16-3811, 16-3805

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

FEDERAL CHECK PROCESSING, INC., *et al.*,
Defendants,

and

MARK BRIANDI, and WILLIAM MOSES,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of New York, No. 1:14-cv-122-WMS

FINAL FORM BRIEF OF THE FEDERAL TRADE COMMISSION

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JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), and 1692*l*. The district court entered final judgment on October 13, 2016, and appellants filed timely notices of appeal on November 8, 2016. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTION PRESENTED

The Federal Trade Commission (FTC) sued a group of interrelated debt-collection companies and the two individuals, Mark Briandi and William Moses, who co-owned and ran the business, for violating the Federal Trade Commission Act and the Fair Debt Collection Practices Act. Following discovery, the FTC moved for summary judgment. The FTC's evidence—which included scripts used by defendants' employees, transcribed recordings of their calls to consumers, consumer complaints to the FTC and state agencies, and sworn consumer declarations—demonstrated that defendants' collectors routinely used false threats of criminal prosecution and other unlawful tactics to extort money from consumers. These unlawful practices continued, moreover, even after Briandi and Moses entered into an Assurance of Discontinuance with the State of New York to resolve the State's findings that their collection business "repeatedly and persistently" engaged in deceptive practices. The corporate defendants did not respond to the FTC's summary judgment motion. Briandi and Moses did not

dispute that their employees had used unlawful collection practices, but argued that they were unaware of this wrongdoing and thus could not be held individually liable. They failed, however, to back up their blanket denials with evidence. The district court granted summary judgment for the FTC.

Briandi and Moses filed separate appeals. Moses did not submit a brief. Briandi's brief raises the following issues:

1. Whether the district court properly held Briandi individually liable for the consumer injury caused by his companies' violations.

2. Whether the district court properly set the measure of equitable monetary relief equal to Briandi's companies' total proceeds from the fraudulent scheme.

STATEMENT OF THE CASE

A. Defendants' Unlawful Debt Collection Practices.

Mark Briandi started a debt collection business in 2009 under the corporate name Federal Recoveries, LLC. SOF ¶¶2, 20 (Dkt. 127-2 at 2, 6) [A. 138, 142].[1] He and Moses subsequently created twelve more corporations, all of which existed to further the operation's purpose of collecting consumer debts (principally defaulted payday loans), which they purchased from third-party debt brokers for

[1] "SOF" refers to the FTC's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried. "Dkt." refers to entries on the district court docket. "A." refers to the joint appendix.

pennies on the dollar. SOF ¶¶2, 8, 14 (Dkt. 127-2 at 2-5) [A. 138-41]. From the start, defendants pursued debt collection aggressively and deceptively, preying on consumers' unfamiliarity with the legal system to extort payments through bogus threats of potential criminal or civil actions. Their practices violated the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a), and the Fair Debt Collection Practices Act (FDCPA), which prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C § 1692e. FDCPA violations are deemed to be "unfair or deceptive acts or practices" under the FTC Act. 15 U.S.C § 1692*l*(a).

The FTC's evidence showed that the deception began from the start of a collection call placed to a consumer. Although the FDCPA requires a debt collector to identify himself as such, 15 U.S.C. § 1692e(11), Briandi's collectors did not do so. Instead, they identified themselves as "processors," "officers," or "investigators" from the company's "fraud unit" or "fraud division." SOF ¶¶87, 88 (Dkt. 127-2 at 17-18) [A. 153-54]. In some instances, defendants' collectors expressly told consumers that they were *not* debt collectors. SOF ¶86 (Dkt. 127-2 at 16-17) [A. 152-53]. To hide their identities further, Briandi's callers frequently used aliases. SOF ¶85 (Dkt. 127-2 at 16) [A. 152].

The FDCPA expressly prohibits debt collectors from falsely representing or implying "that the consumer committed any crime" or "threat[ening] to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5), (7).[2] Defendants' collectors nevertheless accused consumers of criminal violations and threatened that legal action was pending or imminent, even though these threats lacked any basis. SOF ¶¶89-97 (Dkt. 127-2 at 18-25) [A. 154-61]. One script (authored by Moses) directed the callers to tell consumers that they were accused of "intensionally" [*sic*] writing bad checks, and "[t]he party to whom your check bounced is alleging . . . you should be processed." The script instructed the caller to extract payment from the consumer by offering to "accommodate a voluntary resolution" of this "complaint." PSJX 41 at 1422 (Dkt. 132-11 at 109) [A. 551]; PSJX 41 at 1398.1 (Dkt. 132-11 at 85) [A. 548].[3] Another script included directions for the "processor" to leave a voice mail message stating that "I have a claim here naming you as a main respondent" in connection with "a NSF transaction" and "would like to review the complaint with you prior to processing." The script directed the caller to leave follow-up messages warning the consumers

[2] *See also* 15 U.S.C. § 1692e(4) (prohibiting "[t]he representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action").

[3] "PSJX" refers to plaintiff FTC's exhibits by number. An index of the FTC's exhibits can be found at Dkt. 129 at 2-4 [A. 722-24].

that failure to respond to the "pending allegations" would result in an adverse decision against them. PSJX 39 at 1091 (Dkt. 132-8 at 13) [A. 656].

Other scripts—found in numerous cubicles in defendants' call center—elaborated on the legal jeopardy that consumers supposedly faced if they did not immediately pay. PSJX 16 at 402-06 ¶¶11-27 (Dkt. 130-4 at 5-8) [A. 883-86]. These scripts stated, for example:

> This is Kim Carter calling w/ the fraud division of NCP … I'm calling in regard to a complaint that was filed & Formalized w/ our office . . . You are listed as the primary respondent in regards to allegations of fraud. PSJX 16 at 424 (Dkt. 130-4 at 26) [A. 889].
>
> I'm calling in regards to a number of questionable transactions made via a Bank checking [a]cct that is directly linked to your name and SSN! . . . at this time, unfortunately, they are requesting we process this matter against you in accordance w/ State & Federal Law. However there is a small window of time I can allow you the opportunity . . . to avoid these proceedings that are due to commence. PSJX 16 at 433 (Dkt. 130-4 at 35) [A. 890].
>
> I'm calling regarding a legal matter, we received a claim from bank stating that you wrote a bad check electronically on the computer . . . So we have 2 charges pending. A criminal charge and a civil charge regarding the balance owed. . . . You are eligible for $ as an out of court settlement . . . We are not a collection agency or a financing dept so we can't take anything small over an extended period of time. PSJX 16 at 446-47 (Dkt. 130-4 at 48-49) [A. 892-93].
>
> You are being investigated for fraud. Attached to the complaint is your home & SS# ending in _ _ _ _. If you wish to resolve this matter voluntarily, before any charges are filed in ___ county, you are mandated to respond. . . . You are being charged with: − aggrivated [*sic*] defrauding of a Financial institution − Theft of service & intent to defraud a Banking institution. PSJX 16 at 487 (Dkt. 130-5 at 34) [A. 894].

The FTC's evidence confirmed that Briandi's collectors followed these scripts when contacting consumers for payment. Transcripts of recorded calls documented representations that consumers had committed criminal or civil fraud in connection with their debts. PSJX 38 at 799-810 ¶¶5-36 (Dkt. 132-7 at 2-13) [A. 610-21]; *e.g.*, *id*. at 816-17 (Dkt. 132-7 at 19-20) [A. 623-24]; *id*. at 928-32 (Dkt. 132-7 at 131-35) [A. 629-33]; *id*. at 1061-63 (Dkt. 132-7 at 264-66) [A. 640-42]; *id*. at 1076 (Dkt. 132-7 at 279) [A. 643]. Further, multiple consumer declarants reported being threatened with criminal or civil penalties, including arrest, felony charges, or garnishment of wages. PSJX 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (Dkt. 129 at 5-24. 129-1, 129-2, 129-3, 129-4, 129-5, 129-6, 129-7, 129-8, 129-9) [A. 725-97]. Hundreds of consumers complained to the FTC and state agencies about similar threats. PSJX 11 at 80-83 ¶¶64-70 (Dkt. 129-10 at 18-21) [A. 815-18]; *id*. at 307-08 ¶¶14-15 (Dkt. 129-14 at 48-49) [A. 869-70]; PSJX 39 at 1087 ¶31 (Dkt. 132-8 at 9) [A. 652].

Briandi's collection efforts did not stop at the consumers themselves. His collectors also tried to increase the pressure by contacting third parties close to consumers, including their relatives and employers. SOF ¶¶107-115 (Dkt. 127-2 at 26-28) [A. 162-64]. The FDCPA prohibits such practices with only limited exceptions inapplicable here. *See* 15 U.S.C. § 1692c(b); *see also Padilla v. Payco Gen. Am. Credits, Inc.*, 161 F. Supp. 2d 264, 274 (S.D.N.Y. 2001). To tighten the

screws further, one script called for the collector to threaten to "supena [*sic*] the records" of the consumer's employer. PSJX 16 at 504 (Dkt. 130-5 at 51) [A. 895]. Following another script, the collector would tell third parties that there was a "Complaint filed under name and SSN," and the caller needed "to speak to [the debtor] before the complaint is filed." PSJX 16 at 440 (Dkt. No. 130-4 at 42) [A. 891]. Several consumers submitted declarations to the FTC confirming that Briandi's collectors in fact contacted their relatives and employers, often repeatedly, claiming that the consumer had committed "fraud" and was facing legal action. PSJX 4 ¶¶7-8 (Dkt. 129-3 at 3-4) [A. 757-58]; PSJX 5 ¶¶8-10 (Dkt. 129-4 at 3) [A. 761]; PSJX 6 ¶¶12, 15 (Dkt. 129-5 at 4) [A. 766]; PSJX 9 ¶¶11-12, 14-15 (Dkt. 129-8 at 5-6) [A. 787-88]; PSJX 10 ¶7 (Dkt. 129-9 at 3) [A. 795].

All of these threats were empty. Defendants never filed a single lawsuit against a consumer or sought to garnish any consumer's wages, and they lacked any basis for claiming that the original creditor would do so. Nor was any consumer arrested or prosecuted by criminal authorities, as Briandi's callers had threatened. SOF ¶¶91-93, 95, 97 (Dkt. 127-2 at 24-25) [A. 160-61]; PSJX 43 at 1495, Tr.44:2-8 (Dkt. 132-13 at 12) [A. 559]; *id*. at 1505, Tr. 82:7-20 (Dkt. 132-13 at 22) [A. 560].

In addition, even though Section 1692e(2) of the FDCPA prohibits falsely representing "the character, amount, or legal status of any debt," Briandi's

collectors misrepresented the amount of debt the consumers owed. Using a "formula" that Moses created, they tacked on "interest" to the debts. But they simply made up that amount, using interest rates they found in sample payday loan contracts, without any indication that those interest rates actually applied to the particular debt collected. SOF ¶¶129-134 (Dkt. 127-2 at 31-32) [A. 167-68]. Consequently, many consumers paid more than they owed. For example, defendants' collectors told one consumer that she owed $10,979.07, which she agreed to pay, even though her outstanding balance was listed as $5,892.58. SOF ¶128(a) (Dkt. 127-2 at 30-31) [A. 166-67]. Another consumer was told that he owed over $400 when the debt portfolio listed his debt as $166.04. SOF ¶128(d) (Dkt. 127-2 at 31) [A. 167]. Indeed, the company that sold debt portfolios to defendants complained to Moses that they were "inflating the balance" of debts. SOF ¶¶136-38 (Dkt. 127-2 at 32-33) [A. 168-69]; PSJX 41 at 1444-45 (Dkt 132-11 at 131-32) [A. 552-53]. Nevertheless, this practice continued.

Further, the collecting companies withheld information they were legally obligated to provide. The FDCPA requires a debt collector to give consumers written notice containing the amount of the debt and the name of the creditor, along with a statement that the debt collector will assume the debt is valid unless the consumer disputes the debt within 30 days. 15 U.S.C. § 1692g(a). Heedless of

this requirement, the collecting companies failed to provide documentation even when a consumer requested it. SOF ¶¶ 118-121 (Dkt. 127-2 at 28-29) [A. 164-65].

Rather than complying with the statute, Briandi's collectors insisted that consumers first agree to pay before the company would provide documentation of the debt. SOF ¶122 (Dkt. 127-2 at 29-30) [A. 165-66]. For example, when one consumer asked for "a statement in the mail," the collector protested that he did not have time for "going back and forth in the mail," and "it's either . . . get it resolved or process it." PSJX 38 at 825-26 (Dkt. 132-7 at 28-29) [A. 625-26]. When the consumer persisted, asking for email confirmation of the payment demands, the collector ended the call, warning, "We have your place of employment located. Good luck in court." *Id*. at 828 (Dkt. 132-7 at 31) [A. 628]. When another consumer stated that she wanted "to investigate before I do anything," the collector said she could provide "an information letter" but warned that "[t]he balance is due today," and "[i]t will state right on the letter we have to have a confirmation today of your agreement." PSJX 38 at 942-43, 945-46 (Dkt. 132-7 at 145-46, 148-49) [A. 635-36, 638-39]. Defendants' caller told another consumer, "it is not Nationwide Check Processing's policy to send out letters"—adding that if the consumer did not pay by the day's end, "subpoenas would be processed" and the consumer "would be served with legal papers." PSJX 2 ¶¶4-5 (Dkt. 129-1 at 2-3) [A. 746-47]. When the collection companies did send letters to consumers, they

neglected to include information—required by the FDCPA—about how to dispute the purported debt. *See*, *e.g.*, PSJX 41 at 1417-18 (Dkt. 132-11 at 104-05) [A. 549-50].

B. The Roles Of Briandi And Moses.

Documents and information obtained from defendants, confirmed by sworn deposition testimony, showed that Briandi and Moses were the driving force behind the entire business. They started the business in 2009 and were the co-owners, principals, and sole officers of the corporate defendants. SOF ¶¶20-21, 41-42 (Dkt. 127-2 at 6-7, 9) [A. 142-43, 145]; PSJX 34 at 769 (Dkt. 132-3 at 4) [A. 564]; PSJX 35 at 773-79 (Dkt. 132-4 at 2-8) [A. 569-75]. They had signatory authority over the corporate bank accounts and controlled the corporate finances. SOF ¶¶22, 43 (Dkt. 127-2 at 7, 10) [A. 143, 146]; PSJX 41 at 1321-33, 1336-37 (Dkt. 132-11 at 6-18, 21-22) [A. 531-45]. Briandi and Moses each drew over $1.1 million directly from the corporate bank accounts.[4] SOF ¶¶24, 45 (Dkt. 127-2 at 7, 10) [A. 143, 146]; PX 39 ¶¶27-28 (Dkt. 132-8 at 8-9) [A. 651-52]. They had the authority to hire and fire employees, discipline employees, and determine employee compensation. SOF ¶¶26-27, 46-47 (Dkt. 127-2 at 7-8, 10) [A. 143-44, 146]; Briandi Deposition (Dep.) at 162, 188-89 (Dkt. 150-1 at 166, 192-93)

[4] They also transferred $92,000 from corporate bank accounts to a horse racing venture of theirs, Empowered Racing, named as a relief defendant in this case. SOF ¶162 (Dkt. 127-2 at 36) [A. 172].

[A. 357, 383-84]. Briandi was responsible for signing the checks and managing the corporate defendants' banking. Briandi Dep. at 176 (Dkt. 150-1 at 180) [A. 371]. He was listed as the contact person for the corporate defendants' phone and internet registry accounts. SOF ¶29 (Dkt. 127-2 at 8) [A. 144].

Briandi and Moses played significant roles in the debt collection operation. Both maintained desks in the call center. SOF ¶¶36, 52 (Dkt. 127-2 at 9, 11) [A. 145, 147]. Initially, Briandi regularly made collection calls himself. Briandi Dep. at 71 (Dkt. No. 150-1 at 75) [A. 266]. Some of Briandi's calls led to consumer complaints to the FTC. PSJX 11 at 261-78 (Dkt. 129-14 at 2-19) [A. 850-66]. As the operation matured, Briandi did not place many collection calls, but would handle calls "passed to" him by other collectors. Briandi Dep. at 72 (Dkt. 150-1 at 76) [A. 267]; PSJX 40 at 1279-80 (Dkt. 132-10 at 19-20) [A. 529-30].

Moses approved scripts used by collectors to make collection calls and authored at least one of the deceptive scripts. SOF ¶¶53-54 (Dkt. 127-2 at 11) [A. 147]. Moses also handled collection calls, some of which led to consumer complaints to the FTC. SOF ¶¶59-60 (Dkt. 127-2 at 12) [A. 148]. In addition, Moses received and responded to complaints from state law enforcement and the Better Business Bureau. SOF ¶¶55-57 (Dkt. 127-2 at 11) [A. 147].

C. The Continued Violations After Briandi And Moses Agreed With The State Of New York To Stop Violating The FDCPA.

In 2012, Briandi and Moses learned that New York State's Attorney General, spurred by voluminous consumer complaints, was investigating their operation. PSJX 35 at 781 (Dkt. 132-4 at 10) [A. 577]. The State ultimately found that the Briandi/Moses debt collection companies "repeatedly and persistently violated the FDCPA." PSJX 11 at 307-08 ¶17 (Dkt. 129-14 at 49) [A. 870]. Briandi and Moses resolved the state investigation in February 2013 by signing an Assurance of Discontinuance ("AOD"). *Id*. at 305-16 (Dkt. 129-14 at 46-57) [A. 867-78]. The AOD stated that the Attorney General, the Better Business Bureau, and the FTC had received numerous complaints that the collectors accused the consumers of breaking the law, threatened them with arrest and imprisonment, falsely informed them that a lawsuit had been or would be filed, disclosed their debts to third parties, threatened to seize their property and garnish their wages, and failed to send them validation letters. *Id*. at 307-08 ¶15 (Dkt. 129-14 at 48-49) [A. 869-70]. Although they did not admit or deny the charges, Briandi and Moses agreed to correct these practices. *Id*. at 309 ¶21 (Dkt. 129-14 at 50-51) [A. 871-72]. Among other things, the AOD required them to notify the Attorney General if they incorporated new corporations or began to do business under new names. *Id*. at 311-12 ¶28 (Dkt. 129-14 at 52-53) [A. 873-74]. Briandi and Moses later signed an affidavit certifying that they had implemented various procedures to ensure the

collection companies' compliance. PSJX 41 at 1446-49 (Dkt. 132-11 at 133-36) [A. 554-57].

Despite their agreement with the State, Briandi and Moses did not stop their companies' unlawful collection practices. Instead, to evade scrutiny, they formed new corporations and began collecting debts under new names—without disclosing these entities to the Attorney General.[5] Although their collection business was based exclusively in the Buffalo area, Briandi and Moses established mailing addresses for the new entities in Denver, Colorado, and Erie, Pennsylvania. Their companies used these out-of-state addresses in their communications with consumers. To further evade local scrutiny, Briandi and Moses began using phone lines with Denver and Erie area codes to place collection calls. SOF ¶¶65-77 (Dkt. 127-2 at 13-14) [A. 149-50].

D. The FTC's Enforcement Lawsuit.

In February 2014, the FTC sued Briandi, Moses, and their companies for violations of the FTC Act and the FDCPA.[6] Dkt. 1. The district court entered a temporary restraining order granting the FTC access to defendants' business

[5] Briandi refused to answer on Fifth Amendment grounds when asked if they informed the Attorney General about the formation of new debt collection companies. Briandi Dep. at 191-93 (Dkt. 150-1 at 195-97) [A. 386-88]. Moses testified that he did not believe they informed the Attorney General. PSJX 43 at 1493, Tr. 35-36 (Dkt. 132-13 at 10) [A. 558].

[6] The complaint also named Empowered Racing as a relief defendant. *See supra* 10 n.4.

premises. Dkt. 11. When FTC staff entered the premises, it found deceptive scripts at 15 of 26 call center work stations, consumer complaints in both Briandi's and Moses' offices, and a list of criminal and civil penalties for bad checks (useful for threatening consumers) at Briandi's desk on the collection floor. PSJX 39 at 1083-84 & 1087 ¶¶15, 18, 31 (Dkt. 132-8 at 5-6, 9) [A. 648-49, 652]. FTC staff also obtained recordings of collections calls. PSJX 38 at 799-809 ¶¶5-35 (Dkt. 132-7 at 2-12) [A. 610-20]. The FTC's evidence captured 21 of the 25 collectors employed by Briandi and his companies committing unlawful collection practices—including the three managers who supervised all collections. PSJX 39 at 1085 ¶20 (Dkt. 132-8 at 7) [A. 650]. Shortly thereafter, defendants stipulated to a preliminary injunction. Dkt. 43.

The court gave the parties a year to conduct discovery. Dkt. 68. Defendants, however, largely ignored and avoided the process. The corporate defendants and Moses did not produce the mandatory initial disclosures required by Fed. R. Civ. P. 26(a) and failed to comply with the court's order requiring production. *See* Report and Recommendation (R&R) 13-14 (Dkt. 168) [A. 13-14]; Dkt. 80, 88, 104, 108, 113, 114. For his part, Briandi did not respond to the FTC's requests for admission until well after discovery had closed (and Moses did not respond at all). *See* R&R 26, 28 n.10 [A. 26, 28]. When the FTC deposed Briandi and Moses, both refused to answer numerous questions, instead invoking the Fifth Amendment. Briandi

invoked the privilege in response to questions concerning his involvement in training staff, ensuring that consumers received statutorily-required validation letters, disciplining employees for violating the FDCPA, and his conduct with respect to compliance measures required by the AOD. Briandi Dep. at 191-93, 199-205 (Dkt. 150-1 at 195-97, 203-09) [A. 386-88, 394-400]. Moses invoked the privilege with respect to whether he obfuscated the identity and location of his companies following the AOD. PX41 at 1368, 1371 (Dkt. 132-11 at 53, 56) [A. 546-47]. The defendants did not seek discovery from the FTC or third parties.

E. The FTC's Motion For Summary Judgment

After the conclusion of discovery, the FTC filed a motion for summary judgment supported by over 1,500 pages of evidence, including collection scripts found in defendants' call center, transcribed recordings of their collection calls, sworn declarations by consumers, consumer complaints submitted to the FTC and other agencies, and deposition testimony by Briandi, Moses (individually and as a representative of the corporate defendants), and an employee of the business. Dkt. 127-132.

The corporate defendants did not file an opposition to the FTC's motion or respond to the FTC's statement of undisputed facts. *See* R&R 2 [A. 2]. Briandi's response to the FTC's statement of facts consisted almost entirely of unsupported denials; he cited evidence (his deposition testimony) in response to only three (out

of 165) numbered paragraphs. Dkt. 150. He accompanied his response with a four-paragraph affidavit stating that he "agree[d] with" his attorney's assertions in that filing. Dkt. 150-1 at 2 [A. 193]. Briandi also submitted, for the first time, a response to the FTC's Requests for Admission (served on him seven months earlier). *Id*. at 244-48 [A. 435-39]. Moses cited no evidence in his response to the FTC's statement of facts. Dkt. 145.

F. The District Court's Decision.

The court designated Magistrate Judge Michael J. Roemer to hear and report on dispositive motions. Dkt. 159. On April 13, 2016, Judge Roemer recommended that the court grant the FTC's motion for summary judgment. Dkt. 168 [A. 1-36]. He found that nearly all items in the FTC's statement of facts regarding the corporate defendants' unlawful practices were undisputed. R&R 2 [A. 2]. These undisputed facts established that the corporate defendants operated as a common enterprise owned and directed by Briandi and Moses. *Id*. at 16-18 [A. 16-18].

Judge Roemer found further that the undisputed facts showed that the corporate defendants violated the FDCPA's prohibition of false or misleading representations by: (1) falsely representing or implying government affiliation; (2) deceptively threatening criminal and other legal actions; (3) inflating the amount of debts; and (4) failing to disclose that the communication was from a debt collector. The Judge found that the corporations also violated the FDCPA by

improperly communicating with third parties and by failing to provide consumers with validation of the debt. *Id*. at 18-23 [A. 18-23]. Those undisputed facts also proved that the corporate defendants violated the FTC Act because they made material misrepresentations likely to mislead reasonable consumers. Indeed, the Judge noted, the FTC had identified consumers who were duped by the misrepresentations into paying the corporate defendants. *Id*. at 23-24 [A. 23-24]. Thus, Judge Roemer recommended that summary judgment be granted against the corporate defendants on each count of the complaint. *Id*. at 24 [A. 24].

Judge Roemer also found that undisputed facts established that both Briandi and Moses were individually liable for the corporate violations. With respect to Moses, he found that Moses had the authority to control the corporate defendants and directly participated in their wrongdoing by handling collection calls, approving scripts used by collectors to call consumers, and authoring a deceptive script. The undisputed facts also showed that Moses had knowledge of the corporate defendants' misrepresentations, "aris[ing] from his participation in the corporate defendants' operation, which was permeated with fraud," and by virtue of the AOD. In addition, the Judge found, Moses' failure to respond to the FTC's Requests for Admission operated as an admission that he knew of the corporate defendants' wrongdoing. *Id*. at 24-26 [A. 24-26].

With respect to Briandi, Judge Roemer found that the undisputed facts established that he also was individually liable because he had the authority to control the corporate defendants and had knowledge of their misrepresentations. Although Briandi disputed having actual knowledge of the corporate defendants' misrepresentations, the Judge found that the uncontroverted facts established that in light of the AOD, Briandi was aware of a high probability of fraud within the corporate defendants' operation, but intentionally avoided learning of continued violations. The Judge also found that, by failing to respond timely to the FTC's Requests for Admission, Briandi admitted his knowledge of the corporate defendants' wrongdoing. But even in the absence of this admission, the Judge noted, he would still recommend summary judgment against Briandi. *Id*. at 26-29 [A. 26-29].

Judge Roemer recommended both that defendants be permanently enjoined from engaging in debt collection activities and that the district court award equitable monetary relief to remedy consumer injury. *Id*. at 31, 34 [A. 31, 34]. With regard to consumer injury, the Judge noted that the FTC was "not required to prove each individual consumer's reliance," but was "entitled to a presumption of reliance," if (1) the defendants made material misrepresentations of the kind relied on by reasonable persons; (2) the misrepresentations were "widely disseminated"; and (3) consumers actually paid the defendants. *Id*. at 32 [A. 32] (citing *FTC v.*

BlueHippo Funding, LLC, 762 F.3d 238, 244 (2d Cir. 2014)). The Judge found that the FTC met all three requirements. *Id*. at 32-33 [A. 32-33]. Because defendants had "not submitted any proof that [they] earned all or some of their revenue through lawful means," Judge Roemer recommended that the district court grant judgment against the defendants for $10,852,396, the total amount they collected from consumers. *Id*. at 34 [A. 34].

The district court adopted the Report and Recommendation and granted the FTC's motion for summary judgment in its entirety. Dkt. 186. On October 12, 2016, the court entered judgment for the FTC. Dkt. 188 [A. 37-67].

SUMMARY OF ARGUMENT

The district court properly held Briandi individually liable for the actions of his debt collection companies, after it found undisputed facts establishing the two key elements of individual liability: that Briandi had (1) authority to control the companies and (2) knowledge of their deceptive and abusive collection practices. Briandi admitted both elements by failing to timely respond to the FTC's Requests for Admission.

But even setting those admissions aside, Briandi has failed to demonstrate any genuine dispute of fact that would preclude summary judgment. Although Briandi claims that his devotion to prayer left him unaware of his companies' violations, his lack of actual awareness is immaterial. The knowledge required for

individual liability can be satisfied by an "awareness of a high probability of fraud along with an intentional avoidance of the truth." *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989). Here, Briandi does not—and cannot—dispute that the New York Attorney General's 2012 investigation and the 2013 Assurance of Discontinuance, which he personally signed, put him on notice that his companies were using deceptive and abusive collection practices. If Briandi was ignorant of his companies' practices after that point, his ignorance was self-imposed, and it does not insulate him from liability.

Briandi's claim that the district court wrongly deprived him of discovery needed to oppose summary judgment is specious. He waived that argument by failing to provide an explanatory affidavit, as Federal Rule of Civil Procedure 56(d) requires. Moroever, Briandi had ample notice of the FTC's arguments and abundant time—a year—to conduct discovery to counter those arguments. He has only himself to blame for his failure to conduct discovery.

Briandi's challenges to the award of monetary relief are likewise meritless. Briandi is wrong that the district court, in finding pervasive violations, improperly relied on declarations of defrauded consumers and consumer complaints submitted to the FTC and state agencies when it granted summary judgment. By not objecting to this evidence below, Briandi has waived this argument. In any event, Federal Rule of Civil Procedure 56 expressly contemplates the use of declarations,

so long as the declarant is competent to testify, and the declaration's content is based on his or her personal knowledge and would be admissible at trial. The proffered declarations met those conditions, and they therefore were plainly appropriate to consider on a motion for summary judgment. Further, as numerous courts have recognized, the proffered consumer complaints are admissible under Federal Rule of Evidence 807, the "residual" hearsay exception.

Briandi is flatly wrong that the monetary judgment against him must be reversed because the evidence did not conclusively establish that *all* of defendants' collection activities were fraudulent. The extensive evidence of defendants' routine use of deception in collecting debt justified a presumption that consumers made payments in reliance on defendants' misrepresentations. In contrast, defendants, submitted no proof that they earned any portion of their revenue lawfully. The district court thus was correct to use defendants' total proceeds from debt collection as the measure of consumers' losses. *See BlueHippo*, 762 F.3d at 244.

Moses has not filed a brief or offered any explanation of his failure to file, and the Court should dismiss his appeal for lack of prosecution.

STANDARD OF REVIEW

The Court reviews *de novo* a district court's grant of summary judgment, "utiliz[ing] the same standard as the district court." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). "Summary judgment must be granted where the

pleadings, the discovery and disclosure materials on file, and any affidavits show 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). Where the moving party demonstrates the absence of a genuine issue of material fact, the burden is on the opposing party to come forward with specific evidence demonstrating the existence of a trial worthy issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). "Where no rational finder of fact could find in favor of the nonmoving party because the evidence to support its case is so slight, summary judgment must be granted." *Brown*, 654 F.3d at 358 (internal quotation marks omitted). The Court "may affirm on any basis that finds support in the record," whether or not the district court relied upon that ground. *Tolbert v. Smith*, 790 F.3d 427, 434 (2d Cir. 2015).

A district court's denial of a request for additional discovery to respond to a summary judgment motion is reviewed for abuse of discretion. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994). And, "[b]ecause the district court has wide discretion in determining which evidence is admissible," the Court "review[s] its evidentiary rulings for manifest error." *Nora Beverages, Inc. v. Perrier Grp. of Am., Inc.*, 164 F.3d 736, 746 (2d Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD BRIANDI PERSONALLY LIABLE FOR HIS COMPANIES' UNLAWFUL PRACTICES.

Briandi does not contest the district court's conclusion that the corporate defendants violated the FTC Act and the FDCPA. He claims only that the district court improperly held him personally liable for the corporate violations.

An individual is liable for corporate violations of the FTC Act, if he (1) "participated directly in the deceptive practices or acts *or* had authority to control them" and (2) "had some knowledge of the practices." *Amy Travel*, 875 F.2d at 573; *see FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014); *cf. FTC v. LeadClick Media, LLC*, 838 F.3d 158, 170 (2d Cir. 2016) (applying *Amy Travel*). Knowledge in this context means "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." *Amy Travel*, 875 F.2d at 574 (quoting *FTC v. Kitco of Nev., Inc.*, 612 F.Supp. 1282, 1292 (D. Minn. 1985)); *accord FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204, 1207 (10th Cir. 2005); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997).

The district court concluded that, as a matter of law, Briandi is individually liable for the wrongdoing of his companies because the undisputed facts showed

that he had authority to control them and knowledge of their misrepresentations. That decision was correct.

A. The District Court Properly Concluded That There Were No Genuine Issues of Material Facts Precluding Summary Judgment.

To begin with, summary judgment was proper because Briandi's admissions establish both elements of individual liability. Briandi did not respond to the FTC's Requests for Admission until he filed his opposition to summary judgment—seven months after the FTC served its Requests and well after the discovery cut-off date.[7] The Magistrate Judge thus deemed admitted that Briandi:

- "formulated, directed, controlled, had the authority to control, or participated in the acts and practices" of each corporate defendant; and
- "knew that in more than one instance one or more Corporate Defendants" had engaged in the debt collection practices alleged in the FTC's complaint.

PSJX 18 ¶¶1-13, 44-51 (Dkt. 130-7 at 7-9, 11-12) [A. 497-99, 501-02]. Under Fed. R. Civ. P. 36(a)(3), "[a] matter is admitted" if a party fails to timely respond; thus,

[7] The FTC served its Requests for Admission on April 30, 2015. Discovery was supposed to end May 29, 2015, but was extended pending determination of the FTC's motions to compel depositions. Those depositions took place on August 3, 2015. Briandi did not respond to the Requests until December 3, 2015, submitting them simultaneously with his opposition to the FTC's motion for summary judgment. *See* R&R 28 n. 10 [A. 28].

as the magistrate judge correctly held, Briandi's failure to timely respond resulted in admission of those matters. R&R 28 n. 10 [A. 28]. Summary judgment may properly be granted on issues deemed admitted under Rule 36 due to untimely responses. *SEC v. Dynasty Fund, Ltd*., 121 F. App'x 410, 411-12 (2d Cir. 2005). These admissions alone suffice to hold Briandi individually liable for the corporate violations.[8]

The Court need not rely on only these admissions, however, because other abundant and uncontroverted evidence also shows that Briandi meets the test for individual liability. To start, he had authority to control the corporate defendants and their activities. He created the business, incorporated the first corporate entity, and had signatory authority over each corporate defendant's bank accounts. *See supra* 10-11. Exercising that authority to control the corporate bank accounts, Briandi used them to pay himself more than $1.2 million. *Id*. at 10. Briandi also served (along with Moses) as a Director and General Manager of each of the corporate defendants (with the possible exception of one entity).[9] PSJX 34 at 769 (Dkt. 132-3 at 4) [A. 564]; PSJX 35 at 773-79 (Dkt. 132-4 at 2-8) [A. 569-75]. As

[8] Moses also failed to respond to the FTC's Requests for Admission and thus made similar admissions. R&R 26 [A. 26]; PSJX 19 ¶¶1-13, 44-51 (Dkt. 130-8 at 7-9, 11-12) [A. 516-18, 520-21].

[9] Briandi could not recall his interest in Flowing Streams, the entity that purchased debt portfolios. Moses, however, testified that he and Briandi served as general managers of that entity. PSJX 37 at 796 (Dkt. No. 132-6 at 7) [A. 587].

owner and controlling officer of the corporations, Briandi signed the Assurance of Discontinuance and a subsequent affidavit certifying the implementation of procedures to ensure the corporations' compliance. PSJX 11 at 315 (Dkt. 129-14 at 56) [A. 877]; PSJX 41 at 1449 (Dkt. 132-11 at 136) [A. 557]. His position as a corporate officer with signatory authority was sufficient in itself to constitute control for purposes of individual liability. For example, the Ninth Circuit has held an individual in control of a corporation and liable for its acts where she "assum[ed] … the role of president" and had "authority to sign documents on behalf of the corporation." *Publ'g Clearing House, Inc.*, 104 F.3d at 1170; *see also FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005) (officer and director status established authority and control).

Beyond that, the uncontroverted evidence shows that Briandi directly participated in his companies' collection activities for several years, though he claims he later stepped back from that role. Initially, Briandi made collection calls himself, and some of those calls resulted in consumer complaints to the FTC. *See supra* 11. For example, one consumer reported:

> I received a call from Mr. Briandi . . . . He said he tried to be nice, and if I didn't pay, then they would be forced to press charges on me. . . . He claimed that this was a federal matter (the company is US Federal Recoveries). I felt threatened . . . .

PSJX11 at 277 (Dkt. 129-14 at 18) [A. 866]. Another reported:

> This company is harassing me and threatening to serve me with a summons. They have also sent information to my payroll department. I asked Mr. Briandi not to contact my payroll department and he stated that he has jurisdiction to do so. I have asked them not to call my job and they continue to do so. I have asked them to send me a debt verification letter and they have yet to do so.

Id. at 273 (Dkt. 129-14 at 14) [A. 862]. And yet another one reported:

> Mr. Briandi . . . calls my work phone stating . . . that he is going to take action against me. Plus he also has called my parents home phone . . . . They have nothing to do with this issue.

Id. at 269 (Dkt. 129-14 at 10) [A. 858]. Even after he stopped placing collection calls himself, Briandi handled calls that collectors "passed" to him. Briandi Dep. at 72 (Dkt. 150-1 at 76) [A. 267]. Thus, Briandi knew, from personal experience, the type of collection tactics his business employed.

Moreover, Briandi also knew—from the New York Attorney General's 2012 investigation and the 2013 Assurance of Discontinuance, *which he signed*—that scores of consumers had complained about his companies' deceptive and abusive collection practices, and these violations were "repeated[] and persistent[]." *See supra* 12. Briandi does not disclaim that knowledge, nor could he in light of his signature on the agreement.

In response to that overwhelming uncontroverted evidence, Briandi argues that, after the New York proceeding in 2013, he left the task of ensuring compliance to others and no longer involved himself in the collection side of the business. He claims, apparently without irony, that he spent much of each day

praying, while his employees were pervasively violating the law in an operation that was "permeated with fraud." R&R 34 [A. 34]. He thus says he was unaware of his companies' violations. Br. 25-30.

The claim fails. Even if Briandi lacked actual knowledge of violations—which is doubtful, since he personally violated the FDCPA numerous times and his office contained numerous consumer complaints about his companies, *see supra* 14, 26-27—actual knowledge is not required for individual liability. To the contrary, the knowledge prong can be satisfied by an "awareness of a high probability of fraud along with an intentional avoidance of the truth." *Amy Travel*, 875 F.2d at 574. If nothing else, the New York AOD put Briandi on notice that his employees were preying on consumers using unlawful means, such as bogus threats of criminal action and other deceptive tactics, and that it was his responsibility to remedy the violations. Instead of carrying out that responsibility, Briandi chose to spend most of his time praying in his office and running errands. If Briandi was ignorant of continuing violations, his ignorance was self-imposed—in such circumstances, locking yourself in your office and seeking divine solace amounts at best to sticking your head in the sand. Briandi's laissez faire management philosophy does not insulate him from liability. *See FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010) (finding that corporate

officers "continued to turn a blind eye" to "myriad red flags" supported finding of liability).

Briandi is also wrong that officers can be held liable for corporate wrongdoing under the FDCPA only where they "personally violated" the law, or "direct[ed] the policies, practices and operations" and were "involved in the creation and modification of form letters." Br. 23-24. That may be so in private-party cases under the FDCPA, but it is not the standard in an FDCPA action brought by the FTC. FDCPA violations are treated in the same manner as "an unfair or deceptive act or practice" under the FTC Act. 15 U.S.C. § 1692*l*(a). Under that statute, the appropriate standard is the two-prong individual liability test discussed above, which for all the reasons stated was amply satisfied by abundant uncontradicted evidence. *See FTC v. Williams, Scott & Assocs.*, No. 1:14-CV-1599-HLM, 2015 WL 12856779, at *14 n.9 (N.D. Ga. Nov. 4, 2015) (rejecting argument that individuals must directly violate the FDCPA when enforced by the FTC).

Further, Briandi's submissions below were utterly inadequate to defeat summary judgment. His unsupported assertions and blanket denials in response to the FTC's statement of facts did not satisfy his burden to "come forward with evidence that would be sufficient to support a jury verdict in his favor." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995); *Payne v.*

United States, 980 F.2d 148, 153 (2d Cir. 1992) ("blanket denial" insufficient). And his "self-serving affidavit without citations to the record" likewise was "insufficient to create a material issue of fact." *Jain v. McGraw-Hill Cos.*, 506 F. App'x 47, 49 (2d Cir. 2012).

B. The District Court Properly Rejected Briandi's Argument That Discovery Was Not Complete.

Briandi waived his argument (Br. 21-22) that the district court wrongly deprived him of discovery needed to oppose summary judgment. Rule 56 of the Federal Rules of Civil Procedure requires a party opposing summary judgment on the ground of incomplete discovery to explain by affidavit why further discovery is required. It states:

> (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). As this Court has explained, a Rule 56(d) affidavit (formerly known as a Rule 56(f) affidavit) must show: "[1] the nature of the uncompleted discovery; [2] how the facts sought are reasonably expected to create a genuine issue of material fact; [3] what efforts the affiant has made to obtain those facts; and [4] why those efforts were unsuccessful." *Paddington Partners*, 34 F.3d at

1138; *see Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 926 (2d Cir. 1985).

Briandi did not provide such an affidavit. Instead, his memorandum opposing summary judgment simply alluded to the possibility of future evidence, stating—without elaboration—that "full discovery has not been completed by the defense." Dkt. 151 at 4. To the extent that was a request to defer a decision to allow time to discover those facts, his failure to submit a Rule 56(d) affidavit was "itself sufficient grounds to reject a claim." *Paddington Partners*, 34 F.3d at 1137 (holding that a claimed need for additional discovery in a memorandum of law is inadequate); *Burlington Coat Factory*, 769 F.2d at 926 (same). The district court was therefore within its discretion in rejecting Briandi's argument.

Contrary to Briandi's contention, moreover, his submission of a witness list did not substitute for the "concrete evidence" needed to defeat summary judgment. *Anderson*, 477 U.S. at 256. "[A] mere promise to produce admissible evidence at trial does not suffice to thwart the summary judgment ax." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990). The district court properly disregarded this "submission." Br. 21 n.4.

Briandi has only himself to blame for his failure to develop a factual record. His claim that, until the FTC moved for summary judgment, he was unaware of "the circumstances of his position" (Br. 21-22) is utterly implausible because the

FTC's initial motion for a TRO provided a roadmap of its case. Dkt. 3, 32. The FTC's discovery produced additional evidence supporting its claims but did not substantially alter its case against the defendants. Moreover, Briandi cannot complain that the time the district court allotted for discovery—a full year—was insufficient. Indeed, defendants themselves requested that schedule. Dkt. 67.

II. THE DISTRICT COURT CORRECTLY AWARDED EQUITABLE MONETARY RELIEF FOR DEFENDANTS' VIOLATIONS.

This Court assesses a district court's award of equitable monetary relief under a two-part burden-shifting regime. First, the FTC must show that the harm to consumers "reasonably approximate[s]" the defendants' unjust gains from their unlawful scheme. If the FTC makes that showing, the burden then shifts to defendants to prove that the FTC's calculation is inaccurate.[10] *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011). "After the burden shifts, the risk of uncertainty 'fall[s] on the wrongdoer whose illegal conduct created the uncertainty.'" *Id.* (quoting *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 69 (2d Cir. 2006)).

With respect to the first part of that regime, the harm to consumers will equal the total proceeds of the scheme if the FTC shows that the defendants made misrepresentations that were material to consumers' decisions and those

[10] Briandi is wrong that monetary relief is governed by 15 USC §1692k(b). Br. 18. The district court awarded equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), not damages under the FDCPA.

misrepresentations were widely disseminated. *BlueHippo*, 762 F.3d at 244-45. This showing creates a presumption that consumers who paid defendants did so in reliance on the misrepresentations. *Id*. at 244; *see also FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993).

Here, the district court concluded that uncontroverted evidence demonstrated that defendants' misrepresentations to consumers were widely disseminated, *see supra* 4-8, and thus granted judgment against Briandi and his co-defendants in the amount of $10,852,396—their total revenues from debt collection. Briandi, who offered no evidence to rebut the presumption, argues that there was insufficient evidence to support the court's conclusion. He also argues, for the first time on appeal, that certain of the FTC's evidence—consumer declarations and consumer complaints—"should not be considered at the summary judgment phase." Br. 31. None of his arguments withstands scrutiny.

A. The District Court Properly Considered The Proffered Consumer Declarations And Consumer Complaints.

Briandi objects to reliance on the consumer declarations and consumer complaints (without distinction between the two categories) seemingly on the theory that they are inadmissible hearsay. He did not challenge this evidence below

and has therefore waived this argument.[11] *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) ("[i]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal") (internal quotation marks omitted). But it also fails on the merits.

1. The Sworn Consumer Declarations.

Briandi fails to apprehend the role—and routine use—of declarations in the summary judgment process. Rule 56(c) expressly contemplates the use of declarations to support (or oppose) a summary judgment motion. It provides, in part:

> (1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including . . . affidavits or declarations . . . .
>
> * * *
>
> (4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Fed. R. Civ. P. 56(c). As the text of the rule makes plain, the use of declarations is an integral part of the process of presenting the trial court with the record material that supports (or defeats) a summary judgment motion—on equal footing with

[11] *See* R&R 5 n.6 [A. 5] ("[t]he defendants do not argue that the FTC's evidence (*e.g.*, telephone calls, scripts, consumer complaints) is inadmissible").

other forms of evidence, such as "depositions, documents, . . . admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). So long as the party proffering the declaration can show that the facts set out therein would be admissible at trial, and that the declarant meets the personal knowledge and competency-to-testify prongs of Rule 56(c)(4), then the district court can—indeed, must—consider the proffered declaration in deciding whether summary judgment is appropriate.

Here, the FTC's proffered consumer declarations met the Rule 56(c)(4) requisites because the declarants stated that they are over 18 years of age, "have personal knowledge of the facts" asserted, and "would testify" to those facts if called. PSJX 1 (Dkt. 129 at 6-8) [A. 726-28]; PSJX 2 (Dkt. 129-1) [A. 746-49]; PSJX 3 (Dkt. 129-2) [A. 751-54]; PSJX 4 (Dkt. 129-3) [A. 756-58]; PSJX 5 (129-4) [A. 760-62]; PSJX 6 at 34-38 (Dkt. 129-5) [A. 764-68]; PSJX 7 (Dkt. 129-6) [A. 774-77]; PSJX 8 at 47-50 (Dkt. 129-7) [A. 779-82]; PSJX 9 (Dkt. 127-8) [A. 784-89]; PSJX 10 (Dkt. 127-9) [A. 794-95]. Briandi does not identify a single consumer declaration that fails to comport with the Rule's requirements, nor does he identify a problem with a specific portion of any declarant's testimony.[12] Thus,

[12] That FTC staff may have assisted in the drafting of consumers' declarations based on the information consumers provided does not, as Briandi suggests (Br. 33), make them inadmissible. Declarations are often drafted by counsel. So long as the declaration meets the requirements of Rule 56(c)(4), and it is signed under penalty of perjury, the court may deem its content truthful.

it was appropriate for the court to consider these declarations in support of the FTC's motion.

Briandi's reliance on *FTC v. Washington Data Resources*,[13] a case concerning the admissibility of declarations *in lieu of* trial testimony, is misplaced. Here, the FTC proffered consumer declarations *not at trial* (in lieu of live testimony), but in support of its summary judgment motion. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee's note to 1963 amendment. Where the evidence that a party seeks to present to the court is testimonial in nature, waiting until the trial to present it through live witnesses would defeat the point of that procedure.

Further, the use of unopposed or uncontradicted, and proper, affidavits promotes the efficient administration of justice by obviating the need, in appropriate cases, for lengthy trials involving the testimony of numerous witnesses. Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1)). Especially in cases such as this one, where the conduct at issue affected

[13] No. 8:09- cv-2309-T-23TBM, 2011 WL 2669661 (M.D. Fla. July 7, 2011).

thousands of consumers, that goal would be disserved by insisting that numerous consumers take the witness stand and testify in open court—to exactly what their unchallenged declarations already said.

2. The Consumer Complaints.

It was also well within the district court's discretion to assess whether defendants' misrepresentations were widely disseminated based on complaints submitted by consumers to the FTC and state law enforcement agencies. As explained in affidavits by FTC staff, the FTC located over 500 consumer complaints about defendants' debt collection activities in its "Consumer Sentinel" database. PSJX 11 at 80-83 ¶¶64-70 (Dkt. 129-10 at 18-21) [A. 815-18]; *id*. at 235-59 (Dkt. 129-13 at 21-45) [A. 824-48]; id. at 260-78 (Dkt. 129-14 at 1-19) [A. 849-66]. And the FTC found numerous consumer complaints submitted to state agencies (and forwarded to defendants for response) on defendants' premises, in both Briandi's and Moses's offices and their desks on the collection floor. PSJX 39 at 1087 ¶31 (Dkt. 132-8 at 9) [A. 652]; *id*. at 1127- 40 (Dkt. 132-8 at 49-62) [A. 657-70]; *id*. at 1141-53 (Dkt. 132-9 at 1-13) [A. 671-83]. Defendants did not challenge this evidence, so the magistrate did not address its admissibility at length, but he observed that courts have found consumer complaints admissible under Fed. R. Evid. 807, the "residual exception" to the hearsay rule. R&R 5 n.6 [A. 5].

The magistrate was correct. Under Rule 807, a court may admit hearsay if the statement containing hearsay (1) has "circumstantial guarantees of trustworthiness," (2) "is offered as evidence of a material fact," (3) "is more probative on the point for which it is offered" than other evidence the FTC can obtain "through reasonable efforts," and (4) best serves "the purposes of these rules and the interests of justice." Fed. R. Evid. 807; *see United States v. Morgan*, 385 F.3d 196, 208 (2d Cir. 2004). The consumer complaints meet each factor.

Most importantly, the consumer complaints have "circumstantial guarantees of trustworthiness." The complaints were made independently by numerous unrelated consumers to a variety of agencies in multiple jurisdictions, and they report "roughly similar experiences" with defendants' collectors. *Figgie*, 994 F.2d at 608. They describe, for instance, the collectors' accusations of "fraud," threats of criminal or civil lawsuits, and warnings that consumers will be arrested if they do not pay. *E.g.*, PSJX 39 at 1127- 40 (Dkt. 132-8 at 49-62) [A. 657-70]; *id*. at 1141-48 (Dkt. 132-9 at 1-8) [A. 671-78]. The experiences the consumer complainants reported are also corroborated by other evidence, such as the consumer declarations, the scripts used by defendants' collectors, and the calls captured on tape, which record similar episodes. *See supra* 4-7. All the evidence points in one direction, which indicates that the complaints are not "the product of

faulty perception, memory or meaning, the dangers against which the hearsay rule seeks to guard." *Figgie*, 994 F.2d at 608 (internal quotation marks omitted).

The other factors also warrant admission of this evidence. The consumer complaints are probative of a material fact: the prevalence of defendants' deceptive collection tactics. Also, "reasonable efforts" would not likely produce more probative evidence. As the Ninth Circuit stated in *Figgie*, the "FTC could bring [the consumers] into court to swear, under oath and subject to cross-examination, that the contents of their [complaints] were true. But such efforts would not be reasonable." *Id.* at 608-09. Finally, admitting the complaints "furthers the federal rules' paramount goal of making relevant evidence admissible." *Id*. at 609 (internal quotation marks omitted).[14] *Accord FTC v. Instant Response Sys., LLC*, No. 13 Civ. 00976(ILG)(VMS), 2015 WL 1650914, at *4-5 (E.D.N.Y. Apr. 14, 2015); *FTC. v. Ewing*, No. 2:07–CV–00479–PMP–GWF, 2014 WL 5489210, at *2-4 (D. Nev. Oct. 29, 2014); *FTC v. Magazine Solutions, LLC*, No. 07-692, 2009 WL

[14] Briandi also had ample notice of this evidence. The FTC's initial motion for a TRO appended consumer complaints located in its database, *see* Dkt. 9-11 at 17-20, and its motion for summary judgment supplemented this evidence with consumer complaints found in defendants' own offices. He nevertheless failed to take any discovery from the FTC.

690613, at *1-2 (W.D. Pa. Mar. 16, 2009); *FTC v. Cyberspace.com, LLC*, No. C00-1806L, 2002 WL 32060289, at *3 n.5 (W.D. Wash. July 10, 2002).[15]

B. The Undisputed Facts Show That Defendants' Misrepresentations Were Widely Disseminated.

Briandi claims that the monetary judgment must be reversed because the FTC's evidence was not "conclusive," Br. 33, that "each and every one of the calls made by collectors was fraudulent," Br. 31, or that "every debt was recovered inappropriately," Br. 35. The law requires no such showing. To the contrary, the FTC can trigger the presumption of reliance by showing wide dissemination of misrepresentations. The FTC made that showing.

The uncontroverted evidence leaves no doubt that the defendants' deceptive collection practices—including misrepresentations about the caller's identity, bogus accusations of criminal wrongdoing, and false threats of imminent legal action—were pervasive and not just isolated occurrences. Collection scripts containing such misrepresentations were found in over half of the cubicles and desks in defendants' call center. *See supra* 14. By itself, that is powerful evidence that collectors routinely employed these tactics in their calls to consumers. Even if

[15] This case does not present the same circumstances presented in *FTC v. E.M.A. Nationwide, Inc.*, No. 1:12-cv-2394, 2013 WL 4545143 (N.D. Ohio Aug. 27, 2013), where the court declined to admit consumer complaints. *See* Br. 31-32. Unlike in that case, the consumer declarants here were not asking for refunds or other payment that might (arguably) cast doubt on the reliability of their statements; nor did they allege acts by entities not named in this action.

the scripts alone were not enough, audio recordings confirmed that collectors followed the scripts when contacting consumers for payments. *See supra* 6. The consumer declarations and consumer complaints provided further corroboration that this enterprise was steeped in deception. Indeed, out of the 25 collectors employed by Briandi and his companies at the time the FTC brought this case, the FTC's evidence captured 21 of them (including the three managers who supervised all collections) falsely representing that they were law enforcement personnel or "processors" handling complaints against the consumer. *See supra* 14. And it is also undisputed that the collecting companies regularly inflated the amount that consumers owed, by applying unfounded "interest" rates to the debts. *See supra* 8.

This extensive evidence of defendants' pattern and practice of deception justified a presumption of consumer reliance. Thus, the district court was correct to use defendants' total proceeds from debt collection as the measure of consumers' losses. *See BlueHippo*, 762 F.3d at 244. If defendants wanted to show that the operation's total receipts were not an accurate assessment of consumer injury, they could have tried to do so. *Id.* In fact, however, Briandi and his co-defendants did "not submit any proof that the corporate defendants earned all or some of their revenue through lawful means." R&R 34 [A. 34]. As the magistrate judge noted, "[h]ad they done so, a hearing may have been required to determine the amount of disgorgement. But they did not." *Id*.

III. THE COURT SHOULD DISMISS MOSES'S APPEAL FOR LACK OF PROSECUTION.

Moses has failed to prosecute his appeal, and the Court should dismiss it. He was initially represented by counsel, but his attorney notified the Court on March 3, 2017, that he had resigned as Moses' counsel. Moses does not appear to have retained other counsel, nor has he entered his appearance as a pro se appellant. Moses did not submit a scheduling request for his brief, pursuant to Local Rule 31.2(a)(1)(A). On March 23, acting on Briandi's scheduling request, the Court set a May 24, 2017 deadline for Briandi's brief.

Moses has not filed a brief or offered any explanation of his failure to file. Accordingly, the FTC requests that his appeal be dismissed for failure to prosecute, pursuant to Fed. R. App. P. 31(c) and Local Rule 31.2(d).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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September 15, 2017

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 10,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Michele Arington
MICHELE ARINGTON

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I served the foregoing Final Form Brief of the Federal Trade Commission on counsel of record by electronic service through the Court's CM-ECF system.

/s/ Michele Arington
MICHELE ARINGTON