

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

INTERBILL, LTD., and THOMAS WELLS,
individually and as an officer or director of
InterBill,

Defendants.

INTERBILL, LTD., and THOMAS WELLS,
individually and as an officer or director of
InterBill,

Third-Party Plaintiffs,

v.

WELLS FARGO BANK NATIONAL
ASSOCIATION,

Third-Party Defendant.

CV-S-06-01644-JCM-PAL

FINAL JUDGMENT AND ORDER
FOR PERMANENT INJUNCTION
AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), has filed a motion for summary judgment against defendants InterBill, Ltd. (“InterBill”), and Thomas Wells (“Wells”), pursuant to Rule 55(c) of the Federal Rules of Civil Procedure. This Court, having considered the arguments, pleadings, declarations, exhibits, and memoranda of the parties, and being fully advised in the premises, hereby grants the FTC’s Motion for Summary Judgment. The Court makes the following findings and enters the following Order for Permanent Injunction:

FINDINGS

1. This is an action by the Commission initiated under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Pursuant to this section of the FTC Act, the Commission has the authority to seek the relief contained herein.

1 2. “Payment processing” shall mean directly or indirectly providing a merchant with
2 access, through any third-party depository financial institution (TPDFI), to payment mechanisms
3 that allow consumers to purchase the merchant’s goods or services by debiting a consumer’s
4 bank account or charging a consumer’s credit card account. Payment processing may include,
5 among other things, providing a merchant with the means to electronically accept and transmit
6 consumer payments through any TPDFI; monitoring, tracking, and reconciling payments,
7 returns, and charge-backs; providing pre-authorization, post-authorization, and refund services to
8 merchants; and disbursing funds receipts to merchants.

9 3. “Client” shall mean any person, corporation, originator, or other entity, including
10 any merchant, with whom defendants have contracted or agreed to provide third-party payment
11 processing services.

12 4. “Consumer” means any person whose bank account or credit card account
13 defendants cause, or attempt to cause, to be debited, charged, or otherwise accessed.

14 5. “Payment processor” means any person providing any payment processing
15 services in connection with the sale or purchase of goods or services, including but not limited to
16 depository financial institutions, third-party processors, data processing service bureaus, and any
17 others who provide services to verify, correct, or update account or bank routing data or formats.

18 6. “Person” means any natural person or organization, including but not limited to,
19 any proprietorship, partnership, company, firm, corporation, joint venture, society, association,
20 trust, or government agency or unit, and any other group or combination acting as an entity.

21 7. “Telemarketing” means any business activity (whether or not covered by the
22 Telemarketing Sales Rule, 16 C.F.R. Part 310) that involves attempts to induce consumers to
23 purchase any investment, item, good, service, partnership interest, trust interest or other
24 beneficial interest, or to enter a contest for a prize, by means of telephone sales presentations,
25 either exclusively or in conjunction with the use of other forms of marketing.

26 8. “TSR” means the Telemarketing Sales Rule, 16 C.F.R. Part 310.

PROHIBITED PRACTICES

I. UNLAWFUL PROCESSING PROHIBITED

IT IS THEREFORE ORDERED that defendants, and each of them, and their successors, assigns, officers, agents, servants, employees, attorneys, joint venturers, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, are hereby restrained and enjoined from:

A. Taking any action to process any payment, directly or on behalf of any client, against any consumer's credit card or bank account without having previously undertaken a reasonable investigation to determine that the consumer has provided defendants or the defendants' client with authorization for the debit or charge; and

B. Processing or taking any action to process any charge or debit against a consumer's credit card or bank account for any client while knowing or consciously avoiding knowing that the client's business practices, related to an offer for which defendants are providing payment processing services, are or are likely to be deceptive or unfair within the meaning of Section 5 of the FTC Act or the TSR.

II. REASONABLE INVESTIGATION REQUIRED

IT IS FURTHER ORDERED that defendants, and each of them, and their successors, assigns, officers, agents, servants, employees, attorneys, joint venturers, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, are hereby restrained and enjoined from processing payments on behalf of any client without first engaging in a reasonable investigation of the prospective client and the offer for which the prospective client requests defendants' payment processing services to ensure that the charges to be processed are authorized and that the prospective client is complying with the FTC Act. Such reasonable investigation shall include, but not be limited to:

1 the transaction. Defendants shall immediately cease providing payment processing services to
2 any client where defendants, through this monitoring or any other source, have reason to believe
3 that the client's business practices are deceptive, unfair, or abusive within the meaning of
4 Section 5 of the FTC Act or the TSR. Provided, however, that defendants may resume
5 processing for any client if they determine, based on clear and convincing evidence, that the
6 client's business practices were not, or are no longer, deceptive, unfair, or abusive within the
7 meaning of Section 5 of the FTC Act or the TSR; and

8 C. Failing to immediately conduct a reasonable investigation of the cause for any
9 chargeback or return rate that exceeds two and one-half percent (2.5%). In the case of an
10 investigation of any client triggered by a chargeback or return rate in excess of two and one-half
11 percent (2.5%), defendants shall immediately suspend payment processing services, unless,
12 following a reasonable investigation, defendants determine, based on clear and convincing
13 evidence, that the client's business practices were not, or are no longer, deceptive, unfair, or
14 abusive within the meaning of Section 5 of the FTC Act or the TSR. For purposes of this
15 Paragraph, a reasonable investigation may include, but is not limited to:

16 1. verifying the truth and accuracy of information gathered in compliance
17 with Part II of this Order and, where found to be incomplete or outdated, obtaining
18 complete and current information from the client;

19 2. comparing the client's account chargebacks or return rates to industry
20 published rates, as set forth from time to time by financial institutions, bank regulators,
21 bankcard associations, or NACHA, and seeking a reasonable explanation for any
22 significant variances;

23 3. contacting consumers, financial institutions, and law enforcement
24 agencies to gather detailed information regarding complaints about the client;

25 4. conducting "test" shopping to determine the client's sales practices, where
26 possible;

1 **V. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

2 IT IS FURTHER ORDERED that each defendant, within five (5) business days of receipt
3 of this Order as entered by the Court, must submit to the Commission a truthful sworn statement
4 acknowledging receipt of this Order.

5 **VI. DISTRIBUTION OF ORDER BY DEFENDANTS**

6 IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of
7 this Order, defendants shall deliver copies of the Order as directed below:

8 A. Corporate defendant InterBill must deliver a copy of this Order to all of its
9 principals, officers, directors, and managers. Corporate defendant InterBill also must deliver
10 copies of this Order to all of its employees, agents, and representatives who engage in conduct
11 related to the subject matter of the Order. For current personnel, delivery shall be within five (5)
12 days of service of the Order upon the corporate defendant. For new personnel, delivery shall
13 occur prior to them assuming their responsibilities;

14 B. For any business that individual defendant Wells controls, directly or indirectly,
15 or in which he has a majority ownership interest, defendant Wells must deliver a copy of this
16 Order to all principals, officers, directors, and managers of that business. Defendant Wells must
17 also deliver copies of this Order to all employees, agents, and representatives of that business
18 who engage in conduct related to the subject matter of the Order. For current personnel, delivery
19 shall be within five (5) days of service of the Order upon defendants. For new personnel,
20 delivery shall occur prior to them assuming their responsibilities;

21 C. For any business where defendant Wells is not a controlling person but otherwise
22 engages in conduct related to the subject matter of this Order, defendant Wells must deliver a
23 copy of this Order to all principals and managers of such business before engaging in such
24 conduct;

25 D. Defendants must secure a signed and dated statement acknowledging receipt of
26 the Order, within thirty (30) days of delivery, from all persons receiving a copy of this Order
27 pursuant to this Section.

VII. COMPLIANCE REPORTING BY DEFENDANTS

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

A. Defendant InterBill shall, for a period of five (5) years from the date of entry of this Order, notify the Commission of:

1. Changes in its principal place of business, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;

2. Changes in its name or use of any aliases or fictitious names, within ten (10) days of the date of such change; and

3. Changes in corporate structure that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, provided that, with respect to any proposed change in the corporation about which InterBill learns less than thirty (30) days prior to the date such action is to take place, InterBill shall notify the Commission as soon as is practicable after obtaining such knowledge.

B. Defendant Wells shall, for a period of five (5) years from the date of entry of this Order, notify the Commission of any changes in his principal place of business, mailing addresses, and telephone numbers, and any changes in his name or use of any aliases or fictitious names, within ten (10) days of the date of such change.

C. One hundred eighty (180) days after the date of entry of this Order, and thereafter within ten (10) days of receipt of written notice from a representative of the Commission, defendants shall each submit a written report to the Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to, any changes required

1 to be reported pursuant to subparagraphs A and B, above. In addition, the report shall include
2 information concerning defendants' provision of payment processing services to 1) any person
3 where the chargeback or return rate exceeds two and one-half percent and 2) any person or
4 company where one or more of the principals is not a U.S. resident or where consumers'
5 payments are wired or otherwise deposited into accounts outside of the U.S.

6 D. For the purposes of this Order, defendants shall, unless otherwise directed by the
7 Commission's authorized representatives, mail all written notifications to the Commission to:

8 Associate Director for Enforcement
9 Federal Trade Commission
10 600 Pennsylvania Avenue NW
11 Room NJ2122
12 Washington, DC 20580
13 Re: FTC v. InterBill, Ltd.

14 **VIII. PLAINTIFF'S AUTHORITY TO MONITOR COMPLIANCE**

15 IT IS FURTHER ORDERED that the Commission is authorized to monitor defendants'
16 compliance with this Order by all lawful means including, but not limited to, the following:

17 A. The Commission is authorized, without further leave of Court, to obtain discovery
18 from any person in the manner provided by Chapter V of the Federal Rules of Civil Procedure,
19 Fed. R. Civ. P. 26-37, including the use of compulsory process pursuant to Fed. R. Civ. P. 45, for
20 the purpose of monitoring and investigating defendants' compliance with any provision of this
21 Order;

22 B. The Commission is authorized to use representatives posing as consumers and
23 suppliers to defendants, defendants' employees, or any other entity managed or controlled in
24 whole or in part by defendants, without the necessity of identification or prior notice; and

25 C. Defendants shall permit representatives of the Commission to interview any
26 employer, consultant, independent contractor, representative, agent, or employee who has agreed
27 to such an interview, relating in any way to any conduct subject to this order. The person
interviewed may have counsel present.

1 *Provided that* nothing in this Order shall limit the Commission's lawful use of compulsory
2 process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49 and 57b-1, to investigate
3 whether defendants have violated any provision of this Order or Section 5 of the FTC Act, 15
4 U.S.C. § 45.

5 **IX. RECORD KEEPING PROVISIONS**

6 IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of
7 this Order, in connection with payment processing, defendants and their successors and assigns,
8 are hereby restrained and enjoined from failing to create and retain for three (3) years the
9 following records:

10 A. Accounting records that reflect the cost of goods or services sold, revenues
11 generated, and the disbursement of such revenues;

12 B. Personnel records accurately reflecting: the name, address, and telephone number
13 of each person employed in any capacity by such payment processing business, including as an
14 independent contractor; that person's job title or position; the date upon which the person
15 commenced work; and the date and reason for the person's termination, if applicable;

16 C. Client files containing the names, addresses, telephone numbers, dollar amounts
17 paid, quantity of items or services purchased, and description of items or services purchased, to
18 the extent such information is obtained in the ordinary course of business;

19 D. Complaints and refund requests (whether received directly, indirectly or through
20 any third party) and any responses to those complaints or requests; and

21 E. All records and documents necessary to demonstrate full compliance with each
22 provision of this Order, including but not limited to, copies of documents obtained as part of the
23 requirements of Sections II and III; acknowledgments of receipt of this Order required by
24 Section V, and all reports submitted to the FTC pursuant to Section VII of this Order;

25 F. Records sufficient to demonstrate that consumers have provided authorization for
26 charges or debits against their accounts prior to the time that defendants processed charges or
27 debits or caused to be processed charges or debits against those consumers' accounts; and

1 G. All records relating to defendants' provision of payment processing services to
2 1) any person where the chargeback or return rate exceeds two and one-half percent and 2) any
3 person or company where one or more of the principals is not a U.S. resident or where
4 consumers' payments are wired or otherwise deposited into accounts outside of the U.S. Such
5 records shall include all application forms and related materials; correspondence transmitted
6 electronically, by facsimile, or otherwise; documents demonstrating the total number and gross
7 dollar amount of transactions processed or serviced by defendants, directly or indirectly through
8 another payment processor; documents demonstrating the total number and gross dollar amount
9 of transactions that were returned; and documents disclosing all processing fees and charges, net
10 funds paid to sellers, reserve funds, or other funds withheld from sellers, the financial
11 institution(s) and accounts where the processed funds were deposited, and the financial
12 institutions and account numbers to which any processed funds were transferred.

13 X. RETENTION OF JURISDICTION

14 IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for
15 purposes of construction, modification, and enforcement of this Order.

16 IT IS SO ORDERED.

17 Dated: April 30, 2009

18 
United States District Judge

19 Submitted by:

20 /s/ Tracy S. Thorleifson
21 Tracy S. Thorleifson
22 Mary T. Benfield
23 Federal Trade Commission
24 BLAINE T. WELSH
25 Assistant United States Attorney
26 Attorneys for Plaintiff
27 Federal Trade Commission

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CERTIFICATE OF ELECTRONIC SERVICE

I, Tracy Thorleifson, hereby certify that on this 17th day of April 2008, a true copy of the foregoing Plaintiff FTC's Proposed Final Judgment and Order for Permanent Injunction was filed and served electronically via the CM/ECF to the following:

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/s/ Tracy Thorleifson
Tracy Thorleifson