

**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., HAL E. SMITH and
UNIVERSAL PROCESSING SERVICES
OF WISCONSIN, LLC,**

Defendants.

ORDER

This cause comes before the Court on the Federal Trade Commission's ("FTC") Motion for Permanent Injunction against Defendants Hal E. Smith and HES Merchant Services Company, Inc. ("Smith") (Doc. No. 211), to which Smith responded (Doc. No. 231) and the FTC replied (Doc. No. 238). The Court held a hearing on this and two related motions on February 5, 2015. For the following reasons, the Motion will be granted and the attached injunction entered.

I. BACKGROUND

This is the final stage of an FTC action to dismantle a telemarketing boiler room and recover consumer funds from the various companies and individuals who facilitated the scam. Ten defendants settled, but two did not: the credit card processing company (UPS), whom the FTC accused of violating the Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310.3(b), by assisting and facilitating the boiler room's unlawful business practices, and a key participant in the venture (Smith), whom the FTC accused of violating the TSR and Section 5 of the FTC Act, 15 U.S.C. § 45. On November 18, the Court granted summary judgment in favor of the FTC and against UPS

and Smith, (Doc. No. 208), and ordered the FTC to file motions for permanent injunctions and monetary relief in the form of a requested final judgment. The FTC did so on December 5.

II. LEGAL STANDARDS & ANALYSIS

Section 13(b) of the FTC Act provides that “in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction” for violations of “any provision of law enforced by the [FTC].” 15 U.S.C. § 53(b). This includes violations of the TSR. 15 U.S.C. § 6105(b). An injunction may incorporate “fencing-in” provisions, which “serve to ‘close all roads to the prohibited goal, so that (the FTC’s) order may not be by-passed with impunity,’” *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473, 72 S. Ct. 800, 803 (1952)), so long as all such provisions “bear a ‘reasonable relation to the unlawful practices found to exist,’” *id.* (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95, 85 S. Ct. 1035, 1047-48 (1965)); *see also FTC v. RCA Credit Servs., LLC*, No. 8:08-cv-2062-T-27AEP, 2010 WL 2990068, at *5 (M.D. Fla. July 29, 2010). Even if a defendant’s unlawful conduct has ceased, a permanent injunction may still be “appropriate if ‘the defendant’s past conduct indicates that there is a reasonable likelihood of further violations in the future.’” *FTC v. USA Fin., LLC*, 415 F. App’x 970, 975 (11th Cir. 2011) (per curiam) (quoting *SEC v. Caterinicchia*, 613 F.2d 102, 105 (5th Cir. 1980)). To determine the likelihood of future violations, courts consider “the egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.” *RCA Credit Servs.*, 2010 WL 2990068, at *5 (quoting *SEC v. CarribaAir, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982)).

The FTC introduced uncontroverted evidence of Smith's continuous and substantial involvement in telemarketing schemes based on credit card interest rate reduction services and timeshare resales. (Doc. No. 211 at 4-6.) At the hearing, Smith's counsel attempted to minimize Smith's role in the scheme vis-à-vis other defendants, but could only offer his client's age and declining health as factors to mitigate the likelihood of future violations. Consideration of the legal standards outlined above reveals the necessity of a strong injunction against Smith. His participation in this and other telemarketing schemes was obvious and substantial, and with a high degree of scienter; he does not appear to recognize the wrongful nature of his conduct, as he apparently intends to resume similar business activities; and there is no reason to believe that he will abstain from future violations merely because of his age or health. Thus, the Court will exercise its discretion to enter the attached injunction.

III. CONCLUSION

Based on the foregoing, it is ordered as follows:

1. The Federal Trade Commission's Motion for Permanent Injunction against Defendants Hal E. Smith and HES Merchant Services Company, Inc. (Doc. No. 211), filed December 5, 2014, is **GRANTED**.
2. The Clerk is directed to enter the attached Final Judgment and Order against Defendants Smith and HES.

**ORDER FOR PERMANENT INJUNCTION AND FINAL JUDGMENT AS TO
DEFENDANTS HAL E. SMITH AND HES MERCHANT SERVICES COMPANY, INC**

Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), filed its First Amended Complaint for a Permanent Injunction and Other Equitable Relief pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108, to obtain temporary, preliminary, and permanent injunctive relief, rescission or reformation of contracts, restitution, disgorgement of ill-gotten gains, and other equitable relief for Defendants’ acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and in violation of the FTC’s Trade Regulation Rule entitled “Telemarketing Sales Rule” (“TSR”), 16 C.F.R. Part 310. Defendants Hal E. Smith, a/k/a H.E. Smith (“Smith”) and Defendant HES Merchant Services Company, Inc., (“HES”) having been found to have violated Section 5 of the FTC Act and the TSR, the Court hereby issues this permanent injunction and final judgment.

THEREFORE, IT IS ORDERED as follows:

FINDINGS

1. This court has jurisdiction over this matter.
2. Defendants Smith and HES have violated Section 5 of the FTC Act and the TSR as alleged in the complaint and set forth in this Court’s Summary Judgment opinion, Doc. 208.

DEFINITIONS

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

1. “**Asset**” or “**Assets**” means any legal or equitable interest in, right to, or claim to, any real or personal property, including, but not limited to, “goods,” “instruments,” “equipment,” “fixtures,” “general intangibles,” “inventory,” “checks,” or “notes,” (as these terms are defined

collectively, or in any combination.

6. **“Document”** or **“Documents”** means any materials listed in Federal Rule of Civil Procedure 34(a) and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, into reasonably usable form through detection devices. A draft or nonidentical copy is a separate Document within the meaning of the term.
7. **“Financial Institution”** means any bank, savings and loan institution, credit union, or any financial depository of any kind, including, but not limited to, any brokerage house, trustee, broker-dealer, escrow agent, title company, commodity trading company, or precious metal dealer.
8. **“Financial Related Product or Service”** means any product or service represented, directly or by implication, to:
 - A. provide any consumer, arrange for any consumer to receive, or assist any consumer in receiving, credit, debit, or stored value cards;
 - B. improve, or arrange to improve, any consumer’s credit record, credit history, or credit rating;
 - C. provide advice or assistance to any consumer with regard to any activity or service the purpose of which is to improve a consumer’s credit record, credit history, or credit rating;
 - D. provide any consumer, arrange for any consumer to receive, or assist any consumer in receiving, a loan or other extension of credit;
 - E. provide any consumer, arrange for any consumer to receive, or assist any consumer in receiving any service represented, expressly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a consumer and one or more secured creditors, servicers, or debt collectors.

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IV.

**PROHIBITED PRACTICES RELATING TO
FINANCIAL RELATED PRODUCTS OR SERVICE**

IT IS FURTHER ORDERED that Defendants, their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any Financial Related Product or Service, are, for twenty years from the entry of this Order, restrained and enjoined from:

A. Misrepresenting or Assisting Others in misrepresenting, expressly or by implication, any material fact, including but not limited to:

1. The terms or rates that are available for any loan or other extension of credit, including but not limited to:

- a. closing costs or other fees;
- b. the payment schedule, the monthly payment amount(s), or other payment terms, or whether there is a balloon payment; interest rate(s), annual

f. that the credit does not have a prepayment penalty or that no prepayment penalty and/or other fees or costs will be incurred if the consumer subsequently refinances; and

g. that the interest rate(s) or annual percentage rate(s) are fixed rather than adjustable or adjustable rather than fixed.

2. That any person can improve any consumer's credit record, credit history, or credit rating by permanently removing negative information from the consumer's credit record, credit history, or credit rating, even where such information is accurate and not obsolete;

3. Any person's ability to improve or otherwise affect a consumer's credit record, credit history, credit rating, or ability to obtain credit; and

4. Any aspect of any mortgage loan modification service or foreclosure relief service, including, but not limited to, the amount of savings or reduction in interest rate, loan principal, or monthly payment that a consumer will receive from purchasing, using, or enrolling in such mortgage loan modification service or foreclosure relief service; the amount of time before a consumer will receive a mortgage loan modification or relief from foreclosure; the likelihood that a consumer will obtain a modified mortgage loan or relief from foreclosure; or the reduction or cessation of collection calls.

B. Advertising or Assisting Others in advertising credit terms other than those terms that actually are or will be arranged or offered by a creditor or lender.

notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale or sale of any product or service, are, for twenty years from the entry of this Order, restrained and enjoined from misrepresenting or Assisting Others in misrepresenting, expressly or by implication, any material fact, including but not limited to:

A. Any material aspect of the nature or terms of any refund, cancellation, exchange, or repurchase policy, including, but not limited to, the likelihood of a consumer obtaining a full or partial refund, or the circumstances in which a full or partial refund will be granted to the consumer;

B. That any person is affiliated with, endorsed or approved by, or otherwise connected to any other person, government entity, or public, non-profit, or other non-commercial program, or any other program;

C. The total costs to purchase, receive, or use, or the quantity of, the product, or service;

D. Any material restriction, limitation, or condition on purchasing, receiving, or using the product or service; and

E. Any material aspect of the performance, efficacy, nature, or characteristics of the product or service.

VI.

SUBSTANTIATION FOR BENEFIT, PERFORMANCE, AND EFFICACY CLAIMS

IT IS FURTHER ORDERED that Defendants, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly indirectly, in connection with the advertising, marketing, promotion, offering for sale or sale of any product or service, are, for twenty years from the entry of this Order, restrained and enjoined from making any representation or Assisting Others in making any representation, expressly or by implication, about the benefits, performance, or efficacy of any product or service, unless, at the time such representation is

made, Stipulating Defendants possess and rely upon competent and reliable evidence that substantiates that the representation is true.

VII.

MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment in the amount of One Million Seven Hundred Thirty-Four Thousand Nine Hundred and Seventy-Two dollars (\$1,734,972.00) is entered against Defendants, jointly and severally, as equitable monetary relief.

B. Defendants are ordered to pay to the Commission the sum of One Million Seven Hundred Thirty-Four Thousand Nine Hundred and Seventy-Two dollars (\$1,734,972.00). Such payment must be made within seven (7) days of entry of this Order by electronic fund transfer in accordance with instructions to be provided by a representative of the Commission.

C. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer

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Service from any Defendant.

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ORDER ACKNOWLEDGMENTS

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

A. Each Defendant within seven (7) days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For five (5) years after entry of this Order, the Individual Defendant, for any business that such Defendant, individually or collectively with any other Defendant, is the majority owner or controls directly or indirectly, and the Corporate Defendant, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to Sections IV, V, and VI of the Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within seven (7) days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Defendant delivered a copy of this Order, that Defendant must obtain, within thir.5(o)-.8(E5E6fil49ptity)-57-11.7917eo ent of receipt oy

address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with that Defendant; (b) identify all of that Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendant (which Individual Defendant must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Defendant is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, the Individual Defendant must: (a) identify all telephone numbers and all email, Internet, physical, and postal addresses, including all residences; (b) identify all business activities, including any business for which he performs services whether as an employee or otherwise and any entity in which he has any ownership interest; and (c) describe in detail his involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For twenty (20) years following entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Defendant must report any change in: (a) any designated point of contact; or (b) the structure of the Corporate Defendant or any entity that Defendant has any ownership interest in or directly or indirectly controls that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, the Individual Defendant must report any change in: (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business

activity, including any business for which he performs services whether as an employee or otherwise and any entity in which he has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

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

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

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

employee or otherwise, that person's: name, addresses, and telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

E. A copy of each unique advertisement or other marketing material.

XIII.

Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

XIV.

SEVERABILITY

IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determin