No. 15-14437

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

CONSUMER COLLECTION ADVOCATES CORP.
and MICHAEL ROBERT ETTUS,
Defendant-Appellant.

On Appeal From the United States District Court
for the Southern District of Florida
No. 15-cv-62491
Hon. Beth Bloom

BRIEF OF THE FEDERAL TRADE COMMISSION

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No. 15-14437
FTC v. Consumer Collections Advocates Corp.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Eleventh Circuit R. 26.1-1 to 26.15, the Federal Trade Commission certifies to the best of its knowledge that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal.

Bloom, Beth– United States District Judge

Bolton, Barbara E. – FTC attorney

Consumer Collection Advocates Corp. – Defendant-Appellant

Damian, Melanie E. – Court-appointed receiver

Damian & Valori, LLP – Attorneys for the receiver

Ettus, Michael Robert – Defendant-Appellant

Federal Trade Commission – Plaintiff-Appellee

Hoffman, Matthew M. – FTC attorney

Marcus, Joel – FTC attorney

Metzler, Theodore (Jack) – FTC attorney

Mateo, Marcela C. – former FTC attorney

Nuechterlein, Jonathan E. – former FTC attorney

Shonka, David C. – FTC attorney

Valle, Alicia O. – United States Magistrate Judge

Visconti, Melissa Damian – Attorney for the receiver

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To the best of the FTC's knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. It involves no legal issue that has not been authoritatively determined, and the facts and legal issues are fully set out in the briefs and the decision of the District Court below.

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JURISDICTION

This is an appeal from a final judgment of the district court disposing of all parties' claims. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1337(a) and 1345 and under 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c) and 6105(b). This Court has appellate jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on September 28, 2015, and the notice of appeal was filed on October 2, 2015.

STATEMENT OF THE ISSUES

The FTC sued Consumer Collection Advocates Corp. ("CCA") and its sole owner, Michael Robert Ettus, for deceptive practices in violation of the Federal Trade Commission Act and the FTC's Telemarketing Sales Rule. Following discovery, the FTC moved for summary judgment, supporting its motion with 21 declarations (including several from injured consumers), internal CCA documents, Ettus's deposition testimony, and interrogatory responses from Ettus and CCA. As required by Rule 56 and Southern District of Florida Local Rule 56.1, the FTC also submitted a detailed statement of material facts not in dispute with citations to supporting materials. CCA and Ettus did not respond to the FTC's Rule 56.1 statement. Nor did they otherwise present any evidence to dispute the facts presented by the FTC. In the order on review, the district court held that CCA and Ettus "utterly fail[ed] to negate the FTC's assertions or introduce any evidence in support of their arguments." ECF No. 80 at 5. It therefore deemed the FTC's facts admitted and granted summary judgment for the FTC.

Neither CCA nor Ettus challenges the entry of summary judgment against CCA. The sole issue presented on appeal is whether the district court properly granted summary judgment against Ettus and held him personally liable for CCA's actions based on the undisputed facts as set forth in the FTC's Rule 56.1 statement.

STATEMENT OF THE CASE

A. Overview

CCA—which was wholly owned and controlled by Ettus—operated a "recovery room" scam that preyed on consumers, many of them seniors or retirees, who had previously lost money in fraudulent investment and timeshare resale schemes. Acting on scripts written and provided by Ettus, CCA telemarketers told the company's "clients" that if they paid a large advance fee, CCA could recover most or all of the money they had lost within a few months. Many consumers relied on these representations, paying CCA fees that ranged from a few hundred dollars to as much as $15,000. But after paying these up-front fees, consumers never heard anything more from CCA and never got their money back. Consumers who had already fallen victim to fraud once were thus victimized a second time by CCA and Ettus.

The FTC sued CCA and Ettus in 2014. *See* ECF No. 1 (Complaint). Count I of the complaint alleged that their representations to consumers were a deceptive practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which declares unlawful "unfair or deceptive acts or practices in or affecting commerce." Count II alleged that CCA and Ettus violated the FTC's Telemarketing Sales Rule ("TSR") by charging an up-front fee for their purported recovery services. *See* 16 C.F.R.

§ 310.4(a)(3).[1] Count III alleged that CCA and Ettus violated the TSR by materially misrepresenting their services. *See id.* § 310.3(a)(2)(iii).[2] The FTC alleged that consumers had and were continuing to suffer substantial injury and that CCA and Ettus had been unjustly enriched as a result of these violations. It sought an injunction barring CCA and Ettus from further violations and equitable monetary relief, including restitution to consumers and disgorgement of unjust enrichment.

B. The FTC's Summary Judgment Motion

Following discovery, the FTC moved for summary judgment. ECF No. 64. It supported the motion with 24 exhibits, numbered PX 1 through 24. *See* ECF

[1] Section § 310.4(a)(3) provides in relevant part:

> It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to . . .[r]equest[] or receiv[e] payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person.

[2] Section 310.3(a)(2) provides in relevant part:

> It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to . . .[m]isrepresent[], directly or by implication, in the sale of goods or services . . . [a]ny material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer.

Nos. 65-69.[3] The exhibits included 15 declarations from consumers who had been targeted by CCA, many of whom paid the company substantial sums for promised, but undelivered services. *See* PX 5-19. They also included declarations from the FTC's case investigator, Florida telemarketing and licensing agency officials, the Southeast Florida Better Business Bureau, and court-appointed receivers in investment fraud cases. *See* PX 1-4, 20, 24. Numerous internal CCA documents and state and third-party records were attached to these declarations. The summary judgment exhibits also included excerpts from Ettus's deposition (PX 21) and CCA's and Ettus's interrogatory responses (PX 22-23). As required by Local Rule 56.1, the FTC submitted a detailed statement of material facts as to which there was no genuine issue to be tried, each supported by citations to the underlying materials. *See* ECF No. 64-1 (Rule 56.1 statement).

The FTC's Rule 56.1 statement and supporting materials established that CCA is a Florida corporation that operated a recovery room business. *Id.* ¶ 1. Ettus was the sole owner and officer of CCA and ran its day-to-day business. *Id.* ¶ 2. This included hiring, firing, overseeing and directing the company's employees. *Id.* Ettus also wrote the scripts used by CCA's telemarketers and

[3] For ease of reference, this brief refers to these exhibits using the "PX" exhibit numbers, rather than the docket numbers. Page number reference to these exhibits refer to the "PX" page number on the lower right-hand corner of each page.

provided them to telemarketers. *Id.* ¶ 3. He obtained telemarketing licenses for himself, CCA and CCA employees. *Id.* He also registered and controlled the domain name and webhosting for CCA's website, and handled and responded to consumer complaints. *Id.* ¶¶ 3, 5. Ettus also managed CCA's finances, intermingling them with his own. He was the sole signatory on CCA's bank accounts and had sole check writing privileges. *Id.* ¶ 4. Ettus paid his personal expenses from CCA's accounts and made over $280,000 in cash payments to himself from the company. *Id.* Most of these facts were established by Ettus's own admissions in his deposition. *See* PX 21 at 13-15, 18-20, 35, 40-43.

As shown in the Rule 56.1 statement, beginning in July 2011, CCA and Ettus engaged in a scheme to induce consumers to purchase recovery services through unsolicited outbound telephone calls or cold calls. ECF No. 64-1 ¶ 6. They targeted consumers who had already lost money in fraudulent telemarketing schemes, many of them seniors or retirees. *Id.* ¶¶ 11-12, 27-28. CCA's pitch was that it could virtually guarantee recovery of a significant portion of the money these individuals had lost within a short time—typically 30 to 180 days. *Id.* ¶¶ 15-17. But to obtain these services, consumers would need to pay CCA a large up-front fee, ranging from several hundred dollars to as much as $15,000. *Id.* ¶¶ 13-14. CCA typically told customers that it could be trusted because it was licensed by the State of Florida as a "consumer collection agency"—even though that

license did not give CCA any authority or approval to collect funds on behalf of consumers victimized by fraud or telemarketing schemes. *Id.* ¶ 8; PX 1 at 79-80; PX 4 ¶¶ 14-16.

CCA used highly aggressive tactics. It told consumers that they needed to sign up with CCA quickly to have any chance of recovering their money and that if they did not use CCA's services they would have no chance of recovery. ECF No. 64-1 (Rule 56.1 statement) ¶ 16. If a consumer did not immediately sign up for services, CCA's marketers would continue to call, e-mail, and write, repeating their promises of a large payday and urging them to act quickly. *Id.* ¶ 18.

These tactics are evident from the scripts that CCA provided to its telemarketers. One script boasts: "We do not take on cases unless we can get the money back! . . . . [W]e will not charge you money for something we cannot recover." PX 1 at 81. The script encourages consumers to pay the up-front fee by credit card to "allow you to comfortably afford it and by the time the dispute is settled 60% of the money you lost before will make up for this sacrifice." *Id.* It also urges customers to sign up immediately: "It's imperative that we act on this now due to the fact that these companies are being shutdown [sic] and it makes it difficult if not impossible to get your money back. . . . [T]ime is not a luxury you or our collection agency has." *Id.* It promises that "[y]ou might not get the money

tomorrow, but acting on this now will allow you to see results within 180 days." *Id.* And it asserts that "[t]ogether is the only way we'll get your money back." *Id.*

Other CCA marketing materials submitted by the FTC contain similar statements. One sales script instructs telemarketers to state: "Now my collection department looked at your file and feel you have a very strong likelihood of recovery based on our pending cases with this company's principal already." PX 20 at 32. It emphasizes that "Timing is of the essence." *Id.* Another states that "the likelihood of reimbursement is excellent" and "you're [*sic*] only out of pocket expenses will be the 20% for the retainer fee. *Id.* at 14. Another states that CCA is "xtremly [*sic*] good at what we do" and has a "very high success rate." *Id.* at 25. An e-mail from a CCA marketer to a prospective target framed the company's services as a no-lose proposition:

> **UNTIE MY HANDS—BECOME A CLIENT, $5000 RETAINER IS PEANUTS GIVEN THE RETURN.**
>
> LOOK AT IT THIS WAY: 1) I AM NOT A BUSINESS/INVESTMENT OPPORTUNITY 2) BUT IF I WERE YOU WOULD BE LOOKING AT A 4000% RETURN IN 3 TO 6 MONTHS
>
> **ABSOLUTE WORST CASE: YOU GET $50,000 INSTEAD OF $150,000 PLUS (approximately) <u>NET</u> <u>NET</u> <u>NET</u>**
>
> **AGAIN: THE QUESTION IS NOT <u>IF</u>, BUT <u>HOW MUCH</u> !!!**

Id. at 34.

The numerous consumer declarations provided to the district court confirm CCA's use of these tactics. For example, a CCA telemarketer told Jim Carney that "for an up-front fee of $10,000, CCA could recover as much as $175,000 back out of the $200,000" he had lost in a precious metals investment scam. PX 5 ¶ 5. John Hood was told that "if I hired CCA, I could expect to get my money back quickly, within six to eight weeks." PX 8 ¶ 6. Jonathan Jackson was told that "if I paid an advance fee to CCA of $1200, CCA would guarantee that I would recover my $25,000 plus triple civil penalties within 90 days," but that "I would not get my money back if I did not hire CCA." PX 9 ¶ 5.[4] Although not all of the consumer declarants fell for CCA's scheme, many did, and paid CCA amounts ranging from $500 to more than $7,000. All told, CCA collected approximately $2.8 million from its victims. *See* ECF No. 20 (report of court-appointed receiver) at 15.

CCA's promises were empty and its business was a scam. After paying the up-front fee, consumers generally heard nothing further from CCA. ECF No. 64-1 (Rule 56.1 statement) ¶ 24. Consumers had difficulty reaching anyone at CCA to ask about the status of their case. *Id.* If they did reach someone, CCA would put them off with perfunctory excuses that it was understaffed, that the consumers

[4] For similar statements from other consumer declarants, see PX 10 ¶ 5 (Paul Palmer); PX 12 ¶ 5 (Linda Robert); PX 15 ¶ 5 (James Rutledge); PX 16 ¶ 5 (David Scheibel); PX 17 ¶ 4 (Wilbur Thomas); PX 18 ¶ 5 (Eugene Witkowski).

needed to be patient, and that their recovery would take time. *Id.* Many consumers complained to the FTC, other federal and state agencies, and the Better Business Bureau. *Id.* ¶ 25. In a few cases, CCA and Ettus offered to refund some money or provided assurances that work would be done on a case in exchange for the consumer's pledge to retract a complaint. *Id.* ¶ 26. In the vast majority of cases, however, consumers never recovered either the funds they had previously lost or a refund of the up-front fee paid to CCA. *Id.* ¶ 27.

C. CCA's and Ettus's Response

CCA and Ettus did not respond to the FTC's Rule 56.1 statement as the Local Rule required them to do. They did file a brief in opposition to summary judgment motion (ECF No. 73), but cited no legal authority (apart from a single perfunctory reference to Rule 56) and did not address the substance of the facts and evidence set forth by the FTC. Instead, CCA and Ettus argued that the FTC's consumer declarations were not credible. ECF No. 73 at 2. They listed nine purported facts that the court would supposedly learn at a trial on the merits, but provided nothing to support any of them. *Id.* at 2-4.

The only evidence that CCA and Ettus submitted was the deposition of the FTC's case investigator, Evan Castillo, who had collected many of the relevant documents and submitted declarations in support of summary judgment. CCA and Ettus did not argue that Mr. Castillo's deposition testimony contradicted the facts

relied on by the FTC. Instead, they argued that his testimony showed that the FTC's investigation was inadequate. *Id.* at 4-6.

D. The District Court Decision

The district court granted the FTC's motion for summary judgment. ECF No. 80. It described the case as "a cautionary tale regarding the importance of adherence to rules, particularly, the Federal Rules of Civil Procedure and the Local Rules of this Court." *Id.* at 1. It found that there was no genuine issue of material fact because CCA and Ettus had "utterly fail[ed] to negate the FTC's assertions or introduce any evidence in support of their arguments." *Id.* at 5.

The district court held that CCA and Ettus had failed to comply with the procedural requirements of both Rule 56 and Local Rule 56.1. It first addressed Rule 56, noting that the rule requires the opposing party to cite evidence in the record to support its factual assertions, and that and that "[f]or all intents and purposes, the Rule allows a Court to punish a litigant who fails to properly support or address a fact by considering that fact undisputed." *Id.* at 6. The court explained:

> Defendants' Response . . . is utterly devoid of citations to pertinent parts of the record. Rather, the Response simply contains the unsupported assertions of counsel. *See id.* at 2-4 (containing, without citation whatsoever, assertions concerning facts that will be "learn[ed]" at "an eventual trial"). Moreover, to the extent the Court may consider these unsubstantiated assertions, the majority are wholly irrelevant to the issues presented in the Motion, namely, issues regarding whether Defendants requested and received an illegal up-

> front fee from consumers or whether the pitch employed by CCA was misleading to consumers. The Defendant's failure to refute the FTC's well-supported factual predicate is fatal.

Id. at 6-7.

The district court next addressed Local Rule 56.1. It held that CCA's and Ettus's failure to respond to the FTC's Rule 56.1 statement was a further defect, and that under the rule, CCA and Ettus had "admitted all facts contained [in the FTC's Statement] to the extent such facts are supported by evidence contained in the record." *Id.* at 7. It held that "[t]he [FTC's] Statement of Facts contains copious citations to unrefuted evidence and, as a result, remains uncontroverted." *Id.*

The court rejected CCA's and Ettus's attacks on the credibility of the FTC's consumer declarants, noting that it could not make credibility determinations on summary judgment, and that Rule 56 expressly allows a party to support a summary judgment with affidavits and declarations. *Id.* at 9-10. "While the Court need not accept the contents of an affidavit where contradictory record evidence is presented, Defendants fail to offer any evidence rebutting the contentions contained in the declarations." *Id.* at 10. The court held that CCA's and Ettus's "attempt to slander the affidavits by injecting elements of bias and motive is also unpersuasive" because defendants did not disclose what bias or motive might be present, and the declarations were based on personal knowledge and sworn to

under penalty of perjury. The court held that it would not "blindly accept the contentions of counsel where such contentions are not supported by *any* evidence in the record." *Id.* at 11.

Having found all the facts set forth by the FTC to be undisputed, the court determined that the FTC was entitled to judgment as a matter of law. The court held that CCA's representations to consumers were deceptive and violated Section 5, and that CCA had also violated the TSR by charging upfront fees and misrepresenting its services. *Id.* at 11-12. It then held that Ettus was individually liable for CCA's misconduct by virtue of his status as CCA's president and sole owner, his control over the company's operations and financial affairs, and his direct participation in the company's unlawful practices. *Id.* at 13. The court held that "[i]f there was a captain of the M/S CCA, it was Ettus." *Id.*

The court also rejected CCA's and Ettus's attacks on the FTC's case investigator, holding that they "simply mischaracterize Castillo's testimony and focus on facts that remain irrelevant to the determination of liability." *Id.* at 14. The court held that CCA's and Ettus's claims of an inadequate investigation were irrelevant and "belied by Castillo's own testimony." *Id*. at 15.[5]

[5] The court likewise rejected CCA and Ettus's argument that the receiver appointed by the court to oversee CCA's affairs was motivated by a personal vendetta, holding that that "[i]mpugning the Receiver's credibility via

(continued)

The court entered a permanent injunction barring CCA and Ettus from engaging in recovery services or telemarketing or making any misrepresentations in connection with the sale or offer for sale of any good or service, and ordered them to disgorge $2,825,761.28 (the amount of CCA's ill-gotten receipts) as equitable monetary relief. *See* ECF No. 81.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *E.g.*, *Flowers v. Troup Cty.*, 803 F.3d 1327, 1335 (11th Cir. 2015). But this case turns largely on the district court's application of its Local Rules, which this Court reviews for abuse of discretion, giving "great deference" to the district court. *Mann v. Taser Int'l*, 588 F.3d 1291, 1302 (11th Cir. 2009) (citation omitted). To meet this standard, defendants bear the burden of showing that the district court made a "clear error of judgment." *Id.* (citation omitted). The district court's imposition of personal liability on Ettus based on his undisputed actions is subject to *de novo* review.

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unsubstantiated, personal opinions does nothing to further Defendants' cause" and that there was "simply no evidence to support this unscrupulous assertion." ECF No. 80 at 15.

SUMMARY OF ARGUMENT

CCA and Ettus failed to comply with the basic requirements of Rule 56 and Local Rule 56.1 and were therefore properly deemed to have admitted all of the facts set forth in the FTC's Rule 56.1 statement. Ettus does not challenge this ruling, nor does he contest the district court's grant of summary judgment against CCA. The only question is whether he is personally liable for the acts of his corporation.

The undisputed facts amply justify the district court's determination that Ettus was responsible for the FTC Act and TSR violations. It is well-settled in this Circuit that an individual is liable for FTC Act violations committed by a corporate entity if that individual participated directly in the deceptive practices or acts or had authority to control them and had some knowledge of the deceptive practices. *E.g.*, *FTC v. IAB Mktg. Assocs.,* 746 F.3d 1228, 1233 (11th Cir. 2014). Here, the undisputed evidence showed both that Ettus had complete control of CCA and that he actively and knowingly participated in the company's deceptive practices.

Ettus's arguments are meritless. His references to the deposition testimony of the FTC's case investigator, Mr. Castillo, are irrelevant. His attacks on the credibility of the FTC's declarants are improper, since courts do not assess credibility on summary judgment. And his assertion that his own deposition testimony demonstrates a genuine issue of fact is incorrect. To the contrary, Ettus

admitted at his deposition that he controlled CCA and actively oversaw its telemarketing operations. There is no question that he is personally liable for CCA's unlawful conduct.

ARGUMENT

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE FTC AND HELD ETTUS PERSONALLY LIABLE

Rule 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Local Rule 56.1 of the Southern District of Florida, like analogous rules of many districts, sets forth detailed procedural requirements for making and responding to that showing. The FTC complied with Rule 56 and the Local Rule by submitting a detailed statement of material facts not in dispute, supported by citations to declarations, documents, and discovery responses. CCA and Ettus utterly failed to comply with the rules and filed no response to the FTC's statement. In light of that failure, the district court correctly found that the facts set forth by the FTC were undisputed. The undisputed facts plainly support the court's grant of judgment to the FTC as a matter of law.

A. By Failing To Respond To The FTC's Statement of Facts, CCA And Ettus Admitted Them.

Under Rule 56, "a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but

must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) (citation, internal quotation marks and ellipsis omitted). The opposing party must demonstrate the existence of a factual dispute by "citing to particular parts of materials in the record," such as depositions, documents, affidavits and interrogatory answers. Fed. R. Civ. P. 56(c)(1)(A). If a party "fails to properly address another party's assertion of fact as required by Rule 56(c)," the court may "consider that fact undisputed for the purposes of the motion." Fed. R. Civ. P. 56(e)(2).

Local Rule 56.1 amplifies the requirements of Rule 56, and is "designed to help the court identify and organize the issues in the case." *Mann*, 588 F.3d at 1303. It requires a party moving for summary judgment to provide a statement of material facts as to which it contends there is no genuine issue to be tried. S.D. Fla. R. 56.1(a). The statement must consist of separately numbered paragraphs, and must be "supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." *Id.* The opposing party must submit a responsive statement, numbered to correspond with the movant's statement, which also must be supported by specific references to the evidence. *Id.* The rule provides:

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

S.D. Fla. R. 56.1(b).

This Court has held that compliance with Local Rule 56.1 "is not a mere technicality." *Mann*, 588 F.3d at 1303. Failure to properly controvert a fact justifies the district court in treating that fact as admitted, so long it is supported by the record. *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008). Submitting a response to the movant's Rule 56.1 statement is "the only permissible way . . . to establish a genuine issue of material fact at [the summary judgment] stage," and evidence that is not cited in the opposing party's response should be "disregard[ed] or ignore[d]." *Id.*

For example, in *Mann*, the district court deemed the movant's facts undisputed where the respondent's opposing statement was "convoluted, argumentative, and non-responsive." *Mann*, 588 F.3d at 1303. This Court affirmed, noting that it gives "great deference to a district court's interpretation of its local rules," and that the district court had not made a "clear error of judgment" in deeming the facts undisputed. *Id.* at 1302, 1303; *see also Cockrell v. Sparks*, 510 F.3d 1307, 1309 n.2 (11th Cir. 2007) (accepting facts set forth in movant's Rule 56.1 statement as true, and refusing to accept contrary statement in respondent's deposition, where respondent had not properly responded to Rule

56.1 statement); *Jones v. Gerwens*, 874 F.2d 1534, 1537 n.3 (11th Cir. 1989) (facts set forth in Rule 56.1 statement that are not controverted are deemed admitted).

CCA and Ettus did not comply with Local Rule 56.1 and they do not argue that the district court misapplied the rule. Any such argument would be fruitless had it been made. Their noncompliance with Local Rule 56.1 is far more egregious than that in *Mann*. Mann submitted a *deficient* response to a Rule 56.1 statement and that was held insufficient. Ettus and CCA failed to submit *any response at all*. Because the FTC's factual assertions in its Rule 56.1 statement were amply supported by the materials it submitted, the district court properly found those facts undisputed.

B. The Undisputed Facts Show That Ettus Is Individually Liable For CCA's Violations.

Ettus admits that the district court properly granted summary judgment against CCA. He claims only that the district court erred in granting summary judgment against him personally. Br. 1, 3, 11. This argument lacks any merit. The district court applied the correct legal standard and properly determined on the undisputed facts that Ettus is individually liable for CCA's misconduct.

An individual is liable for FTC Act violations committed by a corporate entity if that individual (1) "participated directly in the deceptive practices or acts or had authority to control them" and (2) "had some knowledge of the deceptive practices." *FTC v. IAB Mktg. Assocs.,* 746 F.3d 1228, 1233 (11th Cir. 2014)

(citations, internal quotation marks, and brackets omitted); *see also FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). Ettus meets both tests.

As the district court held, the undisputed facts show that Ettus controlled CCA. "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." *FTC v. Amy Travel Serv.*, 875 F.2d 564, 573 (7th Cir. 1989). Here, Ettus was the sole officer and president of CCA. ECF No. 64-1 (Rule 56.1 statement) ¶ 2. He managed its day-to-day operations, including hiring, firing and training employees and overseeing their operations. *Id.* He also managed the company's bank accounts and had exclusive control over its financial affairs. *Id. ¶* 4. He even admitted in his deposition that "I had the control of the operations." PX 21 at 14. And he concedes in his brief that he had "sole authority to write checks and operate the [CCA] business." Br. 4.

The undisputed facts also show that Ettus directly participated in CCA's deceptive practices. Among other things, he wrote and disseminated the scripts used by telemarketers and responded to consumer complaints. ECF No. 64-1 (Rule 56.1 statement) ¶¶ 3, 5. As the district court held, the evidence clearly shows that "[i]f there was a captain of the M/S CCA, it was Ettus. These uncontested facts support the conclusion that Ettus had the requisite knowledge, awareness, and involvement to impose individual liability." ECF No. 80 at 13-14.

Ettus tries to pin responsibility for CCA's misconduct on unnamed "rogue employees" and asserts that there is no basis for concluding that he had "personal knowledge of the actions of every employee at every moment and that he endorsed and approved of same" or that Ettus was "on the telephones at any time to solicit business from potential customers." Br. 5, 10. But that is not the proper legal test. The FTC was not required to show that Ettus knew and approved of every deceptive action taken by every CCA telemarketer or that he personally called consumers—just that he controlled the company or directly participated in its deceptive practices and that he had "some knowledge" of those practices. *IAB*, 746 F.3d at 1233. The evidence overwhelmingly shows that he did. Accordingly, Ettus is individually liable for CCA's violations of the FTC Act and the TSR.

C. Ettus Has Not Shown A Genuine Factual Dispute.

Ettus does not address his default under Local Rule 56.1 or the district court's careful assessment of the undisputed facts. Instead, he claims that other evidence he put before the district court created factual disputes that defeat summary judgment. None holds water.

1. The testimony of the FTC's investigator does not raise any triable factual issue.

Ettus cites several pages from the deposition testimony of Mr. Castillo, the FTC's case investigator. Br. 6-9. His claim that they raise a genuine issue of material fact is frivolous. As the District Court held, "Defendants simply

mischaracterize Castillo's testimony and focus on facts that remain irrelevant to the determination of liability." ECF No. 80 at 14. Before this Court, Ettus again fails to show how any of the Castillo testimony raises any genuine dispute of fact.

The statements Ettus cites do not contradict or undermine any of the facts set forth in the FTC's Rule 56.1 statement that formed the basis for his liability. Instead, they relate to wholly irrelevant issues, such as whether Mr. Castillo spoke to the Florida Secretary of State or Department of Agriculture (as opposed to merely obtaining documents from those agencies) and the length of time he had been employed by the FTC.

Ettus also grossly mischaracterizes Mr. Castillo's testimony. For example, he cites Mr. Castillo's deposition for the proposition that the FTC "has conducted NO 'victims' interviews of any affiants/complainant *[sic*]." Br. 8. Mr. Castillo said no such thing. He testified that *he personally* did not conduct witness interviews. ECF No. 73-1 (Castillo deposition), at 116. He explained, however, that the investigation was a "team effort," and that lawyers and a paralegals were also involved. *Id.* Obviously, the FTC did conduct witness interviews—it submitted 15 consumer declarations, including several from consumers who lost money to CCA's scam.

Even leaving these misrepresentations aside, Ettus identifies nothing that contradicts the FTC's evidence that CCA engaged in deceptive and unlawful

telemarketing practices and that Ettus controlled CCA and actively participated in the scam. Indeed, he admits both in his brief, conceding that judgment was properly entered against CCA and that he had sole control of that company. Br. 3, 4. The particulars of the FTC's investigation are irrelevant to the overwhelming evidence of CCA's and Ettus's misconduct. If CCA and Ettus believed that additional evidence would have exonerated them, they were free to introduce that evidence. They did not.

2. Ettus's attacks on the credibility of the consumer declarants is improper

Ettus also attacks the credibility of the consumers who provided declarations in support of summary judgment. Br. 9-10. The consumer declarations were unrebutted and were properly accepted as true for summary judgment purposes. *See* Fed. R. Civ. P. 56(c)(1)(A) (facts may be established on summary judgment by "affidavits or declarations"). An "attack on the credibility of [a] witness is inappropriate during a motion for summary judgment." *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1578 n.9 (11th Cir. 1991); *see also Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). If Ettus believed that there was some basis for challenging the credibility of the FTC's declarants, he was free

either to depose those witnesses or to submit other evidence to contradict their assertions. He did neither.

3. Ettus's deposition testimony does not establish a genuine factual dispute.

Ettus also argues that he provided "sworn testimony wherein he denie[d] the allegations made against him." Br. 10. This is incorrect. Ettus did not submit a declaration in opposition to summary judgment, nor does he identify any portion of his deposition transcript that contradicts the FTC's Rule 56.1 statement. Moreover, the FTC and the district court did not ignore Ettus's deposition testimony. To the contrary, the FTC relied on Ettus's deposition testimony for several key admissions, including that he was the sole owner, officer, and manager of CCA; that he was the sole signatory on the company's bank accounts; that he was responsible for hiring and firing employees; that he wrote sales scripts and trained telemarketers; and that he responded to consumer complaints. PX 21 at 13-15, 18-20, 35, 40-43. It also cited his repeated admission that CCA charged upfront fees for its recovery services—a practice that violates the TSR. *Id.* at 6-7, 36, 44-45; *see also* 16 C.F.R. § 310.4(a)(3). In short, far from undercutting the FTC's facts, Ettus's admissions supported them.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,648 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of the Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word 2010 in 14 point Times New Roman type.

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CERTIFICATE OF SERVICE

I certify that on June 6, 2016, I caused a copy of the foregoing brief to be served using the CM/ECF electronic case filing system and by first-class mail on all counsel of record.

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