UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-23543-CIV-LENARD/O'SULLIVAN

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRUMAN FORECLOSURE ASSISTANCE, LLC, a Florida limited liability company, TRUMAN MITIGATION SERVICES, LLC, a Florida limited liability company, FRANKLIN FINANCIAL GROUP US LLC, a Florida limited liability company, and ELI HERTZ, BENZION JACK ITZKOWITZ a/k/a JACK ITZKOWITZ, and RICHARD ZAFRANI a/k/a RICK ZAFRANI,

Defendants.
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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (D.E. 161)

THIS CAUSE is before the Court on Plaintiff's Motion for Summary Judgment against Defendant Richard Zafrani ("Motion," D.E. 161), filed on May 11, 2011.[1] As of the date of this Order, no response has been filed. Having considered the Motion, related pleadings, and the record, the Court finds as follows.

[1] Plaintiff filed separately its memorandum of law in support of its Motion (D.E. 163) and Statement of Undisputed Facts ("Pl. SOF," D.E. 167).

I. Background[2]

This is an action under Section 5 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. § 45(a). Plaintiff, the Federal Trade Commission ("FTC"), brings this enforcement action against three corporate defendants, Truman Foreclosure Assistance, LLC ("Truman Foreclosure"), Truman Mitigation Services, LLC ("Truman Mitigation"), Franklin Financial Group US LLC ("Franklin Financial"), (collectively "Truman" or the "Corporate Defendants"), and three individual defendants, Eli Hertz ("Hertz"), Benzion Jack Itzkowitz ("Itzkowitz"), and Richard Zafrani ("Zafrani"), (collectively the "Individual Defendants").[3] The FTC alleges Defendants engaged in deceptive acts and practices in connection with the marketing and sale of mortgage loan modification and foreclosure relief services.

In July 2008, Hertz and Itzkowitz formed Truman Foreclosure. Beginning in at least October 2008, the company marketed and sold mortgage loan modification or foreclosure relief services to consumers in exchange for an initial fee. That fee typically was in the range of $1500 to $3000.

In October 2008, Hertz and Itzkowitz also formed Truman Mitigation. While Truman Foreclosure focused its activities on selling mortgage and foreclosure assistance services to

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[2] Pursuant to S.D. Fla. Local Rule 7.5(d), all material facts set forth in Plaintiff's Statement of Facts are "deemed admitted" to the extent they are adequately supported by evidence in the record, as Defendant Zafrani failed to file any statement of facts or controvert those stated by Plaintiff.

[3] Default judgment was entered against the three Corporate Defendants on May 12, 2010. (See D.E. 69.) Defendants Hertz and Itzkowitz subsequently entered into settlement agreements with the FTC. (See D.E. 176, 177.)

consumers, Truman Mitigation focused on recruiting individuals to establish additional branches of Truman Foreclosure. Both Truman Foreclosure and Truman Mitigation shared office space and employees, and were controlled as a common enterprise. Nevertheless, both Truman Foreclosure and Truman Mitigation ceased active operations in approximately September 2009.

Also, effective October 2008, the Florida Legislature passed a law prohibiting foreclosure rescue consultants from soliciting, charging, receiving, or attempting to collect or secure payment, directly or indirectly, "for foreclosure-related rescue services before completing or performing all services contained in the agreement for foreclosure-related rescue services." Fla. Stat. § 501.1377(3). Nevertheless, the statute contains an exception for attorneys who provide foreclosure rescue-related services ancillary to the attorney's representation of a homeowner as a client. See Fla. Stat. § 501.1377(2)(b). In order to circumvent this prohibition, Truman attempted to affiliate itself with attorneys in order to continue to charge initial fees. The law firms would charge the consumers an upfront fee, which would then be remitted to Truman less a $200 fee retained by the law firm. The law firms did little substantive work related to any loan modification or foreclosure relief services provided by Truman.

In July 2009, Hertz and Zafrani formed Franklin Financial. In September 2009, Franklin Financial took over the operations for Truman Foreclosure and Truman Mitigation due to "image problems" resulting from consumer complaints about Truman. Beginning in

March 2009, Truman was experiencing a large number of consumer complaints and liquidity concerns, thus damaging Truman's public image. Franklin Financial shared overlapping ownership and personnel with Truman Foreclosure and Truman Mitigation. It also marketed mortgage loan modification and foreclosure relief services using a website that was virtually identical to Truman Foreclosure's website.

Throughout the various corporate changes, Truman's principal business involved targeting distressed homeowners through a marketing campaign that included its own websites, branch websites, videos on www.youtube.com, and handouts. Truman marketed that it possessed the experience, expertise, and special contacts with lenders necessary to save consumers' homes. On its website, Truman advertised that:

> We get your bank to listen to your needs because they know and trust us. We have mitigated many of [sic] home foreclosure cases. That kind of experience gives us credibility with your lender. Over the years we have developed positive working relationships with key people at most banks. Our integrity and professionalism have earned us a reputation that allows us to be heard when no one else can get through the red tape. We will use our experience and connection to your advantage.

(See e.g., D.E. 163-19 at 16.) In fact, neither Hertz, Truman's sales director, or Truman's customer service director, had any mortgage mitigation experience. Itzkowitz only possessed two months experience as a sales agent in the loan modification industry but had never himself modified a mortgage loan. (See Itzkowitz Dep., D.E. 163-4 at 21-26.) Moreover, Truman did not posses any special relationships with key bank personnel but rather simply called the banks' home loan retention or modification departments, which homeowners could

have done themselves. (See Hertz Dep., D.E. 163-6 at 136-139.)

Truman's marketing materials also included purportedly real testimonials touting Truman's previous success. These testimonials were purportedly 100% real. One testimonial on Truman Foreclosure's website stated:

> I just wanted to say thank you again. Not only did you help me save my home, you also helped me save my marriage and my dignity. I could never really begin to thank you enough. If you need someone to do a testimonial for one of your clients, please do not hesitate to give them my name and number!!! Thanks again. EH - Miami, FL.

(See D.E. 163-18 at 17.) Defendant Hertz admitted at his deposition that he provided the testimonial, "EH" stood for Eli Hertz, and the testimonial was not real. (See Hertz Dep., D.E. 163-3 at 97-99.) Zafrani also posted supposed testimonials on his website and on www.youtube.com including one testimonial where a woman named "Diane" states:

> My name is Diane. I was late on my mortgage payments. The bank was going to take my home away. I was so scared my children would be out on the streets. I didn't know what to do. Then I called the Chamber of Commerce and they referred me to Rick from Truman Modifications. Rick saved my home. I'm sure he could save yours, too.

(See D.E. 163-8 at 61-63.) Zafrani admitted that "Diane" was his wife and the testimonial was untrue. (Id.)

Truman also urged homeowners to act quickly and call its toll-free telephone number or visit its website. When consumers called Truman's toll-free number or made contact through its website, Truman employees regaled potential customers with claims of high success rates, promises, and a 100% money back guarantee. These claims were also

reinforced in e-mails from Truman sales employees.

Truman also represented to consumers that only a limited number of clients who "qualified" would be accepted. In fact, Truman typically accepted customers by having a representative collect financial information during an initial telephone call and using a financial worksheet to determine whether the potential customer "qualified." In practice, Truman frequently failed to require consumers to complete the financial worksheet and often instructed consumers not to provide information regarding their assets and liabilities. Instead, Truman representatives often advised consumers to provide false information on their financial worksheets, including telling customers to change their listed expenses without actually verifying that any such changes were made.

Truman further represented it enjoyed great success in achieving loan modification or foreclosure relief for virtually all of its clients. In fact, Truman did not obtain loan modifications or foreclosure relief for virtually all of its clients despite such assurances and representations that it had a better than 90% success rate. Truman representatives frequently represented to consumers during telephone calls and through e-mails that it enjoyed a success rate of over 90%. (See Zafrani Dep., D.E. 163-7 at 40-42, D.E. 163-8 at 20-22; Palmieri Dep., D.E. 163-16 at 37-38.) It also made these claims in videos on www.youtube.com and in handouts. Truman's success rate was at most, closer to 32% and was certainly less than 90%. Hertz admitted that the best evidence of its success rate was contained in its own records, which demonstrate a much lower success rate. (See Stein Dep., D.E. 164-24 at 50-

51; Redding Decl. at ¶¶ 8-19, D.E. 163-20 at 3-6.) Hertz and Itzkowitz admitted that Truman's success rate was less than 90%. (Itzkowitz Dep., D.E. 163-4 at 98; D.E. 163-22 at 102.)

Finally, Truman made numerous representations concerning its 100% money back guarantee. The guarantee appeared on Truman's website and branch websites and stated:

> 100% Money Back Guarantee -- We stand firmly behind our promise to try and help save your home. Our guarantee insures that if we are unable to negotiate a plan with your lender that improves your situation or gives you a viable strategy to avoid or stop foreclosure, we will refund 100% of your money . . . NO QUESTIONS ASKED!

(See e.g., D.E. 163-17 at 4-5; D.E. 163-19 at 8.) Truman also provided customers with a 100% Money Back Guarantee Certificate which states:

> 100% MONEY BACK GUARANTEE
> At [Truman] we stand firmly behind our promise to try and help you with your foreclosure. Due to the fact that the ultimate decisions sits with your lender, we clearly cannot guarantee that your foreclosure will be stopped or avoided. However, we can assure you that if we are unable to negotiate a plan with your lender that betters your situation, or gives you a viable strategy to avoid or stop foreclosure, we will refund 100% of your money* No questions asked! You have nothing to lose, and everything to gain!
> Time is the most critical factor here. Do not hesitate another minute!
> Call us now toll free at 877-9-911-HELP [877-40-FRANKLIN], and receive your FREE foreclosure prevention consultation now! YOU HAVE NOTHING TO LOSE AND EVERYTHING TO GAIN! REMEMBER IT'S 100% GUARANTEED OR YOUR MONEY BACK!

(See D.E. 163-29.) The asterisk in the money back guarantee certificate is apparently never explained. Nevertheless, Truman rejected approximately 95% of its clients' requests for refunds and only gave refunds to 33 customers out of the 1204 who never received any

mortgage loan modification or foreclosure relief. Itzkowitz admitted that representations regarding Truman's money back guarantee were false and misleading. (See Itzkowitz Dep., D.E. 163-4 at 98.) In fact, Truman based its denial of many refund claims on language in the retainer agreement containing a "disclaimer" of any guarantees in fine print.

On November 23, 2009, the FTC initiated this lawsuit. The Complaint alleges three violations of Section 5(a) of the Act concerning: Truman's false representations that it would obtain mortgage loan modification or foreclosure relief in all or virtually all instances (Count I); Truman's false representations that it had helped over 90% of its clients obtain a mortgage loan modification (Count II); and Truman's false representations that it would provide a 100% money back refund if it failed to obtain a mortgage modification or prevented foreclosure (Count III). (See Complaint, D.E. 1.) The Complaint seeks equitable relief in the form of a permanent injunction and such relief as is necessary to redress consumers injured from Defendants' actions including rescission or reformation of contracts, restitution, refund of moneys paid, and disgorgement.

On May 11, 2011, the FTC moved for summary judgment against Zafrani.[4]

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[4] The FTC previously moved for summary judgment against all three Individual Defendants on December 3, 2010. (See D.E. 103.) As no response had been filed, the Court issued an Order to Show Cause on December 21, 2010, directing Defendants Hertz, Itzkowitz, and Zafrani to file a response or risk entry of summary judgment by default. (See D.E. 108.) On December 27, 2010, Zafrani filed his response to the original motion for summary judgment. (See D.E. 113.)

On March 14, 2011, the Court held the pre-trial conference in this matter. Zafrani failed to appear at the pre-trial conference. Accordingly, the Court directed the Clerk to enter default against Zafrani and default was entered on March 15, 2011. (See D.E. 136, 137.) On

II. Motion for Summary Judgment

The FTC moves for summary judgment on all counts against Zafrani. The FTC believes summary judgment is appropriate as to Count I because Truman made numerous representations that it would obtain mortgage loan modifications for all or virtually all consumers, and these representations were both material and false. The FTC similarly believes summary judgment is appropriate as to Count II as Truman made numerous representations that it possessed a success rate of over 90% when in fact that rate was at best closer to 32%, and that these representations were both material and false (or without a reasonable basis or adequate substantiation). As to Count III, the FTC sets forth numerous representations made by Truman regarding its 100% money back guarantee and contends these representations were material, false, and were not cured by any subsequent disclaimer of guarantees contained in fine print. The FTC asserts that Zafrani is individually liable for the conduct of the Corporate Defendants based upon his participation in the deceptive practices and authority to control the Corporate Defendants' conduct. According to the FTC,

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March 25, 2011, the FTC filed its motion for default judgment and a motion to remove the case from the trial calendar. (See D.E. 138, 139.) Zafrani did not file any response. On March 31, 2011, the Court denied the FTC's original motion for summary judgment as moot and removed the case from the trial calendar. (See D.E. 140.)

On April 4, 2011, Zafrani filed a motion to set aside the default entered against him but without providing any reason for failing to appear at the pre-trial conference. (See D.E. 143.) The FTC initially opposed setting aside Zafrani's default. (See D.E. 146.) On April 20, 2011, the FTC withdrew its opposition. (See D.E. 153.) On May 4, 2011, the Court granted Zafrani's motion to set aside the default and granted the FTC's request to re-file its motion for summary judgment as to Zafrani only (as it had reached a tentative settlement agreement with the other Individual Defendants). (See D.E. 157.)

Zafrani demonstrated reckless indifference to the truth or falsity of Truman's misrepresentations coupled with an intentional avoidance of the truth. Zafrani also possessed authority to control his own Truman sales branch, Truman Modification Services, Inc., where he recruited, hired, supervised, trained, and terminated sales agents. Zafrani also selected the marketing materials and instructed his sales agents how to interact with consumers. The FTC contends Zafrani was focused exclusively on selling Truman's services despite knowledge that many of the representations were false and that Truman's business was failing financially. Thus, the FTC requests both monetary and injunctive relief against Zafrani individually. Specifically, the FTC seeks $108,000 from Zafrani as redress for consumers and an injunction precluding Zafrani from marketing or selling any mortgage-related services in the future.[5]

III. Standard of Review

On a motion for summary judgment, the Court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine dispute as to any material fact and the movant is

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[5] The FTC calculated the amount of consumer redress of $108,000, by taking Zafrani's stated income from Truman between January 2009 and October 2009 of $16,884.73, and dividing that by the typical Truman commission of $350 per sale. That results in an estimate that Zafrani brought approximately 48 consumers into the scheme. Truman typically charged between $1500 to $3000 for its services. Estimating that Truman received approximately $2250 per each of the 48 consumers he brought in, the FTC believes Zafrani should be responsible for $108,000. (See D.E. 163 at 40.)

entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The Supreme Court has explained the summary judgment standard as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248; see also Barfield v. Brierton, 883 F.2d 923, 933 (11th Cir. 1989).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. Once this initial demonstration under Rule 56(c) is made, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that

there is a genuine issue for trial.'" Id. at 324; see also FED. R. CIV. P. 56(e). In meeting this burden the nonmoving party "must do more than simply show that there is a metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." Id. at 587. An action is void of a material issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Id. Moreover, "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990) (citing Liberty Lobby, 477 U.S. 242 (1986)).

IV. Discussion

The Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). In order to establish liability under Section 5 of the Act, "the FTC must establish that (1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances, and (3) the representation was material." FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003). In proving that a representation is likely to mislead consumers, the FTC can either prove that the express or implied message is false or it can rely on the "reasonable basis" theory. Id. at 1278; FTC v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994). Under the "reasonable basis" theory, the FTC must show that the defendant did not have a reasonable basis, or adequate substantiation, for the representations made. Tashman, 318 F.3d at 1277. Moreover, "[a]

misleading impression caused by a solicitation is material if it 'involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding, a product.'" FTC v. Cyberspace.com, LLC, 453 F.3d 1196, 1201 (9th Cir. 2006) (quoting Cliffdale Associates, Inc., 103 F.T.C. 110, 165 (1984)); FTC v. SlimAmerica, Inc., 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999). Materiality is presumed if the claims go to the core characteristics of the product or service. See Cyberspace.com, LLC, 453 F.3d at 1201.

Additionally, conduct of corporate defendants acting as a common enterprise is attributable to all members of the enterprise in determining liability. See FTC v. J.K. Publicatons, Inc., 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000); see also, FTC v. Wolf, 1996 WL 812940 at *8, (S.D. Fla. Jan. 31, 1996) (a common enterprise exists where "the thirty corporate defendants are commonly controlled, share office space and officers, conduct their business through a maze of interrelated companies, commingle corporate funds, and . . . . nothing in the evidence shows a real distinction between the corporate defendants"). "Defendants found to be a common enterprise are held 'jointly and severally liable for the injury caused by their violations of the FTC Act . . . .'" J.K. Publications, Inc., 99 F. Supp. 2d at 1202 (quoting Wolf, 1996 WL 812940 at *8). Furthermore, an individual may be held liable for corporate violations and be subject to injunctive relief if the individual directly participated in the deceptive practices or had authority to control the corporate defendants. FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996). They may be liable for monetary damages if they had some knowledge of the wrongful acts or practices. Id.

Knowledge may be proven through reckless indifference to the truth or falsity of a misrepresentation or awareness of a high probability of fraud coupled with an intentional avoidance of the truth. See SlimAmerica, Inc., 77 F. Supp. 2d at 1276. Under Section 13(b) of the Act and the Court's inherent equitable powers, the Court may order injunctive or equitable relief necessary to accomplish complete justice. See U.S. Oil & Gas Corp., 748 F.2d 1431, 1433-34 (11th Cir. 1984). Such remedies may include an order of consumer redress, constituting the total amount paid by consumers to purchase goods or services, less any refunds returned to consumers. See McGregor v. Chierico, 206 F.3d 1378, 1386-88 (11th Cir. 2000). The redress calculation need only be a reasonable approximation and not an absolute measure. See FTC v. Wilcox, 926 F. Supp. 1091, 1105-06 (S.D. Fla. 1996).

The Court finds the FTC is entitled to summary judgment on all counts against Zafrani. First, the FTC offers an abundance of evidence that Truman and Zafrani himself made representations to consumers that it would obtain mortgage loan modifications for all or virtually all consumers, it possessed a success rate of over 90%, and that it offered a 100% money back guarantee. There is testimony and evidence in the record, including Truman's own records, indicating that these representations were false and likely to mislead customers acting reasonably under the circumstances. There was no reasonable basis or adequate substantiation for Truman's claims that it was able to obtain relief for virtually all of its customers or over 90% in any event. In reality, Truman was *at best* able to obtain some sort of relief for only 32% of its customers. Nor did Truman follow through with its 100% money

back guarantee. The evidence in the record indicates few customers ever received a requested refund and that Truman instead relied upon vague fine print language in their retainer agreements to refuse payment. There could not have been an adequate basis for making these representations given Truman's obvious inability to perform and given its refusal and disclaimer of refunds. In addition, all of these representations were material. Representations regarding Truman's success rate and likely ability to help consumers is most certainly important to prospective consumers and would have affected a reasonable consumer's choice of whether or not to engage Truman's services. The additional incentive of a 100% money back guarantee would similarly have induced consumers to participate and perhaps allayed consumer fears. In fact, the guarantees suggested to consumers that they had "nothing to lose" and that they could only gain from contacting Truman. Clearly, Truman's representations were misleading and deceptive.

Additionally, Zafrani should be held individually liable for Truman's conduct. As an initial matter, the evidence supports that Defendants were engaged in a common enterprise. Truman Foreclosure, Truman Mitigation, and Franklin Financial all involved the same actors in Hertz, Itzkowitz, and Zafrani. They also involved use of the same marketing materials, shared office space and employees, and use of the same law firms or attorneys to collect upfront fees. The record evidence also demonstrates the companies were interrelated and in fact Franklin Financial was formed due to excessive consumer complaints about Truman and the Truman companies' rapidly tarnished image. Zafrani personally participated in the

deceptive acts of these companies and also possessed some authority to control the actions of the corporate defendants. In one instance, Zafrani created a false testimonial with his wife touting Truman's success and posted it on various websites. Zafrani also admits speaking and communicating with customers and advising them Truman enjoyed an extremely high success rate. Moreover, Zafrani was involved with the formation of Franklin Financial and had a role in training, supervising, and providing marketing materials to sales agents at his branch. The evidence tends to show he did all these things with reckless indifference towards the truth or falsity of the representations that were being made to consumers, if not knowledge of the falsity of the representations.

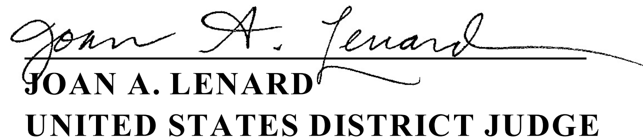
Finally, the Court finds that the requested injunctive relief and consumer redress provide appropriate remedies for Zafrani's violations of the Act. The amount of consumer redress sought is a reasonable estimation. Given the egregious and systematic nature of Truman's conduct, which lasted over a year and affected as many as 1350 consumers, the Court finds appropriate injunctive relief prohibiting Zafrani from selling or marketing any mortgage assistance services or goods and misrepresenting any material aspects of such services or goods. Accordingly it is hereby **ORDERED AND ADJUDGED** that:

1. Plaintiff's Motion for Summary Judgment against Defendant Richard Zafrani (D.E. 161), filed on May 11, 2011, is **GRANTED**;
2. All other pending motions, including Plaintiff's Motion for Default Judgment (D.E. 138), and Plaintiff's Motion *in Limine* (D.E. 182), are

DENIED AS MOOT;

3. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of June, 2011.



JOAN A. LENARD
UNITED STATES DISTRICT JUDGE