge or authorization. *See* pp. 5-7, *supra*. And, apart from the question of Interbill's initial

[19] Interbill's arguments are not helped by *First Alliance Mortgage Co. v. Lehman Commercial Paper, Inc.*, 471 F.3d 977 (9th Cir. 2006), as it contends. Br. at 31. In that case, the Court found that a lender's knowledge of its client's fraudulent practices based on information gained during due diligence – including "red flags" that it ignored – supported a finding of liability under California tort law. 471 F.3d at 999.

due diligence, the evidence shows that, almost immediately after debiting was underway, it became apparent that something was not right about the Pharmacycards program – in Wells' own words, that "this just smells." E.R. 338. Interbill has failed to show that its continuing debiting activities *at that point*, without verifying whether consumers had actually authorized the debits to their accounts, had any benefits to consumers or competition.[20]

Nor is there any merit to Interbill's argument that its conduct in debiting consumers' bank accounts on behalf of Pharmacycards was reasonable because, apart from its own due diligence, the other entities involved in processing the Pharmacycards demand drafts all conducted their own due diligence and found the program to be acceptable. Br. at 24. Even if other entities' due diligence were relevant to the question of Interbill's own knowledge and reasonableness in debiting consumers' bank accounts (at the outset and over the course of the scheme), there is simply no evidence that any of these other entities conducted any due diligence to verify the legitimacy of Pharmacycards' business or to determine whether consumers had authorized the debits to their accounts, or that they did anything

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[20] Although Interbill argues that is it not equipped to conduct the sort of thorough investigation that the FTC can conduct, Br. at 31, it had a choice – if it could not, or for whatever reasons would not, verify the legitimacy of the Pharmacycards business, it should have declined to provide payment processing services to Pharmacycards.

other than assure themselves that they could make a profit from this enterprise.[21]

There is likewise no merit to Interbill's suggestion that its practices benefitted consumers because it took steps to reduce the problem of high return rates and implemented "safeguards" to protect consumers. Br. 34-35. None of these steps involved verifying whether consumers actually authorized the debits to their accounts. Instead, the evidence shows that the steps that Interbill took were designed for the sole purpose of keeping the program afloat as long as possible so that all parties involved (except for consumers) could continue to make money from the program.

The evidence showed, for example that the "scrubbing" of data was merely meant to bring down return rates so that the bank would continue to process the demand drafts and not shut the program down. *See* p. 10, *supra*. Similarly, the steps that Interbill took to increase reserves in the face of escalating return rates served to protect the financial interests of the entities processing these unauthorized debits, not consumer. Consumers are protected by measures to prevent theft from their accounts in the first place, not by reserving some of the proceeds of that theft to reimburse complaining consumers after the fact (and after Interbill deducted its

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[21] Indeed, in its brief, Interbill acknowledges (and Wells so testified, E.R. 260-61) that all parties involved were motivated by the opportunity to make a profit from this scheme. Br. at 25-26.

and other participants' processing fees from the reserve). Moreover, setting reserves does nothing to protect those consumers who have not discovered the theft from their accounts. E.R. 480 (¶ 31). *See FTC v. Neovi, Inc.*, 598 F. Supp. 2d at 1109-10 (rejecting defendants' argument that they took reasonable steps to prevent their check-issuing service from being used to make unauthorized withdrawals, because none of their steps "did anything to verify that the person who had requested the check had authority over the bank account").

Interbill also argues that the scheme "only" lasted about eight weeks, and that the problems with the Pharmacycards program are only clear in hindsight. But, again, the undisputed evidence shows that Interbill knew of the suspect nature of the proposed scheme from the outset and became aware of significant problems with the Pharmacycards scheme almost immediately after processing began, yet took no steps to verify that the demand drafts it was processing were authorized by consumers. Eight weeks was certainly long enough to cause substantial injury to consumers, and Interbill has cited no evidence to show that its continued processing of unauthorized debits during that time benefitted consumers in any way.

Finally, there is no merit to Interbill's contention that summary judgment is an inappropriate way to decide questions concerning the reasonableness of its actions. Br. at 31 (citing *Software Toolworks Inc. v. PaineWebber Inc.*, 50 F.3d 615

(9th Cir. 1994)). In that case, the Court there made it clear that "reasonableness becomes a question of law and loses its triable character if the undisputed facts leave no room for a reasonable difference of opinion." 50 F.3d at 621-22 (internal quotation omitted).[22] That is precisely the case here.

* * * * *

Thus, Interbill raised no genuine issue of material fact with respect to any of the elements of unfairness. The district court correctly held that Interbill's conduct in processing debit transactions to consumers' bank accounts, while knowing or consciously avoiding knowing that those transactions were unauthorized by consumers, constituted an unfair practice in violation of the FTC Act.

II. THE RELIEF ENTERED BY THE DISTRICT COURT WAS NOT AN ABUSE OF DISCRETION.

A. The FTC Act Provided The District Court With Ample Authority To Enjoin Interbill From Providing Payment Processing Services Without Conducting A Reasonable Investigation.

There is absolutely no merit to Interbill's contention that the district court erred in granting a permanent injunction. It is well settled that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides a district court with authority to grant

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[22] In its brief, Interbill repeatedly asserts that *a jury* should decide disputed issues of material fact. Br. 5-6, 17-18. As this Court has recognized, however, no right to a jury trial exists in an action by a governmental agency for injunctive and equitable monetary relief. *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993).

permanent injunctions and other equitable relief for violations of the FTC Act. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (citing *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)). The FTC is not limited to seeking injunctive relief "prohibiting the illegal practice in the precise form in which it is found to have existed in the past," but "must be allowed effectively to close all roads to the prohibited goal * * *." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *accord Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 215 (9th Cir. 1979) ("'fencing in' provisions are needed to prevent similar and related violations from occurring in the future").[23] After having concluded that Interbill violated Section 5 of the FTC Act, the district court used this injunction authority to prohibit Interbill and Wells from providing payment processing services on behalf of any client without first conducting a reasonable investigation of the prospective client and the offer for which the prospective client requests Interbill's services to ensure that consumers have authorized the charges to their accounts. E.R. 4-5.[24]

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[23] *See also Zenith Radio Corp. v. Hazeltime Research, Inc.*, 395 U.S. 100, 132 (1969) ("A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendants' conduct in the past.")

[24] Interbill erroneously asserts that the injunction prohibits Interbill from engaging in any type of payment processing. Br. at 4. The injunction is not an absolute bar to Interbill's providing payment processing services; it merely requires that, before Interbill provides such services, it must engage in a reasonable

Interbill contends that entry of a permanent injunction was error because it did not violate the FTC Act. As discussed above, however, the facts and the relevant law establish otherwise. Accordingly, the district court acted well within its authority by entering a permanent injunction to prevent Interbill from engaging in such violations in the future.

B. The Consumer Relief Ordered By The District Court Was An Appropriate Monetary Remedy.

Finally, there is no merit to Interbill's argument that the district court erred in entering summary judgment against Interbill and Wells on the appropriate amount of monetary relief, because (Interbill contends) this is a question of material fact. Br. at 37. Contrary to Interbill's contention, the monetary relief that may be assessed under the FTC Act is a legal issue, not a factual one.

Interbill argues that it was error for the district court to enter a monetary judgment for the full amount of consumers' unrecovered losses resulting from this unauthorized debiting scheme where that amount exceeded Interbill's profit for the services from the scheme. It is well-established that, pursuant to Section 13(b) of

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investigation of the prospective client and the offer for which the prospective client requests Interbill's services. Interbill may be referring to the fact that "payment processing" as defined in the injunction is not limited to demand draft processing services but also includes credit card and ACH processing. The district court plainly determined that such "fencing in" relief was appropriate to prevent Interbill from engage in similar unfair practices in connection with other types of payment processing, and Interbill has cited nothing that would show this was error.

the FTC Act, the court has the authority to grant not only injunctive relief, but also other equitable relief, including restitution. *FTC v. Pantron*, 33 F.3d at 1102. As this Court has recognized, the proper measure of restitution "is the amount that will restore the victims to the status quo ante, not what [the defendants] received." *FTC v. Gill*, 265 F.3d 944, 958 (9th Cir. 2001). Accordingly, the district court did not err as a legal matter.[25]

Nor has Interbill shown that the district court's calculation of the monetary judgment is incorrect as a factual matter. Interbill does not dispute here, nor did it dispute below, the Commission's figures (which derived from information that Interbill itself provided) regarding the amount that Interbill debited from consumers without authorization, the amount that has been returned to consumers, and the amount of losses that remain unrecovered. *See* E.R. 386-87 (¶ 10), 444. Thus, Interbill has failed to show that there is a genuine issue of material fact with regard to this issue.

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[25] Although Interbill also asserts, in its statement of issues presented for review, Br. at 1, that the district erred in determining that Interbill and Wells are jointly and severally liable for the judgment amount, Interbill makes that argument nowhere in its brief, nor did it raise that issue below. Accordingly, it has waived that argument. *See Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("[w]e will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim") (internal quotation and citation omitted).

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the district court granting the Commission's motion for summary judgment and imposing injunctive and monetary relief.

Respectfully Subitted,

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Dated: December 23, 2009

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. 32 (a)(7)(B), in that it contains 7,749 words, as counted by the WordPerfect word processing system.

s/ Michele Arington
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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, I electronically filed the Brief of Plaintiff-Appellee Federal Trade Commission with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Michele Arington
MICHELE ARINGTON

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.