UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 0:11-civ-61072-WJZ

FEDERAL TRADE COMMISSION,

Plaintiff,
v.

AMERICAN PRECIOUS METALS, LLC, a Florida limited liability company,

HARRY R. TANNER, **JR.,** individually and as an owner, officer, and managing member of AMERICAN PRECIOUS METALS, LLC,

ANDREA TANNER, individually and as an owner, officer, and managing member of AMERICAN PRECIOUS METALS, LLC, and

SAM J. GOLDMAN, a/k/a SAMMY JOE GOLDMAN, individually and as an owner or manager of AMERICAN PRECIOUS METALS, LLC.

Defendants.

REPLY BRIEF IN SUPPORT OF PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES/ RULES

I. INTRODUCTION

In opposing Plaintiff's motion for summary judgment, Defendants first challenge the timing of Plaintiff's motion and ask the Court to disregard admissible evidence that the FTC has presented. Next, Defendants attempt to create disputes of fact where none exist using self-serving declarations and unsupported, bare denials. These are not sufficient to create genuine disputes of material fact. Given Defendants' failure to demonstrate that there are any disputes of material fact remaining for trial, summary judgment is appropriate.

II. ARGUMENT

A. THIS CASE IS RIPE FOR SUMMARY JUDGMENT

Contrary to Defendants' assertion, the FTC's motion for summary judgment is not premature. There is no requirement that the parties await the close of discovery. Fed. R. Civ. P. 56(b) provides that a motion for summary judgment may be filed "at *any time* until 30 days after the close of discovery"(emphasis added), or as otherwise ordered by the Court. Defendants' reliance on *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865 (11th Cir. 1988) to support this proposition is misplaced. In *Snook*, the Eleventh Circuit reversed a grant of summary judgment where, after its discovery efforts had been thwarted by its opponent, the nonmoving party was still awaiting a ruling on its motion to compel when summary judgment was granted. *Id.* at 871-72. Thus, the party opposing discovery in that case was able to show easily that relevant discovery was needed. Defendants, by contrast, cannot make such a showing here. Indeed, the FTC has responded fully to their discovery requests.[1]

Moreover, contrary to Defendants' assertion, this case is not in its "infancy." (Dkt. 258 p. 3). Plaintiff's initial complaint against the "original Defendants" (American Precious Metals, LLC ["APM"], Harry Tanner, and Andrea Tanner) was filed nearly one year ago. (Dkt. 1). After the original Defendants stipulated to a preliminary injunction (Dkt. 54), the Court

---

[1] The Federal Rules permit a party responding to summary judgment to seek denial or deferral of the motion on the grounds that it cannot present facts essential to its opposition. Fed. R. Civ. P. 56(d). However, a party "must conclusively justify entitlement to the shelter of Rule 56(d) by presenting specific facts explaining the inability to make a substantive response" and "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." *Southard v. State Farm Fire and Casualty Co.*, No. 4:11-cv-243, 2012 U.S. LEXIS 35395, at *8 (S.D. Ga. Mar. 15, 2012) (internal citations omitted). Defendants have not invoked Rule 56(d), nor have they met its requirements of showing by, affidavit or declaration, specific reasons that have prevent them from presenting essential facts.

scheduled a trial in October 2011. (Dkt. 69). The original Defendants did not seek additional time. In fact, in responding to their former counsels' motion to withdraw, they objected to delay. (Dkt. 134). Discovery commenced more than eight months ago when the FTC produced 330,728 KB of electronically-stored information to Defendants. Although Mr. Goldman was not named as a defendant until October 2011 (Dkt. 155), he has never made any discovery demands.

B. DEFENDANTS' TELEMARKETING SCRIPTS ARE ADMISSIBLE

There is likewise no merit to Defendants' assertion that the telemarketing scripts that an FTC Investigator found on Defendants' premises after entry of the TRO are not admissible. (*See* P.E. 18 Atts. E–O, Q-V). Many of the scripts contain the exact claims that consumers uniformly attested to hearing in sworn declarations.[2] The FTC offered them, not "to prove the truth of the matter asserted," but to prove that the claims were made. Thus, contrary to Defendants' assertion, the scripts are not unreliable hearsay. Fed. R. Evid. 801(c).

Nor is there merit to Defendants' contention that the scripts were not sufficiently authenticated.[3] A document may be authenticated by "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed. R. Evid. 901(b)(4). Wholly circumstantial evidence, including the document's distinctive characteristics and the circumstances surrounding its discovery, may be used to authenticate a document. *United States v. Smith*, 918 F.2d 1501, 1510 (11th Cir. 1990). In this case, the appearance, content, substance, internal patterns, and other distinctive characteristics of the scripts suffice to authenticate them as Defendants' telemarketing scripts. They include word-by-

---

[2] Defendants suggest that the uniformity of consumers' experiences is due to the FTC's drafting of the declarations. However, they have not explained how the FTC could have the prescient ability to know the exact claims contained in Defendants' scripts, which were found weeks later.

[3] Defendants seem to suggest that the scripts are not reliable because APM's offices were used by unaffiliated parties. In support, they imply that Universal Home Lending, a company whose name was listed on the building directory, may have used scripts in which their employees held themselves out as representatives of APM and asked consumers to buy precious metals from Defendants. In fact, the only evidence of another business operating from Defendants' location was the testimony of Ted Romeo, who ran an APM "branch office" (T.R. 96:23-97:1) and therefore was a business associated with APM.

word sales pitches for APM as well as Defendants' business telephone numbers.[4] They also contain the very claims – *e.g.*, the ability to quickly double or triple consumers' investments and the purported "safe haven" nature of the investments – that declarants reported hearing from Defendants' telemarketers. (PSOF ¶ 8, *see also* F.N. 2). Additionally, there are a number of marginal notations and comments – some, entirely handwritten – evidencing their use. (P.E. 18 Atts. E-F, J, L, O, Q, S-V). Two handwritten scripts refer to Randi Green (P.E. 18 Atts. Q-U), an APM salesperson whose name was mentioned by three declarants (P.E. 5 ¶ 4; P.E. 13 ¶ 2; P.E. 17 ¶ 3) and in Defendants' exhibits (D.E. 4(o) p. 25 of 224), and whose APM business card, bearing the title "Senior Metals Analyst," was also found on site. (P.E. 18 Att. AA). The scripts were found throughout Defendants' business premises, including in the office of Harry Tanner and Sam Goldman and on the desks of numerous telemarketers. (P.E. 18 ¶¶ 6-7, 12, 14-15, 18-23). Given the content and circumstances surrounding their discovery, there is no doubt that the requirements of Fed. R. Evid. 901 have been satisfied. They should be considered by the Court.[5]

III. DEFENDANTS HAVE NOT RAISED *GENUINE* ISSUES OF MATERIAL FACT

A party opposing 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, 249 (1985). Of course, a court must view the evidence in a light most favorable to the nonmoving party. *Penley v. Eslinger*, 605 F.3d 843, 848 (11th Cir. 2010). But that does not mean that it must disregard the record. Indeed, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Thus, a court need only draw "inferences in favor of a nonmoving party *to the extent*

---

[4] Compare P.E. 18 Atts. E-F with D.E. 4(h)-(i).

[5] Plaintiff's evidence is sufficient to support summary judgment, even without the scripts. Nonetheless, because the scripts are properly authenticated "by evidence sufficient to support a finding" as required by Fed. R. Evid. 901(a), they are admissible and should be considered. *See Rowell v. Bellsouth Corp*., 433 F.3d 794, 800 (11th Cir. 2005) (court may consider evidence that is admissible or can be presented in an admissible form on summary judgment).

supportable by the record. *Id*. at 381. This is critical here, as Defendants have not introduced any evidence to counter Plaintiff's claims and have failed to show a genuine disputed of fact.

A. THERE IS NO GENUINE ISSUE OF FACT THAT DEFENDANTS MISREPRESENTED PROFITABILITY AND RISK

Undisputed evidence establishes that Defendants violated the law by using false representations to sell their precious metals investments. As documented by consumer declarations, APM telemarketers misrepresented that they were offering profitable, low-risk investments. (PSOF ¶¶ 8-19). Courts frequently admit consumer declarations (and even unsworn letters of complaint) under the residual exception to the hearsay rule, Fed. R. Evid. 807.[6] The consumer declarations possess strong guarantees of trustworthiness because they were made under oath by unrelated members of the public and all report substantially similar experiences. In addition, the declarations are consistent with other documents filed by the FTC, including APM's scripts and "compliance" materials.[7] (PSOF ¶¶ 8-10, 13, 18-19, 25-26, P.E. 29). Defendants' bare assertion that Plaintiff's evidence is not enough[8] does not create a genuine issue of fact, particularly given Defendants' admitted failure to take any steps to ensure that APM telemarketers complied with the FTC Act or TSR. (D.E. 255-21 Interrs. 4-5, 8-9).[9]

---

[6] *See, e.g., FTC v. Kuykendall*, 312 F.3d 1329, 1343 (10th Cir. 2002); *FTC v. Cyberspace.com*, 2002 U.S. Dist. LEXIS 25565 at *13, n.5 (W.D. Wash. 2002); *FTC v. Figgie Int'l., Inc.*, 994 F. 2d 595, 604, 608-09 (9th Cir. 1993); *FTC v. Amy Travel*, 875 F.2d at 576; and *FTC v. Kitco Nevada, Inc.*, 612 F. Supp. 1282, 1294 (D. Minn. 1985).

[7] *See United States v. Doerr*, 886 F.2d 944, 956 (7th Cir. 1989) (corroborating evidence is an indicator of trustworthiness).

[8] Defendants' assertion that the FTC has introduced only a small number of consumer declarations is unavailing. The fact that "a large number of consumers did not complain or . . . that the FTC came forward with relatively few consumer declarations in support of its motion does not bar the court from entering [summary] judgment." *FTC v. Peoples Credit,* 2005 U.S. Dist. LEXIS 38545, at *25. Moreover, Defendants' observation that two FTC declarants did not personally lose money with APM does not create a question of fact. Even these consumers, who have no cause to be aggrieved, stated that Defendants' telemarketing practices were deceptive

[9] Defendants sold their investments through various "independent" contractors and branch offices. (D.E. 34-1 ¶ 3, Dkt. 52 p. 5). "However, the status of defendants' salesmen as independent contractors or employees is irrelevant to the issues before this Court. The 'independent contractor defense' has been frequently raised and invariably rejected." *FTC v. U.S. Oil & Gas Corp*., No. 83-1702, 1987 U.S. Dist. LEXIS 16137, at * 48 (S.D. Fla. July 10,

B. THERE IS NO GENUINE ISSUE OF FACT THAT DEFENDANTS FAILED TO ADEQUATELY DISCLOSE TOTAL COSTS AND RISKS

Undisputed evidence shows that Defendants violated Section 5 and the TSR by using deceptive omissions to market and promote leveraged investments in precious metals. (*See* PSOF ¶¶ 14-21). Defendants' response consists of general denials that, as a matter of law, are insufficient to avert summary judgment. Plaintiff and Defendant each rely upon the same evidence to prove their claims: APM's brochure,[10] contracts, and "compliance" materials.

1. Defendants Have Cited No Evidence Showing Clear Disclosures of the Total Costs

Incontrovertible evidence shows that Defendants failed to provide consumers with clear disclosures regarding the total costs of their investments. In opposing summary judgment, Defendants baldly assert that all fees, commissions, interest charges and leverage balances were clearly communicated to consumers in APM's contract and post-sale "compliance" calls. (D.E. 34-1 ¶¶ 25-35). The record, however, establishes that Defendants merely told consumers that they would pay a fee of "15 percent of the 'total metal value,'"[11] an inherently confusing message which, combined with Defendants' failure to state the quantity and purchase price of the metals being purchased, was construed by consumers to refer to their initial or cash investment.[12] (*See* D.E.34-1 ¶¶ 21, 27, PSOF ¶¶ 14-15). Similarly, during post-sale

---

1987) (citing *Goodman v. FTC*, 244 F.2d 584, 591 (9th Cir. 1957); *Consumer Sales Corp. v. FTC*, 198 F.2d 404, 406-407 (2d Cir. 1952), *cert. den.* 344 U.S. 912, 97 L. Ed. 703, 73 S. Ct. 335 (1953); *Steelco Stainless Steel, Inc. v. FTC*, 187 F.2d 693, 697 (7th Cir. 1951); *International Art Co. v. FTC*, 109 F.2d 393, 397 (7th Cir.), *cert. den.* 310 U.S. 632 (1940)).

[10] Because the brochure is not part of the consumers' sales contracts and consumers are not required to read or acknowledge receipt or review of the brochure, the brochure is irrelevant and cannot be relied upon to show that proper disclosures were made. (Tr. 77:18-20). Even if the brochure was considered to be a part of consumers' contracts, the purported disclosures, which are at the bottom of page six of the document, are printed over a graphic, rendering any text inconspicuous compared to the general sales materials, which was printed over a plain background. (P.E. 28).

[11] In some instances, consumers were not told about APM's fees. (PSOF ¶ 15). However, for purposes of summary judgment, Plaintiff will assume that consumers were told that the fee was "15 percent of the total metal value."

[12] Defendants' contracts did not define "total metal value" or state the quantity, price, or fees for the metals being purchased. (D.E. 1).

"compliance" procedures, Defendants did not tell consumers, in clear dollars and cents terms, the total costs and fees to be incurred or the exact quantity and purchase price of the metals. Instead, Defendants again told consumers that APM's fee was "15 percent of the 'total metal value'" and gave the "approximate" quantity and price of the metals. (P.E. 29).

The practice of quoting their fees as "15 percent of the 'total metal value'" violated both Section 5 and the TSR. The practice was deceptive under Section 5 because it was likely to mislead consumers acting reasonably.[13] Consumers have stated that they were misled by Defendants' explanation of fees and believed that "15 percent of the total metal value" meant 15 percent of their cash investment. (PSOF ¶ 15). The practice also violated Section 310.3(a)(1)(i) of the TSR, which required Defendants to truthfully, clearly, and conspicuously disclose the total costs and the quantity of the precious metals before consumers paid. 16 C.F.R.§ 310.3(a)(1)(i).

Given the failure of Defendants to provide clear disclosures regarding the total costs, it was reasonable and expected that consumers would be misled. Defendants could have provided a clear statement of the purchase price and quantity of the metals and the fee to be incurred. Their decision not to do so caused consumers to be deceived and violated both Section 5 of the FTC Act, 15 U.S.C. § 45(a), and the TSR, 16 C.F.R. § 310.3(a)(1)(i).

2. Defendants Have Cited No Evidence Showing Conspicuous Disclosures of Risks

Undisputable evidence establishes that Defendants did not provide clear and conspicuous disclosures of the material conditions of their sales offer, as required by Section 310.3(a)(1)(ii) of the TSR. Most notably, after first representing that the precious metals investments were lucrative and safe, Defendants failed alert consumers to the likelihood of an equity call that, for consumers who lacked the wherewithal to make additional investments, culminated in the liquidation of their investments at a loss. (PSOF ¶¶ 8-10, 17-19). As one former APM telemarketer testified, consumers needed the "financial wherewithal" to invest additional money if prices dipped, so that their precious metals would not be liquidated at a loss. (Tr. P. 115). Notwithstanding these risks, Defendants pressured consumers to buy precious metals on credit or

---

[13] A representation or omission is deceptive under Section 5 if it is *likely* to mislead reasonable consumers. *Peoples Credit,* 244 Fed. Appx. 942, 944 (11th Cir. 2007); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003).

to invest their life savings without warning them of the dire consequences for their investments if they were unable to satisfy an equity call. (PSOF ¶¶ 12, 17).

In opposing summary judgment, Defendants baldly assert that they disclosed the risk of equity calls in their contracts. (D.E. 34-1). In fact, the cited contracts show that APM assured consumers that they would "determine if precious metals investing is suitable for you." (D.E. 1, PSOF ¶ 22). Defendants' oblique reference to the risk of an equity call was buried in the middle of a long paragraph at the bottom of page three: "Should the value of the product decline,[14] the lending institution reserves the right to demand either a principal loan reduction or the provision of additional acceptable collateral. . . .[and] also reserve[s] the right to liquidate all or part of the product acting as collateral for the loan without any prior notice to the client." (D.E. 1). Such buried "disclosures' were not sufficient to overcome the overall impression that precious metals were low-risk, "safe haven" investments and therefore were not clear or conspicuous as a matter of law. (*See* PSOF ¶¶ 8-10, 18-19). Thus, for purposes of summary judgment, Defendants reliance on them is unavailing.

3. Defendants' Post-Sale "Compliance" Procedures Were Untimely as a Matter of Law

Defendants assert that proper disclosures were provided during "compliance" calls, which took place *after* consumers paid for their investments.[15] (PSOF ¶ 21). However, the TSR requires disclosures to be made *before* a consumer pays for goods or services offered. 16 C.F.R. 310.3(a)(1).[16] Despite the plain language of the TSR, Defendants assert that their "compliance" procedures satisfy § 310.3(a)(1) because, although the consumer had already paid, "no trade was finalized until it was confirmed with APM's compliance officer and the customer was tape recorded." (DSOF ¶ 21). Defendants provide no authority for their contention that, contrary to §

---

[14] A scenario expressly discounted by Defendants during sales solicitations, when consumers were told precious metals prices were "poised to skyrocket" and were a "safe haven." (PSOF ¶¶ 8-10, 18-19).

[15] Even if the "compliance" calls had occurred before consumers paid, Defendants failed to clearly disclose the total costs and risks of the investments during the calls. *Supra,* p. 8.

[16] In fact,"[w]hen a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the sell or telemarketer must make the disclosures require by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment." § 310.3(a)(1) N.1.

310.3(a)(1), disclosures can be provided after a consumer pays, but before an account is opened or a trade executed. Indeed there is no such authority and purported disclosures given during "compliance" calls were insufficient as a matter of law.

C. THERE IS NO GENUINE ISSUE OF FACT THAT DEFENDANTS PARTICIPATED IN OR CONTROLLED AND HAD REQUISITE KNOWLEDGE OF THE DECEPTION

The FTC has amassed substantial evidence of each of the Defendants' knowledge, participation, or control of the deceptive scheme. (PSOF ¶¶ 30-37). Defendants replied with mere general denials and self-serving assertions that are not accompanied by supporting evidence.

Notwithstanding Defendants' bald assertion that Defendant Andrea Tanner was a bookkeeper who lacked authority to control APM, the evidence shows that she was fully engaged in APM's business, that she participated in or controlled APM and knew about, or recklessly disregarded, the law violations. Her authority to control the corporation was evidenced in a number of different ways: (1) she contracted with telemarketers on behalf of APM (P.E. 23 Att. J); (2) she established company policies (P.E. 23 Att. L); and (3) she held herself out as a manager of APM to the state of Florida (P.E. 1 Att. B). Additionally, as vice-president and managing member, she filed APM's annual reports (P.E. 1 Att. A), and was listed as a general partner or member-manager of APM on its Schedule K-1. (P.E. 23 Att. S). APM's profits were filtered through Harebear, Inc., a closely-held shell corporation for which she was an officer and sole shareholder. (P.E. 23 Att. U). Ms. Tanner formed APM with her husband and Mr. Goldman after their three prior businesses were banned from selling futures by the National Futures Association because of deception (PSOF ¶¶ 34, 38; P.E. 1 Att. N), so she was aware of a high probability of deception. She had access to all of the evidence submitted in this matter including the telemarketing scripts, consumer files, and audio recordings. (PSOF ¶ 34). Given her ongoing involvement in APM's affairs, it is obvious that, at a minimum, Mrs. Tanner was recklessly indifferent to its law violations.

Likewise, the evidence of Sam Goldman's knowledge, participation, and control of APM is also uncontroverted. (PSOF ¶¶ 35-37). Mr. Goldman hired APM's telemarketers, including those he knew to have prior regulatory or criminal histories (Tr. 26:6 - 30:3, Tr. 96:16-22, Tr. 116:22 - 117:9), and he provided them with training or instruction. (Tr. 30:23 - 32:23, Tr. 37:1-6, Tr. 37:16-20, Tr. 34:5-9, Tr. 39:19 - 40:6). Mr. Goldman actively participated in the deception

and told telemarketers to trade accounts frequently to generate additional fees. (Tr. 37:1-20). He placed orders for APM customers to have accounts established at Global Asset Management (D.E. 181-1), received and responded to consumer complaints (Tr. 40:11-12. Tr. 98:21-23), and participated in APM's affairs as a manager. (P.E. 9 ¶ 13).

The deceptive practices employed at APM were identical to those used at three of the companies that Mr. Goldman and Mr. Tanner previously operated together: Mizner Fin'l. Trad. Group, Bentley Trad. Group, Inc., and Terranova Fin'l. Trad. Corp. – all of which were permanently expelled from NFA membership after being found to have misrepresented the likelihood of profits and failed to adequately disclose risk (where 302 of 398 customers lost a total of $3.3 million).[17] (P.E. 1 Att. N pp. 169-215). Indeed, the contracts and "compliance" procedures employed by APM are the same as those used at Messrs. Goldman and Tanner's prior companies – the companies even shared the same "compliance officers": Anthony Masters and Harry Tanner. (*See* D.E. 255-21 Interr. 10, P.E. 1 Att. N. p. 190). Defendants have thus failed to raise any genuine issue as to Mr. Goldman's liability.

IV. DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE FOR APM'S UNJUST ENRICHMENT

In addition to failing to show that there are no disputed issues of material fact regarding Defendants' liability for APM's unlawful practices, Defendants have not shown that the *amount* of their liability is genuinely disputed. The proper amount to be disgorged is $26,883,390, representing the commissions and fees that APM received from consumers who purchased its products, and excluding any losses caused to consumers by external market forces. Between June 29, 2007 and May 13, 2011, consumers paid APM $41,665,099 to purchase precious metals

---

[17] Defendants object to Plaintiff's characterization of Messrs. Goldman and Tanner as "recidivists" and misleadingly assert to the Court that Mr. Goldman voluntarily entered into only 7 consent agreements during his career. However, Defendants ignore a September 27, 2006 NFA decision, entered following a contested hearing, that Goldman and Tanner's three companies operated deceptively and made false and misleading representations that investors were likely to earn high profits (P.E. 1 Att. N p. 202) without adequately disclosing risks. (P.E. 1 Att. N pp. 203-205). Defendants also ignore the fact that courts may consider a litigant's pattern of *consent* orders to show knowledge of legal requirements, intent, plan, or absence of mistake. *See, e.g. New England Enter., Inc. v. U.S.*, 400 F.2d 58, 70 (1st Cir. 1968); *U.S. v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1982); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1413 (4th Cir. 1991) (*en banc*); *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 584 (9th Cir. 1982).

investments. (Dkt. 109 p. 20 of 26, *see also* Tr. 10:13-14). In turn, APM paid $17,292,608 to fund consumers' purported investments (Dkt. 109 p. 20 of 26, Tr. 10:17-18), and retained the balance, $24,372,491, as payment of fees and commissions. In addition, APM received $2,510,899 from its clearinghouse as payment of commissions owed for consumers who used the "equity" to purchase additional metals.[18] (Dkt. 109, p. 20 of 26). Although Defendants object to these figures in their opposition to summary judgment, they have disavowed knowledge of and have not rebutted these figures in answer to interrogatories. (Dkt. 255-21 Interrs. 19-21).

In addition to their joint and several liability for $26,883,390,[19] Defendant Goldman is also separately liable for $1.2 million in interest charges that were assessed to APM's customers and then paid to him. (Dkt. 161 p. 8 of 17, Dkt. 232 p. 7 of 12).

V. CONCLUSION

Defendants have failed to raise a genuine issue of material fact to counter Plaintiff's motion for summary judgment. Therefore, summary judgment is both appropriate and just under Fed. R. Civ. P. 56(a).

---

[18] Consumers who purchased additional metals using their "equity" did not send payment directly to APM. Instead, accounting entries were made at the clearinghouse to reflect the reinvestment of the consumers' equity and the clearinghouse then paid APM its commissions. (Dkt. 204-1 ¶¶ 6-7). Defendants contend that, through this process, they are entitled to an offset of more than $12 million, but they not supported this claim with one iota of evidence.

[19] *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (holding that joint and several liability for unjust enrichment or disgorgement is appropriate when two or more individuals have close relationship in engaging in illegal conduct even if one is more culpable). *See also FTC v. Gem Merch. Corp*., 87 F.3d 466, 470 (11th Cir. 1996) ("Once the FTC has established corporate 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").

Respectfully submitted,

Dated: April 5, 2012

/s/ Dama J. Brown
DAMA J. BROWN
Special Florida Bar No. A5501135
Email: dbrown1@ftc.gov
Telephone: (404) 656-1361

BARBARA E. BOLTON
Special Florida Bar No. A5500848
Email: bbolton@ftc.gov
Telephone: (404) 656-1362

225 Peachtree Street, N.E., Suite 1500
Atlanta, Georgia 30303
Facsimile: (404) 656-1379

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing motion was filed with the Clerk of the Southern District of Florida using the CM/ECF system, which will send notice of electronic filing to all counsel or parties of record on the Service List below.

Service List

Myles Malman
myles@malman.com
Malman, Malman & Rosenthal
3107 Stirling Road, Suite 101
Fort Lauderdale, Florida 33312-8500
Tel. 954-322-0065
Fax. 954-322-0064
Attorney for Defendants

Jonathan Rosenthal
jrosenthal@bellsouth.net
Malman, Malman & Rosenthal

3107 Stirling Road, Suite 101
Fort Lauderdale, Florida 33312-8500
Tel. 954-322-0065
Fax. 954-322-0064
Attorney for Defendants

Patrick Rengstl
pjr@lkllaw.com
Levine Kellog Lehman Schneider & Grossman
201 South Biscayne Boulevard
34th Floor, Miami Center
Miami, Florida 33131
Telephone: (305) 403-8788
Fax: (305) 403-8789
Attorney for David R. Chase, Receiver

April 5, 2012

/s/ Dama J. Brown
Dama J. Brown
Special Bar No. A5501135
Email: dbrown1@ftc.gov
Telephone: (404) 656-1361