UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-CIV-62491-BLOOM

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CONSUMER COLLECTION ADVOCATES CORP., a Florida corporation, and MICHAEL ROBERT ETTUS, individually and as an officer of Consumer Collection Advocates, Corp.,

Defendants.
_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Plaintiff , the Federal Trade Commission's Motion for Summary Judgment, ECF No. [64] ("Motion"). The Court has reviewed the Motion, all supporting and opposing filings, the record, and is otherwise fully advised in the premises.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

telemarketing investment schemes. *See* Complaint, ECF No. [1]. Specifically, from July 2011 to November 2014, Defendants preyed on fraud victims in order to perpetuate their own scam and bilk hundreds and sometimes thousands of dollars out of the already injured and desperate. *See id.* On November 3, 2014, the FTC filed the instant action seeking to halt Defendants' practice alleging that Defendants violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and the FTC's Trade Regulation Rule, 16 C.F.R. Part 310 (the

legal action on behalf of consumers, CCA, nonetheless, represented to customers that it was able to utilize legal actions and remedies to recover the funds. *Id.* at ¶¶ 9-10. These services came with a price. *See id.* at ¶¶ 13-14. CCA required an up-front fee or retainer, ranging from several hundred to as much as fifteen thousand dollars, as well as an additional back-end commission ranging from 10% to 20% of the funds actually recovered. *Id.* CCA claimed to be able to recover consumers' lost monies typically within 30 to 180 days. *Id.* at ¶¶ 17, 32.

In order to persuade potential clients into signing up for this plan, CCA promised that their service was highly likely to recover a substantial portion of the funds previously lost, such

CCA guaranteed recovery for the victims in the APM and Hunter Wise Cases, recovery in those cases was either impossible or substantially below the figures promised by CCA. *Id.* at ¶¶ 28-29.

Once a consumer agreed to purchase CCA's services, he or she would return the CCA documents sent to them, including the up-front payment. *Id.* at ¶ 23. At this point, communications from CCA would cease. *Id.* at ¶ 24. Consumers were met with difficulty when they attempted to contact CCA regarding their promised recovery. *Id.* at ¶ 24. A persistent consumer who was able to reach CCA would be provided excuses, for instance, that CCA was understaffed, or would simply be told that they needed to be patient and that recovery would take time. *Id.* Those frustrated by their inability to receive answers from CCA and, more importantly, their promised recovery, would sometimes file complaints with third parties, such as Florida State agencies, the FTC, the Better Business Bureau, and the U.S. Commodity Futures Trading Commission.[2] *Id.* at ¶ 25. When Defendants received these complaints, Defendants contacted the consumers, sometimes requesting that the consumer retract their complaints. *Id.* at ¶ 26. In other instances, Defendants would offer the consumer a refund or simply make further assurances regarding their recovery. *Id.*

Months and, in some cases, years passed and the consumers who signed up for CCA's services did not recovered the funds as promised.[3] *Id.* at ¶¶ 27, 31.

[2] The Commission's review of records obtained from the Florida Office of the Attorney General reveals that rCCoe0002 TcTJ191.38 410.88 Tma26459 t.033(s 19(6('s4,2)]0.2r5s 19cC7TJT*sthe Florido

Defendant Ettus was the sole owner and officer of CCA and was responsible for the company's day-to-day operations. *Id.* at ¶ 2. Managerial decisions fell exclusively in Ettus' hands, and his authority included employee relations as well as being the lone signatory on CCA's bank accounts. *Id.* at ¶¶ 2, 4. Any complaint received by CCA was handled by Ettus and he regularly communicated with the Better Business Bureau, state agencies, court-appointed receivers in other actions and, on occasion, individual consumers. *Id.* at ¶¶ 5, 26. Additionally, Ettus was responsible for the creation of the sales scripts utilized by CCA's employees, obtained telemarketing licenses for himself, CCA, and its employees, and controlled the domain and webhosting for CCA's website. *Id.*

The moving party shoulders the initial burden of showing the absence of a genuine issue of material fact. *Shiver v. Chertoff*

S. Ry. Co., 692 F.3d 1151, 1154 (11th Cir. 2012) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict." (quoting *Anderson*, 477 U.S. at 255)). Second, Rule 56 explicitly allows a party to support its factual proffer with citation to affidavits and declarations. Fed. R. Civ. P. 56(c)(1)(A). While the Court need not accept the contents of an affidavit where contradictory record evidence is presented, Defendants fail to offer any evidence rebutting the contentions contained in the declarations.

> by Fed. R. Civ. P. 56(e), the opposing party is required to come forward with materials envisioned by the Rule, setting forth specific facts showing that there is a genuine issue of material fact to be tried. He cannot defeat the motion by relying on the allegations in his pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible. The motion will not be defeated merely on the basis of conjecture or surmise.

Gottlieb v. Cnty. of Orange, 84 F.3d 511, 518 (2d Cir. 1996) (internal quotations and citations removed). This Court will not blindly accept the contentions of counsel where such contentions are not supported by *any* evidence in the record. As noted, the affidavits contain sufficient indicators of truthfulness which has not been refuted in any respect and, therefore, the Court appropriately considers them for the purposes of the instant Motion. Defendants' baseless quarrel with the declarations is insufficient to deny their consideration.

For these reasons, a plentiful record exists to determine that CCA has violated the Section 5(a) of the FTC Act as a matter of fact and law.

C. CCA Violated the Telemarketing Sales Rule, 16 C.F. R. Part 310

or acts or had authority to control them . . . [and] that the individual had some knowledge of the practices." *Id.* (internal quotation, citation, and formatting omitted). "The FTC may establish the knowledge requirement by showing that individual had 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Transnet Wireless*, 506 F. Supp. 2d at 1270 (quoting *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)). Where the entity subjected to scrutiny is a closely-held corporation, an individual's status as a corporate officer will give rise to a presumption of control. *Id.* (citing *F.T.C. v. Windward Mktg.*, 1997 WL 33642380 at *25 (N.D. Ga. Sept.30, 1997)). However, the FTC is not required to demonstrate that the individual defendant had the intent to defraud. *Id.* (citing

uncontested facts support the conclusion that Ettus had the requisite knowledge, awareness, and involvement to impose individual liability.[4]

E. Unresolved Issues

The Court is obligated to address Defendants' remaining evidentiary "challenges" to the submitted evidence and to certain contentions contained in the Commission's Motion. A substantial portion of Defendants' Response is dedicated to undermining the declarations of the FTC's lead investigator, Evan Castillo ("Castillo"), ECF Nos. [65-1] through [65-7]. *See* Resp. at 4-6. Defendants contend that Castillo's deposition testimony reveals an entirely different story, one involving "arrogance and a lack of due diligence, fairness and attention to due process procedures." *Id.* at 6. The Court has reviewed the cited portions of Castillo's deposition, ECF No. [73-1] ("Castillo Deposition"), and finds that his testimony does not report a different investigation than the one contained in his declaration. Defendants simply mischaracterize Castillo's testimony and focus on facts that remain irrelevant to the determination of liability. For instance, Defendants call into question Castillo's investigation based on the fact that he never spoke to anyone at various Florida agencies, including the Florida Department of Agriculture, which was purportedly responsible for the "oversight, licensing, and accreditation" of CCA and Ettus' licenses, as well as the approval of proposed scripts. *See* Resp. at 5, 8. However, a bureau chief at the Florida Department of Agriculture of Consumer Services ("FDACS") has attested to the fact that FDACS "does not review the content of written materials submitted by the business applicant" and, reflecting this, the pertinent application clearly advises the applicant that FDACS "does not review the content of contracts or scripts." *See* Declaration of Liz Compton, ECF No. [74-3] at ¶¶ 5-6. Thus, this assertion not only appears to be hollow,

[4] Ettus attempts to use former employees as the "fall guys" for any illicit conduct. *See* Resp. at 7. As expected, no citation to record evidence is provided to support this assertion.

but also irrelevant. Further, regarding Castillo's purportedly inadequate investigation, Defendants place emphasis on Castillo's inability to state whether he communicated with any complainants. *See* Resp. at 4-5. To the extent this assertion is relevant, which it is not, it is belied by Castillo's own testimony. Castillo clearly indicates that the investigation was a "team effort," and notes that various other individuals were also working on the matter. *See* Castillo Depo. at 116:5-17.

a similar amount: $2,834,704.68. *See* Notice, ECF No. [77]; Supplemental Declaration of Evan Castillo, ECF No. [74-4] at ¶ 5 (totaling CCA's gross receipts and subtracting refunds to

Inc., 604 F.3d 1150, 1159 (9th Cir. 2010) (determining the appropriate measure of equitable disgorgement to be total revenue). Indeed, as the Eleventh Circuit has noted, the purpose of disgorgement "is not to compensate the victims of fraud, but to deprive the wrongdoer of his ill-gotten gain." *Gem Merchandising*, 87 F.3d at 470. Consequently, Defendants' objection is meritless and irrelevant. While the Commission may not have estimated the harm specifically incurred by consumers, it has, nonetheless, aptly ascertained a monetary value of the funds received by Defendants as a result of the illicit tactics they employed.

To the extent that Defendants' argument can be construed as a challenge to the accuracy

reviewing spreadsheets collected from CCA's computers. *See* Supplemental Declaration of Evan Castillo ("Castillo Supplemental Declaration"), ECF No. [68-2] at ¶ 18 (noting that CCA collected varied fee amounts between $200 and $15,000); *see also* Attachment "L" to Castillo Supplemental Declaration, ECF No. [68-3] at 67-71, ECF No. [68-4] at 1-27, ECF No. [68-5] at 1-2 (collectively, "Attachment L") (containing spreadsheets of fees collected). The recorded spreadsheets indicate a total income of $2,648,422.12 from August 2011 to the end of October 2014. *See* Castillo Supp. Decl., ECF No. [68-2] at ¶ 18; Attachment L. Admittedly, this calculation does not include numbers for February 2013 and March 2014, which the Commission was unable to locate. *See id.* In order to account for these missing months, Castillo analyzed CCA's bank records for February 2013 and March 2014, reviewing checks from consumers and merchant deposits not included in the previously-reviewed spreadsheets. *See* Second Supplemental Declaration of Evan Castillo ("Castillo Second Supplemental Declaration"), ECF No. [74-4] at ¶¶ 3-5; *see also* Attachment "B" to Castillo Second Supp. Decl., *id.* at 173-76 (containing spreadsheet of February 2013 and March 2014 transactions). Castillo was then able to total CCA's gross receipts and then subtract the refunds actually paid to consumers, which yielded a total more akin to the Receiver's initial approximation: $2,825,761.28. *See id.* at ¶ 5.

Based on this evidence, the Commission has provided a basis for its reasonable approximation of Defendants' unjust gains and Defendants have introduced no evidence indicating that the promoted figures are inaccurate. Consequently, the proper value of consumer harm in this action is $2,825,761.28. *See F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013) (upholding district court determination that net revenue—gross receipts minus profits—was the correct measure of damages under § 13(b)).

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Plaintiff Federal Trade Commission's Motion for Summary Judgment,