11-10150-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

MIRIAM SOPHIA SMOLYANSKI ANDREONI,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (Case 1:04-CV-22431-JEM)

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

RUTHANNE M. DEUTSCH
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
(202) 326-3677
rdeutsch@ftc.gov

Of Counsel:

MICHAEL E. TANKERSLEY
DANIEL O. HANKS
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Federal Trade Commission v. Miriam Andreoni, No. 11-10150-EE

PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1 and 28-1(b), the Federal Trade Commission ("FTC" or "Commission") certifies that, in addition to those persons and entities listed in the Certificate of Interested Persons filed by Appellant, the following persons or entities are known to have an interest in the outcome of this case or appeal:

Daly, John F.— FTC Deputy General Counsel for Litigation

Tom, Willard K.— FTC General Counsel

STATEMENT REGARDING ORAL ARGUMENT

No material facts are in dispute and the controlling law is settled. Oral argument, therefore, is not required.

TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT. C1

STATEMENT REGARDING ORAL ARGUMENT. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iv

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

SUPPLEMENTAL STATEMENT OF THE CASE. 2

A. AED's Business Practices and Mrs. Andreoni's Role. 2

B. General Course of the Proceedings. 5

C. Settlement Negotiations, Agreement and Submission to the Court, and Mrs. Andreoni's Failed Attempt to Revoke Consent. 7

1. Settlement Negotiations 7

2. The Signed and Submitted Agreement 9

3. Mrs. Andreoni's failed attempt to withdraw consent. 12

STANDARD OF REVIEW 14

SUMMARY OF ARGUMENT 15

ARGUMENT. 17

I. The district court did not err in refusing to allow Mrs. Andreoni to unilaterally repudiate a binding settlement agreement. 17

A. Under clearly established precedent, a party may not unilaterally repudiate a binding settlement agreement. 17

B. Mrs. Andreoni has waived any argument that the agreement was not binding under Florida contract law or that her due process rights were violated. 21

C. In any event, Mrs. Andreoni's arguments that the settlement agreement was not binding under Florida law are meritless.. 24

1. State worker's compensation cases are irrelevant. 26

2. Appellant's other contract defenses should also be rejected. 27

II. The district court properly approved the consent order without a hearing.. 35

CONCLUSION... 41

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES **PAGE**

In re AWECO,
725 F.2d 293 (5th Cir. 1984). 36

Access Now, Inc. v. Southwest Airlines Co.,
385 F.3d 1324 (11th Cir. 2004). 22

Aldana v. Del Monte Fresh Produce N.A., Inc.,
578 F.3d 1283 (11th Cir. 2009). 23

Allen v. Alabama State Bd. of Educ.,
816 F.2d 575 (11th Cir. 1987). 13, 14, 19, 20

In re American Reserve Corp.,
841 F.2d 159 (7th Cir. 1987). 36

Aoude v. Mobil Oil Corp.,
862 F.2d 890 (1st Cir. 1988). 38

Breland v. Louisiana Pacific Corp.,
698 F.2d 773 (5th Cir. 1983). 26

Cia. Anon Venezolana de Navegacion v. Harris,
374 F.2d 33 (5th Cir. 1967). 18

Columbus-America Discovery Grp. v. Atlantic Mut. Ins. Co.,
203 F.3d 291 (4th Cir. 2000). 20

In re Cotton,
992 F.2d 311 (11th Cir. 1993). 20

Cotton v. Hinton,
559 F.2d 1326 (5th Cir. 1977). 39

D.H. Overmeyer Co., Inc. v. Frick Co.,
405 U.S. 174 (1972).. 38

Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.,
561 F.3d 1298 (11th Cir. 2009)... 21

FTC v. Colgate-Palmolive Co.,
380 U.S. 374 (1965).. 32

FTC v. Leshin,
618 F.3d 1221 (11th Cir. 2010)... 34

FTC v. Nat'l Lead Co.,
352 U.S. 419 (1957).. 32

Holmes v. Cont'l Co.,
706 F.2d 1144 (11th Cir. 1983)... 36, 37

Irving v. Mazda Motor Corp.,
136 F.3d 764 (11th Cir. 1998)... 22

Jacksonville Branch, NCAAP v. Duval Cnty. School Bd.,
978 F.2d 1574 (11th Cir. 1992)... 15

Johnson v. United States,
340 F.3d 1219 (11th Cir. 2003)... 22

Leverso v. Southtrust Bank of Al. Nat'l Assoc.,
18 F.3d 1527 (11th Cir. 1994)... 15

In re Lloyd, Carr and Co.,
617 F.2d 882 (1st Cir. 1980)... 36

Martin v. Kane,
784 F.2d 1377 (9th Cir. 1986)... 36

Morrissey v. Brewer,
408 U.S. 471 (1972).. 38

Norelus v. Denny's, Inc.,
628 F.3d 1270 (11th Cir. 2010). 22

Oklahoma Press Publ'g Co. v. Walling,
327 U.S. 186 (1946). 31

Pendergast v. Sprint Nextel Corp.,
592 F.3d 1119 (11th Cir. 2010). 28

Petty v. Timken Corp.,
849 F.2d 130 (4th Cir. 1988). 13, 20

Plummer v. Chem. Bank,
668 F.2d 654 (2d Cir. 1984). 37

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,
390 U.S. 414 (1968). 36

Reed v. United States,
891 F.2d 878 (11th Cir. 1990). 18, 19, 20

Resnick v. Uccello Immobilien GMBH, Inc.,
227 F.3d 1347 (11th Cir. 2000). 24

SEC v. Bank of Am. Corp.,
653 F. Supp. 2d 507 (S.D.N.Y. 2009). 33, 34

SEC v. Hatch,
1989 U.S. Dist. LEXIS 16389 (D.N.J. Oct.19, 1989). 23

In re Seminole Walls & Ceilings Corp.,
388 B.R. 386 (M.D. Fla. 2008). 21

Sheng v. Starkey Labs., Inc.,
117 F.3d 1081 (8th Cir. 1997). 20

Smith v. Secretary, Dep't of Corr.,
572 F.3d 1327 (11th Cir. 2009*)*. 23

Stovall v. City of Cocoa, Florida,
117 F.3d 1238 (11th Cir. 1997). 14, 15, 19, 37

In re Syncor ERISA Litig.,
516 F.3d 1095 (9th Cir. 2008). 20

United States v. Apfelbaum,
445 U.S. 115 (1980).. 32

United States v Cannons Eng'g Corp.,
899 F.2d 79 (1st Cir. 1990). 15

United States v. City of Miami,
614 F.2d 1322 (5th Cir. 1980). 15

United States v. Dunkel,
927 F.2d 955 (7th Cir.1991). 23

United States v. McAnlis,
721 F.2d 334 (11th Cir. 1983). 31

United States v. Reis,
765 F.2d 1094 (11th Cir. 1985). 31

White Farm Equip. Co. v. Kupcho,
792 F.2d 526 (5th Cir. 1986). 13, 17, 18, 19, 20

Young v. FDIC,
103 F.3d 1180 (4th Cir. 1997). 20

STATE CASES

B. Frank Joy Co. v. Isaac,
636 A.2d 1016 (Md. App. 1994). 27

Bland v. Health Care & Ret. Corp. of Am.,
927 So. 2d 252 (Fla. 2d Dist. Ct. App. 2006). 28

In re Estate of Boyar,
592 So. 2d 341(Fla. 4th Dist. Ct. App. 1992). 25

Callins v. Abbatecola,
412 So. 2d 58 (Fla. 4th Dist. Ct. App. 1982). 25

Cheverie v. Geisser,
783 So. 2d 1115 (Fla. 4th Dist. Ct. App. 2001). 25

Gunderson v. Sch. Dist.,
937 So. 2d 777(Fla. 1st Dist. Ct. App. 2006)... 25

Fredekind v. Trimac Ltd,
566 N.W.2d 148 (S. D. 1997). 26

Gross v. Nat'l Health Enter., Inc.,
582 S.W.2d 379 (Tenn. 1979). 27

Jenkins v. The City Ice and Fuel Co.,
160 So. 215 (Fla. 1935).. 25

Nat'l Gypsum Co. v. Brewster,
461 P.2d 593 (Okla. 1969). 27

Robbie v. Miami,
469 So. 2d 1384 (Fla. 1985). 24

Rogers v. Concrete Sciences, Inc.,
394 So. 2d 212 (Fla. 1st Dist. Ct. App. 1981).. 26

Schuck & Sons Constr. v. Indus. Comm'n,
963 P.2d 310 (Ariz. Ct. App. 1998)... 27

Smith v. Rose Auto. Stores,
596 So. 2d 809 (Fla. 1st. Dist. Ct. App. 1992).. 26

VoiceStream Wireless Corp. v. U.S. Commc'ns Inc.,
912 So. 2d 34 (Fla. 4th Dist. Ct. App. 2005). 28, 30

W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.,
728 So. 2d 297 (Fla.1st Dist. Ct. App. 1999).. 25

DOCKETED CASES

FTC v. Global Mktg. Grp., Inc.,
No. 8:06-cv-02272 (M.D. Fla. Feb. 13, 2009). 12

FTC v. Glucorell, Inc.,
No. 6:08-cv-01649 (M.D. Fla. Oct. 2, 2008). 12

FTC v. Grp. One Networks, Inc.,
No. 8:09-cv-00352 (M.D. Fla. Jan. 12, 2010). 12

FTC v. Leshin,
No. 0:06-cv-61851 (S.D. Fla. May 5, 2008),
aff'd 618 F.3d 1221 (11th Cir 2010). 12, 34

FTC v. USA Financial LLC,
No. 8:08-cv-899 (M.D. Fla. April 5, 2010); *aff'd*
2011 WL 679430 (11th Cir. Feb. 25, 2011). 12

Reassure Am. Life Ins. Co., v. Shomers et al.,
No. 1:08-22664-Civ-Martinez (S.D. Fla. 2010). 10

United States v. MacArthur, et al.,
No. 0:05-cr-60203, *aff'd* 323 Fed. Appx. 880 (11th Cir. 2009). 3, 6, 30

United States v. Paz,
No. 0:06-cr-60249 (S.D. Fla. April 19, 2007). 6

FEDERAL STATUTES

11 U.S.C. § 1208(b). 20

Federal Trade Commission Act

15 U.S.C. § 45(a). 1

15 U.S.C. § 53(b). 1

15 U.S.C. § 57(b). 1

28 U.S.C. § 1291. 1,2

28 U.S.C. § 1292(a)(1). 2

28 U.S.C. § 1331. 1

28 U.S.C. § 1337(a). 1

28 U.S.C. § 1345. 1

RULES AND REGULATIONS

16 C.F.R. Part 436. .... 1, 4, 10

16 C.F.R. Part 437. 10

Fed. R. Civ. P. 52(a)(3). 39

Fed. R. Civ. P. 54(b). 1

Fed. R. Civ. P. 65(d). 33

STATEMENT OF JURISDICTION

The Commission filed a complaint on September 28, 2004, charging appellant Miriam Smolyanski, a.k.a. Masha Tango ("Mrs. Andreoni")[1] and her nine co-defendants (five corporations and four individuals) with deceptively promoting video rental machines as business opportunities, thereby violating Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and various provisions of the Franchise Rule, 16 C.F.R. Part 436. The district court has jurisdiction under 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. §§ 53(b) and 57(b). All claims in this case have been resolved except those still pending against the Estate of Anthony Rocco Andreoni.

On November 17, 2010, the district court entered a stipulated final order and permanent injunction against Mrs. Andreoni, adopting the stipulated proposed order that she and the Commission had submitted and denying her motion to withdraw her consent. D.297; D.298. That order was certified as a final judgment under Federal Rule of Civil Procedure 54(b). D.298 at 3, ¶ 10. This appeal was timely noticed on January 12, 2011. D.303. This Court has jurisdiction under 28

---

[1] The Commission charged appellant as Miriam Smolyanski, and as Masha Tango, the alias she used when marketing AED products. D.3. Subsequent filings, including the consent decree here at issue, used her married name, Andreoni. This brief refers to appellant as Mrs. Andreoni.

U.S.C. § 1291, and also, because the order grants injunctive relief, under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court properly denied Mrs. Andreoni's motion to repudiate a signed and binding settlement agreement.

2. Whether the district court acted within its discretion in entering the agreed-to judgment without holding a hearing, when no hearing was requested and no factual challenge was raised as to the validity or scope of the agreement.

SUPPLEMENTAL STATEMENT OF THE CASE

A. AED's Business Practices and Mrs. Andreoni's Role.

The Commission commenced this law enforcement action in September 2004, filing a complaint for injunctive and monetary relief against five corporate and five individual defendants, including Mrs. Andreoni. The complaint charged that defendants deceptively marketed business opportunities involving automated DVD rental machines under the name "Box Office Express," through the entity "American Entertainment Distributors, Inc." ("AED"). In support of its ex parte motion for a Temporary Restraining Order ("TRO"), the Commission presented evidence on how the defendants operated this business opportunity fraud through a web of interrelated corporations. *See* D. 18. Consumers lost at least $19.2

million to AED before the operation was eventually halted by court order. D.119 at 3, 10-11; D.124 at 4.[2]

The FTC alleged that the five corporate defendants, operating as a common enterprise, tricked investors into paying $28,000 to $37,500 apiece for video rental vending machines, luring them by promising earnings of between $60,000 and $80,000 a year, or the opportunity to recoup their initial investment in six to 14 months. D.3 at 8; D.18 at 21-22. These unsupported earnings claims and false promises were made through internet web sites, television commercials, unsolicited faxes, and high-pressure telephone sales pitches. D.3 at 6-10; D.18 at 17-24.

Phony references formed an integral part of AED's marketing scheme. During a telephone sales pitch, prospective investors were given the names of two "references" to call – purportedly existing investors who could attest to their own handsome profits from investments in AED's machines. D.18 at 23. But these references were paid shills; many did not even own an AED machine. *Id.* at 26.

The Commission documented how consumers who invested in AED's

---

[2] *See also United States v. MacArthur*, No. 0:05-cr-60203-JEM-1, D.570 (criminal judgment against one of Mrs. Andreoni's co-defendants, Russell J. MacArthur, including an award of restitution of $19,617,947.00), *aff'd* 323 Fed. Appx. 880 (11th Cir. 2009) (per curiam).

machines never came close to realizing the promised earnings, but instead, typically lost money on their investment. D.3 at 9; D.18 at 22-28. It is hardly surprising that the investments were not as profitable as promised. AED failed entirely to deliver the promised goods and services – the machines were not comparable to the promised machines, no operation manual was provided, the machines frequently broke down; and AED did not keep its promise to help investors locate their machines in high-volume areas. D.3 at 9-10; D.18 at 24-25. These false promises, according to the Commission, violated Section 5(a) the FTC Act. The Commission also demonstrated how the AED operation violated the disclosure requirements and prohibitions of the Franchise Rule, 16 C.F.R. Part 436. D.3 at 14-15; D.18 at 27-28. In total, the Commission brought seven counts against the five corporate defendants, and the five individuals who were responsible, in whole or in part, for their actions. *See* D.3.

Mrs. Andreoni was an active participant in the scam. The Commission's TRO filings detailed her role in perpetrating the scheme. D.18 at 8-17. Mrs. Andreoni, also known as "Masha Tango" in her dealings with AED customers, was extensively involved in the day-to-day operations of the scam. *Id.* at 15. Together with her husband and co-defendant, Anthony Rocco Andreoni (one of the principals and co-founders of AED), Mrs. Andreoni made major decisions for

AED, including hiring and supervising sales personnel and managing financial matters. *Id.* at 15 & n.22, 33. Indeed, co-defendant James MacArthur, the President of AED, described Mrs. Andreoni as his "right hand executive." *Id.* at 33, n.69.[3] Mrs. Andreoni also played a key role in supervising AED's phony references, regularly monitoring their contacts with prospective investors, and signed their weekly compensation checks totaling almost $70,000. *Id.* at 33.

B. General Course of the Proceedings.

The district court granted the Commission's request for a TRO on September 29, 2004, together with other requested relief including an asset freeze and appointment of a receiver. D.27. Over the following months, all defendants either stipulated to a preliminary injunction or defaulted. *See* D.45 (stipulated preliminary injunction as to defendants AED and James MacArthur, October 21, 2004); D.72 (same as to defendants Universal Cybercom Corp. and Mauricio Paz, November 24, 2004); D.113 (same as to Russell MacArthur, January 21, 2005); D.124 (order of February 22, 2005 granting default judgment and a permanent injunction against defendants James R. MacArthur, AED, and Automated Entertainment Machines).

---

[3] The Commission later discovered that Mrs. Andreoni was a vice president of AED. D.255 at 1.

Appellant too, together with Anthony Andreoni and two corporate co-defendants, stipulated to a preliminary injunction and other equitable relief on January 5, 2005. D.101. Under the terms of this agreement, Mrs. Andreoni and her husband received a one-time allowance of $30,000 from already frozen assets towards payment of their attorney fees. *Id.* at 6. This first consent decree also permitted the Andreonis to retain and spend assets acquired after its date of entry, subject to disclosure and accounting protections, provided that such assets were not derived from the conduct alleged in the Commission's complaint. *Id.*

In February 2005, the district court set a July deadline for the close of discovery, and set trial for November 2005. D.123. Shortly thereafter, the case was halted due to parallel criminal proceedings. Discovery was first stayed in May 2005, upon motion of the United States Attorney's Office for the Southern District of Florida. D.144. Discovery was further stayed in October pending completion of the criminal proceedings. D.179. Mrs. Andreoni consented to the stay. D.154.

Three of Mrs. Andreoni's co-defendants were indicted in the criminal proceedings. James and Russell MacArthur were both convicted,[4] and Mrs.

---

[4] *See United States v. MacArthur, et al.*, No. 0:05-cr-60203 (S.D. Fla. May 20, 2008) (Martinez, J). D.174. Another co-defendant, Mauricio Paz, was convicted in a related case. *See United States v. Paz*, No. 0:06-cr-60249 (S.D. Fla. April 19, 2007)

Andreoni's husband, Anthony, who was also indicted, died before he could be tried. D.254 at 2. On May 5, 2008, upon resolution of the criminal proceedings, the Commission moved to resume its civil law enforcement action against Mrs. Andreoni and the other remaining defendants. D.223. In response, the discovery stay was lifted, and the district court calendared trial for December 8, 2008. D.224; D.226.

Thereafter, new counsel, Jeffrey Cox, entered an appearance on behalf of Mrs. Andreoni. D.251. On October 27, 2008, Mr. Cox filed an unopposed motion to continue the pretrial and trial dates by 60 days to give Mrs. Andreoni more time to "explore all of her options with counsel's assistance." D.252 at 3. The district court granted this continuance and set a new trial date in February 2009. D.253.

C. Settlement Negotiations, Agreement and Submission to the Court, and Mrs. Andreoni's Failed Attempt to Revoke Consent.

1. Settlement Negotiations.

The district court was first advised of the settlement negotiations between the Commission and Mrs. Andreoni on the day before pre-trial stipulations were due. D.257. By this juncture, Mrs. Andreoni and the estate of her deceased husband (represented by Mrs. Andreoni) were the only remaining defendants

---

(Marra, J.).

likely subject to trial, as default judgments had already been entered against three defendants, an unopposed motion for judgment was pending against a fourth, and proposed stipulated judgments for the four other defendants had already been submitted for court approval. *Id.* at 1-2.[5] In moving to vacate the imminent pretrial and trial deadlines, the Commission informed the district court, with the concurrence of Mrs. Andreoni's attorney, that counsel "ha[d] negotiated an agreement in principle" to resolve the Commission's claims against Mrs. Andreoni, and that they "anticipate[d] finalizing the agreement in a proposed stipulated judgment and submitting it to the Commission for approval before the end of the month." *Id.* at 2-3.

Moving from the agreement in principle to the final signed agreement eventually submitted to the district court, however, took more time than anticipated. It was not until July 13, 2010, a year and a half after the court was first informed of settlement negotiations, and after numerous drafts of the settlement agreement had been exchanged, that the Commission informed the

---

[5] Mr. Andreoni died on March 21, 2008, and on December 23, 2008, the FTC moved without opposition to substitute Mrs. Andreoni, the personal representative of his estate, as defendant with respect to the claims against Mr. Andreoni. *See* D.254. This motion was granted. D.275. The Commission's claims against the estate are still pending, as Mrs. Andreoni consented to the stipulated judgment "only in her individual capacity." D.298 at 1.

district court that the Commission and Mrs. Andreoni "ha[d] agreed to the entry of a stipulated judgment to settle pending claims in this action." D.288 at 1; D.292 at 3. Mr. Cox represented Mrs. Andreoni throughout this extended negotiations period, and, along with Mrs. Andreoni, signed the stipulated order. D.288-1 at 20.

2. The Signed and Submitted Agreement.

The signed and stipulated order was submitted to the district court for its approval on July 13, 2010. D.288. Therein, the parties proffered their "consent to the entry of the * * * Stipulated Final Order and Permanent Injunction ("Final Order") as a settlement of the claims against [Mrs.] Andreoni" in the Commission's Complaint." D.288-1 at 1. The Commission and Mrs. Andreoni jointly moved the court to make various findings, and to enter judgment, as set forth in the order. *Id.* at 2. The parties agreed, inter alia, that:

- "Defendant Andreoni enters into this Final Order freely and without coercion. Defendant Andreoni further acknowledges that she has read the provisions of this Final Order and is prepared to abide by them." D.288-1 at 2 (Finding 4);

- "Defendant Andreoni waives all rights to seek appellate review or otherwise challenge or contest the validity of this Final Order." *Id.* (Finding 5); and

- "Entry of this Final Order is in the public interest." *Id.* at 3 (Finding 9).

With respect to the injunctive relief agreed to by the parties, the stipulated judgment first prohibits conduct reasonably related to the alleged unlawful activity

in the Commission's complaint: Part I sets forth prohibitions against false or misleading statements, *id.* at 5-6; Part II prohibits violation of the Franchise Rule or the Business Opportunity Rule, 16 C.F.R. Parts 436 & 437; D.288-1 at 7-8; and Part III enjoins the disclosure of customer information; *id.* at 8.

The parties agreed that Mrs. Andreoni was liable to the FTC for $19,201,403.00, "represent[ing] the amount of consumer injury caused by Defendants' alleged unlawful practices, and the FTC is awarded a monetary judgment in that amount." *Id.* at 9. As partial payment of this judgment, the Commission accepted assignment of Mrs. Andreoni's disputed claim to her deceased husband's life insurance proceeds, worth roughly $2,000,000. *Id.* at 9-11. In assigning this claim, Mrs. Andreoni also agreed that she would not object to the substitution of the FTC or the United States for her as the real party in interest in the interpleader action, would not oppose any effort by the FTC to withdraw or strike any pleadings by her in that action, and would not seek the approval of any settlement or other agreement regarding the disposition of the disputed life insurance proceeds. *Id.* at 9-10.[6] In addition to assigning this

---

[6] The FTC was substituted for Mrs. Andreoni and awarded the proceeds of the life insurance policy in *Reassure Am. Life Ins. Co., v. Shomers et al.,* Case No. 1:08-22664-Civ-Martinez (S.D. Fla.). Appeals of this judgment by other parties asserting claims to the proceeds are currently pending before this Court in Case Nos. 11-10158 and 11-10495.

contingent and hotly-disputed claim, Mrs. Andreoni also agreed to surrender any claim to assets of corporate co-defendants. *Id.* at 10.

In Part V of the order, the parties stipulated to a stay of the unpaid monetary portion of the judgment. The Commission relinquished its claim contingent upon Mrs. Andreoni's compliance with the order and the "truthfulness, accuracy, and completeness" of Mrs. Andreoni's financial statements that had served as the basis for the underlying negotiations. *Id.* at 11-12. The Commission also agreed to lift the court-ordered asset freeze, D.101, on Mrs. Andreoni's personal assets, D.288-1 at 13.

The stipulated judgment next covers Mrs. Andreoni's agreement to assist the Commission in its litigation efforts to recover the life insurance proceeds in the related interpleader action, and explicitly protects her Fifth Amendment privileges. Mrs. Andreoni consents, in Part VI, to discovery requests and to be interviewed "concerning her knowledge of events and documents concerning this insurance policy," but "nothing in this Order shall preclude or prevent Defendant Andreoni from asserting her rights under the Fifth Amendment in response to any question in lieu of testimony." *Id*.

The remainder of the order covers the parties' agreements on compliance monitoring, reporting, and record keeping obligations, *id.* at 14-18, and procedures

for order distribution and acknowledgment of receipt, *id.* at 18-20. These provisions, as well as the conduct prohibitions in the first three parts of the order, are typical in both litigated and consent orders where courts have approved permanent injunctive relief in FTC law enforcement actions.[7]

3. Mrs. Andreoni's failed attempt to withdraw consent.

On August 6, 2010 – more than eighteen months after the parties informed the court that an agreement in principle had been reached, three weeks after the parties jointly moved the court to approve their consent judgment, and days past the court-established deadline for responses to that motion – Mrs. Andreoni changed her mind. D.291. Mrs. Andreoni's one and a half page motion to withdraw consent, filed by the same attorney who had counseled her throughout the eighteen months of settlement negotiations, did not challenge the validity of the agreement, cited no case law, raised no factual disputes, presented no

[7] *See, e.g., FTC v. USA Financial LLC*, No. 8:08-cv-899 (D.156 at 12-18) (M.D. Fla.) (Kovachevich, J.) (April 5, 2010), *aff'd* 2011 WL 679430 (11th Cir. Feb. 25, 2011) (similar permanent injunctive relief awarded after summary judgment); *FTC v. Leshin*, No. 0:06-cv-61851 (D.321 at 48-53 (S.D.Fla.) (Ungaro, J.) (May 5, 2008), *aff'd* 618 F.3d 1221 (11th Cir. 2010) (enforcing similar permanent injunctive relief in contempt proceeding where injunction was entered by stipulated order); *FTC v. Grp. One Networks, Inc.,* No. 8:09-cv-00352 (M.D. Fla.) (Lazzara, J.) (Jan. 12, 2010) (stipulated order with similar relief); *FTC v. Global Mktg Grp., Inc.*, No. 8:06-cv-02272 (M.D. Fla.) (Covington, J.) (Feb. 13, 2009) (same); *FTC v. Glucorell, Inc.*, No. 6:08-cv-01649 (M.D. Fla.) (Spaulding, J.) (Oct. 2, 2008) (same).

evidence, and did not request an evidentiary hearing. *Id.* Rather, Mrs. Andreoni simply advised that, "[a]fter extensive deliberation and consideration, M. Andreoni now unequivocally wishes to withdraw her consent to the Proposed Final Order and fully litigate the instant matter." *Id.* at 1-2. Although Mrs. Andreoni mentioned "due process considerations," she provided no explanation for such concerns. *Id.* at 2. Tellingly, Mrs. Andreoni nowhere contested her agreement to the proposed order nor did she argue that she was not bound to her agreement prior to court approval. *Id.* at 3.

In its opposition, the Commission drew upon a body of precedent establishing that, "in light of the federal policy favoring the enforcement of settlement agreements, a party may not withdraw from a valid agreement to settle." D.292 at 1; 4-7 (citing, inter alia, *Allen v. Alabama State Bd. of Educ.*, 816 F.2d 575 (11th Cir. 1987); *White Farm Equip. Co. v. Kupcho*, 792 F.2d 526 (5th Cir. 1986); and *Petty v. Timken Corp.*, 849 F.2d 130 (4th Cir. 1988)).[8] As background, the Commission noted that, during the eighteen months of settlement negotiations

[8] Mrs. Andreoni's reply failed to refute this authority or to challenge the underlying validity of the agreement. *See* D.296. Instead, Mrs. Andreoni argued that the settlement involved "stigma associated with allegations of fraud," and that the imposition of injunctive relief through judicial entry of a consent decree involving a law enforcement agency, "in the face of an unequivocal request to test the fraud allegations, is unreasonable and unfair." *Id.* at 2-3.

between counseled parties, "numerous drafts of the settlement agreement were exchanged," before Mrs. Andreoni and her counsel finally signed the stipulated order. *Id.* at 2-3. The Commission further noted that the validity of the settlement was not disputed by Mrs. Andreoni, and in fact was "clearer than that of many of the agreements enforced in the above-cited cases, as her settlement was both reduced to writing and signed by the defendant." *Id.* at 6.

On November 17, 2010, finding that Mrs. Andreoni had "freely consented to and signed the agreement," the court denied her motion to withdraw consent. D.297 at 2. The district court concluded that this case was similar to *Allen*, 816 F.2d 575, in which this Court reversed a district court that had declined to enter an order when the defendant "also changed its mind before the district court entered a consent judgment to which the defendant had agreed and consented." D.297 at 1. Before denying Mrs. Andreoni's motion, the district court "carefully scrutinized" the stipulated order and found it "fair, reasonable, and adequate, and that it serves the public interest." *Id.* at 1-2. The order was then approved and entered on November 17, 2010. D.298.

STANDARD OF REVIEW

The district court's approval of the proposed consent decree is reviewed for abuse of discretion. *Stovall v. City of Cocoa, Florida*, 117 F.3d 1238, 1240 (11th

Cir. 1997) (citing *Jacksonville Branch, NCAAP v. Duval Cnty. School Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992)). A district court's *refusal* to approve a consent decree, however, can be subject to more rigorous review. *Stovall*, 117 F.3d at 1240. "[B]ecause the law favors settlement," the district court's approval of the consent decree may be affirmed unless the agreement "is invalid as a matter of law." *Leverso v. Southtrust Bank of Al. Nat'l. Assoc.*, 18 F.3d 1527, 1531 (11th Cir. 1994) When, as here, a government agency is party to a consent decree, the decree is entitled to a "presumption of validity." *United States v. City of Miami*, 614 F.2d 1322, 1333 (5th Cir. 1980). This "doubly required deference – district court to agency and appellate court to district court – places a heavy burden on those who propose to upset a trial judge's approval of a consent decree." *United States v Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990).

SUMMARY OF ARGUMENT

The district court correctly applied governing Circuit precedent in denying Mrs. Andreoni's motion to withdraw consent to a binding settlement agreement simply because she had changed her mind. Mrs. Andreoni never challenged the validity of the settlement agreement before the district court and has therefore waived such challenges. Courts favor settlements, and, except in the rarest circumstances not present here, do not allow parties to walk away from binding

agreements. And for good reason. To allow unilateral repudiation of a binding settlement agreement, simply because one party belatedly regrets the bargain, would create a perverse incentive. A party could block litigation by engaging in protracted settlement negotiations, but then simply walk away unscathed, with no consequences other than harm to the party who had refrained from pursuing his or her case while engaged in good-faith negotiations.

Mrs. Andreoni's due process and other challenges to the validity of the settlement agreement are waived and should not be considered on appealed. If considered, they should be rejected. The statutory worker's compensation cases are irrelevant and do not support the proposition that one party may walk away from a binding settlement prior to court approval. Mrs. Andreoni's contract defenses likewise fail, as the settlement is neither procedurally nor substantively unconscionable. Mrs. Andreoni's constitutional arguments are wholly without merit. (*Part I*).

Nor did the district court abuse its discretion in approving the settlement agreement and entering a consent order without a hearing. No factual dispute was presented, no hearing was requested, no challenge was made to the validity of the settlement, and the only interests of potentially affected third parties are those of injured consumers who stand to gain from the redress permitted by the consent

decree. The district court thus acted well within its discretion in approving the agreement and entering its final order without a hearing. *(Part II)*.

ARGUMENT

I. The district court did not err in refusing to allow Mrs. Andreoni to unilaterally repudiate a binding settlement agreement.

There is no right, under Florida law or otherwise, for one party to revoke unilaterally a valid settlement agreement pending court approval. This Court has made clear that a district court must approve an otherwise valid settlement agreement even if one party changes heart before the agreement is approved. Indeed, the district court would have abused its discretion by refusing to approve the signed and valid agreement. Although Mrs. Andreoni now attempts to argue that the agreement was not valid until approved, she failed to make these arguments before the district court and they are therefore waived. In any event, Mrs. Andreoni's belated arguments that the settlement is invalid are meritless.

A. Under clearly established precedent, a party may not unilaterally repudiate a binding settlement agreement.

The question whether a court should accept the parties' settlement agreement and incorporate it into a valid and enforceable judgment "is purely a matter of federal procedure." *White Farm*, 792 F.2d at 529. Thus, whether "withdrawal is or is not permissible under [state] law is irrelevant." *Id.* at 530. Unless the

defendants "can demonstrate that the judgment differs materially from th[e] agreement, or that the agreement was invalid under state law *at the time it was made*, a federal court may hold them to their word by incorporating the terms of their agreement into a final judgment." *Id.* (emphasis added). Because Mrs. Andreoni made no attempt to demonstrate to the district court that her settlement agreement was invalid when signed (or ever), the district court did not abuse its discretion in denying her motion to withdraw from the settlement agreement. "Federal courts have held under a great variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party." *Cia. Anon Venezolana de Navegacion v. Harris*, 374 F.2d 33, 35 (5th Cir. 1967).

This Court has repeatedly held that one party may not unilaterally repudiate a settlement agreement before the court has a chance to approve it, or even before it is submitted for court approval. In *Reed ex rel. Reed v. United States*, 891 F.2d 878 (11th Cir. 1990), for example, this Court affirmed the district court's refusal to allow the government to unilaterally rescind from an agreed-upon settlement, even though the settlement agreement had not even been submitted to the court for approval. *Id.* In refusing to allow the government to withdraw, this Court recognized that, "the settlement conclusively resolved the dispute," and "the fact that the court did not approve the settlement before [the minor's] death does not

make the agreement any less binding on the government." *Id.*, at 881 & n.3. This Court so ruled even though a Florida statute required court approval of all settlements involving a minor for the settlement to be effective, concluding that "once an agreement to settle is reached, one party may not unilaterally repudiate." *Id.*

To permit Mrs. Andreoni to unilaterally repudiate a binding settlement agreement simply because she changed her mind would have been reversible error. Thus, in *Stovall*, this Court reversed the district court's decision allowing a party to withdraw unilaterally from a settlement brought in a Voting Rights Act case, holding that the district court "was not free to reject the decree solely because the City no longer wished to honor its agreement." 117 F.3d at 1242.[9] Similarly, in *Allen*, this Court reversed a district court for allowing one party to withdraw from an agreed upon settlement even when it had not yet been reduced to writing or signed. 816 F.2d at 576-577.[10] That one party had "changed its mind d[id] not

[9] A remand was warranted in *Stovall* because, even though the City was bound by the agreement, the inquiry as to whether the proposed districting plan passed constitutional muster required "rather complex factual analysis not possible on such a limited record." 117 F.3d at 1243. In this case, no remand is warranted because the district court correctly refused to allow Mrs. Andreoni to withdraw from the settlement agreement.

[10] Appellant's attempts to distinguish *Allen* and *White Farm*, *see* Br. at 28-30, are unpersuasive. The district court here, as in *White Farm*, had "approved the

change the fact that it had already approved the settlement." *Id.* at 577.[11]

Other circuits likewise recognize that "setting aside an otherwise valid agreement is not justified because a party has second thoughts about the results." *Columbus-America Discovery Grp. v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 298 (4th Cir. 2000) (citing *Young v. FDIC*, 103 F.3d 1180, 1195 (4th Cir. 1997) and *Petty*, 849 F.2d 130). *See also In re Syncor ERISA Litig.,* 516 F.3d 1095, 1100-01 (9th Cir. 2008); *Sheng v. Starkey Labs., Inc.,* 117 F.3d 1081, 1083-84 (8th Cir. 1997).

Strong policy reasons support the courts' universal refusal to permit a party to walk away from a binding settlement agreement. Particularly where, as here,

---

substance of the agreement into the record," by accepting the filing of the agreement. 792 F.2d at 528. The agreement here was actually firmer than in *Allen*, where it had yet to be reduced to writing or signed, 816 F.2d at 577, or in *White Farm*, where "details" remained to be resolved. 792 F.2d at 528. Moreover, Mrs. Andreoni ignores cases such as *Reed*, where the settlement had yet to be submitted to the district court for its approval, yet this Court nonetheless affirmed the district court's denial of the government's attempt to withdraw from a binding agreement. 891 F.2d at 879.

[11] Nor is *In re Cotton*, 992 F.2d 311 (11th Cir. 1993), contrary to the general rule that a party may not unilaterally withdraw from a binding settlement agreement. In *Cotton*, a provision of the Bankruptcy Code served to trump the general rule. There, a district court had affirmed the bankruptcy court's refusal to allow one party to unilaterally withdraw from a binding settlement. This Court reversed, only because a debtor normally "has a right to an immediate dismissal of his case upon request under 11 U.S.C. § 1208(b)." *Id.* at 312-13.

settlement negotiations have effectively stayed the litigation for an extended period, allowing unilateral repudiation would undermine any incentive to engage in good faith negotiations. Strategic manipulation of the process would be rewarded by allowing Mrs. Andreoni to revoke her consent simply because – after eighteen months of counseled negotiations and after extracting significant concessions from the Commission with the exchange of numerous drafts – she nonetheless changed her mind. Moreover, if Mrs. Andreoni were allowed to go back on her word at this late date, the Commission would be severely prejudiced in resuming litigation of its claims against Mrs. Andreoni, as these claims have grown increasingly stale in the more than two years since an "agreement in principle," was reached. D.257. "If a party could unilaterally withdraw from a settlement agreement, he or she could strategically enter a settlement agreement and effectively 'stay' the proceedings against him and repudiate on the eve of court approval without consequences." *In re Seminole Walls & Ceilings Corp.*, 388 B.R. 386, 395 (M.D. Fla. 2008).

B. Mrs. Andreoni has waived any argument that the agreement was not binding under Florida contract law or that her due process rights were violated.

By failing to raise any issue regarding the validity of the settlement agreement before the district court, Mrs. Andreoni has waived the right to present such arguments on appeal. *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*,

561 F.3d 1298, 1303-04 (11th Cir.2009). Mrs. Andreoni never challenged the validity of the settlement agreement in her motion to withdraw consent.

This Court has a "well-established rule against reversing a district court judgment on the basis of issues and theories that were never presented to that court." *Norelus v. Denny's, Inc.,* 628 F.3d 1270, 1296 (11th Cir. 2010). Addressing questions not raised below "would not only waste [this Court's] resources, but also deviate from the essential nature, purpose, and competence of an appellate court." *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). *Accord Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998).

Nonetheless, Mrs. Andreoni now argues, for the first time on appeal, that she should have been allowed to withdraw from the settlement agreement because it was not binding until approved, and was invalid, for myriad reasons, under Florida contract law. *See, e.g.*, Br. at 23-27, 35-47. Before the district court, however, Mrs. Andreoni never once mentioned Florida contract law, nor did she raise any challenge to the validity or binding nature of the agreement. *See* D.291; D.296. "Arguments not raised in the district court are waived." *Johnson v. United States*, 340 F.3d 1219, 1228 n. 8 (11th Cir. 2003). Cir. 1998).

Mrs. Andreoni has also waived any due process arguments on appeal, *see* Br.

at 27-35. Mere incantation of the phrase "due process considerations," see D.291 at 2, without more, was insufficient to press the argument below or to preserve a due process challenge for appeal.[12] Mrs. Andreoni did not articulate any discernible due process claim, and failed to assert any protected constitutional interests. But "[j]udges are not like pigs, hunting for truffles buried in briefs," *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991), and district courts need not consider arguments that are inadequately presented, *Smith v. Secretary, Dep't of Corr.,* 572 F.3d 1327, 1352 (11th Cir. 2009); *see also Aldana v. Del Monte Fresh Produce N.A., Inc.* 578 F.3d 1283, 1297, n.6 (11th Cir. 2009) (recognizing that an issue not argued with sufficient particularity before the district court was likely waived upon appeal).

Unsurprisingly, Mrs. Andreoni never attempted to present evidence in support of claims that were never made below. But her current assertions that she was not properly made aware of the terms of the agreement or was forced to accept "boilerplate" language rest on factual predicates that Mrs. Andreoni was required

[12] Before the district court, the only authority cited by Mrs. Andreoni in support of her reference to due process appeared in her reply and was an inapposite unpublished district court opinion. *See* D.296 at 3-4 (citing *SEC v. Hatch*, 1989 U.S. Dist. 16389 LEXIS (D.N.J. Oct. 19, 1989). *Hatch* does not mention due process and involves the denial of a defendant's Rule 60(b) motion to set aside his consent judgment. *Id.* at *13, 16.

to support with evidence for such claims to be seriously considered. (They also are facially implausible, given that she was represented by counsel during a protracted negotiations period over the course of which numerous drafts were exchanged.) An appellant should not be permitted to pursue an appeal based on unsubstantiated assertions of ignorance or coercion that emerge for the first time on appeal.

C. In any event, Mrs. Andreoni's arguments that the settlement agreement was not binding under Florida law are meritless.

Even if this Court were to reach Mrs. Andreoni's waived validity challenges (and assuming, arguendo, that Florida law governs),[13] it need not linger in deeming them meritless. Under Florida law, like federal law, "settlements are highly favored and will be enforced whenever possible." *Robbie v. Miami*, 469 So. 2d 1384, 1385 (Fla. 1985). Settlements are governed by the rules for interpretation of contracts, and the making of a contract depends "on the agreement of two sets of external signs," or on two parties "having said the same thing." *Id.* (internal

[13] Because Mrs. Andreoni's contract law challenges have been waived, and are in any event meritless under any choice of law, the Court need not conclusively resolve the choice-of-law question as to whether Florida law or federal common law governs. *See Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347, 1350, n.4 (11th Cir. 2000) (reviewing authority and suggesting that federal common law might apply when interpreting a settlement agreement in a federal-question suit to which a federal agency was a party).

quotation marks and citations omitted). The Commission and Mrs. Andreoni entered into a binding contract because there was a meeting of the minds when they both signed the same stipulated order evincing their mutual promises to agree to its essential terms. *See generally Cheverie v. Geisser*, 783 So. 2d 1115 (Fla. 4th Dist. Ct. App. 2001). "The mutual promises of the parties were sufficient consideration to constitute a valid contract." *Callins v. Abbatecola*, 412 So. 2d 58, 59 (Fla. 4th Dist. Ct. App. 1982) (citing *Jenkins v. The City Ice and Fuel Co.*, 160 So. 215 (Fla. 1935)). Mrs. Andreoni did not dispute below, and does not contest on appeal, the simple truth that the settlement agreement she signed and submitted to the court satisfies these core elements of contract formation.[14]

Instead, on appeal, Mrs. Andreoni raises two futile challenges: First, drawing upon inapposite worker's compensation cases, she argues that there is an "absolute right under Florida law to withdraw her consent." *See* Br. at 27, 23-27.

---

[14] Mrs. Andreoni's brief might be read to suggest that because certain duties to perform under the stipulated judgment are triggered by the district court's approval and entry of the proposed order, she was not bound until the district court approved and entered the consent judgment. But Florida "courts will recognize a contract so long as no essential terms remain open for consideration and negotiation." *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So.2d 297, 301 (Fla.1st Dist. Ct. App. 1999). Moreover, under Florida contract law, conditions precedent are disfavored, and absent express wording to the contrary, contracts are binding when signed. *See, e.g., In re Estate of Boyar*, 592 So. 2d 341, 348 (Fla. 4th Dist. Ct. App. 1992); *Gunderson v. Sch. Dist.*, 937 So. 2d 777, 779 (Fla. 1st Dist. Ct. App. 2006).

Second, Mrs. Andreoni argues that the contract was a nullity under Florida law because it was both procedurally and substantively unconscionable. *Id.* at 35-47. These arguments were waived. If considered at all, they should be rejected.

1. State worker's compensation cases are irrelevant.

As a general rule, under Florida law or otherwise, no court approval is required for a settlement agreement to be binding. The cases with specific statutory approval requirements relied upon by appellant, *see* Br. at 23-25, stand, at most, for the limited proposition that statutes mandating court or agency approval of a worker's compensation settlement before the settlement is deemed final must be given effect.[15] *See, e.g.*, *Rogers v. Concrete Sciences, Inc.,* 394 So. 2d 212, 213 (Fla. Dist. Ct. App. 1981) ("Under Section 440.20 (10), Florida Statutes (1978), a lump sum settlement agreement * * * is not final and enforceable until or unless it has been approved by the Deputy Commissioner."); *Smith v. Rose Auto Stores*, 596 So. 2d 809, 810 (Fla. 1st. Dist. Ct. App. 1992) (same); *Fredekind v. Trimac Ltd*,

---

[15] All the cases cited by Mrs. Andreoni in this section of her brief involve state worker's compensation settlements, with one exception, *Breland v. Louisiana Pacific Corp*., 698 F.2d 773 (5th Cir. 1983). *See* Br. at 24. But *Breland* also involved a statutory requirement: A mandate of the Louisiana Civil Code requiring that a settlement agreement, to be enforceable, must "be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceedings," and finding the settlement there not enforceable because "neither the fact nor terms of th[e] settlement were recorded in open court." *Id.* at 774.

566 N.W. 2d 148 (S. Dak. 1997) (worker's compensation settlement must comply with statutory approval requirement); *Gross v. Nat'l Health Enter., Inc.* 582 S.W.2d 379 (Tenn. 1979) (same); *Nat'l Gypsum Co. v. Brewster*, 461 P.2d 593 (Okla. 1969) (same). And, even when a statute expressly mandates the need for formal court or agency approval before a settlement may be deemed binding, at least some state courts have nonetheless found that parties may be bound by an otherwise final agreement already submitted, albeit not yet approved. *See Schuck & Sons Constr. v. Indus. Comm'n*, 963 P.2d 310, 315 (Ariz. Ct. App. 1998); *B. Frank Joy Co. v. Isaac*, 636 A.2d 1016 (Md. App. 1994).

Here, unlike the worker's compensation cases relied upon by appellant, there are no comparable statutory requirements. The settlement was set forth in writing, contained all its essential terms, and was signed by both parties. Mrs. Andreoni had no "absolute right," *see* Br. at 27, to withdraw her consent from a binding settlement agreement.

2. Appellant's other contract defenses should also be rejected.

Mrs. Andreoni further argues, again for the first time on appeal, that the district court erred in approving the settlement agreement because it is unconscionable under Florida law. *See* Br. at 35-47. For a contract to be deemed unconscionable under Florida law, it must be *both* procedurally *and* substantively

unconscionable. Br. at 35 (citing, inter alia, *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1133-35 (11th Cir. 2010)). The stipulated order that Mrs. Andreoni and her counsel negotiated with the Commission is neither.

Procedural Unconscionability: Florida law recognizes claims of procedural unconscionability only where a party has no meaningful opportunity to read and understand the terms of the contract. *See, e.g.*, *Bland v. Health Care & Ret. Corp. of Am.*, 927 So. 2d 252, 257 (Fla. 1st. Dist. Ct. App. 2006) (upholding contract where uncounseled plaintiff had one day to consider it); *VoiceStream Wireless Corp. v. U.S. Commc'ns Inc.*, 912 So. 2d. 34, 39 (Fla. 4th Dist. Ct. App. 2005) (upholding contract, against claims of unequal bargaining power, where the parties had opportunity to read the contract and seek advice of counsel, and there was no hinderance to their ability to understand its terms).

In the present case, Mrs. Andreoni had counsel throughout the eighteen months that transpired between the time the agreement in principle was reached and final submission of the signed settlement to the district court. During this period, numerous drafts of the agreement were exchanged, D.292 at 2-3, and Mrs. Andreoni presumably took advantage of this time to "explore all of her options with counsel's assistance." D.252 at 3. Mrs. Andreoni was represented by counsel when the agreement was signed, and her counsel also signed the agreement. D.288-

1 at 20. In that signed agreement, Mrs. Andreoni expressly acknowledged, in clearly delineated language that prefaced the substance of her obligations, that she had entered into the agreement "freely and without coercion." *Id.* at 2.

Ignoring these facts, Mrs. Andreoni now argues that the settlement agreement was procedurally unconscionable. *See* Br. at 36-40. But Mrs. Andreoni's assertions that there was "no real bargaining power going on here," Br. at 37, and that the settlement provisions which "effectively waived Mrs. Andreoni's constitutional rights and privileges were buried," Br. at 40, not only fly in the face of the negotiation history, they are directly contradicted by the express terms of the agreement.

Over the course of negotiations, multiple drafts were exchanged, reflecting her counsel's input. The stipulated order contains tailor-made provisions that Mrs. Andreoni ignores, including those involving the parties' obligations with respect to the conduct of the related interpleader action, D.288-1 at 9-10, 13, the promise to allow release of Mrs. Andreoni's personal assets from the asset freeze, *id.* at 12-13, and the agreement to conditionally stay the judgment, *id*. at 11-12. Such particularized terms hardly indicate a "take it or leave it" agreement, but instead reflect a bargain that was negotiated by Mrs. Andreoni – with the benefit of counsel

– before she signed the final agreement.[16] Accordingly, Mrs. Andreoni's characterization of the stipulation as an "adhesion contract" is baseless.[17]

Nor does the agreement contain "buried" provisions that "effectively waived Mrs. Andreoni's constitutional rights and privileges." Br. at 40. Tellingly, the agreement does explicitly mention Mrs. Andreoni's Fifth Amendment rights, and expressly *preserves* her ability to assert those rights. *See* D.288-1 at 13 ("nothing in this Order shall preclude or prevent Defendant Andreoni from asserting her rights under the Fifth Amendment in response to any question in lieu of testimony"). Mrs. Andreoni erroneously states that the "form agreement" in her case "eliminated this clause." *See* Br. at 38. On the contrary, the settlement agreement negotiated by Mrs. Andreoni and her counsel *did* protect her Fifth Amendment rights, where warranted.

In short, because Mrs. Andreoni had ample opportunity to understand her agreement and accept or reject its terms, over the course of the 18 months that she

---

[16] In noting that she received different terms than those in a co-defendant's default judgment, Br. at 37, Mrs. Andreoni contradicts her contention that the settlement was boilerplate. Moreover, that James MacArthur was not subject to the same compliance and reporting requirements going forward was a rational response to the fact that he was incarcerated. *See United States v. MacArthur, et al.*, No. 0:05-cr-60203, D.586 at 2 (S.D. Fla. June 3, 2008) (Martinez, J).

[17] Even if the agreement were a contract of adhesion, that would not require a finding of procedural unconscionability. *See Voicestream*, 912 So. 2d. at 39-40.

was actively negotiating the terms of that agreement with the benefit of counsel, the agreement is not procedurally unconscionable.

Substantive Unconscionability: Mrs. Andreoni also advances four separate arguments that the bargain she struck with the Commission is substantively unconscionable. *See* Br. at 40-47. But quantity does not make up for quality, all of her arguments are meritless.

First, Mrs. Andreoni's prospective waiver arguments, Br. at 41, are groundless. Mrs. Andreoni has failed entirely to argue or demonstrate that any obligations under the consent order constitute an actual "search" or "seizure," much less any that is so "unreasonable," as to implicate the Fourth Amendment. U.S. Const. amend. IV.[18] As for the Fifth Amendment, with the exception of her duties to produce evidence and discovery in Part VI of the order (where Mrs. Andreoni's Fifth Amendment privilege *is* protected, *see* D.288-1 at 13) any connection to a Fifth Amendment privilege is too attenuated to justify any claim of waiver. "To invoke the privilege, [a party] must be faced with substantial and real hazards of self-incrimination." *United States v. Reis*, 765 F.2d 1094, 1096 (11th

---

[18] Nor could she. *Cf. Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 195 (1946) (enforcement of agency investigative subpoena does not implicate the Fourth Amendment); *accord United States v. McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983).

Cir. 1985) (citing *United States v. Apfelbaum*, 445 U.S. 115 (1980)). And, even if there were a lurking Fifth Amendment claim, Mrs. Andreoni cannot credibly claim that her waiver of any privilege was unknowing, in light of her demonstrable ability to protect her Fifth Amendment rights elsewhere and her access to counsel.[19]

Second, Mrs. Andreoni argues that "the agreement is unconscionable because it allows the FTC to, in effect, regulate Ms. Andreoni's conduct in spheres that would otherwise be beyond the FTC's regulatory authority." Br. at 42. But the FTC's regulatory authority to enjoin conduct reasonably related to unlawful acts so long as there is a cognizable danger of recurrent violations is well-recognized. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *see also supra,* at n.7. That Mrs. Andreoni may now pose "hypothetical situations," which she claims "may rise up to plague [her]" under the terms of the order is not sufficient grounds to defeat the order. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957). Nor is there anything "draconian," Br. at 42, about order provisions that prohibit Mrs. Andreoni from engaging in deceptive business practices, or in providing routine reports on her activities that will allow

[19] Mrs. Andreoni also claims, again without authority or explication, Br. at 41, that consent to having her agents interviewed has waived her attorney-client privilege. She ignores, however, the agreement's proviso that the agents, too, must "agree[] to such an interview." D.288-1 at 14.

Commission staff to monitor her compliance with the order's substantive provisions.

Mrs. Andreoni's third argument, that the contract is illusory because only the FTC may enforce it, Br. at 44-46, is likewise groundless. The agreement benefits Mrs. Andreoni by providing that she will pay only a fraction of the $19.2 million lost by victims of the AED scam, and the freeze on her personal assets will be lifted. She does not need to invoke the district court's contempt authority to enjoy these benefits; the suspended judgment provides her a defense against efforts by the Commission to recover assets beyond those that she has agreed to surrender in the settlement.

Fourth, and finally, Mrs. Andreoni contends "the agreement is unconscionable because the conduct that would constitute a breach of the agreement is undefined and left to the FTC's discretion." Br. at 46. In sole support of this statement, she relies on dicta from *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 511 (S.D.N.Y. 2009), where a proposed consent decree forbade false statements in future proxy solicitations. *Id.* at 508. In suggesting that such a proscription might be too "nebulous" to satisfy the standards of Fed. R. Civ. P. 65(d), that court emphasized that there was arguably no "factual predicate" for the relief, because it remained unclear what, if any, falsity the challenged materials

contained. *Id.* at 509-11.[20] In contrast, the proceedings in the present case and in the related criminal cases have made abundantly clear the unlawful nature of the statements made. That background, together with the consent order's detailed delineation of the types of false or misleading statements proscribed, *see* D.188-1 at 5-6, allay any possible concerns about the specificity of the conduct prohibited. Furthermore, in the event of any enforcement action, Mrs. Andreoni would be protected by the civil contempt standards: "A finding of civil contempt must be supported by clear and convincing evidence that the allegedly violated order was valid and lawful; ... the order was clear and unambiguous; and the ... alleged violator had the ability to comply with the order." *Leshin*, 618 F.3d at 1232 (internal quotation marks and citation omitted).[21]

---

[20] In any event, the court's principal reason for rejecting the settlement was its concern that, by imposing a fine on a corporation for acts of its officers that allegedly misled shareholders, the settlement effectively made "the victims of the violation pay an additional penalty for their own victimization." 653 F. Supp. 2d at 508. Plainly, no comparable concerns are present here, where the consent order contemplates payment *to* the victims, in the form of consumer redress. D.288-1 at 9.

[21] Thus, Mrs. Andreoni is incorrect in suggesting that, if the FTC were to seek a contempt remedy in court, it would not be required to prove anything. *See* Br. at 44. Mrs. Andreoni also overstates in claiming that she agreed, under the order, to accept her liability as true "in any subsequent litigation pursued by the FTC." *Id.* The pertinent provision applies only to related litigation efforts by the Commission "to enforce its rights to any payment or money judgment pursuant to this Order." D.288-1 at 12.

In sum, all of Mrs. Andreoni's challenges to the validity of the stipulated order were waived below, and are, in any event, meritless.

II. The district court properly approved the consent order without a hearing.

The district court did not abuse its discretion in concluding that the uncontestedly valid settlement agreement formed between the Commission and Mrs. Andreoni should be incorporated into a final enforceable judgment. No facts were put in dispute, no third-party challenges were raised, no contravention of law was claimed, and no hearing was requested.

Mrs. Andreoni nonetheless contends that the district court committed reversible error by failing to expend more judicial resources when denying her motion, *i.e.*, by failing to hold a hearing and by declining to produce an extensive written opinion. These arguments not only ignore the procedural history here (the district court can hardly be faulted for ignoring arguments never presented below), they are based on inapposite authority.

In arguing for a remand, Mrs. Andreoni invokes cases involving circumstances where the district court was obligated to consider the interests or arguments of affected third parties before the entry of a consent decree – such as bankruptcy or class actions. Br. at 48-51. In the cases relied upon, the district

courts were required to develop a record to determine whether those who had *not* consented to the agreement, *i.e.*, creditors or absent class members, would be unfairly prejudiced. No such issue is presented here. Mrs. Andreoni's only claim before the district court was that she had changed her mind.

Thus, at issue in *Protective Committee for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968), a case heavily relied upon by Mrs. Andreoni, was court approval of a factually complex corporate reorganization plan in bankruptcy, challenged by stockholders that had been excluded from participation. *Id.* In concluding that a remand was necessary, the Court found "particularly noteworthy," that "despite frequent requests for an investigation, and notwithstanding the fact that the available evidence pointed to probably valid claims * * * no investigation of these matters was ever undertaken or ordered by the trial court." *Id.* at 439-40.[22]

Similarly inapposite are cases involving controverted class action settlements. Thus, in *Holmes v. Cont'l Co.*, 706 F.2d 1144, 1146 (11th Cir. 1983),

---

[22] Much of the authority relied upon, Br. at 48-51, like *TMT Trailer Ferry*, addresses the independent obligations of a bankruptcy court to protect the interests of the estate and address the concerns of third-party creditors. *See In re AWECO*, 725 F.2d 293, 300 (5th Cir. 1984) *Martin v. Kane*, 784 F.2d 1377, 1378, 1383 (9th Cir. 1986); *In re Lloyd, Carr and Co.*, 617 F2d.882, 890-91 n.9 (1st Cir. 1980); *In re American Reserve Corp. ("LaSalle")*, 841 F.2d 159, 161-62 (7th Cir. 1987).

absent class members challenged a proposed class action settlement arising out of an antidiscrimination lawsuit in which the settlement would have disproportionately benefitted the eight named plaintiffs. The court concluded that there was insufficient evidence for the "facially unfair allocation of this back pay award," reversing and remanding for further proceedings. *Id.* at 1150-51. *Plummer*, too, involved a finding of insufficient evidentiary support for the more generous treatment of named plaintiffs when a proposed class action settlement was challenged by third parties, finding no abuse of discretion when the district court rejected the settlement. *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1984). Finally, in *Stovall*, this Court was confronted with a third-party challenge to a consent decree brought under the Voting Rights Act that "will change the method of electing city council members and affect the rights of all [city] voters," 117 F.3d at 1243-44. Recognizing that the requisite strict scrutiny inquiry required a "rather complex factual analysis not possible on such a limited record," this Court remanded for further factual development. *Id.*

But no such complex factual questions were raised here. The constitutional challenges were not adequately presented below and in any event are meritless, the settlement is not facially unfair, and there is no claim of harm to third parties who did not participate in shaping the settlement (to the contrary, consumer redress

allowed by the order will benefit innocent third parties). The district court did not abuse its discretion in approving the settlement without an evidentiary hearing.

To the extent that Mrs. Andreoni is now arguing that the district court was required, under the Due Process Clause, to hold a hearing before denying her motion to withdraw from a binding settlement, that argument too, is waived, and meritless. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Here, Mrs. Andreoni failed to raise *any* question of fact before the district court, did not dispute the validity of the agreement, presented no evidence, and never requested a hearing. *See* D.291. Under these circumstances, due process was served by the district court's consideration of Mrs. Andreoni's motion based on the parties' filings. *Cf. Aoude v. Mobil Oil Corp.,* 862 F.2d 890, 894 (1st Cir. 1988) (a matter can adequately be "heard" on the papers, where the parties had "a fair opportunity to present relevant facts and arguments to the court and to counter the opponent's submissions."). Nor does any authority support the contention that the district court was obliged to sua sponte initiate a colloquy regarding her purported "waiver" of Fourth or Fifth Amendment rights that were never at issue.[23]

---

[23] There is no merit to the contention that waiver of Fourth or Fifth Amendment rights must satisfy any kind of "knowing, intelligent, and voluntary" standard, much less that something akin to a plea colloquy would be required.

Finally, Mrs. Andreoni faults the district court for failing to produce a more elaborate written opinion. Br. at 52. But the district court was under no obligation to make factual findings when no facts were in dispute, or even to produce a written opinion at all.[24] Nonetheless, the district court did produce a written order sufficient to reveal its reasoning. In that order, the court stated that it had "carefully scrutinized the proposed Stipulated Final Order and Permanent Injunction," and found it to be "fair, reasonable, and adequate, and that it serves the public interest." D.297 at 1-2.[25] Absent any evidence to the contrary, (and given Mrs. Andreoni's own averment, *see* D.288-1 at 2), the district court reasoned that "[b]ecause Defendant Miriam Andreoni freely consented to and signed the agreement, the Court will enter it." D.297 at 2.

Settlements are favored in the law because "they contribute greatly to the efficient utilization of our scarce judicial resources." *Cotton v. Hinton*, 559 F.2d

---

Moreover, it is well-established that contractual agreements to waive rights – including due process rights – are valid and enforceable in civil actions without the equivalent of a plea colloquy. *See D.H. Overmeyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185 (1972).

[24] The "court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion." Fed. R. Civ. P. 52(a)(3).

[25] The parties stipulated that the proposed order served the public interest. *See* D.288-1 at 3, and Mrs. Andreoni did not challenge that provision when attempting to revoke her consent.

1326, 1330, 1331 (5th Cir. 1977). No further expenditure of judicial resources was required here. The district court did not abuse its discretion in denying Mrs. Andreoni's motion as it was presented and argued below – a request to withdraw her consent simply because she changed her mind.

CONCLUSION

For the reasons set forth above, the district court's orders denying Mrs. Andreoni's motion to withdraw and entering the stipulated order should be affirmed.

Respectfully submitted,
Willard K. Tom
General Counsel

John F. Daly
Deputy General Counsel for Litigation

/s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580
(202) 326-3677

Of Counsel:
Michael E. Tankersley
Daniel O. Hanks
Federal Trade Commission
Washington, D.C.

Dated: April 8, 2011

CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 9,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that Appellee's Brief 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 this brief has been prepared in a proportionally spaced typeface using the Corel WordPerfect word processing program in 14-point Times New Roman font.

/s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch
Attorney for Appellee,
Federal Trade Commission

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2011, I sent for filing by express overnight delivery an original and six copies of the foregoing Brief of Plaintiff-Appellee Federal Trade Commission to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit. On the same day, I also uploaded one copy of the foregoing Brief in electronic format onto the Web site for the United States Court of Appeals for the Eleventh Circuit. On the same day, I sent two copies by express overnight delivery to counsel for Appellant Miriam Sophia Andreoni at the following address:

G. Richard Strafer, Esq.
G. Richard Strafer, P.A.
201 South Biscayne Blvd.
Suite 1380
Miami, Florida 33131

/s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch
Attorney for Appellee
Federal Trade Commission