

**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,

and

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

and

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

Defendants.

**PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION FOR SUMMARY
JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW**

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I. INTRODUCTION

Defendants Harry and Andrea Tanner owned and operated American Precious Metals, LLC (“APM”), a network of boiler rooms from which telemarketers cold-called consumers and induced them to purchase precious metals as investments.¹ While telemarketing, Defendants misrepresented to consumers that the precious metals investments were safe and lucrative,² and they failed to clearly disclose the total costs and risks associated with the investments.³ As a result of these misrepresentations and deceptive omissions, approximately 1,122 consumers invested with APM, the overwhelming majority of whom lost money.⁴ Collectively, consumers lost more than \$26 million through Defendants’ scheme.⁵

This Court is asked to rule that American Precious Metals’ business practices were deceptive and violated both Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a), and the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310. The Court is further asked to enter, by summary judgment, a permanent injunction to enjoin Defendants from committing future law violations and to provide ancillary equitable relief to consumers injured by Defendants’ deception. Finally, the Court is asked to hold Defendants Harry and Andrea Tanner individually liable for both injunctive and equitable monetary relief due to their knowledge of and participation in, or control over, the corporation’s law violations.⁶

A review of the FTC’s pleadings and exhibits shows that there exists no genuine issue of material fact to be decided at trial and that Plaintiff is entitled to summary judgment as a matter of law. Therefore, pursuant to Fed. R. Civ. P. 56(a), Plaintiff requests that summary judgment be entered against Defendants.

¹ Plaintiff’s Statement of Facts (“PSOF”) ¶¶ 30, 6, 3.

² PSOF ¶¶ 8-10, 18-19.

³ PSOF ¶¶ 14-17, 20.

⁴ PSOF ¶¶ 5, 28-29.

⁵ PSOF ¶ 29.

⁶ PSOF ¶¶ 30-35.

II. THE FTC'S COMPLAINT

On May 10, 2011, the FTC filed its Complaint for Permanent Injunction and Other Equitable Relief against Defendants American Precious Metals, LLC, and its principals, Harry R. Tanner, Jr., and Andrea Tanner.⁷ The FTC's complaint includes five counts – two alleging Section 5 violations and three alleging TSR violations. All of the FTC's claims arise from Defendants' use of misrepresentations and deceptive omissions while telemarketing their investment scheme.

The FTC claims that Defendants violated Section 5 by misrepresenting that: (1) consumers were likely to earn high or substantial profits in a short time period on the precious metals sold by Defendants; and (b) the precious metals sold by Defendants were low or minimal risk investments. The FTC further claims that Defendants violated Section 5 by failing to adequately disclose to consumers material information concerning the precious metals, including: (1) the total fees, commissions, interest charges, and leverage balances that consumers were required to pay; and (2) that consumers were likely to receive equity calls that would require consumers to pay additional money or to liquidate their investment.

Defendants' practices also violated the TSR. The FTC has alleged that Defendants violated § 310.3(a)(2)(vi) of the TSR by misrepresenting the profitability or risk of an investment opportunity; and that they violated §§ 310.3(a)(1)(i) and (ii) of the TSR by failing to clearly disclose the total costs and material conditions of the transactions before consumers paid. All of the claims asserted in Plaintiff's complaint are amply supported by the facts and evidence in this matter, and, therefore, summary judgment should be awarded.

III. THE KEY EVIDENCE⁸

The FTC's key evidence in this case includes: consumer declarations, and Defendants' telemarketing scripts, contracts, a "compliance" script and recordings, and other business records. Collectively, the evidence proves that Defendants engaged in a pattern of deceptive

⁷ Dkt. 1.

⁸ Pursuant to Local Rule 7.5(c), Plaintiff's summary judgment motion is accompanied by a 10-page Statement of Material Facts with specific references to pleadings, depositions, and affidavits on file with the Court. Therefore, in lieu of a Statement of Material Facts, Plaintiff has included a summary of the key evidence in this matter.

conduct that violated both Section 5 of the FTC Act and multiple provisions of the TSR and that the Individual Defendants, Harry and Andrea Tanner, participated in or controlled and had knowledge of the deceptive practices.

A. CONSUMER DECLARATIONS

The FTC has submitted declarations from 15 consumers.⁹ These consumers asserted that Defendants promoted precious metals as high-profit,¹⁰ low-risk investments¹¹ and failed to explain the total costs¹² and risk of loss¹³ of the investments. Consumers stated that Defendants' telemarketers told them metals prices were "poised to skyrocket" or would reach a particular price within a specific time period, enabling consumers to double or triple their investments.¹⁴ Consumers also stated that Defendants used terms such as "safe haven" and assured them that the investments were safe.¹⁵ Finally, consumers accused Defendants of having misled them by failing to disclose, before consumers paid for their transactions, the costs of the investments¹⁶ and the risk that consumers would receive equity calls that would require them to invest additional money or liquidate their investments.¹⁷

The uniformity of consumers' experiences is notable because the FTC's declarants are scattered geographically across twelve states and were solicited by Defendants at various times between August 2007 and May 2011.¹⁸ This uniformity, however, is explained by Defendants'

⁹ P.E. 4-17, 19.

¹⁰ PSOF ¶¶ 8, 12-13.

¹¹ PSOF ¶¶ 9-10, 12-13.

¹² PSOF ¶¶ 14-16.

¹³ PSOF ¶ 17.

¹⁴ PSOF ¶ 8.

¹⁵ PSOF ¶ 9.

¹⁶ PSOF ¶¶ 14-16.

¹⁷ PSOF ¶ 17.

¹⁸ PSOF ¶¶ 4-17, 19.

use of telemarketing scripts, in which Defendants' telemarketers follow written sales solicitations or pitches when speaking with consumers.¹⁹ Moreover, consumers' claims are repeatedly confirmed not only by the Defendants' telemarketing scripts, but also by the Defendants' contracts and "compliance" script and recordings.

B. TELEMARKETING SCRIPTS

Defendants' telemarketing scripts bolster consumers' claims that Defendants' sales solicitations were deceptive. The FTC's evidence includes at least six scripts in which Defendants expressly represented that consumers could double or triple their money in as little as 60 days.²⁰ The scripts also support consumers' assertions that Defendants touted their investments as a "safe haven."²¹ Indeed, Defendants' telemarketing scripts compared their highly-leveraged precious metals investments to "keeping metal under your mattress."²² Further, the scripts show that Defendants' telemarketers failed to provide a clear explanation of the total cost of consumers' transactions, including all fees, commissions, interest charges and leverage balances that consumers were required to pay, or the risk of loss through equity calls.²³ Defendants' telemarketing scripts, examined alone or in tandem with consumers' declarations, prove Defendants' reliance on misrepresentations and deceptive omissions to promote their precious metals investments.

C. CONTRACTS AND COMPLIANCE MATERIALS

To further support this motion, the FTC also relies upon Defendants' contracts, and a "compliance" script and recordings. Here too, whether examined in isolation or alongside consumers' declarations and Defendants' telemarketing scripts, these records provide irrefutable evidence of the misrepresentations and material omissions that form the gravamen of the FTC's complaint.

¹⁹ P.E. 23 ¶ 9h.

²⁰ PSOF ¶ 18.

²¹ PSOF ¶ 19.

²² PSOF ¶ 19c.

²³ PSOF ¶ 20.

Defendants' contracts were deficient on two grounds.²⁴ First, the contracts failed to clearly disclose the total costs of consumers' transactions. The contracts made reference to broker fees and financing costs, and included a "disclosure" form that stated APM charged "15% of the total metal value" plus "4½ plus Prime" on any financed metal. However, neither the contracts nor the "disclosure" form clearly disclosed the amount of the fees, commissions, interest charges, or leverage balances that consumers were required to pay to acquire their precious metals. Nor did the contracts state the quantity or purchase price of metals being purchased, the amount of commission being charged, interest to be assessed, or the mark up or "spread" to be imposed. Second, the contracts failed to clearly inform consumers that their investments were subject to equity calls and could be liquidated at any time without notice. Thus, a review of the contracts supports finding that Defendants misrepresented their offer and failed to clearly and conspicuously disclose, before consumers paid, the total costs and risks of their purported investments.²⁵

Plaintiff also relies upon a post-sale "compliance" script and recordings between Defendants and consumers as additional evidence of both Defendants' law violations and their knowledge of the law violations. The "compliance" script used by Defendants shows that, even *after* consumers purchased their investments, Defendants did not clearly explain the terms of the consumers' transactions.²⁶ For instance, rather than informing consumers of the actual costs of their transactions, Defendants asked consumers to confirm that they understood that their funds would be used to pay APM's fee of "15 percent of the total metal value"²⁷ and that they would pay finance charges of "4½ percent above the prime rate."²⁸ Further, according to the

²⁴ See PSOF ¶¶ 21-24; Dkt. 34-1 D.E. A Att. 1.

²⁵ PSOF ¶¶ 21-24; Dkt. 34-1 D.E. A Att. 1.

²⁶ PSOF ¶ 25; Dkt. 34-1 D.E. A Att. 5.

²⁷ A former APM telemarketer affirmed that consumers interpreted "15 percent of the 'total metal value'" to mean 15 percent of the money the consumer was sending in. P.E. 23 ¶ 9g, Att. W p. 27:9-11.

²⁸ APM's telemarketers falsely characterized the financing charges or interest as "3 cents a week" or "a penny a day." P.E. 23 ¶ 9k, Att. W pp. 39:2-40:12.

“compliance” script, Defendants did not advise consumers of the actual quantity or purchase price of the metal, but instead stated that the quantity, purchase price, and total metal values were “approximate.” Finally, Defendants’ compliance script shows that consumers were not told that the purchase price included a 3 percent mark up.²⁹

Defendants’ “compliance” recordings also prove both that: (1) Defendants’ telemarketers used misrepresentations and deceptive omissions to sell precious metals; and (2) Defendants knew of their telemarketers’ deceptive conduct. The compliance recordings, the majority of which featured Defendant Harry Tanner as APM’s “compliance officer,” are littered with examples of consumers learning the details of their transactions for the first time – *after* they had already entered into their investment transaction with Defendants.³⁰

The “compliance” recordings show that material information had not been disclosed to consumers before they signed their contracts and paid APM. For example, on one post-sale “compliance” call, a consumer told Defendant Harry Tanner, “We are trying to understand how it all works . . . I kind of don’t understand it. I am trying to understand . . . This is the first time I am hearing this because I asked the questions many times and I’m just now getting my answers.”³¹ In another call, a consumer asked Mr. Tanner how APM’s telemarketer could “guarantee” that the consumers would not receive an equity call.³² In a third call, a consumer balked when Mr. Tanner told him about APM’s 15 percent administration fee and said, “Hold up. I was told a one time fee of \$200, now you are . . . coming up with like – Okay. This is ridiculous.”³³ The “compliance” recordings provide incontrovertible evidence of the deceptiveness of Defendants’ operations and of Defendants’ knowledge that consumers were being misled or defrauded by their telemarketers.

²⁹ *Id.*

³⁰ PSOF ¶ 26; *see also* Dkt. 34-1 D.E. A Att. 4.

³¹ PSOF ¶ 26; P.E. 23 ¶ 10f, Att. CC.

³² PSOF ¶ 26; P.E. 23 ¶ 10i, Att. FF.

³³ PSOF ¶ 26; P.E. 23 ¶ 10h, Att. EE.

D. BUSINESS RECORDS

Plaintiff has shown, through the consumer declarations, telemarketing scripts, contracts, and “compliance” materials filed in this matter, that Defendants’ telemarketers not only promoted the leveraged precious metals as high-profit, low-risk investments, but also failed to adequately disclose the costs and risks of the investments. As further support for its motion for summary judgment, Plaintiff cites to Defendants’ business records – which prove the falsity of Defendants’ claims and the significant injury that Defendants caused to consumers who purchased their leveraged precious metals.

Contrary to Defendants’ claims that the precious metals offered were high-profit, low risk investments,³⁴ Defendants’ records indicate that the investments were lucrative only for Defendants and their telemarketers – and were disastrous for consumers. Even examining Defendants’ records in a manner most advantageous to Defendants, the falsity of Defendants’ claims and extent of consumer harm in this case are staggering. Between June 2007 and May 2011, Defendants’ accounting records and bank statements show that APM received \$41,665,099 from consumer investors.³⁵ However, only \$17,292,608 was transferred to Defendants’ clearinghouse to fund consumers’ purported investments, while \$24,372,491 was siphoned off to pay Defendants and their telemarketers.³⁶ Rather than doubling or tripling consumers’ investments as Defendants represented,³⁷ the evidence shows that the value of consumers’ investments plummeted from \$41,665,099 to \$15,498,112.³⁸ Therefore, Defendants’ representations that the precious metals were safe and lucrative were patently false.

³⁴ PSOF ¶¶ 8-13, 18-19.

³⁵ Dkt. 109 p. 16.

³⁶ *Id.* at 16.

³⁷ PSOF ¶¶ 8, 18.

³⁸ Defendants contend that \$1,069,029 worth of metal was delivered to consumers and that funds of \$12,619,101 were returned to consumers. (Dec. of H. Tanner, Dkt. 34-1 P.E. A ¶ 16). In addition, \$1,809,984 was returned to consumers after the appointment of the Court’s Receiver, for a total value to consumers of \$15,498,114. (Receiver’s Second Report, Dkt. 109 p.6).

IV. LAW AND ARGUMENT

A. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted upon a showing “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When seeking summary judgment, the moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate an absence of a genuine issue of material fact.”³⁹

Once the moving party has met its burden under Rule 56(c), the burden shifts to the non-moving party to produce facts to show that there is a genuine issue for trial.⁴⁰ However, “[a] mere scintilla of evidence supporting the opposing party’s position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party.”⁴¹ If the non-moving party’s evidence “is merely colorable, or is not significantly probative, summary judgment may be granted.”⁴²

B. THE FTC IS ENTITLED TO SUMMARY JUDGMENT ON ALL COUNTS

1. Defendants Violated Section 5 of the FTC Act

Section 5 prohibits unfair or deceptive acts or practices in or affecting commerce. “To establish that an act or practices is deceptive, the FTC must show that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was

³⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

⁴⁰ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *see also Harris v. United States*, 110 F. Supp. 2d 1362, 1363 (S.D. Fla. 2000) (“[A]n adverse party may not rest upon mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”).

⁴¹ *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007) (internal quotation marks omitted) (citing *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990), *rev’g* 706 F. Supp. 1467 (N.D. Ala. 1989)).

⁴² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

material.”⁴³ The evidence submitted by the FTC in this case readily proves the three elements needed to find that Defendants’ telemarketing practices were deceptive and violated Section 5, as alleged in Counts I and II of the Plaintiff’s complaint.

The FTC has shown that Defendants’ telemarketing practices (1) included representations and omissions that were both (2) likely to mislead consumers acting reasonably under the circumstances and (3) material to consumers. First, the FTC’s evidence shows that Defendants, through their telemarketers, represented to consumers that their precious metals were high-profit,⁴⁴ low-risk investments.⁴⁵ The evidence also shows that, after telling consumers that the precious metals were lucrative and safe, Defendants omitted to provide consumers with information concerning the total costs and risks associated with the investments.⁴⁶

Second, Defendants’ representations and omissions were likely to and, as evidenced by consumers’ declarations, actually did, mislead consumers who were acting reasonably.⁴⁷ To demonstrate that a representation is likely to mislead a reasonable consumer, “the FTC may proceed under a ‘falsity theory,’ a ‘reasonable basis theory,’ or both.”⁴⁸ Under a falsity theory, the FTC must show that the express or implied claim is false.⁴⁹ Under a reasonable basis theory, the FTC must show that there is no reasonable basis or adequate substantiation for the

⁴³ *FTC v. Peoples Credit First, LLC*, 244 Fed. Appx. 942, 944 (11th Cir. 2007) (following *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003), *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988)). See also *FTC v. U.S. Oil & Gas Corp.*, No. 83-1702, 1987 U.S. Dist. LEXIS 16137, at*44 (S.D. Fla. July 10, 1987) (“It is well established that misrepresentations of material facts made to induce the purchase of goods or services constitutes deceptive acts or practices prohibited by Section 5(a).”).

⁴⁴ PSOF ¶¶ 8, 18.

⁴⁵ PSOF ¶¶ 9-10, 19.

⁴⁶ PSOF ¶¶ 14-17, 20.

⁴⁷ PSOF ¶ 12; see P.E. 3-17.

⁴⁸ *FTC v. Nat’l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2004), *aff’d*, 356 Fed. Appx. 358 (11th Cir. 2009) (quoting *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958-59 (N.D. Ill. 2006)).

⁴⁹ *Nat’l Urological*, 645 F. Supp. 2d at 1190 (citing *FTC v. Natural Solution, Inc.*, No. 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783, at *10 (C.D. Ca. Aug. 7, 2007)).

representation.⁵⁰ Contrary to their representations, Defendants' investments were not likely to earn a profit and were likely to result in a loss.⁵¹ Therefore, Defendants' representations were both false and unsubstantiated and, under either a falsity or a reasonable basis theory, were likely to mislead consumers acting reasonably.

Defendants' omissions were also likely to mislead reasonable consumers. The substantial fees, commissions, and interest charges that consumers were required to pay – which were never clearly disclosed to consumers⁵² – made it unlikely that consumers could profit from the investments.⁵³ Moreover, because consumers' purchases were leveraged and subject to loss by liquidation or unmet equity calls, the transactions were inherently risky. Through these omissions, Defendants withheld information that consumers needed to fully understand the costs and risks of the Defendants' sales offers. As a result, consumers were likely to be misled into believing Defendants' claims that the investments were lucrative and safe.

Finally, Defendants' representations and omissions were material to consumers. A “material” representation or omission “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.”⁵⁴ “Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service are presumptively material.”⁵⁵ Defendants' express promises of high profits and low risk were deliberately made to induce consumers to buy precious metals investments and, therefore, are presumed by law to be material to consumers.

⁵⁰ *Id.*

⁵¹ P.E. 24 ¶¶ 3-5.

⁵² PSOF ¶¶ 14-16.

⁵³ As an example, a consumer who paid \$100,000 for APM's leveraged precious metals investments would immediately pay APM \$46,800 in fees. P.E. 23 ¶ 9f, Att. W p. 26:3-7.

⁵⁴ *Nat'l Urological Group*, 645 F. Supp. 2d at 1190 (quoting *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 960 (N.D. Ill. 2006)).

⁵⁵ *Nat'l Urological Group*, 645 F. Supp. 2d at 1190 (quoting *FTC v. Windward Mktg., Ltd.*, No. 1:96-cv-615, 1997 U.S. Dist. LEXIS 17114, at *28 (N.D. Ga. Sept. 30, 1997)); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999).

Defendants' omissions were also material. The total fees, commissions, interest charges, and leverage balances that consumers were required to pay and the likelihood that an equity call would be made were factors that were likely to affect consumers' decisions about whether to purchase Defendants' investments. Consumers report that, had they been aware of these facts, they would not have purchased Defendants' precious metals investments.⁵⁶

Plaintiff FTC has established the elements necessary to prove that Defendants violated Section 5 of the FTC Act: Defendants made representations or omissions that were likely to mislead consumers acting reasonably and were material to consumers.⁵⁷ Therefore, the FTC is entitled to summary judgment on Counts I and II of Plaintiff's Complaint.

2. Defendants Violated the TSR

Defendants' misrepresentations and deceptive omissions also violated the TSR and form the basis of Counts III-V of the FTC's complaint. The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of an investment opportunity, such as risk, liquidity, earnings potential, or profitability. 16 C.F.R. § 310.3(a)(2)(vi). The evidence shows that Defendants violated this TSR provision by misrepresenting that consumers who purchased precious metals from Defendants would earn substantial profits in a short time period,⁵⁸ with low or minimal risk of loss of their investment.⁵⁹ Therefore, Plaintiff is entitled to summary judgment as to Count III of Plaintiff's complaint.

The TSR also requires that sellers and telemarketers disclose to consumers the total costs to purchase, receive, or use, and the quantity of, any goods or services that were the subject of their sales offer, in a clear and conspicuous manner, *before* the consumer pays for the goods or services. 16 C.F.R. § 310.3(a)(1)(i). Defendants violated this provision of the TSR by failing to adequately disclose, before the consumers paid, the total fees, commissions, interest charges, and leverage balances that consumers were required to pay to purchase or receive their precious

⁵⁶ P.E. 8 ¶¶ 18-20; *See* P.E. 6 ¶¶ 12, 15-16; P.E. 7 ¶ 32; P.E. 9 ¶ 18; P.E. 11 ¶¶ 2, 17; P.E. 12 ¶ 23; P.E. 13 ¶ 27; P.E. 15 ¶ 15; P.E. 16 ¶ 30.

⁵⁷ *See FTC v. Peoples Credit First, LLC*, 244 Fed. Appx. 942, 944 (11th Cir. 1990), *rev'g* 706 F. Supp. 1467 (N.D. Ala. 1989).

⁵⁸ PSOF ¶¶ 8, 18.

⁵⁹ PSOF ¶¶ 9-10, 19.

metals.⁶⁰ Rather than disclose the exact amount APM's fees, commissions, interest charges, or leverage balances, Defendants chose to describe their fees to consumers as "15 percent of the total metal value," which was confusing and misleading to consumers.⁶¹ Moreover, Defendants failed entirely to disclose that APM charged a 3 percent mark up on the price of the metals and a daily compounding interest of 7.75 percent or more.⁶²

Defendants further violated the TSR by failing to clearly and conspicuously disclose all material restrictions, limitations, or conditions to purchase or receive the precious metals. 16 C.F.R. § 310.3(a)(1)(ii). Defendants failed to adequately disclose that consumers were likely to receive equity calls that would require consumers to pay additional money or to liquidate their precious metals.⁶³ This information was material to consumers' decisions about whether to purchase Defendants' investments. Indeed, the evidence shows that some consumers invested their entire life savings with Defendants and were without the ability to meet future equity calls.⁶⁴ Accordingly, Plaintiff is also entitled to summary judgment as to Counts IV and V of its Complaint.

C. THE APPROPRIATE REMEDY

The FTC seeks both injunctive and monetary relief to remedy Defendants' law violations. Injunctive relief is authorized by the second proviso of Section 13(b), which states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."⁶⁵ A case such as this one, which involves a deceptive telemarketing

⁶⁰ PSOF ¶¶ 14-16, 20.

⁶¹ PSOF ¶¶ 15, 24a, 25. In addition, Defendants withheld written statements from consumers to enable APM telemarketers to collect more money from the consumer before he or she became aware of the magnitude of Defendants' fees. P.E. 23 ¶ 9n, Att. W pp. 45:9-46:19.

⁶² PSOF ¶¶ 24c, 25-26.

⁶³ PSOF ¶¶ 17, 20, 23f, 24e.

⁶⁴ P.E. 11 ¶ 17. *See also* P.E. 9 ¶ 18; P.E. 13 ¶ 17.

⁶⁵ 15 U.S.C. § 53(b). *See also* *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432-34 (11th Cir. 1984) (quoting *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)); *FTC v. USA Fin., LLC*, No. 10-12152, 2011 U.S. App. LEXIS 3774, at *11 (11th Cir. Feb. 25, 2011); *FTC v. U.S. Mortgage Funding, Inc.*, No. 11-cv-80155, 2011 U.S. Dist. LEXIS 31148, at *5-6 (S.D. Fla. Mar. 1, 2011).

scheme, qualifies as a proper case under Section 13(b). Indeed, courts in the Eleventh Circuit have held that cases alleging violations of law enforced by the FTC constitute proper cases for which injunctive relief may be sought.⁶⁶

Section 13(b) also preserves the Court's inherent authority to order the ancillary equitable relief that is needed to render complete justice.⁶⁷ This includes "the discretion to model injunctive orders to fit the exigencies of [a] particular case, and the power to enjoin related unlawful acts that may be fairly anticipated from [the] defendants' past conduct."⁶⁸ Also, "[i]ncluded in the panoply of remedies are monetary remedies, including disgorgement and restitution."⁶⁹ "[A]bsent a clear command to the contrary, the district court's equitable powers are extensive. Among the equitable powers of a court is the power to grant restitution and disgorgement."⁷⁰

Based upon the Court's authority to enter a permanent injunction and ancillary equitable relief, Plaintiff FTC seeks a judgment that includes both (1) strong injunctive relief with a permanent ban to preclude Defendants from future telemarketing operations, and (2) monetary restitution to remedy consumer harm.

1. Injunctive Provisions

The Court should permanently enjoin Defendants from violating the FTC Act and TSR. In addition, since Defendant Harry Tanner is a recidivist, having previously been found to have deceptively telemarketed other investments,⁷¹ the Court should permanently ban Defendants from selling goods or services through telemarketing. Broad injunctive provisions are often necessary to prevent transgressors from violating the law in a new guise:

⁶⁶ *U.S. Oil and Gas*, 748 F.2d at 1433-34; *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1271 (S.D. Fla. 2007); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1275 (S.D. Fla. 1999).

⁶⁷ *See U.S. Oil and Gas*, 748 F.2d at 1433-34.

⁶⁸ *SlimAmerica*, 77 F. Supp. 2d at 1275.

⁶⁹ *Transnet Wireless*, 506 F. Supp. 2d at 1271.

⁷⁰ *Gem Merch.*, 87 F. 3d at 469 (citing *Power v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also SlimAmerica*, 77 F. Supp. 2d at 1276.

⁷¹ PSOF ¶¶ 7, 35.

If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.⁷²

The Commission may “frame its order broadly enough to prohibit [defendants’] use of identical illegal practices for any and all products.”⁷³ Thus, in order to secure effective relief and to protect the public, it is proper for this Court to permanently enjoin all of the Defendants from engaging in telemarketing.

2. *Monetary Provisions*

Ancillary equitable relief, in the form of monetary restitution to the victims of Defendants’ telemarketing scheme, is also an appropriate remedy in an FTC enforcement action. This Court has power to grant consumer restitution or compel disgorgement of illegally obtained funds.⁷⁴

A corporation is liable for monetary relief under Section 13(b) if [the FTC] shows that the corporation engaged in misrepresentations or omissions of a kind usually relied on by reasonably prudent persons and that consumer injury resulted. To demonstrate reliance and resulting consumer injury, [the FTC] must prove that [the] “defendant made material representations, that they were widely disseminated, and that consumers purchased the defendants’ product.”⁷⁵

Nonetheless, the fact “[t]hat a large number of consumers did not complain or the fact that the FTC came forward with relatively few consumer declarations in support of its motion does not bar the court from entering [summary] judgment.”⁷⁶ This is because under Section 5, a representation or omission is deceptive if it is *likely* to mislead *reasonable* consumers.⁷⁷ Thus,

⁷² *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952), *aff’g* 191 F.2d 294 (2d Cir. 1951).

⁷³ *See Carter Prods., Inc. v. FTC*, 323 F.2d 523, 533 (5th Cir. 1963) (citing *Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 342-343 (7th Cir. 1960).

⁷⁴ *Gem. Merch.*, 87 F.3d at 468, 470.

⁷⁵ *Nat’l Urological*, 645 F. Supp. 2d at 1211-1212.

⁷⁶ *FTC v. Peoples Credit First, LLC*, No. 8:03-cv-2353, 2005 U.S. Dist. LEXIS 38545, at *25 (M.D. Fla. Dec. 18, 2005), *aff’d* 244 Fed. Appx. 942 (11th Cir. 2007).

⁷⁷ *Peoples Credit*, 244 Fed. Appx. 942, 944 (11th Cir. 2007); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003).

the FTC is not required to prove *certainty* that a reasonable consumer would be misled or that *every* consumer would be misled. A claim is illegal if it has “a ‘tendency’ or ‘capacity’ to deceive; actual deception of particular consumers need not be proven.”⁷⁸

The consumer declarations, telemarketing scripts, and “compliance” recordings in this matter clearly show that Defendants made material misrepresentations and omissions to consumers to induce them to purchase precious metals. These misrepresentations and omissions were made to consumers nationwide over a period of nearly four years. Furthermore, approximately 1,122 consumers purchased Defendants’ product to their detriment and collectively suffered a loss of at least \$26,166,987⁷⁹ as a result.

D. THE INDIVIDUALS ARE LIABLE FOR INJUNCTIVE AND MONETARY RELIEF

1. Legal Standard

An individual is liable for corporate violations of the FTC Act or the TSR where: (a) the individual *either* participated directly *or* had the authority to control the deceptive acts or practices, and (b) had some knowledge of the wrongful acts or practices.⁸⁰ “Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.”⁸¹ “An individual’s status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation. ‘A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception.’”⁸²

⁷⁸ *FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995).

⁷⁹ PSOF ¶¶ 5, 29.

⁸⁰ *FTC v. Gem Merch.*, 87 F.3d 466, 470 (citing *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)); *see also Nat’l Urological*, 645 F. Supp. 2d at 1206-07.

⁸¹ *FTC v. Wilcox*, 926 F. Supp. 1091, 1104 (S.D. Fla. 1995) (quoting *Amy Travel Servs.*, 875 F.2d at 573.)

⁸² *FTC v. Transnet Wireless Corp.*, 506 F. Supp.2d 1247, 1270 (S.D. Fla. 2007) (quoting *FTC v. Windward Mktg.*, No. 1:96-CV-615-FMH, 1997 U.S. Dist. LEXIS 17114, at *25 (N.D. Ga. Sept. 30, 1997).

The FTC is not required to show an intent to defraud.⁸³ Nor must the FTC demonstrate that defendants had actual knowledge of the misrepresentations – reckless indifference to the truth or falsity of the representations or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth will suffice.⁸⁴

2. Individual Liability of Harry Tanner and Andrea Tanner

Defendants Harry and Andrea Tanner participated in or controlled their company's deceptive acts or practices and had the requisite knowledge to be held individually liable. Therefore, each should be held individually liable, jointly and severally, for the company's law violations.⁸⁵

Defendant Harry R. Tanner, Jr., was the president and a managing member of American Precious Metals since its formation.⁸⁶ Mr. Tanner managed day-to-day operations of the business with his wife, Defendant Andrea Tanner, who was the vice president and a managing member of the company.⁸⁷ Together, from their respective corner offices at the Deerfield Beach location,⁸⁸ the Tanners worked daily to direct and control the business practices of American Precious Metals, including the telemarketing practices, and were aware of, or were in reckless disregard of, the company's law violations.

Harry and Andrea Tanner participated in and controlled American Precious Metals' business activities.⁸⁹ They were the only signatories on the company's three known bank accounts, the only managers identified on the company's telemarketing sales license application,

⁸³ *Transnet Wireless*, 506 F. Supp. 2d at 1270 (citing *FTC v. Jordan Ashley, Inc.*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at *9 (S.D. Fla. Apr. 5, 1994)).

⁸⁴ *FTC v. Atlantex Assocs.*, No. 87-0045, 1987 U.S. Dist. LEXIS 10911, at *25 (S.D. Fla. Nov. 25, 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989); *FTC v. Wolf*, No. 94-8119, 1994 U.S. Dist. LEXIS 1760, at *24 (S.D. Fla. Jan. 30, 1996).

⁸⁵ *Gem Merch.*, 87 F.3d at 470.

⁸⁶ PSOF ¶¶ 4, 30-31; P.E. 1 ¶ 6; P.E. 2 ¶ 9.

⁸⁷ PSOF ¶¶ 4, 30, 32; P.E. 1 ¶¶ 6, 9; P.E. 2 ¶ 9.

⁸⁸ P.E. 18 Att. A-B.

⁸⁹ PSOF ¶¶ 30-32.

and the only officers identified on the company's business license records.⁹⁰ They each had authority to bind the corporation and entered into contracts on behalf of American Precious Metals.⁹¹ Between 2007 and 2010, their residence served as the company's registered address with the state of Florida.⁹²

Mr. Tanner was responsible for hiring telemarketers at American Precious Metals and he staffed the company with salespersons who, like him, had prior discipline histories related to deceptive sales practices.⁹³ Mr. Tanner personally called consumers to conduct purported "compliance" procedures for APM, during which he learned first-hand that many consumers were misled by telemarketers regarding the material details of the precious metals purchases.⁹⁴ He also received and responded to consumer complaints and negotiated settlements with injured consumers.⁹⁵ Further, he and Mrs. Tanner were sued by defrauded investors.⁹⁶ Therefore, the evidence show that Mr. Tanner had actual knowledge of the law violations, and that he participated in and controlled APM's deceptive business practices. He should be held individually liable for injunctive and monetary relief.

Defendant Andrea Tanner should also be held individually liable for APM's law violations. Mrs. Tanner helped manage American Precious Metals' business operations. She contracted with suppliers and vendors, including the telephone companies that provided services to American Precious Metals for telemarketing.⁹⁷ Mrs. Tanner oversaw APM's leased offices, managed the company's finances, and authorized and signed the employment contracts with

⁹⁰ P.E. 1 ¶¶ 6, 9; P.E. 2 ¶¶ 9, 29.

⁹¹ PSOF ¶ 30.

⁹² P.E. 1 Att. A; P.E. 2 Att. D.

⁹³ PSOF ¶¶ 7, 35; P.E. 1 ¶¶ 25-26; P.E. 2 ¶ 42; P.E. 7 ¶ 38; P.E. 13 ¶¶ 23-27.

⁹⁴ PSOF ¶ 33.

⁹⁵ PSOF ¶ 33; P.E. 3.A. ¶ 9.

⁹⁶ P.E. 13 Att. B. *See also* P.E. 10 ¶ 18; P.E. 14 ¶ 26.

⁹⁷ PSOF ¶¶ 30, 32.

APM's telemarketers. Mrs. Tanner also responded to unemployment claims filed by former employees.⁹⁸

The evidence also shows that Mrs. Tanner knew or should have know of APM's law violations. She established the company with her husband only months after he was expelled and fined by the NFA for using deceptive sales practices while telemarketing other investments.⁹⁹ Therefore, she was aware that the business carried a high probability of fraud. Despite this awareness, Mrs. Tanner failed to implement monitoring or *pre-sale* compliance procedures to ensure that the customers of her business were not similarly deceived or defrauded. Moreover, while she may not have personally engaged in telemarketing, she contracted with those who did.¹⁰⁰ As an owner, officer, and manager of the business, she was responsible for ensuring that her employees and contractors operated in full compliance of applicable laws. Moreover, Mrs. Tanner had full access to all of the records that the FTC has submitted to the Court as evidence in this matter, including telemarketing and compliance scripts, compliance recordings, and customer files – all of which were located in her office. But for her reckless disregard or intentional avoidance, she would have known of APM's law violations.

V. CONCLUSION

Plaintiff has demonstrated that there exists no genuine issue of material fact to be decided at trial and that, pursuant to Fed. R. Civ. P. 56(a), Plaintiff is entitled to summary judgment as a matter of law. Plaintiff respectfully requests that the Proposed Final Judgment and Permanent Injunction, which accompanies this motion, be entered to permanently enjoin Defendants from future law violations and to provide ancillary equitable relief to consumers injured by Defendants' deception.

Respectfully submitted,

⁹⁸ PSOF ¶¶ 30, 32.

⁹⁹ PSOF ¶¶ 7, 35.

¹⁰⁰ PSOF ¶ 32.

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