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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:	Chapter 11
VELO HOLDINGS INC., <i>et al.</i> ,	Case No. 12-11384 (MG)
Debtors. ¹	Jointly Administered
VELO HOLDINGS INC., <i>et al.</i> ,	Adversary No. 12-01564(MG)
Plaintiffs,	
v.	
PAYMENTECH, LLC	
Defendant.	

**PAYMENTECH, LLC'S OBJECTION TO VERTRUE'S MOTION TO STRIKE
PORTIONS OF DECLARATIONS OF HEIDI BIESTERVELD
AND TO PRECLUDE TESTIMONY BY MS. BIESTERVELD
ON TOPICS OUTSIDE OF HER KNOWLEDGE**

¹ The Debtors in these cases along with the last four digits of each Debtors' federal tax identification number are: Velo Holdings Inc. (3155), V2V Holdings LLC (8801), Coverdell & Company, Inc. (4660), V2V Corp. (0857), LN, Inc. (8759), FYI Direct Inc. (2491), Vertrue LLC (6882), Idaptive Marketing LLC (3362), My Choice Medical Holdings, Inc. (5870), Adaptive Marketing LLC (6882), Interactive Media Group (USA) Ltd. (1016), Brand Magnet, Inc. (8978), Neverblue Communications, Inc. (7832), and Interactive Media Consolidated Inc. (0774).

Paymentech, LLC ("Paymentech"), the Defendant in the above-captioned adversary proceeding (the "Adversary Proceeding"), by and through its undersigned counsel, respectfully submits this Objection to *Vertrue's Motion to Strike Portions of Declarations of Heidi Biesterveld and to Preclude Testimony by Ms. Biesterveld on Topics Outside Her Knowledge* (the "Motion"), and respectfully states as follows:

PRELIMINARY STATEMENT

1. Through the Motion, the Debtors attempt to preclude nearly all of the testimony of Paymentech's main witness - Heidi Biesterveld. If the Debtors have their way, Ms. Biesterveld's trial testimony will be reduced to a few snippets, leaving large portions of Paymentech's case on the cutting room floor. Regardless of when Ms. Biesterveld assumed primary responsibility for risk management of the Vertrue account, that temporal limitation in no way constrains her knowledge as to matters (a) of historical importance or relevance, (b) about which she learned through her review of the business records of Paymentech and the Debtors, and (c) about which she became informed through communications with her colleagues at Paymentech, through communications with VISA or numerous other sources. Adopting the Debtors' absurd standard as the general rule in litigation would require the testimony of the doctor who delivered Ms. Biesterveld in order for her to prove that she is alive.

2. The Debtors' tactics are particularly egregious given that Ms. Biesterveld was designated as Paymentech's witness in response to the Debtors' 30(b)(6) notice, yet not once during her deposition or prior to making this Motion did the Debtors complain that Ms. Biesterveld was not competent to testify about the myriad subjects on which she was examined for seven (7) hours by the Debtors, including, among other things, matters relating to the Debtors' business and the relationship, interactions, and history between and among the Debtors,

Paymentech, and VISA. The Motion is baseless and nothing more than a transparent attempt to leave Paymentech defenseless on the eve of trial and, accordingly, should be denied.

3. Paymentech designated Ms. Biesterveld as its 30(b)(6) witness because she (1) has a vital role as Vice President of Credit Risk Management at Paymentech and (2) obtained knowledge of Vertrue's account with Paymentech and all matters relating thereto in the course of performing her duties. Accordingly, Ms. Biesterveld was, and still is, the most competent employee to serve as the voice of the Defendant in this Adversary Proceeding.

4. As Vice President of Credit Risk Management, Ms. Biesterveld performs numerous key functions at Paymentech. Specifically, Ms. Biesterveld is responsible for the following:

- Overseeing the risk management of Paymentech's merchant acquiring portfolio in the United States and Canada;²
- Overseeing collection for Paymentech and Paymentech's portfolio management;³
- Overseeing credit reviews on merchant portfolios,⁴ and
- Most importantly, determining whether Paymentech should terminate merchant accounts.⁵

5. Furthermore, Ms. Biesterveld was involved to some degree with Vertrue's account as early as February 2011 and ultimately became wholly responsible for managing Paymentech's relationship with Vertrue in January 2012.⁶ In fact, Ms. Biesterveld made the

² Transcript of June 13, 2012 Deposition of Heidi Biesterveld ("Biesterveld Tr.") at 39-40.

³ Id.

⁴ Id.

⁵ Biesterveld Tr. at 41:6-18.

⁶ Biesterveld Tr. at 79:12-15; 87; Biesterveld Trial Decl. ¶ 31.

decision to terminate the Processing Agreements.⁷ During the course of performing her duties, Ms. Biesterveld undoubtedly gained personal knowledge of all of the matters she testified to in her declarations filed with the court in this adversary proceeding including, but not limited to, the following matters:

- Vertrue's business practices and legal challenges;
- VISA's review of Vertrue's marketing practices and RIS performance;
- Vertrue's compliance with VISA rules on recurring payment merchants and "Zombie billing";
- VISA's viewpoint on Vertrue and anticipated conduct; and
- Vertrue's compliance with VISA regulations and the Processing Agreements.

6. Accordingly, it is irrefutable that Ms. Biesterveld is entirely competent to testify to these and other matters relating to the relationship between Paymentech, Vertrue and VISA. It is therefore respectfully submitted that the Motion should be denied.

ARGUMENT⁸

I. THE COURT SHOULD ADMIT MS. BIESTERVELD'S DECLARATIONS IN THEIR ENTIRETY

7. The Court should admit Ms. Biesterveld's three declarations in their entirety because they are based on personal knowledge that Ms. Biesterveld has acquired during the course of her involvement with Vertrue's account since early 2011 and her experience in managing Vertrue's account for Paymentech since January 2012.

⁷ Biesterveld Tr. at 176:8-11.

⁸ Capitalized terms used herein but otherwise undefined shall have the meanings ascribed to them in the *Motion of Paymentech, LLC for Relief from the Automatic Stay to Terminate Processing Agreements* [Docket No. 183].

A. Ms. Biesterveld has Personal Knowledge of Vertrue's Business Practices and Legal Challenges (Biesterveld TRO Declaration ¶¶ 9-17 and Biesterveld Trial Declaration ¶¶ 14-19)

8. During the course of Ms. Biesterveld's involvement with Vertrue's account since early 2011 and management of Vertrue's account since January 2012, she gained personal knowledge of Vertrue's business practices and the legal challenges Vertrue encountered as a result of its history of fraudulent and improper business practices. As part of Ms. Biesterveld's duties, she was aware of, and took into consideration in her assessment of the Vertrue account, any investigations and documents that she was aware of relating to Vertrue. In the ordinary course of her duties, Ms. Biesterveld also took into account monitoring merchants' general compliance with the Restore Online Shoppers Confidence Act ("ROSCA"). Accordingly, Ms. Biesterveld gained knowledge of the general requirements of ROSCA as they relate to Vertrue's business in the ordinary course of monitoring, and subsequently managing, Vertrue's account.

9. During the course of handling Vertrue's account with Paymentech, Ms. Biesterveld also became aware and familiar with Senator John D. Rockefeller IV's investigation of the online direct marketing industry, including Vertrue and other businesses, and the resulting reports issued by Senator Rockefeller's staff (together, the "Rockefeller Reports").⁹

10. In addition to Ms. Biesterveld's personal awareness of Vertrue's legal challenges based on her involvement and handling of Vertrue's account and review of various documents

⁹ In this regard, contrary to the Debtors' assertions in their motion in limine to preclude Paymentech from offering the Rockefeller Reports in evidence, the Rockefeller Reports are not hearsay because they fall into the public records exception to the rule against hearsay contained in Federal Rule of Evidence 803(8). See *Paymentech, LLC's Opposition To Vertrue's Motion In Limine To Preclude Paymentech, LLC From Offering The Staff Reports As Evidence* [Docket No. 58]. However, even if the Rockefeller Reports were deemed hearsay, which they are not, the Rockefeller Reports and Ms. Biesterveld's familiarity with the Rockefeller Reports are admissible for the purpose of showing the effect they had on Paymentech's merchant, Vertrue. See *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004) (Out of court statements by a declarant are admissible and not precluded by the hearsay rules, if they are not being offered for the truth of the matter asserted.); *Williams v. Illinois*, No. 10-8505, 2012 WL 2202981 (June 18, 2012) at *2 (noting that *Crawford* reaffirmed the proposition that statements that are not offered for the truth of the matter asserted are not hearsay).

relating to Vertrue, Ms. Biesterveld has personal knowledge of the multiple legal challenges Vertrue faced by virtue of public announcements. For example, on February 23, 2012, Attorney General Eric T. Schneiderman publicly announced that Vertrue had entered into a settlement agreement with the state of New York wherein Vertrue agreed to provide \$2 million in refunds to New York customers who were tricked into enrolling online in Vertrue's discount club programs and then charged hidden fees.¹⁰

11. Vertrue has not proven, as alleged, that the facts stated in paragraphs 9 through 17 of the Biesterveld TRO Declaration and in paragraphs 14 through 19 of the Biesterveld Trial Declaration are not relevant to this dispute, or that their probative value is outweighed by the alleged prejudice Vertrue would endure if written or live testimony on these facts is admitted. In particular, Vertrue has not offered any evidence that the admission of the Rockefeller Reports would unfairly prejudice its rights.¹¹ Accordingly, Ms. Biesterveld should be permitted to provide testimony and declarations on these topics.

B. Ms. Biesterveld has Personal Knowledge of VISA's Review of Vertrue's Marketing Practices and RIS Performance (Biesterveld TRO Declaration ¶¶ 18-26 and Biesterveld Trial Declaration ¶¶ 20-27, 32-33)¹²

12. Ms. Biesterveld is entirely competent and entitled to summarize the history of VISA's communications concerning Vertrue's customer acceptance practices, fraud performance issues, and the audit conducted by Edgar, Dunn & Company (the "Edgar Dunn Report") because she gained personal knowledge of these matters during the course of her monitoring, and then

¹⁰ Biesterveld Trial Decl. at ¶ 17.

¹¹ Perry v. Ethan Allen, Inc., 115 F.3d 143, 151 (2nd Cir. 1997) ("'[U]nfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party.... The prejudice must be 'unfair.'" (quoting Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977))).

¹² While the Motion requests that ¶ 30 of the Biesterveld Trial Decl. be stricken from the record as set forth in the redline in Appendix C of the Motion, the Motion does not discuss the basis for striking this section of Ms.

managing, Vertrue's account. Although William Matos initially handled issues involving the monitoring and managing of chargeback or fraud performance issues,¹³ Ms. Biesterveld was actively involved with Vertrue's account since early 2011 and became aware of Vertrue's concerns with respect to chargeback and fraud performance, as well as the Edgar Dunn Report. In this regard, Ms. Biesterveld was privy to and had the occasion to review VISA's January 2010 letter citing Paymentech for Vertrue's violation of the VISA International Operating Regulations (the "VIOR"), VISA's January 2011 letter regarding its issues with Vertrue's acceptance practices and fraud performance issues, and Paymentech's May 2011 letter to Vertrue informing Vertrue that the company needed to modify certain areas of its business in order to be compliant with the VIOR in connection with her review of Paymentech's files in the ordinary course of business, as well as her direct communications with VISA.¹⁴ Paymentech has produced to Vertrue in discovery thousands of documents from its business records and there is no good faith basis for Vertrue to challenge the authenticity of these documents.

13. Lastly, it is absurd for Vertrue to contend that Ms. Biesterveld's alleged inability to *calculate* RIS ratios somehow proves its allegation that Ms. Biesterveld does not have personal knowledge of Vertrue's RIS *performance*. Ms. Biesterveld has not been tasked with the

Biesterveld's Trial Decl.

¹³ Transcript of June 13, 2012, Deposition of William Matos ("Matos Tr.") at 67:13 – 68:8.

¹⁴ Hornes v. EOUSA, 2007 WL 1322088 at * 4 (D.D.C. May 4, 2007) ("Agency declarant, whose declaration was based upon his personal knowledge, review of agency files and records, and information he acquired in the performance of his official duties, meets the personal knowledge requirement."); see also DIRECTV, Inc. v. Budden, 420 F.3d 521, 530 (5th Cir. 2005) (personal knowledge may be inferred from an affiant's position with a company); Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531, 544 n.13 (5th Cir. 2002) (holding that, "based on [affiant's] personal knowledge and his position with [the company], it was not an abuse of discretion for the district court to consider the information contained in the affidavits," where affiant stated that he was Director of Claims, that he had personal knowledge of the facts, and that he had access to and had reviewed the company's records as they pertain to information contained in the affidavits) (overruled on other grounds by Grand Isle Shipyard Inc. v. Seacor Marine, LLC, 589 F.3d 778, (5th Cir. 2009)); Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir. 1990) ("That Rule 56(e)'s requirements of personal knowledge and competence to testify have been met may be inferred from the affidavits themselves.").

responsibility of calculating Vertrue's RIS performance, and it is entirely appropriate for her, in the course of her professional responsibilities, to rely on the work of other Paymentech employees in this regard. As the evidence shows, Ms. Biesterveld has knowledge of Vertrue's RIS performance both from other Paymentech employees as well as from VISA directly.¹⁵

C. Ms. Biesterveld has Personal Knowledge of Vertrue's Compliance with VISA Rules on Recurring Payment Merchants and "Zombie Billing" (Biesterveld TRO Declaration ¶¶ 31-32, 34 and Biesterveld Trial Declaration ¶ 38)

14. With regard to the issue of "zombie billing," Ms. Biesterveld's declarations provide her opinion of Vertrue's harvesting proposal based on her personal knowledge of Vertrue's strategy going forward, which was set forth in several of Vertrue's own filed pleadings and declarations, including the *Declaration of Lorraine DiSanto in Accordance with Local Bankruptcy Rule 1007-2* [Docket No. 3]. Similarly, Ms. Biesterveld is entitled to provide her informed opinion that Vertrue's proposed billing practices would likely cause reputational harm to both VISA and Paymentech based on her personal knowledge gained from over 10 years of experience within the credit card processing industry¹⁶ and her discussion regarding these practices with VISA. Based on her experience, Ms. Biesterveld has determined that this type of operation (the continued billing of unwary consumers) undermines the fabric of good faith business practices and consumer confidence and may bring reputational harm to both Paymentech and VISA. Although the Debtors may disagree with her, Ms. Biesterveld's opinions on these issues are admissible pursuant to Federal Rule of Evidence 701.¹⁷

¹⁵ In fact, Ms. Biesterveld was easily able to determine that Vertrue's fraud ratio was above 50 basis points several days prior to her deposition when she was provided with the information from VISA.

¹⁶ Biesterveld Tr. at 45-6.

¹⁷ See *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (Rule 701 provides that a witness may testify in the form of opinion if the opinion is rationally based on the perception of the witness and helpful in understanding his testimony or in determining a fact in issue. Lay witness opinion is admissible so long as it would be helpful to

D. Ms. Biesterveld has Personal Knowledge of Vertrue's Compliance with VISA Regulations and the Processing Agreements (Biesterveld Supplemental Declaration ¶¶ 3-5, 7)

15. As an initial matter, Ms. Biesterveld does, in fact, have personal knowledge of and is familiar with VISA's rules and regulations. In addition to the fact that Ms. Biesterveld received training from VISA while employed at Paymentech,¹⁸ Ms. Biesterveld was also trained by Paymentech with regard to VISA regulations.¹⁹ Furthermore, Ms. Biesterveld routinely reviews VISA's rules and regulations in connection with fulfilling her responsibilities at Paymentech. Consequently, Ms. Biesterveld has extensive experience with VISA's rules and regulations.

16. With regard to Vertrue specifically, Ms. Biesterveld, among other things, has reviewed Paymentech's files on Vertrue, which include several letters from VISA relating to Vertrue's compliance with VISA regulations, including the November 17, 2011 letter, which discussed Vertrue's fraud and chargeback ratios and referenced the governing VIOR (with which Ms. Biesterveld is familiar) that permitted VISA to impose the 50 basis point requirement.

17. Indeed, Ms. Biesterveld participated telephonically in a November 14, 2011 conference call between VISA, Vertrue and Paymentech that shortly predated the November 17, 2011 letter. Based on that meeting, Ms. Biesterveld had personal knowledge that Vertrue was required to achieve a fraud to sales rates and chargeback ratio of 50 basis points or less and that Vertrue may be subject to immediate termination and disqualification pursuant to the VIOR if, among other things, Vertrue did not meet those requirements.

the factfinder and is rationally based on personal perception).

¹⁸ Biesterveld Tr. at 47:25-48:22.

¹⁹ Biesterveld Tr. at 46:17-47:6.

18. In addition, Ms. Biesterveld reviewed letters from VISA on February 24, 2012²⁰ and May 21, 2012 notifying Paymentech that VISA's fraud to sales rate and charge back rates were above 50 basis points.²¹ In fact, *the May 21, 2012 letter was addressed to Ms. Biesterveld's attention*, a fact the Debtors' conveniently ignore.

19. Based on the foregoing, it is clear that Ms. Biesterveld obtained personal knowledge of Vertrue's failure to comply with the VIOR in the course of performing her regular duties at Paymentech. Additionally, Ms. Biesterveld gained personal knowledge of, and is very familiar with, the terms of the Processing Agreements as she reviewed these agreements during the course of her monitoring and managing the Vertrue account.

20. Moreover, it should be noted that the deposition testimony of MaryAnn Ryan and William Matos do not contradict Ms. Biesterveld's declarations and deposition testimony regarding the 50 basis point requirement. As Ms. Ryan testified, Vertrue is the only merchant she is aware of that is subject to a target for fraud and chargeback ratios of less than 1% and there is no .5% criteria for the RIS program.²² William Matos testified that "VISA's operating regulations on RIS are that the merchant must stay below a 1% RIS total."²³

21. As Ms. Biesterveld's declarations note, VISA decided to impose the 50 basis point requirement pursuant to its authority under the VIOR as set forth in the November 17, 2011 letter. To the extent there is any alleged inconsistency between the testimony of Ms. Ryan or Ms. Matos and that of Ms. Biesterveld regarding the nature of the 50 basis point requirement

²⁰ The Debtors incorrectly assert that Ms. Biesterveld did not cite to or attach the February 24, 2012 VISA letter to testimony, Motion at ¶ 16, when, in fact, this letter was attached as Exhibit G in ¶ 9 of the Biesterveld TRO Decl.

²¹ Trial Decl. at ¶ 27.

²² June 15, 2012, Transcript of MaryAnn Ryan at 48:22 – 50:7.

²³ Matos Tr. at 56:11-14

(and there is none), any inconsistency is insignificant and of no import. For these reasons, there is no basis for Ms. Biesterveld's testimony regarding Vertrue's failure to comply with the VIOR and the Processing Agreements to be stricken.

E. Ms. Biesterveld has Personal Knowledge of VISA's Viewpoint and Anticipated Conduct (Biesterveld TRO Declaration ¶¶ 37-41 and Biesterveld Trial Declaration ¶¶ 33-35, 40-43)

22. Ms. Biesterveld undoubtedly has personal knowledge of VISA's concern about Vertrue's longstanding history of fraud and chargeback ratio compliance issues, VISA's directives regarding Vertrue's fraud and chargeback ratios and what action VISA may take in the event Paymentech is unable to terminate the Processing Agreements. First, as noted above, Ms. Biesterveld attended the November 14, 2011 meeting with Vertrue and VISA telephonically, during which the parties discussed Vertrue's performance and payment processing activity.²⁴ In this meeting, Ms. Biesterveld heard first-hand that VISA imposed certain Member Risk Reduction Requirements on Vertrue. The Debtors' contention that Ms. Biesterveld is not competent to testify as to what occurred during a meeting she personally attended is absurd. Secondly, as stated above, Ms. Biesterveld reviewed the November 17, 2011 letter wherein VISA imposed the 50 basis point requirement upon review of Vertrue's RIS performance and the May 21, 2012 letter was addressed to her.

23. Additionally, Ms. Biesterveld is entitled to provide her well-informed opinion as to what steps VISA may take with respect to potentially (1) disqualifying Vertrue, (2) imposing fines or penalties against Paymentech as a result of Vertrue's conduct, or (3) terminating its contractual relationship with Paymentech by virtue of her personal knowledge of (a) VISA expressing its displeasure with Vertrue at the November 14, 2011 meeting (which Ms.

²⁴ Biesterveld Trial Decl. at ¶ 33.

Biesterveld attended), and (b) reviewing the November 17, 2011 letter from VISA imposing the 50 basis point requirement. In fact, Ms. Biesterveld stated, rather unequivocally, that she was personally aware of VISA imposing fines against Paymentech for merchant violations of the VIOR.²⁵ Accordingly, Ms. Biesterveld's statements regarding potential VISA conduct are not mere speculation - they comprise her well-informed opinions which are admissible pursuant to Federal Rule of Evidence 701.

CONCLUSION

24. As set forth above, Ms. Biesterveld has personal knowledge of the testimony given in her declarations and that testimony does not constitute hearsay. Based on the foregoing, Paymentech respectfully requests that the Court (i) deny the Motion, and (ii) grant Paymentech such other and further relief as is just and proper.

Dated: New York, New York
June 25, 2012

Respectfully submitted,

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²⁵ Biesterveld Tr. at 80:6-10.