

Plaintiff,

vs.

TRANSNET WIRELESS CORPORATION,  
a Florida corporation, et al.

Defendants.

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**ORDER AND OPINION GRANTING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT**

THIS CAUSE is before the Court upon Plaintiff Federal Trade Commission's Motion for Summary Judgment, (DE 89), filed on June, 2, 2006. On August 9, 2006, the Court granted (DE 113) Defendant Bradley Cartwright's Motion for Extension of Time to File an Opposition to Plaintiff's Motion for Summary Judgment (DE 109). In that order, the Court advised the *pro se* Defendants that the Court would be considering Plaintiff's Motion on September 8, 2006. The Court also instructed Defendants on how to respond to a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. The Court cautioned Defendants that failure to file a response would result in the Court accepting all material facts set forth in the Motion as true, provided there is record support. A review of the record reveals that Defendants have not filed a response to Plaintiff's Motion for Summary Judgment.<sup>1</sup> Accordingly, the matter is now

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<sup>1</sup> Defendant Farris Pemberton submitted a letter addressed to the undersigned, denying generally any wrongdoing. In the letter, Mr. Pemberton asserts that his role in the 'operations' were limited as serving as a monitor on Paul Pemberton's second shift to assure employees were



to the Defendants, for the purposes of this Summary Judgment Motion, are as follows.

***PARTIES***

Plaintiff, the Federal Trade Commission, is an independent agency of the United States government created by statute. 15 U.S.C. §§ 41 *et seq.* The Commission is charged, *inter alia*, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce, as well as enforcement of the Franchise Rule, 16 C.F.R. § 436. The Commission is authorized to initiate federal district court proceedings, to enjoin violations of the FTC Act in order to secure such equitable relief as may be appropriate in each case, and to obtain consumer redress. 15 U.S.C. §§ 53(b) and 57(b).

Defendant Nationwide Cyber Systems, Inc., (“Nationwide”) is a Florida corporation with its principal place of business located at 6030 Hollywood Boulevard, Suite 140, Hollywood, Florida 33024. Nationwide promoted and sold business ventures involving public access Internet kiosks. Nationwide transacted business in the Southern District of Florida. (Pl. Ex. 1, pp. 114, 118, 178.) Nationwide was incorporated in the state of Florida in January, 2001. (Pl. Ex. 9, pp. 31; Pl. Ex. 20, p. 16.)

Defendant Transnet Wireless Corporation, (“Transnet”) is a Florida corporation with its

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their answers and discovery responses, refusing to answer all substantive discovery questions. Courts have held that adverse inferences may be drawn in the civil context when Defendants invoke the privilege in refusing to testify in response to probative evidence offered against them. *Mitchell v. United States*, 526 U.S. 314, 328 (U.S. 1999). Courts may not draw adverse inferences, however, if it is the sole basis for Plaintiff’s prima facie case, or will cause the “automatic entry of summary judgment.” *United States v. Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991) (citing *Pervis v. State Farm and Case. Co.*, 901 F.2d 944, 949 (11th Cir. 1990)). Here, in light of the myriad evidence presented by Plaintiff, the adverse inferences will not result in the automatic entry of summary judgment. Thus, Plaintiff’s motion is granted; the Court will draw adverse inferences where it deems appropriate.

principal place of business located at 100 South Pine Island Road, Suite 200, Plantation, Florida 33324. Transnet promoted and sold business ventures involving public access Internet kiosks or terminals and transacted business in the Southern District of Florida. (Pl. Ex. 1, pp. 85, 208.)

Transnet was incorporated in the state of Florida in December 2002. (Pl. Ex. 1, p. 85.)

Defendant Paul Pemberton was an officer, director, manager, and/or an owner of both Nationwide and Transnet. He formulated directed, controlled, or participated in the acts and practices of Nationwide and Transnet. He transacted business in the Southern District of Florida.

(Pl. Ex. 1, p. 120; Pl. Ex. 12, ¶ 3; Pl. Ex. 15, ¶ 4; Pl. Ex. 28, ¶ 3; Pl. Ex. 31, ¶ 4.) Defendant

Farris Pemberton was an officer, director, manager, and/or owner of corporate defendant

Nationwide. He formulated, directed, controlled, or participated in the acts and practices of

Nationwide and transacted business in the Southern District of Florida. (Pl. Ex. 1, pp. 113-120,

Pl. Ex. 2, pp. 7, 12.) Defendant Bradley Cartwright was an officer, director, manager, and/or

owner of corporate defendant Transnet. He formulated, directed, controlled, or participated in was an officer, director,

kiosks, also known as kiosks or Internet terminals. (Pl. Ex. 1-32.) These free-standing Internet kiosks house a computer hard-drive, monitor, wireless router, and vending slot. (*Id.*) The units provide direct Internet access, for a fee, to numerous users from public locations, such as hotels, airports, coffee houses, malls, hospitals, and bookstores. (*Id.*)

Defendants promoted their business ventures to prospective purchasers through a variety of media, including radio and television advertisements, an Internet web page, written marketing materials, and telephonic and in-person sales pitches. (*E.g.*, Pl. Ex. 1, pp. 220-247; Pl. Ex. 8, ¶ 1; Pl. Ex. 9, ¶ 2; Pl. Ex. 13, ¶ 2; Pl. Ex. 31, ¶ 1.) Through one or more of these means, Defendants made various representations designed to lure prospective purchasers into buying a business venture by misrepresenting (1) the amount of money the potential purchaser can reasonably expect to earn with the business venture and (2) the availability and profitability of locations for kiosks. For example, a radio advertisement aired during programs, such as the Rush Limbaugh program, stated:

Would you like to own your own business and enjoy financial independence? . . . There is no technical knowledge required. You get everything you need to own and operate your own business. . . . You simply receive a monthly check for all the wireless revenue generated at your location. . . . There is unlimited income potential. . . . Prime locations are available now.

(Pl. Ex. 1, p. 1; see also, Pl. Ex. 13, ¶¶ 2-3; Pl. Ex. 15, ¶ 1; Pl. Ex. 16, ¶ 2.3600 0.0000 TD( ai)Tj11.6400

there is a potential to make significant sums of money, that prime locations are available, that a consumer will be running his/her own business, and that there will be a 100% return in the first year. (Pl. Ex. 2, ¶ 2; Pl. Ex. 3, ¶ 2; Pl. Ex. 4, ¶ 2; Pl. Ex. 5, ¶ 2; Pl. Ex. 6, ¶ 2; Pl. Ex. 7, ¶ 2; Pl. Ex. 9, ¶ 2; Pl. Ex. 10, ¶ 2; Pl. Ex. 11, ¶ 2; Pl. Ex. 12, ¶ 1; Pl. Ex. 14, ¶ 2; Pl. Ex. 30, ¶ 2; Pl. Ex. 32, ¶ 2; Adv. Inf. 8, 42, 67, 129, 164.) In their advertisements, Defendants made representations about the earnings potential of its business venture, and urged consumers to contact them through a toll-free number. (*Id.*) Prospective purchasers called and talked with one of the Defendants or the Defendants' salespeople. (*E.g.*, Pl. Ex. 1, ¶ 7; Pl. Ex. 4, ¶ 2; Pl. Ex. 7, ¶ 2; Pl. Ex. 8, ¶ 1; Pl. Ex. 15, ¶ 2; Pl. Ex. 30, ¶ 4; Pl. Ex. 31, ¶ 2.)

During these sales calls, Defendants and their salespeople represented to prospective business venture purchasers that, in exchange for payment often ranging from \$9,000 to \$100,000, purchasers would receive public access Internet kiosk(s) and profitable locations, through which they were likely to derive substantial income. (Pl. Ex. 5, ¶¶ 3-7; Pl. Ex. 6, ¶¶ 3-8; Pl. Ex. 8, ¶¶ 2-3; Pl. Ex. 10, ¶¶ 3-7; Pl. Ex. 13, ¶¶ 4-6; Pl. Ex. 14, ¶¶ 3-6; Pl. Ex. 15, ¶¶ 4-8; Pl. Ex. 16, ¶¶ 6-9; Pl. Ex. 26, ¶¶ 3-6; Pl. Ex. 29, ¶¶ 3-8; Pl. Ex. 30, ¶¶ 4-8; Pl. Ex. 31, ¶¶ 4-7; Pl. Ex. 39, pp. 5-7, 10-11, 14-20, 22-27.) Generally, Defendants' salespeople told potential consumers that the average income generated from the business venture ranged from \$1,000 to \$2,000 per month per kiosk. (Pl. Ex. 2, ¶ 7; Pl. Ex. 3, ¶ 4; Pl. Ex. 4, ¶ 3; Pl. Ex. 5, ¶ 3; Pl. Ex. 6, ¶¶ 3-6; Pl. Ex. 7, ¶ 3; Pl. Ex. 8, ¶ 2; Pl. Ex. 10, ¶ 3; Pl. Ex. 12, ¶ 3; Pl. Ex. 13, ¶ 4; Pl. Ex. 14, ¶ 3; Pl. Ex. 15, ¶ 4; Pl. Ex. 16, ¶ 6; Pl. Ex. 17, ¶ 4; Pl. Ex. 18, ¶ 5; Pl. Ex., 19, ¶ 4; Pl. Ex. 20, ¶ 6; Pl. Ex. 21, ¶ 2; Pl. Ex. 22, ¶ 3; Pl. Ex. 23, ¶ 4; Pl. Ex. 24, ¶ 3; Pl. Ex. 25, ¶ 3; Pl. Ex. 29, ¶ 3; Pl. Ex. 31, ¶ 4; Pl. Ex. 32, ¶ 3; Pl. Ex. 39, pp. 19-21, 24-25, 35, 49-50.)

One scenario typically described by Defendants was that purchasers of just a 2-location plan, which consisted of 2 Internet kiosks and on-going support, for \$17,990 to \$25,000, would make over \$20,000 per year. (*E.g.*, Pl. Ex. 2, ¶ 7; Pl. Ex. 5, ¶ 3; Pl. Ex. 6, ¶ 3; Pl. Ex. 8, ¶ 2; Pl. Ex. 10, ¶ 3; Pl. Ex. 13, ¶ 4; Pl. Ex. 26, ¶ 3.) Additionally, Defendants would further entice consumers by stating that consumers could increase, and likely double, their income by selling advertisement space on the kiosk screen to businesses. (Pl. Ex. 2, ¶ 9; Pl. Ex. 5, ¶ 3; Pl. Ex. 10, ¶¶ 3-4; Pl. Ex. 12, ¶ 4; Pl. Ex. 14, ¶ 3; Pl. Ex. 17, ¶ 4; Pl. Ex. 18, ¶ 4; Pl. Ex. 20, ¶ 7; Pl. Ex. 21, ¶ 5; Pl. Ex. 22, ¶ 7; Pl. Ex. 23, ¶ 7; Pl. Ex. 24, ¶ 4; Pl. Ex. 28, ¶ 3; Pl. Ex. 29, ¶ 4; Pl. Ex. 39, pp. 6, 15, 26-27, 31-32, 38, 45-46, 53, 59.) Defendants also told consumers that they would recoup the cost of the terminal in one or two years. (Pl. Ex. 3, ¶ 4; Pl. Ex. 9, ¶ 3; Pl. Ex. 12, ¶ 3; Pl. Ex. 13, ¶ 5; Pl. Ex. 14, ¶ 3; Pl. Ex. 15, ¶ 4; Pl. Ex. 17, ¶ 4; Pl. Ex. 20, ¶ 6; Pl. Ex. 25, ¶ 3; Pl. Ex. 26, ¶ 3; Pl. Ex. 27, ¶ 5; Pl. Ex. 28, ¶ 2; Pl. Ex. 31, ¶ 4; Pl. Ex. 37.)

As part of its sales pitch, Defendants represented in their promotional materials that they would assist consumers in finding the “very best locations available” in their area. (*E.g.*, Pl. Ex. 1, p. 2; Pl. Ex. 2, ¶ 5; Pl. Ex. 39, pp. 3, 16-17, 24, 33, 48.) Defendants’ sales representatives consistently told consumers that Defendants location is the key to the business and that Defendants’ location department would find prime, high-traffic, and profitable locations in which to set up the Internet kiosk(s). (Pl. Ex. 2, ¶ 10; Pl. Ex. 3, ¶ 4; Pl. Ex. 5, ¶ 5; Pl. Ex. 7, ¶ 2; Pl. Ex. 8, ¶ 2; Pl. Ex. 10, ¶¶ 2, 5; Pl. Ex. 13, ¶ 4; Pl. Ex. 14, ¶ 3; Pl. Ex. 15, ¶ 4; Pl. Ex. 17, ¶ 4; Pl. Ex. 20, ¶ 6; Pl. Ex. 25, ¶ 3; Pl. Ex. 26, ¶ 3; Pl. Ex. 27, ¶ 5; Pl. Ex. 28, ¶ 2; Pl. Ex. 31, ¶ 4; Pl. Ex. 37.)

secure placement of the Internet kiosk(s) in locations such as hotels, hospitals, malls, airports, coffee shops, truck-stops, and marinas. (Pl. Ex. 1, p. 15; Pl. Ex. 4, ¶ 3; Pl. Ex. 5, ¶ 5; Pl. Ex. 6, ¶ 3; Pl. Ex. 10 ¶ 5; Pl. Ex. 11, ¶ 3; Pl. Ex. 12, ¶ 1; Pl. Ex. 16, ¶ 6; Pl. Ex. 17, ¶ 12, Pl. Ex. 21, ¶ 2; Pl. Ex. 22, ¶ 3; Pl. Ex. 25, ¶ 3; Pl. Ex. 26, ¶ 4; Pl. Ex. 27, ¶ 6; Pl. Ex. 30, ¶ 5; Pl. Ex. 39, pp. 7-8, 16, 23, 33, 47, 54.) If the first location where the kiosk was placed was not successful, Defendants promised that the company would re-locate the kiosk, generally telling consumers they would do so free of charge. (Pl. Ex. 8, ¶ 2; Pl. Ex. 18, ¶ 3; Pl. Ex. 20, ¶ 6; Pl. Ex. 22, ¶ 5; Pl. Ex. 24, ¶ 7; Pl. Ex. 39, pp. 9, 17-18, 24, 33, 48, 54.)

Either before or after the initial sales pitch, Defendants sent a package of promotional materials to prospective purchasers. (*E.g.*, Pl. Ex. 1, pp. 69-112; Pl. Ex. 12, pp. 8-9, 14-28; Pl. Ex. 15, pp. 11-34; Pl. Ex. 19, pp. 6-24; *see also*, Pl. Ex. 1, ¶¶ 8, 9; Pl. Ex. 17, ¶ 2, pp. 9-12; Pl. Ex. 20, pp. 9-31.) This package typically included, among other things, a welcome letter from the president of the company, either Farris Pemberton at Nationwide or Bradley Cartwright at Transnet, promotional brochures and pamphlets, a video, and a disclosure document (the “basic disclosure document”). (*E.g.*, Pl. Ex. 1, pp. 69-112; Pl. Ex. 12, pp. 8-9, 14-28; Pl. Ex. 15, pp. 11-34; Pl. Ex. 32, pp. 8-27; Pl. Ex. 23, pp. 9-25.) For example, the cover letter of the package of promotional materials for Nationwide stated, in part:

If you're looking to start your own business and enjoy financial independence, then you have found a home with us. Because of our future advertising goals, we are looking for only 100 Route Operators in your state. We welcome you to join us while there is still availability. . . . When you follow our formula for success, a profitable business is just around the corner!

(Pl. Ex. 17, p. 9.) Likewise, the cover letter of the package of promotional materials for Transnet



stated, in part:

Transnet Wireless Corporation is offering you an opportunity to take advantage of the hottest and fastest growing sector in technology – Wireless Fidelity (Wi-Fi). . . . If you would like to own your own business and enjoy financial freedom, please take the time to review this package thoroughly. There is limited availability in each state. Your regional director will explain our program in detail and address any questions you may have.

(Pl. Ex. 1, p.73.) The Nationwide promotional brochure stated, in part:

If you would like a MORE SECURE FUTURE, don't wait!

Be your own boss. . . . Increase your monthly cash flow.  
Secure your future. . . . No technical knowledge required. . . .  
Light work.

As with many businesses, location is all-important in providing high traffic. And with this product being so new, the best locations are still available. . . .

Nationwide Cyber Systems, Inc. will assist you in obtaining the very best locations available in your area.

Follow our formula for success, purchase and place the machines required, and then wait for the profits to roll in.

Basically all you have to do is collect your money and keep your machines clean and running. About an hour a week per machine is generally all that's needed. . . .

It's a perfect business opportunity for anyone wishing to supplement their income initially and to build a business th



prospective purchasers that each kiosk made money based on the number of transactions conducted at the kiosk. Then, Defendants and their salespeople told purchasers that the number of daily transactions on one kiosk typically ranged somewhere between 5 and 35 per day. At this transaction rate, the c

even though he was one of the individuals who directed and controlled the operations of Transnet as regional director and director of sales and marketing. In addition, the Transnet disclosure document failed to disclose that Cartwright previously worked at and was Director of Operations at Nationwide. (E.g., Pl. Ex. 1, pp. 113-120; Pl. Ex. 6, ¶ 7; Pl. Ex. 12, ¶ 3; Pl. Ex. 19, pp. 14-15; Pl. Ex. 20, pp. 17-18; Pl. Ex. 23, pp. 15-16; Pl. Ex. 32, pp. 5, 13-14; Pl. Ex. 34; Pl. Ex. 1, pp. 87-103, 113-120; Pl. Ex. 12, pp. 18-19; Pl. Ex. 19, pp. 14-15; Pl. Ex. 32, pp. 13-14; Pl. Ex. 34, p. 5; Pl. Ex. 43, pp. 6-8, 11, 12, 14; Adv. Inf. 58.; Pl. Ex. 1, pp. 311, 383-84; Pl. Ex. 15, ¶ 4, pp. 18-19; Pl. Ex. 16, pp. 24-25; Pl. Ex. 24, pp. 17-18; Pl. Ex. 31, ¶ 4; Pl. Ex. 36, pp. 5, 19; Pl. Ex. 43, p. 2.)

In addition, Defendants' basic disclosure document failed to provide a statement disclosing the names, addresses and telephone numbers of any previous customers of either Nationwide or Transnet, as required by the Franchise Rule. (Pl. Ex. 15, pp. 13-28; Pl. Ex. 16, pp. 20-36; Pl. Ex. 19, pp. 10-24; Pl. Ex. 20, pp. 13-27; Pl. Ex. 23, pp. 11-25; Pl. Ex. 24, pp. 13-26; Pl. Ex. 32, pp. 9-23; Pl. Ex. 34, pp. 1-14; Pl. Ex. 36, pp. 1-34.) Moreover, Defendants did not provide a reasonable basis for its earnings representations, failed to disclose additional information including the number and percentage of prior purchasers known by it to have achieved the same or better results, and failed to provide prospective business venture purchasers with an earn ea

least four different disclosure statements for Nationwide and Transnet that failed to list the number or percentage of business opportunity ventures that attained the level of earnings Defendants claimed. (*E.g.*, Pl. Ex. 15

Keep in mind that doesn't include *any* additional revenue generated from the machine. (Emphasis in original).

Leaving you with a net profit of \$1,721 for the month. Multiply that times 12 months and that's a total of \$20,652 a year, net profit on each machine.

Today you may have 5 people a day logging on a day wireless, but a year from now that can easily be 20 people a day. At an average of \$6, that's over \$43,000 a year, from wireless usage alone, in only one location! That's the opportunity in this business!

There are two

13-16; Pl. Ex. 4, ¶ 12; Pl. Ex. 6, ¶ 12; Pl. Ex. 8, ¶¶ 7-8; Pl. Ex. 9, ¶¶ 7-9; Pl. Ex. 10, ¶¶ 10-13; Pl. Ex. 11, ¶¶ 8-9; Pl. Ex. 14, ¶¶ 8-14; Pl. Ex. 21, ¶ 23; Pl. Ex. 22, ¶¶ 17-18; Pl. Ex. 26, ¶¶ 9-11; Pl. Ex. 27, ¶ 11; Pl. Ex. 30, ¶¶ 9-13; Pl. Ex. 31, ¶ 11.) For example, one consumer whose kiosk was located in a truck stop by Defendants made only \$300 in total revenue in a 12-month period. Even when consumers became dissatisfied with the locations services of Defendants and found their own locations, of the type promoted by Defendants, consumers still failed to earn much money. One consumer who placed his kiosks in high-traffic shopping malls made \$50 in gross revenue per month over the six months that he kept them in their locations. (Pl. Ex. 6, ¶¶ 11-12.) After his expenses, including lease and DSL line rental, this consumer lost money. (*Id.*) Most, if not all consumers, made no profit from Defendants' business venture. (Pl. Ex. 2 - 32.)

None of the 31 consumers providing declarations to this Court recouped his/her investment within six months to one year or for a longer period of time. (*E.g.*, Pl. Ex. 2, ¶ 21; Pl. Ex. 3, ¶ 18; Pl. Ex. 4, ¶ 15; Pl. Ex. 5, ¶ 16; Pl. Ex. 6, ¶ 16; Pl. Ex. 7, ¶ 11; Pl. Ex. 8, ¶ 12; Pl. Ex. 9, ¶ 12; Pl. Ex. 10, ¶ 13; Pl. Ex. 11, ¶¶ 8-12; Pl. Ex. 12, ¶ 18; Pl. Ex. 13, ¶¶ 12; Pl. Ex. 14, ¶ 18; Pl. Ex. 15, ¶ 25; Pl. Ex. 23, ¶ 23; Pl. Ex. 24, ¶ 15;; Pl. Ex. 25, ¶ 18; Pl. Ex. 26, ¶ 15; Pl. Ex. 27, ¶ 14; Pl. Ex. 29, ¶ 14; Pl. Ex. 30, ¶¶ 13, 16; Pl. Ex. 31, ¶ 14.) Defendants were aware that consumers were not earning substantial earnings from the Nationwide or Transnet business opportunity and achieving the projected sales levels; numerous consumers complained directly to Defendants that their locations were not generating the levels of income Defendants represented and Defendants then responded to the complaints. (*E.g.*, Pl. Ex. 3, ¶¶ 14,15; Pl. Ex. 5, ¶ 10 ; Pl. Ex. 6, ¶ 13; Pl. Ex. 8, ¶¶ 8-9; Pl. Ex. 12, ¶ 13; Pl. Ex. 14, ¶ 15; Pl. Ex. 15, ¶¶ 17,18, 23; Pl. Ex. 26, ¶ 12; Pl. Ex. 48. Pl. Ex. 50.)

***MISREPRESENTATIONS REGARDING LOCATIONS***

In numerous instances, in the course of offering for sale and selling the Nationwide and Transnet business ventures, Defenda



will relocate that machine at absolutely no charge . . . .

*(Id.)*

During the sales call, Defendants told prospective purchasers that Defendants had their own in-house locations department that would assist the consumer in securing the most profitable locations available in the consumer's area and that the locators would research and qualify all the potential locations to make sure the locations meet consumers' criteria. (Pl. Ex. 1, p. 15, ll. 18-24; Pl. Ex. 39, pp. 17, 47; Adv. Inf. 46.) Defendants usually told consumers that a locator would contact them to arrange for the location of their kiosk(s). (Pl. Ex. 2, ¶ 7; Pl. Ex. 10, ¶ 3; Pl. Ex. 23, ¶ 3; Pl. Ex. 39, pp. 17, 47.) In addition, some consumers were told to send Defendants a "wish list" indicating where the consumer thought his/her kiosk(s) should be placed. (Pl. Ex. 4, ¶ 5; Pl. Ex. 7, ¶ 5; Pl. Ex. 12, ¶ 6; Pl. Ex. 17, ¶¶ 6-7; Pl. Ex. 21, ¶ 4; Pl. Ex. 22, ¶ 10.)

Defendants told consumers that the in-house locator would set up appointments for two to three times the number of locations needed. Then, the consumer would only have to look at the locations and select the location best suited for the consumer. (Pl. Ex. 2, ¶ 10; Pl. Ex. 5, ¶ 5; Pl. Ex. 7, ¶ 3; Pl. Ex. 9, ¶ 4; Pl. Ex. 10, ¶ 5; Pl. Ex. 12, ¶ 6; Pl. Ex. 20, ¶ 8; Pl. Ex. 22, ¶ 3; Pl. Ex. 23, ¶ 7; Pl. Ex. 39, pp. 23-24.) Defendants told consumers that they would back each location with a guarantee that if the consumer ever had a location that was not doing well, for any reason, Defendants would relocate the machine at no cost to the consumer. (Pl. Ex. 8, ¶ 2; Pl. Ex. 18, ¶ 3; Pl. Ex. 20, ¶ 6; Pl. Ex. 22, ¶ 5; Pl. Ex. 24, ¶ 7; Pl. Ex. 39, pp. 9, 17-18, 24, 33, 48, 54; Pl. Ex. 41, pp. 1-15; Adv. Inf. 53.)

Consumers purchased the Nationwide and Transnet business opportunity based on Defendants' representations that their kiosks would be located in high-traffic, high volume

locations such as hotels, hospitals, malls, coffee shops, truck-stops, and marinas, including the guarantee of a free relocation of the kiosks if the consumer is dissatisfied with the level of sales.

***INDIVIDUAL ACTIONS*****Paul Pemberton**

Defendant Paul Pemberton ran the day-to-day operations of the proposed Corporate Defendants. He regularly held himself out as an officer or director of the companies. For example, he told several Nationwide consumers that he was the president or the vice-president, and he told Transnet consumers that he was the regional director. Many company documents listed Paul Pemberton as director of sales and marketing. (*E.g.*, Pl. Ex. 6, ¶ 7; Pl. Ex. 12, ¶ 3; Pl. Ex. 15, ¶ 4; Pl. Ex. 28, ¶ 3; Pl. Ex. 31, ¶ 4; Pl. Ex. 43, pp. 2, 6-8, 11-12, 14.) In addition, Defendant Paul Pemberton signed corporate documents as vice-president of Nationwide. (Pl. Ex. 1, pp. 115-116; Pl. Ex. 43, pp. 7, 11, 13.) Paul Pemberton was also a signatory on the Nationwide bank accounts along with his brother, Farris Pemberton. On those bank accounts, he was variously listed as vice-president of sales, regional director, and director of operations. (Pl. Ex. 1, pp. 6, 113-120.)

Paul Pemberton made numerous sales pitches directly to consumers. (Pl. Ex. 6, ¶ 7; Pl. Ex. 12, ¶ 3; Pl. Ex. 15, ¶ 4; Pl. Ex. 28, ¶ 3; Pl. Ex. 31, ¶¶ 4-5; Pl. Ex. 42.) During his sales pitches, he made unsubstantiated earnings claims and claims about profitable locations. (Pl. Ex. 6, ¶ 7; Pl. Ex. 12, ¶ 3; Pl. Ex. 15, ¶ 4; Pl. Ex. 28, ¶ 3; Pl. Ex. 31, ¶¶ 4-5.) He also received at least one consumer complaint. (Pl. Ex. 3, ¶ 15.) Additionally, Paul Pemberton hired and fired employees at Corporate Defendants. (Adv. Inf. 32.) He also monitored and often advised Nationwide's attorney on which course of action to pursue regarding legal action brought against Nationwide by consumers. (Pl. Ex. 44, pp. 3-4.)



p. 7; Pl. Ex. 27, p. 6; Pl. Ex. 30, pp. 6, 8-9; Pl. Ex. 32, pp. 8, 28, 30; Pl. Ex. 34, p. 5; *E.g.*, Pl. Ex. 2, p. 7; Pl. Ex. 12, p. 8.; Pl. Ex. 17, p. 9; Pl. Ex. 19, p. 6; Pl. Ex. 20, p. 9.)

Farris Pemberton was introduced to at least two consumer declarants on site at Nationwide's offices. He made claims to them, including earnings and locations claims to at least one of them. (Pl. Ex. 25, ¶ 5; Pl. Ex. 26, ¶ 5.) Farris Pemberton also received and responded to complaints made by consumers about deceptive practices of Nationwide, often denying refunds requested by the consumers. (*E.g.*, Pl. Ex. 50, pp. 5-6, 9, 23, 23-29, 36-40, 50-51, 103, 106-107, 115-121; 152-155, 204-207, 247-248.)

**Bradley Cartwright**

Defendant Bradley Cartwright, along with Defendant Paul Pemberton, operated and directed Transnet. Defendant Cartwright is listed as the president of Transnet on the Florida Business Opportunity Act filing application and as the president and sole shareholder of Transnet on the FTC Franchise Rule disclosure document, on the City of Plantation, Florida, business license application form, and on Transnet's website. (Pl. Ex. 1, p. 91, 207-208, 221, 225, 293-300; Pl. Ex. 15, p. 18.) He was also a signatory on the Transnet bank accounts where he was listed as the president of Transnet. (Pl. Ex. 1, pp. 121-126.)

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Consulting, which was the account through which Transnet paid Bradley Cartwright. (Pl. Ex. 62.)

Bank records show that she was regularly given large sums of money on a monthly basis from Corporate Defendants, often in greater amounts than that being paid to her husband, Paul Pemberton, and to Bradley Cartwright. (Pl. Ex. 1, pp. 127-168.) A sample of Transnet's bank records indicate that Relief Defendant Margaret Pemberton received \$10,532 from Transnet in October 2004 and \$27,430 from Transnet in April 2005. Checks show, for example, that for the month of April 2005, Bradley Cartwright was paid \$15,214. (Pl. Ex. 1, pp. 135-138, 147, 149, 151, 153, 157-166.) In addition, a sample of documents for a three-month period in 2002 show that Relief Defendant Margaret Pemberton received over \$20,000 from Nationwide. (Pl. Ex. 38, pp. 1-2, 5-8, 11-16.)

Nothing on the record indicates that Margaret Pemberton provided any services to Corporate Defendants. Moreover, certain monthly payments of amounts greater than Paul Pemberton and Bradley Cartwright indicate that she had no legitimate claim to sums paid to her by the Corporate Defendants or by Defendant Bradley Cartwright (through Cartwright Consulting). (Pl. Ex. 1, pp. 135-138, 147, 149, 151, 153, 157-166; Pl. Ex. 38, pp. 1-2, 5-8, 11-16.)

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\_\_\_\_\_ **CONSUMER INJURY**

Consumers spent at least \$9,000 for each kiosk that they purchased. (*E.g.*, Pl. Ex. 16, ¶¶ 8-9.) Frequently, the consumers purchased a business opportunity consisting of two kiosks for over \$20,000. A number of consumers purchased a business opportunity consisting of five kiosks for \$40,000 or more. (*E.g.*, Pl. Ex. 2, ¶ 12; Pl. Ex. 5, ¶ 7; Pl. Ex. 6, ¶ 8; Pl. Ex. 8, ¶ 3; Pl. Ex. 9, ¶ 5; Pl. Ex. 10, ¶ 7; Pl. Ex. 13, ¶ 6; Pl. Ex. 14, ¶¶ 6, 7; Pl. Ex. 18, ¶ 8; Pl. Ex. 19, ¶ 6; Pl. Ex. 26, ¶ 6; Pl. Ex. 31, ¶ 7.) None of 31 consumers who provided declarations filed with this Court achieved anything more than nominal amounts of income, and, in many cases, no or almost no income. (Pl. Ex. 4, ¶ 9; Pl. Ex. 5, ¶¶ 9-11; Pl. Ex. 10, ¶¶ 9-13; Pl. Ex. 12, ¶¶ 10-14; Pl. Ex. 14, ¶¶ 8-12; Pl. Ex. 16, ¶¶ 10-13; Pl. Ex. 17, ¶¶ 7-13; Pl. Ex. 18, ¶ 8; Pl. Ex. 19, ¶¶ 7-9; Pl. Ex. 20, ¶¶ 11-19; Pl. Ex. 25, ¶¶ 7-11; Pl. Ex. 27, ¶¶ 8-10; Pl. Ex. 32, ¶¶ 5-19; Pl. Ex. 3, ¶ 17; Pl. Ex. 5, ¶ 3; Pl. Ex. 7, ¶¶ 8-9; Pl. Ex. 12, ¶¶ 11-14; Pl. Ex. 13, ¶¶ 11-12; Pl. Ex. 16, ¶¶ 15-16; Pl. Ex. 20, ¶ 19; Pl. Ex. 23, ¶¶ 17-18; Pl. Ex. 24, ¶¶ 12-13; Pl. Ex. 25, ¶¶ 11-13; Pl. Ex. 29, ¶ 12; Pl. Ex. 32, ¶¶ 12-13.)

In selling the public access Internet business venture, Transnet's Profit and Loss spreadsheet for the period of January 1, 1999 through October 20, 2005, indicates that Transnet received \$17,447,409.00 in sales. Plaintiff asserts that all of these proceeds were received from consumers who purchased Defendants' internet kiosk business opportunity venture and Defendants have not refuted this amount. According to the same Profit and Loss Spreadsheet, Transnet refunded \$238,396.17. Thus, after refunds, Transnet grossed \$17,209,012.83 (Pl. Ex. 51.) As the Defendants have not provided any evidence to dispute the amount of sales recorded on Transnet's own profit and loss spreadsheet, the Court accepts this figure as the total amount

consumers paid out to Transnet.

In selling the public access Internet business venture, Defendants' bank statements indicate that Na

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<sup>5</sup> This number is based on the amount of deposits Nationwide made in its Wachovia bank account. Based on Defendant's failure to dispute this amount, the Court accepts it as the amount Nationwide earned from customers. .

<sup>6</sup> The Court accepts the FTC's formula for assuming Nationwide's refunds were \$476,793.94 as Plaintiff's estimation benefits Defendants absent any asserted amount of refunds by Defendants.

absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party’s case. *Id.* at 325.

After the movant has met its burden under Rule 56©, the burden of production shifts and the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). According to the plain language of Fed. R. Civ. P. 56(e), the non-moving party “may not rest upon the mere allegations or denials of the adverse party’s pleadings,” but instead must come forward with “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson*, 477 U.S. at 257. “A mere ‘scintilla’ of evidence supporting the opposing party’s position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party.” *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party “is merely colorable, or is not significantly probative, then summary judgment may be granted.” *Anderson*, 477 U.S. 242, 249-50.

If the non-moving party fails to submit the necessary sworn affidavits or the concise statement of material fact , the Court may accept all material facts set forth in the Motion as true in accordance with Local Rule 7.5.D.

### **III. Discussion**

#### ***A. Violations Section 5 of the FTC Act***

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). To establish that an act or practice is deceptive under Section 5 of the FTC Act, the FTC must establish that (1) there was a representation; (2) the representation was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation was material. *FTC v. Tashman*, 318 F. 3d 1273, 1277 (11th Cir. 2003) (citing *FTC v. Atlantex Assocs.*, 1987-2 Trade Cas. (CCH) ¶ 67,778 at 59,252 (S.D. Fla. 1987), *aff’d*, 872 F. 2d 966 (11th Cir. 1987)); *FTC v. Peoples Credit First, LLC*, 2005 U.S. Dist. LEXIS 38545, 19-20 (M.D. Fla. 2005); *FTC v. Jordan Ashley, Inc.*, 1994-1 Trade Cas. (CCH) ¶ 70, 570 at 72,096 (S.D. Fla. 1994) (citing *FTC v. Amy Travel Serv. Inc.*, 875 F. 2d 564 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989)).

A representation is material if it is of a kind usually relied upon by a reasonably prudent person. *FTC v. Jordan Ashley, Inc.*, 1994-1 Trade Cas. (CCH) ¶ 70, 570 at 72,096 (S.D. Fla. 1994) (citing *FTC v. Amy Travel Serv. Inc.*, 875 F. 2d 564 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989)). The Commission, however, need not present proof of subjective reliance by each victim:

In an FTC Act Section 13(b) enforcement action in which the government seeks restitution to compensate thousands of individuals victims of unlawful practices, in contrast to a private action for fraud, such representative proof of injury suffered is sufficient to justify the requested relief . . . . Requiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals of the section.



the seemingly low-risk/high-reward opportunities.

The material representations made by salespersons were clear: in exchange for a payment of \$9,000 to \$100,000 (depending on the number of kiosks purchased), consumers would receive internet kiosks that would each generate, at the very minimum, income from \$1,000 to \$2,000 per month. For example, if the consumer purchased two Internet kiosks for \$17,990 to \$30,000, they could expect to make more than \$20,000 per year. The scripts used by the salespersons confirm this.

Defendants then sent consumers a 'welcome' packet of information that included the welcome letter from the president, brochures, and the Franchise Disclosure statement. The various claims in the brochures, cited to above, would lead a reasonably prudent consumer to conclude that a substantial income would be generated by the business opportunity.

To bolster these claims, Defendants directed purchasers to their website where charts detailed the *average* amount of earnings consumers were projected to make. These numbers depicted in the chart coincided with what the salespersons had promised on the phone. I

did not make *any* profit. Most consumers could not even cover their cost of their wireless internet.

When fairly and reasonably viewed as a whole, the Court concludes that this barrage of misrepresentations, promising substantial income and backed up by ostensibly concrete numbers, were material and likely to mislead consumers acting reasonably under the circumstances. Not only were they likely to mislead reasonably prudent consumers, but they did, resulting in over \$47 million in sales.

***ii. Misrepresentations Regarding Location Assistance***

The Defendants misrepresentations about securing profitable locations for the placement of the internet kiosks were equally material and violative of Section 5 of the Franchise

When fairly and reasonably viewed as a whole, the misrepresentations regarding the procurement of the kiosks were undisputably material misrepresentations that were likely to mislead, and in fact did mislead, consumers acting reasonably under the circumstances. These promises were unequivocal, consistent, and backed up by guarantees. All the evidence in the record indicates that reasonably prudent consumers would rely on these misrepresentations.

***B. The Franchise Rule 0000 TD(nta)Tj14.6400 0.0000 TD(tio)Tj12.7200 0.0000 TD(ns)Tj10.6800 0.0000 TD***



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As defined in

pp. 10-24.) In these Disclosures, Defendants made earnings claims within the meaning of the Rule Sections 436.1(b), (c), and (e). The Franchise Disclosure Documents provided by Defendants were deficient in several ways, thereby violating the Franchise Rule or Business Opportunity Rule.

First, Defendants did not disclose the names and business experiences of current directors and officers for the previous five years. For ex

### *C. Liability of Individual Defendants*

Once corporate liability has been established for violations of the FTC Act, two elements must be fulfilled for the FTC to establish individual liability: “the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them . . . the FTC must then demonstrate that the individual had some knowledge of the practices.”

*FTC v. Gem Merchandising Corp.*, 87 F. 3d 466, 470 (11th Cir. 1996)

under Section 13(b) of the FTC Act to remedy violations of Section 5 of the Act. *Gem Merchandising*, 87 F. 3d at 469-70. Included in the panoply of remedies are monetary remedies, including disgorgement and restitution. *Gem Merchandising*, 87 F. 3d at 469; *U.S. Oil & Gas*, 748 F. 2d at 1432, 1434; *FTC v. Silueta Distrib. Inc.*, 1995-1 Trade Cas. (CCH) ¶ 70,918 at 74,100 (N.D. Cal. 1995); *FTC v. Pantron I Corp.*, 33 F. 3d 1088, 1103 & n.34 (9th Cir. 1994), *cert denied*, 514 U.S. 1083 (1995); *Figgie Int'l*, 994 F. 2d at 606-8. In a deceptive sales scheme, restitution may be measured by the amount of loss suffered by the victim and the return to status quo. *Figgie Int'l*, 994 F. 2d at 606-8; *Atlantex*, 1987-2 Trade Cas. at 59,256. Defendants who have violated Section 5 of the FTC act ca

Not only did he assume executive titles, but he directly participated in the companies' deceptive practices. He pitched customers of both companies, promising unsubstantiated high profits and the securement of profitable locations. This personal participation underscores knowledge. This knowledge requirement is further proved by Paul Pemberton's and the company's receipt of consumer complaints and the companies' subsequent responses to those complaints, denying most refunds and frequently telling consumers that it was company policy not to give refunds. Based on the rec

Court concludes Farris Pemberton is personally liable for the deceptive acts and practices of Nationwide.

The Court also finds Brad Cartwright personally liable for the deceptive acts and practices of Transnet. Defendant Cartwright, along with Paul Pemberton, operated Transnet, both participating in its deceptive acts and practices and having knowledge thereof. He was also actively involved in the operations of Nationwide. This is conclusively established by the record evidence and adverse inferences the Court draws from Mr. Cartwright's invocation of the Fifth Amendment.

Defendant Cartwright is listed as the president of Transnet on the Florida Business Opportunity Act filing application, the Franchise Rule disclosure document, the Plantation, Florida, business license application form, and Transnet's website. He is a signatory on Transnet's bank account, where he is listed as president. Like Farris Pemberton, Defendant Cartwright signed initial letters to prospective purchasers as president of Transnet, making claims about enjoying financial freedom. He also responded to one or more consumer complaints as President of Transnet, denying requests for refunds. As such, Defendant Cartwright is liable for the deceptive acts and practices of Transnet.

Based on the factual record before the Court, and absent any objection or contrary assertion by Defendants, the Court concludes that the total amount money defrauded from consumers equals \$48,117,765.49. As discussed in greater detail earlier in this order, Transnet's sales after refunds equals \$17,447,409.00 and Nationwide's deposits after refunds equal \$30,908,752.66. Defendants do not dispute either of these amounts asserted in Plaintiff's Statement of Facts. Accordingly, based on the evidence provided by Plaintiff, the profit and loss



fully developed SEC context. In *SEC v. Cavanagh*, 155 F. 3d 129, 136 (2d Cir. 1998), the Second Circuit held that federal courts may order relief against a ‘nominal’ or defendant, an individual who is not accused of wrongdoing, where (1) the person had ill-gotten funds; and (2) does not have a legitimate claim to those funds.” *Id.* (citing *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998)). This rationale has been transplanted into the FTC arena by the Court in *CFTC v. Kinley*, 276 F.3d 87, 191 (4th Cir. 2002)). The Fourth Circuit acknowledged that it was not to extend the defendant in an FTC action for consumer fraud to extend the justification from the SEC context quoting *Colello*: “The federal courts can be employed to recover gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or the proceeds of the wrong.” *Id.* at 192 n. 4 (quoting 2000), the court explained that “it is just as important to discourage illegal activity the proceeds of that illegality from those who have given no current value for the have been turned over to them (even though they themselves have not directly engaged in the illegal activity) .” *Id.* at 1020.

Notwithstanding, \$300,000 for

through Transnet paid Bradley Cartwright



Therefore, the Court finds that Margaret Pemberton, as a relief defendant, must pay to the FTC \$1.6 million as further specified in this Court's Final Order.

#### **IV. Conclusion**

It hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment (**DE 89**) is **GRANTED** in whole as follows:

1) There does not exist a genuine issue of material fact as to whether Defendants Transnet, Nationwide, Paul Pemberton, Farris Pemberton, and Bradley Cartwright violated Section 5 of the FTC Act. As a matter of law, Defendants Transnet, Nationwide, Paul Pemberton, Farris Pemberton, and Bradley Cartwright violated Section 5 of the FTC Act.

2) There does not exist a genuine issue of material fact as to whether Defendants Transnet, Nationwide, Paul Pemberton, Farris Pemberton, and Bradley Cartwright violated the Franchise Rule. As a matter of law, Defendants Transnet, Nationwide, Paul Pemberton, Farris Pemberton, and Bradley Cartwright violated the Franchise Rule.

3) There does not exist a genuine issue of material fact as to whether Defendants Paul Pemberton, Farris Pemberton, and Bradley Cartwright are individually liable for violations of Section 5 of the FTC Act and the Franchise Rule. As a matter of law, Defendants Paul Pemberton, Farris Pemberton, and Bradley Cartwright are individually liable for violations of Section 5 of the FTC Act and the Franchise Rule.

4) Corporate Defendant Transnet and individual Defendants Paul Pemberton and Bradley  
Ca



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