UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

FEDERAL TRADE COMMISSION,

Plaintiff,
v.

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

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

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

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

Defendants.

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

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I. INTRODUCTION

For nearly four years, Defendants collectively operated American Precious Metals, LLC (APM), a telemarketing scheme that deceived consumers and caused many to lose their life savings or retirement accounts.[1] Through APM, Defendants lured consumers into purchasing large quantities of precious metals on credit, a process known as "leveraging," by promising consumers significant profits with no or minimal risk.[2] Defendants charged hefty fees, commissions, and interest, which were not clearly and accurately disclosed[3] and which rendered the leveraged precious metals largely unprofitable and risky as investments. In fact, even when precious metals performed well in the marketplace, consumers who purchased Defendants' leveraged investments lost money.[4] Consumers lost more than $26 million through the scheme.

Defendants were aware or were in reckless disregard of the dismal performance of their leveraged precious metals investments but, as in prior schemes,[5] they continued to aggressively and deceptively promote the investments as lucrative and safe. Defendants' deceptive practices violated Section 5 of the Federal Trade Commission Act (FTC Act) and multiple provisions of the Telemarketing Sales Rule (TSR), 15 U.S.C. § 45(a) and 16 C.F.R. Part 310.

Plaintiff moves for summary judgment pursuant to Fed. R. Civ. P. 56(a). There is no genuine dispute of material fact to be decided at trial. The cumulative evidence proves that the business practices of the corporate Defendant, APM, were rife with deception and violated Section 5 and the TSR. The evidence further proves that the individual Defendants, Harry Tanner, Jr., Andrea Tanner, and Sam Goldman, participated in or controlled and knew of APM's law violations. Plaintiff is therefore entitled to summary judgment as a matter of law and a permanent injunction, including injunctive and equitable monetary relief, should be entered against Defendants.

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[1] P.E. 7 ¶¶ 20, 36; P.E. 13 ¶¶ 15, 17; P.E. 16 ¶¶ 5, 24, 30; P.E. 17 ¶¶ 7, 11.

[2] PSOF ¶¶ 8-10, 12-13.

[3] PSOF ¶¶ 14-17.

[4] P.E. 6 ¶ 17; *see also* P.E. 10 ¶ 14; P.E. 24 ¶¶ 3-5.

[5] PSOF ¶ 38; *see also* P.E. 1 ¶ 25, Att. N - Sept. 27, 2006 NFA Decision.

II. A SUMMARY OF THE FTC'S CLAIMS

The FTC filed a five-count complaint challenging Defendants' use of misrepresentations and deceptive omissions while telemarketing precious metals investments. Two counts allege that Defendants violated Section 5 of the FTC Act and three counts allege TSR violations.[6] Defendants violated Section 5 by (1) misrepresenting the profitability and risks of their precious metals investments and (2) failing to adequately disclose material information, including the total fees, commissions, interest charges, and leverage balances that consumers were required to pay and the likelihood that consumers would receive equity calls that would require them to pay additional money or to liquidate their investments.

Defendants violated Section 310.3(a)(2)(vi) and Sections 310.3(a)(1)(i) and (ii) of the TSR by: (1) misrepresenting the profitability or risk of an investment opportunity; and by failing to clearly and conspicuously disclose, before consumers paid (2) the total costs and (3) material conditions of APM's sales offer. Plaintiff's claims are supported by facts that are not genuinely in dispute and summary judgment is appropriate.

III. THE ADMISSIBLE EVIDENCE COMPELS SUMMARY JUDGMENT[7]

Relevant evidence includes consumer declarations, Defendants' telemarketing scripts, contracts, a "compliance" script, post-sale audio recordings, and other business records. In addition, Defendants have twice failed to respond to requests for admission, and this Court should deem the requests admitted pursuant to Fed. R. Civ. P. 36(a)(3). All of the evidence proves decisively that APM engaged in deceptive conduct that violated both Section 5 and the TSR and that the individual Defendants participated in or controlled and had requisite knowledge of the deceptive practices.

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[6] Dkt. 155.

[7] Plaintiff's motion for summary judgment is accompanied by a 10-page statement of material facts with specific references to pleadings, deposition, affidavits, and transcript evidence, pursuant to Local Rule 7.5(c). Accordingly, in lieu of repeating a statement of facts herein, Plaintiff has included a summary of the key evidence in this case that shows conclusively why summary judgment should be awarded.

A. CONSUMER DECLARATIONS

The FTC submitted declarations from 16 consumers, which were admitted into evidence at the December 13, 2011 preliminary injunction hearing in this matter.[8] Through these declarations, consumers assert that Defendants promoted precious metals as high-profit, low-risk investments[9] and failed to explain the total costs and risks of the investments.[10] Consumers state that APM telemarketers told them metals prices were "poised to skyrocket" and that consumers would quickly double or triple their money with the investments.[11] Consumers also state that Defendants called the investments a "safe haven" and assured them that the investments were low in risk.[12] Finally, consumers accuse Defendants of having misled them by failing to clearly disclose, before they paid for their investments, the total costs of the precious metals and the risk that consumers would receive equity calls that would require them to invest additional money or liquidate their investments.[13]

The similarity of consumers' experiences is notable because the FTC's declarants are scattered geographically across 12 states and were solicited by Defendants over a nearly four year period between August 2007 and May 2011.[14] This uniformity, however, is explained by Defendants' reliance upon telemarketing scripts that APM telemarketers followed when speaking with consumers.[15]

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[8] P.E. 4-17, 19, 27; *See* Dkts. 203-1.

[9] PSOF ¶¶ 8-10, 12-13.

[10] PSOF ¶¶ 14-17.

[11] PSOF ¶ 8.

[12] PSOF ¶ 9.

[13] PSOF ¶¶ 14-17.

[14] P.E. 4-17, 19.

[15] *See* P.E. 18 ¶¶ 5-23 Atts. E-V.

B. DEFENDANTS' TELEMARKETING SCRIPTS

Defendants' telemarketing scripts not only bolster, but prove consumers' claims that Defendants' sales solicitations were deceptive.[16] The Court received into evidence at least eight scripts that claimed consumers who purchased precious metals from APM would quickly double or triple their money.[17] The scripts also support consumers' assertions that Defendants touted their investments as a "safe haven."[18] Indeed, Defendants' telemarketing scripts compared APM's highly-leveraged investment program to "an insurance policy" or to "keeping metal under your mattress"[19] – despite the fact that, as APM telemarketers admitted under oath, the investments were high in risk.[20]

The scripts further show that Defendants' telemarketers failed to clearly explain the total cost of consumers' transactions, including all fees, commissions, interest charges and leverage balances that consumers were required to pay, or the risk of loss through equity calls.[21] Defendants' telemarketing scripts, whether examined alone or in tandem with consumers' declarations, prove that APM relied upon misrepresentations and deceptive omissions to convince consumers that their precious metals investments were lucrative and safe.[22]

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[16] Notably, the telemarketing scripts found on APM's business premises on or after May 11, 2011 contain the exact misrepresentations that consumers recounted in their earlier sworn declarations.

[17] PSOF ¶ 18.

[18] PSOF ¶ 19(b).

[19] PSOF ¶ 19(a), (c) -(d).

[20] TR 74:19-22, 113:1.

[21] PSOF ¶ 20.

[22] Tellingly, deceptive telemarketing scripts – many of which include telemarketers' hand-written notations and edits – were found littered throughout Defendants' business premises, including in the individual Defendants' offices and on the desks of numerous telemarketers. Plaintiff has highlighted only a few of many deceptive claims that are readily found in APM's telemarketing scripts. *See* P.E. 18 Att. G, p. 3 ("Because your [sic] purchasing actual silver, you can hold it as long as necessary"); Att. K, p. 2 ("a fantastic jump [in silver prices] is inevitable"), p. 4 ("We [APM] really can't make any real money unless you make money, we're in this together"); Att. L, p. 9 ("You can find an excuse to b [sic] broke - or u [sic] can choose to b [sic]

C. CONTRACTS AND COMPLIANCE MATERIALS

Defendants' contracts,[23] "compliance" script, and audio recordings provide further proof of Defendants' law violations.[24] Defendants' contracts were deficient for two reasons. First, the contracts failed to clearly disclose to consumers the total costs of their transactions. The contracts mentioned that APM charged "15% of the total metal value" plus "4½ plus Prime" on financed metal, but failed to clearly state the exact amount of fees, commissions, interest charges, or leverage balances that consumers were required to pay. The contracts also did not state the quantity, purchase price, or type of metal being purchased or reveal that consumers were paying a mark up or "spread" on the price of metals.

Second, the contracts failed to conspicuously disclose to consumers that the investments were subject to equity calls and could be liquidated at any time without notice. Since APM telemarketers presented their investment opportunity as a "safe haven" akin to an "insurance policy" or "keeping metal under your mattress," their failure to prominently disclose the possibility of an equity call or liquidation of the account was deceptive. Thus, Defendants' contracts show that Defendants misrepresented their offer and failed to clearly and

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rich"), p. 10 ('Silver is going to break $50 and probably go to $100!"), p. 13 ("Silver is better than cash . . . there is nowhere for it to go but up! I am giving you an opportunity to make $").

[23] D.E. 1; *see* PSOF ¶¶ 21-24.

[24] The contracts and "compliance" procedures used at APM appear markedly like those used at Harry Tanner and Sam Goldman's prior companies, which the NFA deemed insufficient to protect consumers from deceptive sales activities. At their prior firms, like at APM, new customers underwent taped "compliance" interviews and answered a series of questions after they paid, but before a trade was placed. Customers were required to acknowledge that they understood the risks involved, knew that they could lose money, and that no one guaranteed they would profit. Customers were also required to sign written disclosures. The NFA held that these procedures were inadequate. The NFA noted that the interviewer on the compliance tapes spoke quickly and asked only leading questions that called for a "yes" or "no" response. The NFA further noted that customers were not told that the likelihood of losing money was quite high at the firms and that compliance interviews were preceded by and did not cure misleading promises of high profits and low risk. P.E. 1 Att. N Sept. 27, 2006 NFA Decision, pp. 35-38.

conspicuously disclose, before consumers paid, the total costs and risks of their purported investments.[25]

Likewise, Defendants' "compliance" materials evidence Defendants' law violations and culpability. APM's "compliance" script shows that even *after* consumers paid for their investments, Defendants did not clearly disclose the terms of the transactions.[26] Rather than telling consumers the actual costs of their transactions, Defendants used leading "yes" or "no" questions in induce consumers to confirm that they understood an administrative fee of "15 percent of the total metal value"[27] would be charged and that a clearinghouse was "financing up to about 80 percent of the total metal value" and charging "4½ percent above the prime rate." The "compliance" script also confirms that consumers were not told the exact purchase price of their metals or that the purchase price included a three percent mark up.[28] Finally, although the "compliance" script mentioned the word "risk," the post-sale compliance calls did not provide timely or adequate disclosure to consumers that the highly-leveraged transactions were, contrary to APM telemarketers' repeated assurances, high-risk investments.[29]

Defendants' post-sale "compliance" recordings also prove both that APM relied upon misrepresentations and deceptive omissions to sell precious metals and that the individual Defendants knew or were recklessly indifferent to the deception. The compliance recordings, most of which featured Defendant Harry Tanner as APM's "compliance officer," contain many

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[25] After consumers opened their APM accounts, they received contracts from APM's clearinghouse, Global Asset Management. These subsequent contracts, which also failed to clearly state the terms of the transactions, cannot be used to show that proper pre-sale disclosures were made.

[26] D.E. 5; PSOF ¶ 25.

[27] Consumers understood that APM charged 15 percent of the money they were sending in, not 15 percent of the entire transaction – including the leveraged portion. *See* P.E. 5 ¶¶ 6, 8-10, 14; P.E. 8 ¶ 9; P.E. 27 ¶ 4(a).

[28] D.E. 5. When consumers confronted Defendant Harry Tanner about price discrepancies during post-sale calls, he either admitted that "[w]ell, we buy it for, I believe it is 3 percent above price" or asserted that the consumer was looking at an untimely pricing report. (P.E. 23 ¶ 10(a), Att. X p.5:6-23; P.E. 23 ¶ 10(b), Att.Y p. 8:16-17).

[29] Tr. 74:19-22; Tr. 113:1.

examples of consumers learning the details of their transactions for the first time – *after* they had entered into their transaction and paid Defendants.[30]

The "compliance" recordings show that material information was not disclosed to consumers before they signed their contracts and paid APM.[31] For example, on one post-sale "compliance" call, a consumer told Defendant Harry Tanner, "We are trying to understand how it all works . . . I kind of don't understand it. I am trying to understand . . . This is the first time I am hearing this because I asked the questions many times and I'm just now getting my answers."[32] In another call, a consumer asked Mr. Tanner how APM's telemarketer could "guarantee" that the consumers would not receive an equity call.[33] In a third call, a consumer balked when Mr. Tanner told him about APM's 15 percent administration fee and said, "Hold up. I was told a one time fee of $200, now you are . . . coming up with like – Okay. This is ridiculous."[34] The "compliance" recordings provide incontrovertible evidence of the deceptiveness of Defendants' operations and of Defendants' knowledge that consumers were being misled by APM telemarketers.

D. BUSINESS RECORDS

Plaintiff has shown that APM telemarketers not only promoted the leveraged precious metals as high-profit, low-risk investments, but also failed to adequately disclose the costs and risks of the investments. As further support for its motion for summary judgment, Plaintiff cites to APM's business records – which prove the falsity of Defendants' claims and the significant injury that Defendants caused to consumers nationwide.

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[30] Because "compliance" calls were made only after consumers received the deceptive sales solicitations and paid APM, the calls are not evidence of pre-sale disclosures. Defendants' assertion that consumers were free to cancel their sale and demand refunds during compliance calls is unavailing. Courts have recognized that refunds or a "money back guarantee" does not negate the need for relief. *FTC v. SlimAmerica, Inc.*, 77 F.Supp. 2d 1263, 1272-73 (S.D. Fla. 1999) ("The existence of a money-back guarantee . . . is neither a cure for deception nor a remedy for consumer injury"); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994).

[31] PSOF ¶ 26; *see* P.E. 23, Att. X - GG.

[32] PSOF ¶ 26; P.E. 23 ¶ 10f, Att. CC.

[33] PSOF ¶ 26; P.E. 23 ¶ 10i, Att. FF.

[34] PSOF ¶ 26; P.E. 23 ¶ 10h, Att. EE.

Contrary to APM's claims that the precious metals offered were high-profit, low risk investments,[35] Defendants' records indicate that the investments were lucrative for Defendants and their telemarketers – but were disastrous for the vast majority of consumers.[36] Between June 2007 and May 2011, Defendants' accounting records and bank statements show that APM received $41,665,099 from consumer investors.[37] However, only $17,292,608 was transferred to Defendants' clearinghouse to fund consumers' purported investments, while $24,372,491 was siphoned off to pay APM fees and other costs of the investments.[38] More significantly, the evidence shows that the value of consumers' investments plummeted from $41,665,099 to only $15,498,112.[39] Thus, rather than doubling or tripling as Defendants represented,[40] consumers' investments with APM lost nearly 63 percent of their value. Defendants' representations that the precious metals were safe and lucrative were false and APM's customers collectively suffered a staggering loss of $26,166,987.[41]

IV. LAW AND ARGUMENT

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "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). The party seeking summary judgment "bears the initial responsibility of informing the district court of the

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[35] PSOF ¶¶ 8-13, 18-19.

[36] PSOF ¶¶ 28-29.

[37] Dkt. 109 p. 16. *See also* Tr. 10:13-14.

[38] Dkt. 109 p. 16; Tr. 10:17-18.

[39] Defendants contend that $1,069,029 worth of metal was delivered to consumers and that $12,619,101 was refunded to consumers. D.E. A ¶ 16. In addition, $1,809,984 was returned to consumers after the appointment of the Court's Receiver. Dkt. 109, p. 6. Thus, the total benefit that APM's customers received was only $15,498,114 (representing the sum of any metal delivered and money returned to APM customers).

[40] PSOF ¶¶ 8, 18.

[41] $41,655,099 collected from consumers minus $15,498,112 returned to consumers.

basis for its motion, and identifying those portions of [the record] which it believes demonstrate an absence of a genuine issue of material fact."[42]

Once the moving party has met its burden under Rule 56(c), the burden shifts to the non-moving party to produce facts to show that there is a genuine issue for trial.[43] "A mere scintilla of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party."[44] If the non-moving party's evidence "is merely colorable, or is not significantly probative, summary judgment may be granted."[45]

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

1. Counts I-II: Defendants Violated Section 5 of the FTC Act

Section 5 prohibits unfair or deceptive acts or practices in or affecting commerce. To prevail on a Section 5 claim in the Eleventh Circuit, "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."[46] The evidence before this Court readily proves the three elements needed to find that Defendants' telemarketing practices were deceptive and violated Section 5.

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[42] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

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

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

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

[46] *FTC v. Peoples Credit First, LLC*, 244 Fed. Appx. 942, 944 (11th Cir. 2007) (following *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). *See also FTC v. U.S. Oil & Gas Corp.*, No. 83-1702, 1987 U.S. Dist. LEXIS 16137, at*44 (S.D. Fla. July 10, 1987) ("Misrepresentation of the profit potential of a business or investment opportunity has repeatedly been held to violate Section 5.).

First, incontrovertible evidence shows that APM telemarketers told consumers that they were offering high-profit, low-risk investments.[47] Both consumer declarations and Defendants' telemarketing scripts show that consumers were regularly told that APM was offering an investment opportunity that would enable consumers to quickly double or triple their money.[48] Likewise, APM telemarketers told consumers the investments were a "safe haven."[49] After telling consumers that the precious metals were lucrative and safe, Defendants failed to provide consumers with information concerning the total costs and risks of the investments.[50]

Second, Defendants' representations and omissions were likely to and, as evidenced by consumer declarations,[51] actually did mislead consumers who were acting reasonably. Contrary to their representations, Defendants' investments were not likely to earn a profit and in fact were likely to result in a loss.[52] Consumers were not likely to quickly double or triple money, nor did the investments provide consumers a "safe haven" as APM telemarketers promised.[53] Moreover, the actual performance of consumers' APM accounts proved that the vast majority of consumers lost money.[54] Therefore, APM's representations that the investments were safe and profitable were false, deceptive, and likely to mislead consumers acting reasonably.

Defendants' omissions were also likely to mislead reasonable consumers. The substantial fees, commissions, and interest charges that consumers were required to pay – which

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[47] PSOF ¶¶ 8-10, 18-19.

[48] PSOF ¶¶ 8, 18.

[49] PSOF ¶¶ 9, 19.

[50] PSOF ¶¶ 14-17, 20.

[51] PSOF ¶ 12; *see* P.E. 3-17, 27.

[52] PSOF ¶¶ 28-29.

[53] To the contrary, APM telemarketers have admitted under oath that the investments carried a high risk. Tr. 74:19-22; Tr. 113:1. Indeed, as one of APM's branch managers testified, between 2007 and 2011, precious metals prices shot up and down on a "wild ride" that necessitated investors to possess both "intestinal fortitude and financial wherewithal." Tr. 117:14-21. He further acknowledged that, with each dip in prices, consumers' accounts could be sold out at a loss. Tr. 117:22 - 118:10.

[54] PSOF ¶¶ 28-29.

were never clearly disclosed to consumers[55] – made it unlikely that consumers could profit from the investments.[56] Moreover, because consumers' purchases were leveraged and subject to loss by liquidation or unmet equity calls, the transactions were inherently risky. Through these omissions, Defendants withheld information that consumers needed to fully understand the costs and risks of the Defendants' sales offers. As a result, consumers were likely to be misled into believing Defendants' claims that the investments were lucrative and safe.

Finally, Defendants' representations and omissions were material to consumers. A "material" representation or omission "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product."[57] "Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service are presumptively material."[58] Defendants' express promises of high profits and low risk were used to induce consumers to buy precious metals investments and, therefore, are presumed by law to be material to consumers.

Defendants' omissions were also material. The total fees, commissions, interest charges, and leverage balances that consumers were required to pay and the likelihood that an equity call would be made were factors that were likely to affect consumers' decisions about whether to purchase Defendants' investments. The Commission has found claims concerning the cost or efficacy of products to be material.[59] Consumers report that, had they been aware of these facts, they would not have purchased Defendants' precious metals investments.[60]

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[55] PSOF ¶¶ 14-16.

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

[57] *FTC v. Nat'l Urological Group*, 645 F. Supp. 2d 1167, 1190 (quoting *FTC v. QT, Inc*., 448 F. Supp. 2d 908, 960 (N.D. Ill. 2006)).

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

[59] *In Re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 182 (1981)

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

Plaintiff FTC has established the elements necessary to prove that Defendants violated Section 5 of the FTC Act:[61] Defendants made representations or omissions that were likely to mislead consumers acting reasonably and were material to consumers. Therefore, the FTC is entitled to summary judgment on Counts I and II of Plaintiff's Complaint.

2. Counts III-V: Defendants Violated the TSR

Defendants' misrepresentations and deceptive omissions also violated the TSR. The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of an investment opportunity, including risk, earnings potential, or profitability. 16 C.F.R. § 310.3(a)(2)(vi). Defendants violated this TSR provision by misrepresenting that consumers who purchased precious metals from Defendants would earn substantial profits in a short time period with low or minimal risk of loss.[62]

The TSR also requires that sellers and telemarketers clearly and conspicuously disclose specific categories of information, including total costs and material conditions, to consumers *before* they pay for goods or services. 16 C.F.R. § 310.3(a)(1)(i) and (ii). Defendants violated these provisions of the TSR by failing to properly and timely disclose all the fees, commissions, interest charges, and leverage balances that consumers were required to pay to acquire their precious metals.[63] Defendants also violated these provisions failing to disclose that consumers were likely to receive equity calls that would require them to pay additional money or to liquidate their precious metals.[64] This information was material to consumers' decisions about whether to purchase Defendants' investments. *Supra*, p. 11. Indeed, the evidence shows that some consumers invested their entire life savings with Defendants and were without the ability to meet future equity calls.[65] Accordingly, Plaintiff is entitled to summary judgment of Counts III - V of its Complaint.

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[61] *See FTC v. Peoples Credit First, LLC*, 244 Fed. Appx. 942, 944 (11th Cir. 1990).

[62] PSOF ¶¶ 8-10, 18-19.

[63] PSOF ¶¶ 14-16, 20.

[64] PSOF ¶¶ 17, 20, 23(f), 24(e).

[65] P.E. 11 ¶ 17. *See also* P.E. 9 ¶ 18; P.E. 13 ¶ 17. Such consumers clearly lacked the "financial wherewithal" that APM's telemarketer testified APM investors needed. Tr. 117:2 - 118:10.

C. THE APPROPRIATE REMEDY

The FTC seeks injunctive and equitable monetary relief to remedy Defendants' law violations as authorized by Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b. The second proviso of Section 13(b) states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[66] Section 19 grants the Court jurisdiction to order relief necessary to redress consumer injury caused by violations of the TSR.

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

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

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[66] 15 U.S.C. § 53(b). *See also FTC v. Gem Merch. Corp*, 87 F.3d 466, 468-470 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp*., 748 F.2d 1431, 1432-34 (11th Cir. 1984) (quoting *FTC v. H. N. Singer, Inc*., 668 F.2d 1107, 1113 (9th Cir. 1982)); *FTC v. USA Fin., LLC*, No. 10-12152, 2011 U.S. App. LEXIS 3774, at *11 (11th Cir. Feb. 25, 2011); *FTC v. U.S. Mortgage Funding, Inc*., No. 11-cv-80155, 2011 U.S. Dist. LEXIS 31148, at *5-6 (S.D. Fla. Mar. 1, 2011).

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

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

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

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

1. Injunctive Provisions

The Court should permanently enjoin Defendants from violating the FTC Act and TSR. In addition, since Defendants Harry Tanner and Sam Goldman are recidivists who previously were found to have deceptively telemarketed other investments,[71] the Court should permanently ban Defendants from selling investment-related goods or services through telemarketing. Broad injunctive provisions are often necessary to prevent transgressors from violating the law in a new guise:

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

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

2. Equitable Monetary Provisions

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

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

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[71] PSOF ¶¶ 7, 38.

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

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

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

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

The fact "[t]hat a large number of consumers did not complain or . . . that the FTC came forward with relatively few consumer declarations in support of its motion does not bar the court from entering [summary] judgment."[76] This is because Eleventh Circuit has clearly established that a representation or omission is deceptive under Section 5 if it is *likely* to mislead reasonable consumers.[77] Plaintiff is not required to prove *certainty* that a reasonable consumer would be misled or that *every* consumer would be misled.[78] A claim is unlawful if it has "a 'tendency' or 'capacity' to deceive; actual deception of particular consumers need not be proven."[79]

The consumer declarations, telemarketing scripts, and "compliance" materials clearly show that APM relied upon material misrepresentations and omissions to induce consumers to purchase precious metals. The cited misrepresentations and omissions were made to consumers nationwide over a period of nearly four years. Approximately 1,122 consumers purchased Defendants' product and collectively suffered a loss of $26,166,987[80] as a result. To render complete justice, any permanent injunction entered in this matter must include restitution in the amount of $26,166,987, which represents the difference between what consumers paid to APM and the value of what they received in return.[81]

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

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

[78] *See FTC v. U.S. Oil & Gas Corp*., 1987 U.S. Dist. LEXIS 16137, at *68 (S.D. Fla. July 10, 1987) (holding that when the FTC seeks restitution for thousands of victims of unlawful practices, representative proof of injury is sufficient and that "[r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions").

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

[80] PSOF ¶¶ 5, 29.

[81] The amount of restitution requested does not include any loss of investment opportunity sustained by consumers, who were induced to purchase Defendants' goods and services based upon promises of lucrative profits without risk.

D. THE INDIVIDUALS ARE LIABLE FOR INJUNCTIVE AND MONETARY RELIEF

1. Legal Standard

An individual is liable for corporate violations of the FTC Act or the TSR where: (a) the individual *either* participated directly *or* had the authority to control the deceptive acts or practices, and (b) had some knowledge of the wrongful acts or practices.[82] "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer."[83] "An individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation. 'A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception.'"[84]

The FTC is not required to show an intent to defraud.[85] Nor must the FTC demonstrate that Defendants had actual knowledge of the misrepresentations – reckless indifference to the truth or falsity of the representations or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth will suffice.[86]

2. The Individual Defendants Are Liable

Defendants Harry Tanner, Andrea Tanner, and Sam Goldman each participated in or controlled APM's deceptive acts or practices and had the requisite knowledge to be held

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

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

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

[85] *Transnet Wireless,* 506 F. Supp. 2d at 1270 (citing *FTC v. Jordan Ashley, Inc.*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at *9 (S.D. Fla. Apr. 5, 1994)). *See also Sears Roebuck & Co. v. FTC*, 95 F.T.C. 406, 517 n. 9 (1980) ("A company that deceives consumers through reckless or even simply negligent disregard for the truth may do just as much harm as one that deceives consumers knowingly.").

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

individually liable.[87] Together, the Tanners and Goldman worked daily to direct and control APM's business practices, including the deceptive telemarketing and sales practices giving rise to this action, and were aware or in reckless disregard of their company's law violations. Therefore, they should be held individually liable, jointly and severally, for the company's law violations.[88]

a. Harry Tanner, Jr., and Andrea Tanner

Since its formation, Defendant Harry R. Tanner, Jr., was the president and a managing member of APM.[89] Mr. Tanner managed day-to-day operations of the business with his wife, Defendant Andrea Tanner, and their business partner, Defendant Sam Goldman.[90] Harry and Andrea Tanner were signatories on the company's bank accounts and were identified as managers on the company's telemarketing sales license application and as officers on APM's business license records.[91] They both had authority to bind the corporation and entered into contracts on behalf of APM.[92]

Mr. Tanner has admitted that he was responsible for hiring telemarketers at APM; further, he staffed the company with salespersons who, like him, had prior discipline histories related to deceptive sales practices.[93] Mr. Tanner personally called consumers to conduct purported "compliance" calls at APM, using procedures he knew the NFA had deemed to be insufficient to protect consumers from deceptive sales practices.[94] During "compliance" calls, he learned first-hand that many consumers were misled by APM telemarketers regarding material

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87 PSOF ¶¶ 30-38.

88 *Gem Merch.*, 87 F.3d at 470.

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

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

91 P.E. 1 ¶¶ 6, 9; P.E. 2 ¶¶ 9, 29.

92 PSOF ¶ 30.

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

94 P.E. 1 Att. N Sept. 27, 2006 NFA Decision, pp. 35-38.

details of their precious metals purchases.[95] He also received and responded to complaints and negotiated settlements with injured consumers.[96] The evidence shows that Mr. Tanner participated in or controlled APM's deceptive business practices and had actual knowledge of the violations. He should be held individually liable for injunctive and equitable monetary relief.

APM's vice president and managing member, Defendant Andrea Tanner,[97] should also be held individually liable for APM's law violations. Mrs. Tanner helped manage APM's business operations. She contracted with suppliers and vendors, including the companies that provided phone services to APM for telemarketing.[98] Mrs. Tanner oversaw APM's leased offices, managed the company's finances, authorized and signed employment contracts with APM's telemarketers, filed the company's annual reports, and responded to unemployment claims filed by former APM employees.[99] In addition, profits from APM were funneled to Harebear, Inc., a closely-held shell corporation wholly owned by Mrs. Tanner.[100] Harebear's tax returns show that the funds received by Harebear were for precious metals consulting services and that Mrs. Tanner was the sole employee compensated by Harebear.[101]

The evidence also shows that Mrs. Tanner knew or recklessly disregarded APM's law violations. She established the company months after her husband appeared before the NFA on charges that he and his employees used deception while telemarketing investments.[102] Therefore, she was aware that the business carried a high probability of deception.[103] Despite this

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[95] PSOF ¶ 33.

[96] PSOF ¶ 33; P.E. 3.A. ¶ 9.

[97] PSOF ¶¶ 30, 32-34.

[98] PSOF ¶¶ 30, 32.

[99] PSOF ¶¶ 32-34.

[100] *See* P.E. 2 Att. G; P.E. 23 ¶ 8 Atts. R-V.

[101] P.E. 23 ¶¶ 6, 8 Atts. R, U.

[102] Mr. Tanner and his companies were determined to have engaged in deceptive practices and was fined $100,000 and expelled from NFA membership. PSOF ¶¶ 7, 34, 38.

[103] In fact, NFA records reveal that Mrs. Tanner was involved in similar schemes as far back as 2001, when she witnessed the settlement of a NFA reparations case against Mr. Goldman's

awareness, Mrs. Tanner failed to implement monitoring or *pre-sale* compliance procedures to prevent her customers from being deceived. While she may not have personally engaged in telemarketing, Mrs. Tanner contracted with those who did.[104] As an owner, officer, and manager of APM, she was responsible for ensuring that her employees and contractors complied with applicable laws. Mrs. Tanner had full access to all of the records submitted as evidence in this matter, including telemarketing scripts, which were found on desks and pinned to walls throughout APM, as well as "compliance" recordings and consumer files, which were stored in Mrs. Tanner's office. But for her reckless disregard or intentional avoidance, she would have known of APM's law violations. Accordingly, Mrs. Tanner should be held individually liable for injunctive and equitable monetary relief.

b. Sam Goldman

Sam Goldman was also an owner and manager of APM.[105] He managed APM's day-to-day business operations with the co-Defendants[106] and had authority to control APM and its sales practices.[107] Mr. Goldman knowingly hired telemarketers with prior disciplinary or criminal histories related to deceptive sales practices and allowed them to work from home or manage APM branch offices.[108] He provided telemarketers with sales leads, instructed them while they made sales calls, and told them to maximize the amount of fees APM could charge by frequently

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company that involved churning accounts and exaggerating claims of profits. P.E. 23 Att. O Deron Baugh Apr. 10, 2001 Settlement Agreement p. 6.

[104] PSOF ¶ 32.

[105] Mr. Goldman prefers the terms "founder" and "investor" rather than owner. P.E. 25 Att. H; Dkt. 181 p. 5. However, Plaintiff's claims against Mr. Goldman do not rest upon his ownership of APM, but rather on his participation or ability to control the deceptive practices and his knowledge, reckless disregard, or conscience avoidance of knowledge of the law violations. *See* F.N. 82, 86.

[106] In addition, Sam Goldman and Harry Tanner previously owned and operated at least three companies together: Mizner Financial Trading Corp., Bentley Trading Group, Inc., and Terranova Financial Trading Corp. All three were permanently expelled from the NFA due to deceptive sales solicitations and misrepresentations concerning profit and risk. P.E. 1 Att. N Sept. 27, 2006 NFA Decision.

[107] PSOF ¶¶ 35-36.

[108] PSOF ¶ 35.

trading customer accounts.[109] Mr. Goldman founded APM and negotiated its contract with Global Asset Management, the clearinghouse firm that provided financing to APM's customers.[110] Therefore, he was the linchpin of APM's entire operations: without its contract with Global Asset Management, APM could not have sold the leveraged precious metals.

Mr. Goldman also had the requisite knowledge of the law violations. He received consumer complaints and, holding himself out as a manager, personally responded to them.[111] He provided direction and oversight on compliance issues, and "compliance" calls and consumer complaints were handled from his office.[112] At APM, Mr. Goldman (like the Tanners) chose to employ "compliance" procedures that he knew had been rejected by the NFA as insufficient to deter deception.[113] His choice to continue such practices demonstrates that he either knew of the law violations and intended to resume his prior deceptive enterprises, or he was recklessly indifferent to the law violations. Under either scenario, Mr. Goldman should also be held individually liable for injunctive and monetary relief.

V. CONCLUSION

Because there exists no genuine issue of material fact to be decided at trial, Plaintiff is entitled to summary judgment as a matter of law. Plaintiff asks that the proposed Final Judgment and Permanent Injunction, to be filed subsequent to this motion, be entered by the Court.

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[109] PSOF ¶¶ 35-37.

[110] *See* Def's. Motion to Dismiss Complnt., Civil Action No. 11-cv-61986 (S.D. Fla. Nov. 18, 2011), Dkt. 14 p. 2.

[111] PSOF ¶¶ 36-37.

[112] PSOF ¶¶ 36-37.

[113] Mr. Goldman held ownership interests in Bentley Trading Group, Inc., and Terranova Financial Trading Corp. Both of these companies, while managed by Harry Tanner, employed "compliance" procedures similar to those used at APM. Further, both were fined $100,000 and permanently expelled from the NFA for using deceptive sales solicitations regarding the profitability and risk of investment opportunities.

Respectfully submitted,

Dated: February 24, 2012

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