

No. 15-14437

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

FTC v. Consumer Collections Advocates Corp.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Eleventh Circuit R. 26.1-1 to 26.15, the Federal Trade Commission certifies to the best of its knowledge that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal.

Bloom, Beth– United States District Judge

Bolton, Barbara E. – FTC attorney

Consumer Collection Advocates Corp. – Defendant-Appellant

Damian, Melanie E. – Court-appointed receiver

Damian & Valori, LLP – Attorneys for the receiver

Ettus, Michael Robert – Defendant-Appellant

Federal Trade Commission – Plaintiff-Appellee

Hoffman, Matthew M. – FTC attorney

Marcus, Joel – FTC attorney

Metzler, Theodore (Jack) – FTC attorney

Mateo, Marcela C. – former FTC attorney

Nuechterlein, Jonathan E. – former FTC attorney

Shonka, David C. – FTC attorney

Valle, Alicia O. – United States Magistrate Judge

FTC v. Consumer Collections Advocates Corp.

Visconti, Melissa Damian – Attorney for the receiver

Witlin, Barry E. – Attorney for Defendants-Appellants

To the best of the FTC's knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. It involves no legal issue that has not been authoritatively determined, and the facts and legal issues are fully set out in the briefs and the decision of the District Court below.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF AUTHORITIES	iv
JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	3
A. Overview	3
B. The FTC’s Summary Judgment Motion.....	4
C. CCA’s and Ettus’s Response.....	10
D. The District Court Decision.....	11
STANDARD OF REVIEW	14
SUMMARY OF ARGUMENT	15
ARGUMENT	16
The District Court Properly Granted Summary Judgment To The FTC And Held Ettus Personally Liable	16
A. By Failing To Respond To The FTC’s Statement of Facts, CCA And Ettus Admitted Them.	16
B. The Undisputed Facts Show That Ettus Is Individually Liable For CCA’s Violations.....	19
C. Ettus Has Not Shown A Genuine Factual Dispute.....	21
1. The testimony of the FTC’s investigator does not raise any triable factual issue.	21
2. Ettus’s attacks on the credibility of the consumer declarants is improper	23

3. Ettus’s deposition testimony does not establish a genuine
factual dispute.....24

CONCLUSION24

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

* <i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505 (1986)	17, 23
<i>Cockrell v. Sparks</i> , 510 F.3d 1307 (11th Cir. 2007).....	18
<i>Flowers v. Troup Cty.</i> , 803 F.3d 1327 (11th Cir. 2015)	14
* <i>FTC v. Amy Travel Serv.</i> , 875 F.2d 564 (7th Cir. 1989)	20
* <i>FTC v. Gem Merch. Corp.</i> , 87 F.3d 466 (11th Cir. 1996).....	20
* <i>FTC v. IAB Mktg. Assocs.</i> , 746 F.3d 1228 (11th Cir. 2014).....	15, 19, 21
<i>Jones v. Gerwens</i> , 874 F.2d 1534 (11th Cir. 1989)	19
* <i>Mann v. Taser Int’l</i> , 588 F.3d 1291, 1302 (11th Cir. 2009).....	14, 17, 18, 19
* <i>Reese v. Herbert</i> , 527 F.3d 1253 (11th Cir. 2008)	18
<i>Thompson v. Metro. Multi-List, Inc.</i> , 934 F.2d 1566 (11th Cir. 1991)	23

STATUTES

15 U.S.C. § 45.....	3
---------------------	---

REGULATIONS

16 C.F.R. § 310.3(a)(2)(iii).....	4
16 C.F.R. § 310.4(a)(3).....	3-4, 24

RULES

Fed. R. Civ. P. 56..... *passim*
Fed. R. Civ. P. 56(a).....16
Fed. R. Civ. P. 56(c)(1)(A) 17, 23
Fed. R. Civ. P. 56(e)(2).....17
S.D. Fla. R. 56.1 *passim*
S.D. Fla. R. 56.1(a)17
S.D. Fla. R. 56.1(b)18

** Cases and other authorities principally relied upon are marked with asterisks*

JURISDICTION

This is an appeal from a final judgment of the district court disposing of all parties' claims. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1337(a) and 1345 and under 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c) and 6105(b). This Court has appellate jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on September 28, 2015, and the notice of appeal was filed on October 2, 2015.

STATEMENT OF THE ISSUES

The FTC sued Consumer Collection Advocates Corp. (“CCA”) and its sole owner, Michael Robert Ettus, for deceptive practices in violation of the Federal Trade Commission Act and the FTC’s Telemarketing Sales Rule. Following discovery, the FTC moved for summary judgment, supporting its motion with 21 declarations (including several from injured consumers), internal CCA documents, Ettus’s deposition testimony, and interrogatory responses from Ettus and CCA. As required by Rule 56 and Southern District of Florida Local Rule 56.1, the FTC also submitted a detailed statement of material facts not in dispute with citations to supporting materials. CCA and Ettus did not respond to the FTC’s Rule 56.1 statement. Nor did they otherwise present any evidence to dispute the facts presented by the FTC. In the order on review, the district court held that CCA and Ettus “utterly fail[ed] to negate the FTC’s assertions or introduce any evidence in support of their arguments.” ECF No. 80 at 5. It therefore deemed the FTC’s facts admitted and granted summary judgment for the FTC.

Neither CCA nor Ettus challenges the entry of summary judgment against CCA. The sole issue presented on appeal is whether the district court properly granted summary judgment against Ettus and held him personally liable for CCA’s actions based on the undisputed facts as set forth in the FTC’s Rule 56.1 statement.

STATEMENT OF THE CASE

A. Overview

CCA—which was wholly owned and controlled by Ettus—operated a “recovery room” scam that preyed on consumers, many of them seniors or retirees, who had previously lost money in fraudulent investment and timeshare resale schemes. Acting on scripts written and provided by Ettus, CCA telemarketers told the company’s “clients” that if they paid a large advance fee, CCA could recover most or all of the money they had lost within a few months. Many consumers relied on these representations, paying CCA fees that ranged from a few hundred dollars to as much as \$15,000. But after paying these up-front fees, consumers never heard anything more from CCA and never got their money back. Consumers who had already fallen victim to fraud once were thus victimized a second time by CCA and Ettus.

The FTC sued CCA and Ettus in 2014. *See* ECF No. 1 (Complaint). Count I of the complaint alleged that their representations to consumers were a deceptive practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which declares unlawful “unfair or deceptive acts or practices in or affecting commerce.” Count II alleged that CCA and Ettus violated the FTC’s Telemarketing Sales Rule (“TSR”) by charging an up-front fee for their purported recovery services. *See* 16 C.F.R.

§ 310.4(a)(3).¹ Count III alleged that CCA and Ettus violated the TSR by materially misrepresenting their services. *See id.* § 310.3(a)(2)(iii).² The FTC alleged that consumers had and were continuing to suffer substantial injury and that CCA and Ettus had been unjustly enriched as a result of these violations. It sought an injunction barring CCA and Ettus from further violations and equitable monetary relief, including restitution to consumers and disgorgement of unjust enrichment.

B. The FTC's Summary Judgment Motion

Following discovery, the FTC moved for summary judgment. ECF No. 64. It supported the motion with 24 exhibits, numbered PX 1 through 24. *See* ECF

¹ Section § 310.4(a)(3) provides in relevant part:

It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to . . .[r]equest[] or receiv[e] payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivs a.2(ney or)]T8457T,5 aitouch J12.8

Nos. 65-69.³ The exhibits included 15 declarations from consumers who had been targeted by CCA, many of whom paid the company substantial sums for promised, but undelivered services. *See* PX 5-19. They also included declarations from the FTC's case investigator, Florida telemarketing and licensing agency officials, the Southeast Florida Better Business Bureau, and court-appointed receivers in investment fraud cases. *See* PX 1-4, 20, 24. Numerous internal CCA documents and state and third-party records were attached to these declarations. The summary judgment exhibits also included excerpts from Ettus's deposition (PX 21) and CCA's and Ettus's interrogatory responses (PX 22-23). As required by Local Rule 56.1, the FTC submitted a detailed statement of material facts as to which there was no genuine issue to be tried, each supported by citations to the underlying materials. *See* ECF No. 64-1 (Rule 56.1 statement).

The FTC's Rule 56.1 statement and supporting materials established that CCA is a Florida corporation that operated a recovery room business. *Id.* ¶ 1. Ettus was the sole owner and officer of CCA and ran its day-to-day business. *Id.* ¶ 2. This included hiring, firing, overseeing and directing the company's employees. *Id.* Ettus also wrote the scripts used by CCA's telemarketers and

³ For ease of reference, this brief refers to these exhibits using the "PX" exhibit numbers, rather than the docket numbers. Page number reference to these exhibits refer to the "PX" page number on the lower right-hand corner of each page.

provided them to telemarketers. *Id.* ¶ 3. He obtained telemarketing licenses for himself, CCA and CCA employees. *Id.* He also registered and controlled the domain name and webhosting for CCA's website, and handled and responded to consumer complaints. *Id.* ¶¶

license did not give CCA any authority or approval to collect funds on behalf of consumers victimized by fraud or telemarketing schemes. *Id.* ¶ 8; PX 1 at 79-80; PX 4 ¶¶ 14-16.

CCA used highly aggressive tactics. It told consumers that they needed to sign up with CCA quickly to have any chance of recovering their money and that if they did not use CCA's services they would have no chance of recovery. ECF No. 64-1 (Rule 56.1 statement) ¶ 16. If a consumer did not immediately sign up for services, CCA's marketers would continue to call, e-mail, and write, repeating their promises of a large payday and urging them to act quickly. *Id.* ¶ 18.

These tactics are evident from the scripts that CCA provided to its telemarketers. One script boasts: "We do not take on cases unless we can get the money back! [W]e will not charge you money for something we cannot recover." PX 1 at 81. The script encourages consumers to pay the up-front fee by credit card to "allow you to comfortably afford it and by the time the dispute is settled 60% of the money you lost before will make up for this sacrifice." *Id.* It also urges customers to sign up immediately: "It's imperative that we act on this now due to the fact that these companies are being shutdown [sic] and it makes it difficult if not impossible to get your money back. . . . [T]ime is not a luxury you or our collection agency has." *Id.* It promises that "[y]ou might not get the money

tomorrow, but acting on this now will allow you to see results within 180 days.”

Id. And it asserts that “[t]ogether is the only way we’ll get your money back.” *Id.*

Other CCA marketing materials submitted by the FTC contain similar statements. One sales script instructs telemarketers to state: “Now my collection department looked at your file and feel you have a very strong likelihood of recovery based on our pending cases with this company’s principal already.”

PX 20 at 32. It emphasizes that “Timing is of the essence.” *Id.* Another states that “the likelihood of reimbursement is excellent” and “you’re [*sic*] only out of pocket expenses will be the 20% for the retainer fee. *Id.* at 14. Another states that CCA is “xtremely [*sic*] good at what we do” and has a “very high success rate.” *Id.* at 25.

An e-mail from a CCA marketer to a prospective target framed the company’s services as a no-lose proposition:

UNTIE MY HANDS—BECOME A CLIENT, \$5000 RETAINER IS PEANUTS GIVEN THE RETURN.

LOOK AT IT THIS WAY: 1) I AM NOT A BUSINESS/INVESTMENT OPPORTUNITY 2) BUT IF I WERE YOU WOULD BE LOOKING AT A 4000% RETURN IN 3 TO 6 MONTHS

ABSOLUTE WORST CASE: YOU GET \$50,000 INSTEAD OF \$150,000 PLUS (approx3me5K

needed to be patient, and that their recovery would take time. *Id.* Many consumers complained to the FTC, other federal and state agencies, and the Better Business Bureau. *Id.* ¶ 25. In a few cases, CCA and Ettus offered to refund some money or provided assurances that work would be done on a case in exchange for the consumer's pledge to retract a complaint. *Id.* ¶ 26. In the vast majority of cases, however, consumers never recovered either the funds they had previously lost or a refund of the up-front fee paid to CCA. *Id.* ¶ 27.

C.

relied on by the FTC. Instead, they argued that his testimony showed that the FTC's investigation was inadequate. *Id.* at 4-6.

D. The District Court Decision

The district court granted the FTC's motion for summary judgment. ECF No. 80. It described the case as "a cautionary tale regarding the importance of adherence to rules, particularly, the Federal Rules of Civil Procedure and the Local Rules of this Court." *Id.* at 1. It found that there was no genuine issue of material fact because CCA and Ettus had "utterly fail[ed] to negate the FTC's assertions or introduce any evidence in support of their arguments." *Id.* at 5.

The district court held that CCA and Ettus had failed to comply with the procedural requirements of both Rule 56 and Local Rule 56.1. It first addressed Rule 56, noting that the rule requires the opposing party to cite evidence in the record to support its factual assertions, and that and that "[f]or all intents and purposes, the Rule allows a Court to punish a litigant who fails to properly support or address a fact by considering that fact undisputed." *Id.* at 6. The court explained:

Defendants' Response . . . is utterly devoid of citations to pertinent parts of the record. Rather, the Response simply contains the unsupported assertions of counsel. *See id.* at 2-4 (containing, without citation whatsoever, assertions concerning facts that will be "learn[ed]" at "an eventual trial"). Moreover, to the extent the Court may consider these unsubstantiated assertions, the majority are wholly irrelevant to the issues presented in the Motion, namely, issues regarding whether Defendants requested and received an illegal up-

front fee from consumers or whether the pitch employed by CCA was misleading to consumers. The Defendant's failure to refute the FTC's well-supported factual predicate is fatal.

Id. at 6-7.

The district court next addressed Local Rule 56.1. It held that CCA's and Ettus's failure to respond to the FTC's Rule 56.1 statement was a further defect, and that under the rule, CCA and Ettus had "admitted all facts contained [in the FTC's Statement] to the extent such facts are supported by evidence contained in

under penalty of perjury. The court held that it would not “blindly accept the contentions of counsel where such contentions are not supported by *any* evidence in the record.” *Id.* at 11.

Having found all the facts set forth by the FTC to be undisputed, the court determined that the FTC was entitled to judgment as a matter of law. The court held that CCA’s representations to consumers were deceptive and violated Section 5, and that CCA had also violated the TSR by charging upfront fees and misrepresenting its services. *Id.* at 11-12. It then held that Ettus was individually liable for CCA’s misconduct by virtue of his status as CCA’s president and sole owner, his control over the company’s operations and financial affairs, and his direct participation in the company’s unlawful practices. *Id.* at 13. The court held that “[i]f there was a captain of

The court entered a permanent injunction barring CCA and Ettus from engaging in recovery services or telemarketing or making any misrepresentations in connection with the sale or offer for sale of any good or service, and ordered them to disgorge \$2,825,761.28 (the amount of CCA's ill-gotten receipts) as equitable monetary relief. *See* ECF No. 81.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *E.g., Flowers v. Troup Cty.*, 803 F.3d 1327, 1335 (11th Cir. 2015). But this case turns largely on the district court's application of its Local Rules, which this Court reviews for abuse of discretion, giving "great deference" to the district court. *Mann v. Taser Int'l*, 588 F.3d 1291, 1302 (11th Cir. 2009) (citation omitted). To meet this standard, defendants bear the burden of showing that the district court made a "clear error of judgment." *Id.* (citation omitted). The district court's imposition of personal liability on Ettus based on his undisputed actions is subject to *de novo* review.

unsubstantiated, personal opinions does nothing to further Defendants' cause" and that there was "simply no evidence to support this unscrupulous assertion." ECF No. 80 at 15.

SUMMARY OF ARGUMENT

CCA and Ettus failed to comply with the basic requirements of Rule 56 and Local Rule 56.1 and were therefore properly deemed to have admitted all of the facts set forth in the FTC's Rule 56.1 statement. Ettus does not challenge this ruling, nor does he contest the district court's grant of summary judgment against CCA. The only question is whether he is personally liable for the acts of his corporation.

The undisputed facts amply justify the district court's determination that Ettus was responsible for the FTC Act and TSR violations. It is well-settled in this Circuit that an individual is liable for FTC Act violations committed by a corporate entity if that individual participated directly in the deceptive practices or acts or had authority to control them and had some knowledge of the deceptive practices. *E.g., FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014). Here, the undisputed evidence showed both that Ettus had complete control of CCA and that he actively and knowingly participated in the company's deceptive practices.

Ettus's arguments are meritless. His references to the deposition testimony of the FTC's case investigator, Mr. Castillo, are irrelevant. His attacks on the credibility of the FTC's declarants are improper, since courts do not assess credibility on summary judgment. And his assertion that his own deposition testimony demonstrates a genuine issue of fact is incorrect. To the contrary, Ettus

admitted at his deposition that he controlled CCA and actively oversaw its telemarketing operations. There is no question that he is personally liable for CCA's unlawful conduct.

ARGUMENT

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE FTC AND HELD ETTUS PERSONALLY LIABLE

Rule 56 provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Local Rule 56.1 of the Southern District of Florida, like analogous rules of many districts, sets forth detailed procedural requirements for making and responding to that showing. The FTC complied with Rule 56 and the Local Rule by submitting a detailed statement of material facts not in dispute, supported by citations to declarations, documents, and discovery responses. CCA and Ettus utterly failed to comply with the rules and filed no response to the FTC's statement. In light of that failure, the district court correctly found that the facts set forth by the FTC were undisputed. The undisputed facts plainly support the court's grant of judgment to the FTC as a matter of law.

A. By Failing To Respond To The FTC's Statement of Facts, CCA And Ettus Admitted Them.

Under Rule 56, “a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but

must set forth specific facts showing that there is a genuine issue for trial.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986)

(citation, internal quotation marks and ellipsis omitted). The opposing party must

demonstrate the existence of a factual dispute by “citing to particular parts of

materials in the record,” such as depositions, documents, affidavits and

interrogatory answers. Fed. R. Civ. P. 56(c)(1)(A). If a party “fails to properly

address another party’s assertion of fact as required by Rule 56(c),” the court may

“consider that fact undisputed for the purposes of the motion.” 588 F.3d 1303 (11th Cir. 2019). 19-18-0001 (itted).

56(e)(2).

Local Rule 56.1 amplifies the requirements of Rule 56, and is “designed to

help the court identify and organize the issues in the case.” *Mann*, 588 F.3d at

1303. It requires a party moving for summary judgment to provide a statement of

material facts as to which it contends there is no genuine issue to be tried. S.D.

Fla. R. 56.1(a). The statement must consist of separately numbered paragraphs,

and must be “supported by specific references to pleadings, depositions, answers sputd]TJ-19.18-

All material facts set forth in the movant's statement filed and supported as required above will be deemed admitted unless controverted by the opposing party's statement, provided that the Court finds that the movant's statement is supported by evidence in the record.

S.D. Fla. R. 56.1(b).

This Court has held that compliance with Local Rule 56.1 "is not a mere technicality." *Mann*, 588 F.3d at 1303. Failure to properly controvert a fact justifies the district court in treating that fact as admitted, so long it is supported by the record. *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008). Submitting a response to the movant's Rule 56.1 statement is "the only permissible way . . . to establish a genuine issue of material fact at [the summary judgment] stage," and evidence that is not cited in the opposing party's response should be "disregard[ed] or ignore[d]." *Id.*

For example, in *Mann*, the district court deemed the movant's facts undisputed where the respondent's opposing statement was "convoluted, argumentative, and non-responsive." *Mann*, 588 F.3d at 1303. This Court affirmed, noting that it gives "great deference to a district court's interpretation of its local rules," and that the district court had not made a "clear error of judgment" in deeming the facts undisputed. *Id.* at 1302, 1303; *see also Cockrell v. Sparks*, 510 F.3d 1307, 1309 n.2 (11th Cir. 2007) (accepting facts set forth in movant's Rule 56.1 statement as true, and refusing to accept contrary statement in respondent's deposition, where respondent had not properly responded to Rule

56.1 statement); *Jones v. Gerwens*, 874 F.2d 1534, 1537 n.3 (11th Cir. 1989) (facts set forth in Rule 56.1 statement that are not controverted are deemed admitted).

CCA and Ettus did not comply with Local Rule 56.1 and they do not argue that the district court misapplied the rule. Any such argument would be fruitless had it been made. Their noncompliance with Local Rule 56.1 is far more

mischaracterize Castillo's testimony and focus on facts that remain irrelevant to the

either to depose those witnesses or to submit other evidence to contradict their assertions. He did neither.

3. Ettus's deposition testimony does not establish a genuine factual dispute.

Ettus also argues that he provided “sworn testimony wherein he denie[d] the allegations made against him.” Br. 10. This is incorrect. Ettus did not submit a declaration in opposition to summary judgment, nor does he identify any portion of his deposition transcript that contradicts the FTC’s Rule 56.1 statement.

Moreover, the FTC and the district court did not ignore Ettus’s deposition testimony. To the contrary, the FTC relied on Ettus’s deposition testimony for several key admissions, including that he was the sole owner, officer, and manager of CCA; that he was the sole signatory on the company’s bank accounts; that he was responsible for hiring and firing employees; that he wrote sales scripts and trained telemarketers; and that he responded to consumer complaints. PX 21 at 13-15, 18-20, 35, 40-43. It also cited his repeated admission that CCA charged upfront fees for its recovery services—a practice that violates the TSR. *Id.* at 6-7, 36, 44-45; *see also* 16 C.F.R. § 310.4(a)(3). In short, far from undercutting the FTC’s facts, Ettus’s admissions supported them.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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June 6, 2016

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,648 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of the Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word 2010 in 14 point Times New Roman type.

June 6, 2016

/s/ Matthew M. Hoffman

MATTHEW M. HOFFMAN

FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I certify that on June 6, 2016, I caused a copy of the foregoing brief to be served using the CM/ECF electronic case filing system and by first-class mail on all counsel of record.

/s/ Matthew M. Hoffman

MATTHEW M. HOFFMAN

FEDERAL TRADE COMMISSION