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9 Attorneys for Plaintiff
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11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

14 FEDERAL TRADE COMMISSION,

15 Plaintiff,

16 v.

17 3RD UNION CARD SERVICES INC.,
doing business as
18 PHARMACYCARDS.COM,
a Delaware Corporation, et al.

19 Defendants.

CV-S-04-0712-RCJ-RJJ

**PLAINTIFF'S APPLICATION
FOR ENTRY OF ORDER
DIRECTING THIRD PARTIES
HOLDING PHARMACYCARDS
FUNDS TO PAY THOSE FUNDS
TO THE FTC**

22 Plaintiff hereby requests that the Court enter the attached proposed Order directing
23 third parties holding funds on behalf of defendants to pay those funds to the FTC to be
24 used for consumer redress. This application follows a third party claims process ordered
25 by the Court on July 19, 2005.

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1 In connection with its motion for default judgment, the FTC asked that third
2 parties holding funds on behalf of defendants be directed to transfer those funds over to
3 the FTC to be used for consumer redress, in partial satisfaction of the judgment against
4 defendants. The FTC argued that the funds should be deemed held in constructive trust
5 on behalf of consumers injured by defendants' fraudulent and unlawful acts.

6 The Court granted the FTC's motion for default judgment, entering a judgment for
7 \$5,315,824 on July 19, 2005. At the same time, the Court directed third parties holding
8 funds on behalf of Pharmacards to file with the Court and the FTC any claims that they
9 might have to those funds. Four such third parties were specifically identified.

10 The claims were due by July 29, 2005. The FTC's opposition to any claim was
11 due August 12, 2005, and claimants' responses to the FTC's opposition were due on
12 August 29, 2005. The FTC's reply to any such response was due on September 9, 2005.

13 Two claims were filed, one by Wells Fargo bank for \$71,593.85 and one by
14 Matthew Jackson for \$175,000. The FTC timely responded, accepting the claim of Wells
15 Fargo and objecting to the claim of Matthew Jackson. In its opposition, the FTC argued
16 that the \$175,000 taken by Matthew Jackson should be deemed as held in constructive
17 trust for injured Pharmacards consumers, and that Jackson should be ordered to pay that
18 amount to the FTC to be used for redress.

19 Jackson has not responded to the FTC's opposition to his claim. Pursuant to the
20 Court's Order, such a response was due on August 29, 2005. The FTC now asks the
21 Court to impose the requested constructive trust and enter the attached proposed order
22 directing Jackson to pay to the FTC \$175,000 to be used to redress consumers injured by
23 defendants in the above-captioned matter. The proposed order also directs those third
24 parties not making a claim to pay to the FTC the funds they are holding on behalf of the
25 Pharmacards defendants, and orders Wells Fargo to pay to the FTC the funds it is
26 holding on behalf of Pharmacards, less the claimed \$71,593.85.

1 The FTC will use the funds to redress injured consumers, as provide in Section III
2 B of the default judgment entered in this matter. Depending on the costs of distribution,
3 it is contemplated that a pro-rated amount will be distributed to all consumers who have
4 not received a refund or other credit for the unauthorized withdrawals from their
5 accounts, that the FTC can identify.

6 For the above-stated reasons, the FTC respectfully requests that the Court enter the
7 attached order.

8
9 Dated: Sept. 8, 2005

Respectfully submitted,
WILLIAM BLUMENTHAL
General Counsel

11 

12 Tracy S. Thorleifson
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26 Federal Trade Commission
27
28

1 **CERTIFICATE OF SERVICE**

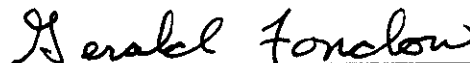
2 I, Gerald Fondow, am a citizen of the United States, over the age of eighteen years.
3 I am an employee of the Federal Trade Commission. My business address is 915 Second
4 Avenue, Suite 2896, Seattle, WA 98174. On October 27, 2004 and February 2, 2005, the
5 clerk entered default against the named defendants, so I did not attempt service on them.

6
7 On 8 Sep., 2005, I served copies of the foregoing document by
8 sending it, by facsimile and first class mail, to:

- 9 1. Susan E. Flint, Managing Counsel, Wells Fargo Bank, Law Department, MAC:
10 N9305-176, 1700 Wells Fargo Center, 6th and Marquette Avenue, Minneapolis,
11 MN 55479, (612) 667-5098 (facsimile);
- 12 2. Local Counsel for Wells Fargo, Kent F. Larsen, Smith Larsen & Wixom, Hills
13 Center Business Park, 1935 Village Center Circle, Las Vegas, NV 89134, (702)
14 252-5002, (702) 252-5006 (facsimile);
- 15 3. Counsel for InterBill, Ltd., and Thomas Wells: Lawrence Semenza, Semenza Law
16 Firm, 3027 East Sunset Road, # 106, Las Vegas, NV 89120-2758, (702) 263-3539
17 (facsimile);
- 18 4. John F. Haussner, C.F.O, Electronic Funds Transfer Corporation, 245 Saw Mill
19 River Road, Suite 105, Hawthorne, NY (914) 747-3222 (facsimile);
- 20 5. Paul G. Hook, Alliance Payment Technologies, Inc., 302 S. Milliken Avenue,
21 Suite G-1, Ontario, CA 91761, (909) 974-0110 (facsimile); and
- 22 6. Counsel for Matt Jackson: Paul N. Jacobs, Jacobs & Dodds, 881 Dover Drive,
23 Suite 285, Newport Beach, CA 92663-5962, (949) 645-7305 (facsimile).

24
25 I declare under penalty of perjury that the foregoing is true and correct.

26 Executed this 8th day of September 2005.

27
28 
Gerald Fondow

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11 UNITED STATES DISTRICT COURT
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14 FEDERAL TRADE COMMISSION,

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17 3RD UNION CARD SERVICES INC.,
18 doing business as
PHARMACYCARDS.COM, et al.

19 Defendants.

CV-S-04-0712-RCJ-RJJ

**(PROPOSED) ORDER
DIRECTING THIRD PARTIES
TO PAY FUNDS HELD ON
BEHALF OF DEFENDANTS**

21 Plaintiff, Federal Trade Commission, has applied for an Order directing funds held
22 by third parties on behalf of the defendants in the above-captioned case be paid to the
23 FTC in partial satisfaction of the default judgment entered by this Court on July 19, 2005.
24 The FTC would use the funds to redress consumers injured by defendants' unlawful
25 activities, as provided in Section III.B of the default judgment previously entered in this
26 matter.

1 The FTC has alleged that Jackson diverted \$175,000 from the Pharmacards
2 defendants without their authorization, and kept that money for his personal use. The
3 FTC offers in support of its allegations copies of email communications by and between
4 Jackson, his business partner Eric Peacock, and defendant Steve Pearson that document
5 Jackson's diversion of these funds. In his claim, Jackson does not dispute these facts, but
6 rather argues that because his company, Fission Group, has lost so much money on
7 chargebacks from the Pharmacards scheme, he ought to be able to keep the \$175,000 as
8 recompense for the business losses his company experienced. The FTC argues that
9 Jackson holds these funds in constructive trust on behalf of injured consumers and should
10 be required to pay that amount to the FTC for consumer redress. Jackson does not
11 respond to this argument.

12 Constructive Trust

13 Imposition of a constructive trust is appropriate where funds have been illegally
14 debited from consumers' accounts and are being held by third parties. In a constructive
15 trust, "a person who has engaged in fraud or other wrongful conduct holds only bare legal
16 title to the property subject to a duty to reconvey it to the rightful owner." *FTC v.*
17 *Crittenden, et. al*, 823 F. Supp. 699, 703 (C.D. Cal. 1993), *aff'd*, 19 F.3d 26 (9th Cir.
18 1994) (table, text in Westlaw); *see In re N. Am. Coin & Currency, Ltd.*, 767 F.2d 1573,
19 1575 (9th Cir. 1985) ([a] constructive trust is a remedy "flexibly fashioned in equity to
20 provide relief where a balancing of interests in the context of a particular case seems to
21 call for it"); *see also SEC v. Elmas Trading Corp.*, 683 F. Supp. 743, 747 (D. Nev. 1987)
22 ("[a] constructive trust is a remedial device whereby the holder of legal title to property is
23 deemed to be a trustee of that property for the benefit of another who is entitled to it").
24 Even where the funds are legally titled in the name of a third party, the Court may hold
25 that a constructive trust exists – "that a transferee was not 'the original wrongdoer' does
26 not insulate him from liability for restitution." *Harris Trust & Sav. Bank v. Salomon*
27 *Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) (internal quotations omitted).

1 Courts have impressed constructive trusts over the proceeds of fraud in other FTC
2 actions, which is precisely what the Commission seeks here. For example, in *FTC v.*
3 *Crittenden*, a case involving the deceptive sale of goods in violation of the FTC Act, the
4 court impressed a constructive trust over the funds that customers paid to the defendant.
5 823 F. Supp. 699. The court reasoned that these funds, which were being held in the
6 receivership estate, belonged to the customers, not to the defendant, and blocked the IRS
7 from accessing these funds to satisfy the defendant's tax liability. 823 F. Supp. at 703.
8 Here, the funds that Jackson stole were unlawfully taken from consumers' checking
9 accounts originally, and those funds should be held in constructive trust on behalf of
10 injured consumers and not be subject to claim by third parties.

11 Fission Group is located in California, where Matt Jackson also resides. Thus, it is
12 appropriate to look to California law governing constructive trusts in analyzing the
13 obligations of Matt Jackson to the Pharmacards consumers. California law requires
14 three elements to establish a constructive trust: (1) the existence of a res, (2) the
15 plaintiff's right to the res, and (3) the defendant's (i.e., Pharmacards) acquisition of the
16 res by some wrongful act. *Crittenden*, 823 F. Supp. at 703.

17 The constructive trust extends to anyone else who subsequently obtains the res, so
18 long as they are not innocent takers. The jurisdiction of the Court is over the wrongfully
19 acquired funds. A constructive trust can "reach the property either in the hands of the
20 original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in
21 good faith and without notice acquires a higher right and takes the property relieved from
22 the trust." *Harris Trust & Sav. Bank*, 530 U.S. at 250-51. *See also U.S. v. St. Germain*,
23 363 F. Supp.2d 1293, 1298 (D. Colo. 2005) (a restitution order may be enforced against
24 funds that have been unjustly obtained; the funds do not have to be in the possession of
25 the defendant to be subject to a constructive trust). Under California law, a court may
26 find that a constructive trust exists if it finds merely that "the acquisition of property was
27 wrongful and that the keeping of the property by the defendant would constitute unjust
28

1 enrichment.” *Crittenden*, 823 F. Supp. at 703 (quoting *Calistoga Civic Club v. City of*
2 *Calistoga*, 191 Cal. Rptr. 571, 576 (Cal. Ct. App. 1983).

3 Here, it is undisputed that funds processed by Fission Group on behalf of
4 Pharmacycards (the res) were taken without authorization (the wrongful act), from
5 consumers’ accounts, and that the FTC, standing in the shoes of the consumers, has a
6 right to these funds to redress injured consumers. Thus, funds held by Fission Group
7 were subject to a constructive trust on behalf of consumers. Jackson did not take the
8 Pharmacycards funds held by Fission Group in good faith or without notice that the funds
9 had been acquired unlawfully – indeed, he relied on the fact that Pharmacycards was in
10 no position to complain about his theft, given its own wrongful acquisition of the funds.
11 Because Jackson took funds rightfully belonging to consumers, to which he had no right,
12 a constructive trust should be imposed over the funds he took and he should be ordered to
13 pay them to the FTC for the benefit of injured consumers.

14 Jackson’s claim that he is entitled to keep these funds because he and Fission
15 Group owe money to the bank that processed their Pharmacycards transactions lacks
16 merit. He does not assert that he is an innocent taker or argue that he has a defense to the
17 imposition of a constructive trust.

18 On this record, the Court finds that imposition of a constructive trust is warranted.
19 Jackson holds the \$175,000 on behalf of injured consumers and should be required to
20 repay it to the FTC to use to redress those consumers.

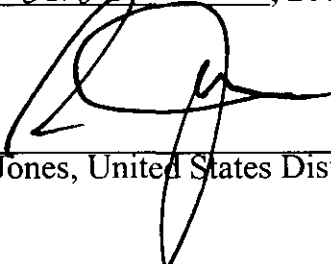
21 Order

22 The Court allows the claim of Wells Fargo for \$71,593.85 because that amount
23 represents funds already paid to injured consumers by Wells Fargo. The Court disallows
24 the claim of Matthew Jackson for \$175,000, because those funds are held constructively
25 on behalf of injured consumers. Because neither Electronic Funds Transfer Corporation
26 nor Alliance Payment Technologies made claims against the funds they hold, they will be
27 directed to transfer the Pharmacycards funds they hold to the FTC.


1 The Court hereby orders third parties holding funds on behalf of Pharmacards to
2 pay those funds to the FTC, to be used for consumer redress, as follows:

- 3 (1) Wells Fargo Bank, holding Pharmacards funds in an account titled in the
4 name of payment processor InterBill, in the amount of \$588,034.15 (the
5 amount held by Wells Fargo, \$659,628, less the amount claimed by Wells
6 Fargo, \$71,593.85);
7 (2) Electronic Funds Transfer Corporation holding Pharmacards funds in the
8 amount of \$85,365;
9 (3) Alliance Payment Technologies, Inc., holding Pharmacards funds in the
10 amount of \$23,693; and
11 (4) Matthew G. Jackson, sole director of Helmcrest USA, LLC, holding
12 Pharmacards funds diverted without authorization from payment
13 processor Fission Group, in the amount of \$175,000.

14
15 **SO ORDERED**, this 26th day of October, 2005.

16
17
18 
Robert C. Jones, United States District Judge

19 Presented by:

20 
21 Tracy S. Thorleifson
22 Mary T. Benfield
23 Attorneys For Plaintiff
Federal Trade Commission

24 Date: 9/08/05

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21 6. Counsel for Matt Jackson: Paul N. Jacobs, Jacobs & Dodds, 881 Dover
22 Drive, Suite 285, Newport Beach, CA 92663-5962, (949) 645-7305
23 (facsimile).

24
25 I declare under penalty of perjury that the foregoing is true and correct.

26 Executed this 8th day of August 2005.

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Gerald Fondow