[1]Plaintiff's Notice of Motion does not state that summary judgment is sought against Defendant, Jack G. Schwartz. It is unclear from the Court's docket sheet whether Defendant Schwartz has been dismissed from the action.

following reasons, Plaintiff's motion is **DENIED** as to Defendant Sanchez and **GRANTED** as to

Disclosure Document in connection with the profit projections/earning claims that were made to them by Defendant Corporations. (Pl.'s 56.1 ¶¶ I.47, 50, II.39-40, III.25-26). Numerous purchasers of Defendant Corporations' vending machines earned little or no return on their investment, even though they were promised income and profits by Defendants. (Pl.'s 56.1 ¶¶ I.36, II.38, III.19).

Defendant Guadagno was the owner of Essex, WMA, MV, and WMG, an officer of Essex, the president of WMA and WMG, and the managing member of WMA. (Pl.'s 56.1 ¶¶ II.43-47; III.4-5). In these capacities, he signed purchaser contracts, signed letters, made sales calls to prospective purchasers, was responsible for and controlled the marketing and sales of the vending machines, wrote and reviewed the sales scripts, wrote the classified ads, and ran the day-to-day business offices. (Pl.'s 56.1 ¶¶ II.48-50, 53-58, III.6, 8-12).

Defendant Guadagno initially began selling vending machine business opportunities through Essex to purchasers from approximately March 2000 to July 2000, (Pl.'s 56.1 ¶ III.7), and began selling vending machines through WMA and WMG from approximately the end of 2000 through 2001. (Pl.'s 56.1 ¶ II.3). In addition to the vending machine scheme discussed above, the FTC alleges that upon receiving calls from the purchasers who did not receive their machines within the specified contractual period, WMA and WMG would provide fake tracking numbers or tell purchasers that the vending machines were about to be delivered, when in fact they knew that to be untrue. (Pl.'s 56.1 ¶¶ II.29-30, 34). The FTC also states WMA and WMG used Proctor & Gamble's Pringles trademark in connection with the sale of vending machines without permission. (Pl.'s 56.1 ¶¶ II.16, 19).

In October 2001, MV was established as a New York limited liability company, and in

early 2002, Defendant Guadagno began selling vending machine business opportunities through

Amnesty Am. v. Town of W. Hartford, 288 F.3d 467, 470 (2d Cir. 2002) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact,

evidence clearly shows that, at the very least, there are numerous questions of fact with respect to Sanchez's participation, control, and knowledge of the alleged business practices at Manhattan Vending." (Def's Opp. at 3) Similarly, with respect to damages, Defendant Sanchez asserts that "at the very least, numerous questions of fact exist, precluding summary judgment, with respect to the amount of gross sales Sanchez would be responsible for, if any." (Def's Opp. at 25) Defendant Sanchez is correct.

To find a defendant individually liable for a violation of Section 5 of the FTC Act and the Franchise Rule for corporate practices, a party must demonstrate that (1) the corporate defendant violated the FTC Act or the Franchise Rule; and that (2) the individual defendant participated directly in the wrongful acts or practices *or* the individual defendant had authority to control the corporate defendant, and the individual defendant knew of the wrongful acts or practices. FTC v. Five-Star Automobile Club, Inc., 97 F.Supp.2d 502, 535 (S.D.N.Y. 2000). Authority to control a company is evidenced by active involvement with business matters and corporate policy including assumption of officer duties. Consumer Sales Corp. v. Federal Trade Commission, 198 F.2d 404, 408 (2d Cir. 1952); See also Rayex Corp. v. Federal Trade Commission, 317 F.2d 290, 295 (2d Cir. 1963) (noting that participation or control may exist when an individual is a substantial stockholder, vice-president, and is required during the president's absence to perform all his duties and exercise all his powers); FTC v. Publishing Clearing House, 104 F.3d 1168, 1170 (9th

truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" Five-Star Auto Club, 97 F.Supp. at 535.

The evidence presented in this case raises a relevant issue of fact as to Defendant Sanchez's direct participation in the alleged wrongful acts or his alleged authority to control the corporate defendant, MV. Specifically, the FTC lists the following evidence to support its claim that Defendant Sanchez either directly violated the FTC Act or had authority to control MV:

- Sanchez signed letters to MV purchasers as MV's managing member. (Fact 61)
- Sanchez signed Certificates of "Vandalism and Theft Insurance" as MV's "Executive" and admits that those Certificates were distributed to MV's products purchasers. (Fact 62)
- Sanchez signed MV payroll and commission checks as its managing member. (Fact 72)
- Sanchez maintained MV's payroll records, made bank deposits and wire transfers on behalf of MV, paid the advertising agency, and was responsible for placing MV advertisements. (Facts 73, 74, 75)
- Sanchez knew the first page of the promotional materials on MV's website was signed "With Warm Regards, Henry Sanchez, President," and he made no attempt to verify the accuracy of the information on this website. (Facts 77, 78)
- Sanchez reviewed and completed state and federal franchise disclosure forms on behalf of MV, which listed him as the managing member of MV. (Fact 88, TRO Ex. G)

(Ptf. Mem. at 8) Conversely, Defendant Sanchez disputes that he either personally violated the

FTC Act or had the authority to control MV, by setting forth the following evidence:

- An MV salesman testified that Sanchez was merely an investor in MV, and had no authority in the company. (Ex. B at pp. 21, 34-35) The salesman testified that while Guadagno held Sanchez out as the "managing member," this title existed in name only. (Id.)

- No signed operating agreement exists which designates Sanchez as a member, much less a managing member.

- Before Sanchez arrived at Manhattan Vending, Guadagno announced to the company that, although Sanchez would be investing in the company, Guadagno would still be retaining all control over the company. (Ex. B at pp. 21, 34-35). Guadagno made it clear that Sanchez was merely a "silent investor" with no control in the company. (Id.)

- MV salesmen testified that Sanchez had no involvement with writing sales scripts. (Ex. B at pp. 36-39) Sanchez had no authority to hire or fire employees. (Id.) Sanchez had no role in the advertising of the company. (Id

The FTC insists that Defendant Sanchez failed to dispute at all or does not adequately dispute numerous facts set forth in plaintiff's Rule 56.1 statement because he either does not specifically controvert the facts or does not support his dispute with admissible evidence. (Ptf's Reply Mem. at 2) Contrary to the FTC's argument, the evidence adduced by Defendant Sanchez (which includes references to admissible deposition testimony of MV salesmen and MV's sales manager) raises an issue of fact concerning Defendant Sanchez's direct participation in the alleged fraudulent acts or his authority to control MV. See, e.g., Federal Trade Commission v. P.M.C.S., Inc., 21 F.Supp.2d 187, 192 (E.D.N.Y. 1998) (finding that fact issues existed that precluded summary judgment when defendants disputed the extent to which they participated in the alleged FTCA and Franchise Rule violations, and the extent to which one defendant actually controlled or had the authority to control the corporation); Cf. Publishing Clearing House, 104 F.3d at 1170 (9th Cir. 1996) (finding on summary judgment that the defendant's assumption of the role of president and her authority to sign documents demonstrated the requisite control over the corporation, when the defendant offered no evidence to rebut the showing of control). Therefore, FTC's motion for summary judgment with respect to Defendant Sanchez is denied.

3. Other Defendants

A District Court "may not grant the [summary judgment] motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial." Vt. Teddy Bear Co., 373 F.3d at 244. Because no material issue of fact remains, FTC's summary judgment motion with respect to the remaining

defendants is granted.

Plaintiff's unopposed 56.1 Statement sets forth sufficient facts for this Court to conclude that the remaining defendants violated Section 5 of the FTC Act as well as the Franchise Rule. Defendant Guadagno, through his complete and total control of the Defendant Corporations, engaged in a scheme whereby defendants engaged in deceptive conduct in offering for sale vending machine business opportunities by misrepresenting the income purchasers would receive and misrepresenting details regarding the delivery of purchased vending machines. In his capacity as an owner of the Defendant Corporations, he signed purchaser contracts, signed letters, made sales calls to prospective purchasers, was responsible for and controlled the marketing and sales of the vending machines, wrote and reviewed the sales scripts, wrote the classified ads, and ran the day-to-day business offices. (Pl.'s 56.1 ¶¶ II.48-50, 53-58, III.6, 8-12). Furthermore, Defendant Guadagno has pled guilty in a criminal proceeding challenging this same conduct.

CONCLUSION

For the foregoing reasons, FTC's motion for summary judgment with respect to Defendant Sanchez is **DENIED** and FTC's motion with respect to all other Defendants is **GRANTED**.

SO ORDERED.

/s/
Thomas C. Platt, U.S.D.J.

Dated: Central Islip, New York
July 8, 2008