UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-CIV-62491-BLOOM

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CONSUMER COLLECTION ADVOCATES CORP., a Florida corporation, and MICHAEL ROBERT ETTUS, individually and as an officer of Consumer Collection Advocates, Corp.,

Defendants.
_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Plaintiff , the Federal Trade Commission's Motion for Summary Judgment, ECF No. [64] ("Motion"). The Court has reviewed the Motion, all supporting and opposing filings, the record, and is otherwise fully advised in the premises.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This matter presents a cautionary tale regarding the importance of adherence to rules, particularly, the Federal Rules of Civil Procedure and the Local Rules of this Court. Plaintiff, the Federal Trade Commission (the "FTC" or "Commission") has moved for summary judgment on all claims pursuant to Fed. R. Civ. P. 56(a). *See* Mot., ECF No. [64]. For the reasons that follow, the Motion is granted.

According to the Complaint, Defendant Consumer Collection Advocates Corp. ("CCA") and its sole officer, Defendant Michael Robert Ettus ("Ettus") (collectively, "Defendants"), ran a "recovery room scam," defrauding consumers who had previously lost large sums in

telemarketing investment schemes. *See* Complaint, ECF No. [1]. Specifically, from July 2011 to November 2014, Defendants preyed on fraud victims in order to perpetuate their own scam and bilk hundreds and sometimes thousands of dollars out of the already injured and desperate. *See id.* On November 3, 2014, the FTC filed the instant action seeking to halt Defendants' practice alleging that Defendants violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and the FTC's Trade Regulation Rule, 16 C.F.R. Part 310 (the "Telemarketing Sales Rule") by (1) requesting and/or receiving payment of illegal up-front fees from consumers for recovery services, and (2) misrepresenting the amount, timeliness, and likelihood of recovery. *See id.* The following day, this Court issued a Temporary Restraining Order, ECF No. [10], which enjoined the conduct alleged in the Complaint, froze Defendants' assets, and appointed attorney Melanie Damian as Receiver. On November 17, 2014, a stipulated preliminary injunction, ECF No. [19], was entered by the Court.

II. FACTUAL PREDICATE[1]

From its inception, CCA engaged in a telemarketing plan or program designed to induce consumers to purchase recovery services through unsolicited outbound telephone calls. *See* Plaintiff's Statement of Facts, ECF No. [64-1] at ¶ 6 (hereinafter, "Pl. SOF"). Often focusing their calls on seniors or retirees, the crux of CCA's pitch was its ability to collect funds that consumers had previously lost in fraudulent telemarketing schemes. *Id.* at ¶¶ 11-12. Claiming that they were an "advocacy firm" or "agency" that "engages in public services campaigns," and further representing that they were uniquely licensed by the State of Florida, CCA pitched countless consumers on this recovery program. *Id.* at ¶¶ 7-9. Although CCA does not engage in

[1] For the reasons discussed in Section III.A., *infra*, Defendants have admitted to all facts contained in the FTC's Statement of Facts, ECF No. [64-1]. *See* S.D. Fla. L.R. 56.1(b). Accordingly, the facts are garnered from the FTC's Statement and the citations to the record evidence contained therein.

legal action on behalf of consumers, CCA, nonetheless, represented to customers that it was able to utilize legal actions and remedies to recover the funds. *Id.* at ¶¶ 9-10. These services came with a price. *See id.* at ¶¶ 13-14. CCA required an up-front fee or retainer, ranging from several hundred to as much as fifteen thousand dollars, as well as an additional back-end commission ranging from 10% to 20% of the funds actually recovered. *Id.* CCA claimed to be able to recover consumers' lost monies typically within 30 to 180 days. *Id.* at ¶¶ 17, 32.

In order to persuade potential clients into signing up for this plan, CCA promised that their service was highly likely to recover a substantial portion of the funds previously lost, such as 60% or more recovery, triple civil penalties, a 4000% return, and/or a refund of their initial fee. *Id.* at ¶¶ 15, 21. CCA emphasized to potential clients that they would be unable to recover unless they enlisted CCA's services, cautioning consumers that they needed to act immediately as their time to recover was quickly diminishing. *Id.* at ¶ 16. The purported coercion did not end there. *See id.* at ¶ 18. If a consumer failed to purchase the recovery services after the initial sales call, CCA continued to contact the consumer, following up with additional phone calls, emails, and letters, which repeated the claims of significant recovery. *Id.*

CCA regularly recruited clients from victims of precious metals investment frauds. *See id.* at ¶¶ 28-29. For example, in October 2013, CCA began signing up consumers to recover funds lost in a precious metal investment fraud involving a company called American Precious Metals, LLC ("APM"). *Id.* at ¶¶ 28, 33; *see also F.T.C. v. American Precious Metals, LLC*, No. 0:11-cv-61072-WJZ (S.D. Fla.) (the "APM Case"). Defendants also sought consumers from other precious metals investment scams, including individuals involved in the case of *U.S. Commodity Futures Trading Commission v. Hunter Wise Commodities, LLC, et al.*, Case No. 12-81311-CIV-Middlebrooks (S.D. Fla.) (the "Hunter Wise Case"). Pl. SOF at ¶ 29. Although

CCA guaranteed recovery for the victims in the APM and Hunter Wise Cases, recovery in those cases was either impossible or substantially below the figures promised by CCA. *Id.* at ¶¶ 28-29.

Once a consumer agreed to purchase CCA's services, he or she would return the CCA documents sent to them, including the up-front payment. *Id.* at ¶ 23. At this point, communications from CCA would cease. *Id.* at ¶ 24. Consumers were met with difficulty when they attempted to contact CCA regarding their promised recovery. *Id.* at ¶ 24. A persistent consumer who was able to reach CCA would be provided excuses, for instance, that CCA was understaffed, or would simply be told that they needed to be patient and that recovery would take time. *Id.* Those frustrated by their inability to receive answers from CCA and, more importantly, their promised recovery, would sometimes file complaints with third parties, such as Florida State agencies, the FTC, the Better Business Bureau, and the U.S. Commodity Futures Trading Commission.[2] *Id.* at ¶ 25. When Defendants received these complaints, Defendants contacted the consumers, sometimes requesting that the consumer retract their complaints. *Id.* at ¶ 26. In other instances, Defendants would offer the consumer a refund or simply make further assurances regarding their recovery. *Id.*

Months and, in some cases, years passed and the consumers who signed up for CCA's services did not recovered the funds as promised.[3] *Id.* at ¶¶ 27, 31.

[2] The Commission's review of records obtained from the Florida Office of the Attorney General reveals that 94 complaints were filed with State of Florida agencies. Declaration of Evan Castillo, ECF No. [65-1] at ¶ 9.

[3] Some customers did report that CCA was successful in obtaining chargebacks from their respective credit card companies for payments to fraudulent telemarketers. *See* Pl. SOF at ¶ 30. However, further investigation revealed that these requests were more often than not rejected or reversed upon further examination. *See* Supplemental Declaration of Evan Castillo, ECF No. [68-2] at ¶ 22.

Defendant Ettus was the sole owner and officer of CCA and was responsible for the company's day-to-day operations. *Id.* at ¶ 2. Managerial decisions fell exclusively in Ettus' hands, and his authority included employee relations as well as being the lone signatory on CCA's bank accounts. *Id.* at ¶¶ 2, 4. Any complaint received by CCA was handled by Ettus and he regularly communicated with the Better Business Bureau, state agencies, court-appointed receivers in other actions and, on occasion, individual consumers. *Id.* at ¶¶ 5, 26. Additionally, Ettus was responsible for the creation of the sales scripts utilized by CCA's employees, obtained telemarketing licenses for himself, CCA, and its employees, and controlled the domain and webhosting for CCA's website. *Id.* at ¶ 3. Evidence also indicates that Ettus regularly exploited CCA's financial accounts for what appeared to be personal benefit. *See id.* at ¶ 4.

III. DISCUSSION

The Commission asserts that no genuine issues of material fact preclude the Court's grant of judgment as a matter of law in this case. Because Defendants utterly fail to negate the FTC's assertions or introduce any evidence in support of their arguments, the Court agrees.

A. Applicable Rules and Defendants' Failure to Abide by Them

The recitation of the applicable Rules of Civil Procedure and Local Rules of this Court are of profound importance in this case. Rule 56 of the Federal Rules of Civil Procedure provides that a party may obtain summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is genuine if "a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

The moving party shoulders the initial burden of showing the absence of a genuine issue of material fact. *Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). Once this burden is satisfied, "the nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Ray v. Equifax Info. Servs., L.L.C.*, 327 F. App'x 819, 825 (11th Cir. 2009) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Therefore, while the Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in the non-moving party's favor, *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006), "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) (quoting *Anderson*, 477 U.S. at 252). The non-moving party must produce evidence, going beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designating specific facts to suggest that a reasonable jury could find in the non-moving party's favor. *Shiver*, 549 F.3d at 1343.

In this same vein, Rule 56 also provides that "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by" citation to the record, including, *inter alia*, depositions, documents, affidavits, or declarations. Fed. R. Civ. P. 56(c). For all intents and purposes, the Rule allows a Court to punish a litigant who fails to properly support or address a fact by considering that fact undisputed. *See id.* at (e)(2)-(3). Defendants' Response, ECF No. [73], is utterly devoid of citations to pertinent parts of the record. Rather, the Response simply contains the unsupported assertions of counsel. *See id.* at 2-4 (containing, without citation whatsoever, assertions concerning facts that will be "learn[ed]" at "an eventual trial"). Moreover, to the extent the Court may consider these unsubstantiated assertions, the majority are

wholly irrelevant to the issues presented in the Motion, namely, issues regarding whether Defendants requested and received an illegal up-front fee from consumers or whether the pitch employed by CCA was misleading to consumers. The Defendant's failure to refute the FTC's well-supported factual predicate is fatal.

Defendants' failure to comply with Rule 56 is not the Response's sole defect. The Local Rules of this Court impose an additional but analogous requirement. Local Rule 56.1 requires a summary judgment movant to submit a "Statement of Material Facts" along with the original motion. *See* S.D. Fla. L.R. 56.1(a). The Statement must "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court. *Id.* at (a)(2). Critically, the Local Rules punish an opponent who fails to controvert the movant's Statement of Material Facts:

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

Id. at (b). Defendants wholly failed l to respond to the FTC's Statement of Facts, ECF No. [64-1]. Thus, for the purposes of the instant Motion, they have admitted all facts contained therein to the extent such facts are supported by evidence contained in the record. *See Joseph v. Napolitano*, 839 F. Supp. 2d 1324, 1336 (S.D. Fla. 2012) (deeming facts admitted where party failed to controvert under Local Rule 56.1); *Maryland Cas. Co. v. Integration Concepts, Inc.*, No. 14-CV-14231, 2015 WL 4747539, at *1 n.1 (S.D. Fla. June 24, 2015) (same). The Commission's Statement of Facts contains copious citations to unrefuted evidence and, as a result, remains uncontroverted. With the FTC's record-backed factual affirmations in hand, the Court addresses the merits.

B. CCA Violated Section 5(a) of the FTC Act

In its pertinent part, § 5(a) of the FTC Act proscribes "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(1). "To establish that an act or practice 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 material." *F.T.C. v. Peoples Credit First, LLC*, 244 F. App'x 942, 944 (11th Cir. 2007) (citing *F.T.C. v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)). When assessing whether a representation is misleading, courts look to the representation's "overall, net impression rather than the literal truth or falsity." *F.T.C. v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008) *aff'd*, 356 F. App'x 358 (11th Cir. 2009) (citing *F.T.C. v. Peoples Credit First, LLC*, No. 8:03-CV-2353-T, 2005 WL 3468588, at *5 (M.D. Fla. Dec. 18, 2005) *aff'd*, 244 F. App'x 942 (11th Cir. 2007)). "A representation is material if it is of a kind usually relied upon by a reasonably prudent person." *F.T.C. v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007) (citation omitted). "Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service are presumed to be material." *Id.* at 1267 (citation omitted).

When viewing the uncontroverted evidence in the light most favorable to Defendants, it is clear that CCA made a material representation that was likely to mislead consumers acting reasonably under the circumstances. While the Commission "need not present proof of subjective reliance by each victim" in order to show a violation of § 5(a), see *Transnet* at 1266-67 (citation omitted), it has, nonetheless, done so by submitting sworn affidavits of both potential and actual clients of CCA that detail their experience with the company. *See* Declaration of Thomas R. Rowland, ECF No. [67-3] (potential client); Declaration of Bruce Roskamp, ECF No.

[67-4] (potential client); Declaration of Jim M. Carney, ECF No. [66-3] (potential client); Declaration of Linda Robert, ECF No. [67-2] (potential client); Declaration of Andrew Dlugolecki, ECF No. [68-1] (potential client); Declaration of Shasta Frandrup, ECF No. [66-4] (client); Declaration of Darlene R. Haney, ECF No. [66-5] (client); Declaration of John V. Hood, ECF No. [66-6] (client); Declaration of Johnathan Jackson, ECF No. [66-7] (client). Although Defendants contend that no nexus exists between CCA's allegedly deceptive tactics and actual reliance by potential customers, the record clearly reveals otherwise. These declarations confirm that CCA, through its unsolicited telephone calls and repeated follow-up communications, employed deceptive and misleading practices and made material representations which reasonably would, and did, mislead consumers into subscribing to their fraudulent scheme. CCA's communications targeted despondent individuals who had often suffered tremendous financial losses and were frequently elderly or retired. CCA repeatedly and expressly promised those individuals substantial recovery of their previously lost funds and touted its false support from State agencies and regulatory authorities. After succumbing to CCA's advances, these consumers received little to absolute no money. Thus, taken as a whole, CCA made material representations that were likely to mislead consumers acting reasonably under the circumstances, thereby violating Section 5(a) of the FTC Act.

Defendants' attempts to discount the evidence presented, specifically the multitude of declarations submitted in support of the Commission's Motion, is unavailing. Focusing on the comparable format of the various affidavits, Defendants assert, in essence, that they are not to be trusted, that the affiants were instructed regarding the contents of their respective affidavits, and that the Court must consider the credibility of the affiants. *See* Resp. at 2. To begin with, the Court does not make credibility determinations on summary judgment. *See Strickland v. Norfolk*

S. Ry. Co., 692 F.3d 1151, 1154 (11th Cir. 2012) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict." (quoting *Anderson*, 477 U.S. at 255)). Second, Rule 56 explicitly allows a party to support its factual proffer with citation to affidavits and declarations. Fed. R. Civ. P. 56(c)(1)(A). While the Court need not accept the contents of an affidavit where contradictory record evidence is presented, Defendants fail to offer any evidence rebutting the contentions contained in the declarations.

Defendants' attempt to slander the affidavits by injecting elements of bias and motive is also unpersuasive. First, Defendants do not to disclose what bias and/or motive may be present. Second, the declarations in question are based on personal knowledge and sworn to under penalty of perjury. Absent incompatible evidence, this is sufficient for the Court to consider the contents as truthful. *See F.T.C. v. Kuykendall*, 312 F.3d 1329, 1343 (10th Cir. 2002) *opinion vacated on other grounds*, 371 F.3d 745 (10th Cir. 2004) (finding that consumer "declarations and complaints had circumstantial guarantees of trustworthiness as all were made under oath subject to penalty of perjury"); *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir.1989) ("The interests of justice are served by allowing the affiants to submit affidavits instead of requiring their appearance in court. The defendants ran a nation-wide telemarketing operation and it would be cumbersome and unnecessarily expensive to bring all the consumers in for live testimony."). Last, counsel's sweeping opposition to the Court's consideration of the consumer declarations is insufficient to controvert the statements and assertions contained therein. As noted by the Second Circuit:

> In order to defeat a summary judgment motion that is properly supported by affidavits, depositions, and documents as envisioned

> by Fed. R. Civ. P. 56(e), the opposing party is required to come forward with materials envisioned by the Rule, setting forth specific facts showing that there is a genuine issue of material fact to be tried. He cannot defeat the motion by relying on the allegations in his pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible. The motion will not be defeated merely on the basis of conjecture or surmise.

Gottlieb v. Cnty. of Orange, 84 F.3d 511, 518 (2d Cir. 1996) (internal quotations and citations removed). This Court will not blindly accept the contentions of counsel where such contentions are not supported by *any* evidence in the record. As noted, the affidavits contain sufficient indicators of truthfulness which has not been refuted in any respect and, therefore, the Court appropriately considers them for the purposes of the instant Motion. Defendants' baseless quarrel with the declarations is insufficient to deny their consideration.

For these reasons, a plentiful record exists to determine that CCA has violated the Section 5(a) of the FTC Act as a matter of fact and law.

C. CCA Violated the Telemarketing Sales Rule, 16 C.F. R. Part 310

Since 1995, the Telemarketing Sales Rule has prohibited recovery services from requiring an up-front fee. In its pertinent part, the Rule deems the following "an abusive telemarketing act or practice" and a violation of [the] Rule:

> Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person.

16 C.F.R. § 310.4(a)(3). The undisputed evidence viewed in the light most favorable to Defendants reveals that CCA, on nearly every occasion, if not every occasion, requested and sometimes received advance fees ranging from the hundreds to the thousands from consumers

who were previously defrauded in telemarketing schemes. Clearly, such acts fall squarely within the conduct prohibited by the Telemarketing Sales Rule, 16 C.F.R. § 310.4(a)(3).

CCA's actions also violate § 310.3(a)(2)(iii) of the Telemarketing Sales Rule, which proscribes deceptive telemarketing acts or practices, including, *inter alia*, "[m]isrepresenting, directly or by implication, in the sale of goods or services . . . any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer[.]" In its pitch, CCA consistently represented that by purchasing its recovery services, the consumer was highly likely to recover a substantial portion of the funds which were previously lost to fraudulent telemarketing schemes. CCA went further, promising that it would recover said monies within 30 to 180 days. As many consumers unfortunately discovered, these material representations were altogether spurious, yielding the inescapable conclusion that CCA misrepresented several material aspects of its services including, most notably, the performance and efficacy of the services. *See F.T.C. v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1275 (M.D. Fla. 2012) *aff'd sub nom. F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323 (11th Cir. 2013) (holding that defendant violated § 310(a)(2)(iii) where services deceptively overstated the likelihood of receiving the promised service); *see also F.T.C. v. USA Fin., LLC*, 415 F. App'x 970, 974 (11th Cir. 2011).

Consequently, no genuine issues of material fact forestall the conclusion that CCA violated §§ 310.3(a)(2)(iii) and 310.4(a)(3) of the Telemarketing Sales Rule.

D. Defendant Ettus is Subject to Individual Liability

Corporate violations of the FTC Act may be imputed to individuals. *See F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). "Once the FTC has established corporate liability, the FTC must show that the individual defendants participated directly in the practices

or acts or had authority to control them . . . [and] that the individual had some knowledge of the practices." *Id.* (internal quotation, citation, and formatting omitted). "The FTC may establish the knowledge requirement by showing that individual had '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.'" *Transnet Wireless*, 506 F. Supp. 2d at 1270 (quoting *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)). Where the entity subjected to scrutiny is a closely-held corporation, an individual's status as a corporate officer will give rise to a presumption of control. *Id.* (citing *F.T.C. v. Windward Mktg.*, 1997 WL 33642380 at *25 (N.D. Ga. Sept.30, 1997)). However, the FTC is not required to demonstrate that the individual defendant had the intent to defraud. *Id.* (citing *F.T.C. v. Jordan Ashley, Inc.*, No. 93-2257-CIV-NESBITT, 1994 WL 200775, at *3 (S.D. Fla. Apr. 5, 1994)).

Here, the admitted facts indicate that Defendant Ettus was the sole officer and president of CCA. This fact alone raises the presumption that Ettus had the requisite control. *See Transnet Wireless* at 1270. Ettus' control is further evidenced by his engagement in the day-to-day operations of CCA, including overseeing worker's operations, hiring and firing decisions, training, and general direction of employees. Ettus also managed CCA's bank accounts and maintained exclusive authority over its financial affairs. Moreover, Ettus directly participated in the illicit practices CCA engaged in and was well aware of such conduct. For example, Ettus wrote and disseminated the scripts utilized by CCA's employees and was the sole point of contact for the company. If there was a captain of the M/S CCA, it was Ettus. These

uncontested facts support the conclusion that Ettus had the requisite knowledge, awareness, and involvement to impose individual liability.[4]

E. Unresolved Issues

The Court is obligated to address Defendants' remaining evidentiary "challenges" to the submitted evidence and to certain contentions contained in the Commission's Motion. A substantial portion of Defendants' Response is dedicated to undermining the declarations of the FTC's lead investigator, Evan Castillo ("Castillo"), ECF Nos. [65-1] through [65-7]. *See* Resp. at 4-6. Defendants contend that Castillo's deposition testimony reveals an entirely different story, one involving "arrogance and a lack of due diligence, fairness and attention to due process procedures." *Id.* at 6. The Court has reviewed the cited portions of Castillo's deposition, ECF No. [73-1] ("Castillo Deposition"), and finds that his testimony does not report a different investigation than the one contained in his declaration. Defendants simply mischaracterize Castillo's testimony and focus on facts that remain irrelevant to the determination of liability. For instance, Defendants call into question Castillo's investigation based on the fact that he never spoke to anyone at various Florida agencies, including the Florida Department of Agriculture, which was purportedly responsible for the "oversight, licensing, and accreditation" of CCA and Ettus' licenses, as well as the approval of proposed scripts. *See* Resp. at 5, 8. However, a bureau chief at the Florida Department of Agriculture of Consumer Services ("FDACS") has attested to the fact that FDACS "does not review the content of written materials submitted by the business applicant" and, reflecting this, the pertinent application clearly advises the applicant that FDACS "does not review the content of contracts or scripts." *See* Declaration of Liz Compton, ECF No. [74-3] at ¶¶ 5-6. Thus, this assertion not only appears to be hollow,

[4] Ettus attempts to use former employees as the "fall guys" for any illicit conduct. *See* Resp. at 7. As expected, no citation to record evidence is provided to support this assertion.

but also irrelevant. Further, regarding Castillo's purportedly inadequate investigation, Defendants place emphasis on Castillo's inability to state whether he communicated with any complainants. *See* Resp. at 4-5. To the extent this assertion is relevant, which it is not, it is belied by Castillo's own testimony. Castillo clearly indicates that the investigation was a "team effort," and notes that various other individuals were also working on the matter. *See* Castillo Depo. at 116:5-17.

Defendants also launch personal attacks on the Court-appointed Receiver in this case, claiming that the Receiver maintains a personal vendetta against them. Impugning the Receiver's credibility via unsubstantiated, personal opinions does nothing to further Defendants' cause. The FTC began researching CCA's illicit activities which culminated in the commencement of this action well before the Receiver was appointed by the undersigned. There is simply no evidence to support this unscrupulous assertion.

In sum, Defendants' contentions that seek to address the facts on which liability is imposed are either unsupported or irrelevant in light of Defendants' admissions. Defendant fails to introduce even a modicum of evidence on which a reasonable trier of fact could find in their favor. *See* Fed. R. Civ. P. 56(c) (requiring a party who asserts that a fact is "genuinely disputed" must support their assertion by citation to record evidence).

F. Consumer Injury and Damages

Based on CCA's own records and databases, the Receiver was able to identify approximately 1480 consumers who had retained CCA. *See* Receiver's Report, ECF No. [20] at 7. Again relying on CCA's own documentation, the Receiver estimated the harm suffered: the Report states that during the operative time period CCA had total revenues of approximately $2,801,257.44. *Id.* at 9. Accordingly, the Commission requests that this Court enter judgment in

a similar amount: $2,834,704.68. *See* Notice, ECF No. [77]; Supplemental Declaration of Evan Castillo, ECF No. [74-4] at ¶ 5 (totaling CCA's gross receipts and subtracting refunds to consumers). A district court may exercise "its full equitable powers under Section 13(b) of the FTC Act to remedy violations of Section 5 of the Act." *Transnet*, 506 F. Supp. 2d at 1271 (citing *F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 469-70 (11th Cir. 1996)). Included among these remedies is the authority to order monetary remedies, which include disgorgement and restitution. *Id.* (citing *Gem Merchandising* at 469; *F.T.C. v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432, 1434 (11th Cir. 1984)) (further citations omitted). Defendants' primary complaint in this regard concern's the FTC's alleged failure to identify the damages suffered by any of CCA's customers. *See* Resp. at 9-10 (stating that the Commission has "not demonstrated a money figure to reflect the actual losses, if any, to consumers").

However, in an FTC-enforcement action, a defendant is "liable to the extent of their ill-gotten gains." *F.T.C. v. IAB Mktg. Associates, LP*, 972 F. Supp. 2d 1307, 1312 (S.D. Fla. 2013) (citing *F.T.C. v. Bishop*, 425 F. App'x 796, 798 (11th Cir. 2011). Critically, "[t]he proper measure of ill-gotten gains is revenue, not profit." *Id.* (citing *F.T.C. v. Washington Data Resources*, No. 8:09–cv–2309–T–23TBM, 2011 WL 3566612, at *3 (M.D. Fla. July 15, 2011 *report and recommendation adopted*, No. 8:09-CV-2309-T-23TBM, 2011 WL 3566208 (M.D. Fla. Aug. 12, 2011) ("[T] he measure of equitable restitution is the benefit unjustly received by the defendant, i.e., the defendant's ill-gotten gains."))). "[E]quitable remedies do not take into consideration the plaintiff's losses." *Washington Data* at *3 (citing *Bishop* at 798) (finding that the appropriate measure of the defendant's ill-gotten gains were "the monies paid to his company"); *see also F.T.C. v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 14 (1st Cir. 2010) (upholding damages determination on gross receipts rather than net profits); *F.T.C. v. Neovi*,

Inc., 604 F.3d 1150, 1159 (9th Cir. 2010) (determining the appropriate measure of equitable disgorgement to be total revenue). Indeed, as the Eleventh Circuit has noted, the purpose of disgorgement "is not to compensate the victims of fraud, but to deprive the wrongdoer of his ill-gotten gain." *Gem Merchandising*, 87 F.3d at 470. Consequently, Defendants' objection is meritless and irrelevant. While the Commission may not have estimated the harm specifically incurred by consumers, it has, nonetheless, aptly ascertained a monetary value of the funds received by Defendants as a result of the illicit tactics they employed.

To the extent that Defendants' argument can be construed as a challenge to the accuracy of the Commission's stated figure, this assertion also flounders under the relevant law. The FTC's burden in this respect is one of approximation; "[e]xactitude is not a requirement." *Washington Data*, 2011 WL 3566612, at *2 (quoting *Bishop* at 798)). To wit, "if a precise calculation of illegally obtained profits is not feasible, a reasonable approximation will do." *United States v. Prochnow*, No. 07-10273, 2007 WL 3082139, at *4 (11th Cir. Oct. 22, 2007) (citing *S.E.C. v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004)). Thus, "[t]o determine the amount of equitable restitution or disgorgement, the FTC must show that its calculations reasonably approximated the amount of [Defendants'] unjust gains, thereafter, the burden shifts to [Defendants] to show that those figures are inaccurate." *Washington Data* at *2 (citing *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 68 (2d Cir. 2006)). The Commission has demonstrated, by reasonable approximation, the value of Defendants' ill-gotten receipts.

After thorough review of CCA's data and records, the Receiver in this action calculated an amount totaling $2,801, 257.44, which represented total revenues from collection of initial and post-recovery fees from customers between June 2011 and November 4, 2014. *See* Receiver's Report, ECF No. [20] at 8. The FTC investigator also pored over CCA's data,

reviewing spreadsheets collected from CCA's computers. *See* Supplemental Declaration of Evan Castillo ("Castillo Supplemental Declaration"), ECF No. [68-2] at ¶ 18 (noting that CCA collected varied fee amounts between $200 and $15,000); *see also* Attachment "L" to Castillo Supplemental Declaration, ECF No. [68-3] at 67-71, ECF No. [68-4] at 1-27, ECF No. [68-5] at 1-2 (collectively, "Attachment L") (containing spreadsheets of fees collected). The recorded spreadsheets indicate a total income of $2,648,422.12 from August 2011 to the end of October 2014. *See* Castillo Supp. Decl., ECF No. [68-2] at ¶ 18; Attachment L. Admittedly, this calculation does not include numbers for February 2013 and March 2014, which the Commission was unable to locate. *See id.* In order to account for these missing months, Castillo analyzed CCA's bank records for February 2013 and March 2014, reviewing checks from consumers and merchant deposits not included in the previously-reviewed spreadsheets. *See* Second Supplemental Declaration of Evan Castillo ("Castillo Second Supplemental Declaration"), ECF No. [74-4] at ¶¶ 3-5; *see also* Attachment "B" to Castillo Second Supp. Decl., *id.* at 173-76 (containing spreadsheet of February 2013 and March 2014 transactions). Castillo was then able to total CCA's gross receipts and then subtract the refunds actually paid to consumers, which yielded a total more akin to the Receiver's initial approximation: $2,825,761.28. *See id.* at ¶ 5.

Based on this evidence, the Commission has provided a basis for its reasonable approximation of Defendants' unjust gains and Defendants have introduced no evidence indicating that the promoted figures are inaccurate. Consequently, the proper value of consumer harm in this action is $2,825,761.28. *See F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013) (upholding district court determination that net revenue—gross receipts minus profits—was the correct measure of damages under § 13(b)).

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Plaintiff Federal Trade Commission's Motion for Summary Judgment, **ECF No. [64]**, is **GRANTED**. Final injunctive and monetary judgment shall be entered by separate order.

DONE AND ORDERED in Fort Lauderdale, Florida, this 8th day of September, 2015.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record