10-12152

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

USA FINANCIAL, LLC, et al.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA (Case No. 8:08-cv-00899-EAK-MAP)

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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Federal Trade Commission v. USA Financial, LLC, No. 10-12152

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 in Appellants' Initial Brief, the following persons or entities are known to have an interest in the outcome of this case or appeal:

Arvanitakis, Sarvas

Bentley III, A. Lee – Acting United States Attorney

Bergman, Michael D. – FTC Attorney

Consumer Trust Financial, Inc. – company affiliated with defendant Buschel

DeMille-Wagman, Lawrence – FTC Ass't General Counsel for Litigation

Doyle, Philip – U.S. Dept. of Justice Attorney

Grilli, Peter J. – Mediator

Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A.

Kaufman, Daniel – Acting Director, FTC's Southeast Region

Kirtz, Harold E. – FTC Attorney

Federal Trade Commission v. USA Financial, LLC, No. 10-12152

Koalar Trust

Liebes, Cindy – FTC Assistant Regional Director, Southeast Region

Makris, Peter, CPA

Pizzo, Mark A. – U.S. Magistrate Judge

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

TABLE OF AUTHORITIES

CASES **PAGE**

* Authorities principally relied upon.

* Authorities principally relied upon.

* Authorities principally relied upon.

* Authorities principally relied upon.

* Authorities principally relied upon.

STATE CASES

FEDERAL STATUTES

RULES AND REGULATIONS

STATEMENT OF JURISDICTION

The Federal Trade Commission filed a complaint on May 12, 2008, charging defendants with making false representations to consumers, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. pt. 310. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. §§ 45(a), 53(b). That court issued an opinion on April 5, 2010, granting summary judgment for the Commission, denying defendants' motion for summary judgment, and entering final judgment against all defendants. A notice of appeal was timely filed on May 6, 2010. This court has jurisdiction under 28 U.S.C. § 1291.[1]

STATEMENT OF THE ISSUES

1. Whether the district court properly granted summary judgment in favor of the FTC, where the FTC provided undisputed evidence that defendants'

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[1] The final judgment signed by the district court was mistakenly dated "April 5, ***2009***," District Court document number ("D.") 156 at 18, but that is a typographical error. The final judgment in fact was signed on April 5, 2010. Further, as noted *infra*, at 4 n.2, cross-claims brought by the United States and third-party claims brought by the Receiver, both alleging certain tax deficiencies by entities related to the receivership defendants, were still pending after issuance of the final judgment. The post-judgment tax-related claims are independent of the claims brought by the FTC under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) that were resolved by the district court in its Amended Order, D.155, and Final Judgment and Order for Permanent Injunction ("Final Judgment") (D.156). Thus, the post-judgment claims do not affect the finality of the Amended Order and Final Judgment imposing liability and ordering relief against the defendants for purposes of this appeal.

telemarketers falsely promised thousands of consumers that, if they paid $200, defendants would provide them with a general purpose credit card, but where not a single consumer received a general purpose credit card after paying this fee.

2. Whether the district court properly held that the individual defendants were personally liable for the corporate defendants' deceptive conduct where they controlled or participated directly in the activities of the corporations and had the requisite knowledge of their material misrepresentations.

3. Whether the district court's order imposing equitable relief fell within its broad discretion, where the monetary equitable relief was based on the net sales of defendants' deceptive product, the permanent ban on telemarketing imposed on the individual defendants was necessary to bar such misconduct in the future, and the continuing asset freeze was necessary to assure full payment of this judgment by defendants.

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

On May 12, 2008, plaintiff Federal Trade Commission filed a complaint against corporate defendants American Financial Card, Inc. ("American Financial," and formerly known as Capital Financial, Inc.), and USA Financial, LLC ("USA Financial"), and against individual defendants Jeffrey R. Deering, Richard R.

Guarino, and John F. Buschel. D.1. The complaint alleged that defendants misrepresented in telemarketing calls that by paying an advance fee, typically in the amount of $200, consumers would receive an unsecured general purpose credit card that could be used to purchase goods from any retailer. Instead, after paying the fee, providing their checking account information to defendants, and obtaining a packet of materials, consumers learned that the card could only be used to make purchases from defendants' catalogs or online store. Based on this conduct, the Commission charged defendants with making false representations to consumers, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. pt. 310. The Commission sought both injunctive relief and monetary equitable relief.

On the same day the complaint was filed, the district court entered an *ex parte* temporary restraining order ("TRO") against the defendants, freezing defendants' assets, and appointing a temporary Receiver. D.10. After answering the complaint on June 2, 2008 and June 10, 2008, D.28, D.34, the defendants agreed to a stipulated preliminary injunction, continuing the asset freeze, and appointment of a permanent receiver. This stipulated relief was entered by the district court on July 29, 2008. D.74.

On April 15, 2009, defendants moved for summary judgment, D.109, and on

April 17, 2009, the Commission cross-moved for summary judgment. D.110, D.111. On April 5, 2010, the district court issued an amended order granting the Commission's motion for summary judgment and denying defendants' motion for summary judgment. D.155. The court held that defendants had violated Section 5 of the FTC Act and the TSR, and entered a final judgment and order for permanent injunction. The judgment and order included, *inter alia*, a permanent injunction against telemarketing and monetary equitable relief in the amount of $17,300,509. D.156. This appeal followed.[2]

B. Statement of the Facts

1. Background

This case involves an advance fee credit card scam masterminded by

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[2] There have been two collateral tax-related claims made in this proceeding. First, on July 20, 2009, the United States of America intervened to assert cross-claims against the receivership defendants for unpaid employee payroll withholding taxes. D.127. On May 3, 2010, the United States moved to amend the final judgment until resolution of its tax deficiency claims against the receivership defendants' assets. D.158. On May 28, 2010, the United States withdrew this motion, D.164, and on June 7, 2010 moved to voluntarily dismiss its cross-claims without prejudice. D.165. On June 15, 2010, the district court dismissed the United States' cross-claims without prejudice and denied as moot its motion to alter the judgment because the motion had been withdrawn. D.166, D.167. Second, on Feb. 8, 2010, the Receiver filed a third-party complaint against Savas Arvanitakis (alleged to be the former President of American Financial) and the Koalar Trust (alleged to own American Financial) contending that they were liable for certain tax deficiencies on behalf of American Financial. D.146. Neither of the tax-related proceedings is the subject of this appeal.

defendants Buschel, Guarino, and Deering, and the companies they controlled. Telemarketers for the corporate defendants falsely represented to thousands of consumers throughout the United States that, by paying a $200 advance fee, they would receive a general purpose credit card that could be used at retailers anywhere. Instead, the cards that consumers received from defendants were not general purpose credit cards, but could only be used to purchase products from defendants' catalog or website.

Upon discovering the true nature of the card, numerous consumers attempted to obtain refunds from defendants. However, few consumers actually received a refund. Indeed, collection of the advance fees was the true purpose of the scam, as very few consumers ever purchased products from defendants and only a very small amount – less than 3 percent – of defendants' revenue came from product sales. The defendants' scheme was effective, as consumers lost over $17 million due to defendants' misrepresentations.

a. Defendants misrepresented that they would provide consumers a general purpose credit card for $200

From November 2004 until the TRO was entered in May 2008, defendants engaged in the marketing and sale of advance fee credit cards. Defendants solicited consumers through outbound telephone calls and misrepresented that, in

exchange for a fee, consumers would receive a general purpose credit card. *See*, *e.g.*, D.6, Ex.3 ¶¶2-3; D.6, Ex.4 ¶¶2-4; D.6, Ex.5 ¶4; D.6, Ex.7 ¶¶2-3; D.6, Ex.8 ¶6; D.6, Ex.9 ¶2; D.6, Ex.10 ¶2; D.6, Ex.12 ¶2; D.6, Ex.13 ¶4; D.6, Ex.15 ¶¶5-6; D.6, Ex.16 ¶3; D.6, Ex.17 ¶¶2-3; D.6, Ex.18 ¶2; D.6, Ex.19 ¶¶5-6; D.6, Ex.20 ¶¶2-3; D.6, Ex.21 ¶2; D.6, Ex.22 ¶2; D.6, Ex.23 ¶¶ 2,6; D.6, Ex.24 ¶4; D.6, Ex.25 ¶5; D.6, Ex.1, at 55-404; D.110-6 at 9 [#1]; D.110-7 at 9 [#1]; D.110-8 at 9 [#1].

First through Capital Financial, later through American Financial, and finally through USA Financial, defendants deceived thousands of unwitting consumers to pay over $17 million. D.110-9 at 22-23, 34-39; 44-45; D.110-10 at 11 [#5]; D.110-6 at 9 [#2, 3]; D.110-7 at 9 [#2, 3]; D.110-8 at 9 [#2, 3]. By November 2006, defendants knew that the Better Business Bureau ("BBB") had received nearly 500 complaints from consumers, who almost uniformly complained about defendants' business practices and stated they thought they were paying the advance fee to receive a major credit card and not a catalog card.[3] Nonetheless, American Financial continued its deceptive practices until at least late 2007. D.58 at 22. Defendants Guarino and Deering then continued the same

[3] As of May 2, 2008 (just prior to issuance of the TRO in this case), consumers had lodged 766 complaints with the West Florida BBB against American Financial and 52 complaints against USA Financial. D.6, Ex.2 ¶¶13-14, pp. 6-29. The BBB gave both companies an unsatisfactory rating. *Id*. ¶16.

deceptive scheme by establishing USA Financial in August 2006. They victimized consumers unabated until enjoined by the district court's TRO in May 2008. *See, e.g.*, D.6, Ex.20 ¶¶2-7.

Many consumers complained that defendants' telemarketers expressly promised consumers that consumers would receive a general purpose credit card that consumers could use anywhere, and that the card defendants offered had characteristics of a general purpose card, such as an annual interest rate, a $2,000 credit limit, and cash-advance capabilities. *See, e.g.*, D.6, Ex.8 ¶5; D.6, Ex.9 ¶2; D.6, Ex.12 ¶2; D.6, Ex.15 ¶6; D.6, Ex.16 ¶3; D.6, Ex.17 ¶2; D.6, Ex.20 ¶3; D.6, Ex.21 ¶2; D.6, Ex.26 ¶2; D.6, Ex.27 ¶¶3, 6; D.112-5; D.112-6; D.112-7; D.112-8; D.112-9; D.112-10; D.112-11; D.112-12.

Indeed, defendants' preprinted telemarketing scripts used by their telemarketers confirmed that the offered cards had the characteristics of a general purpose credit card, and failed to correct the implication that the card could be used generally at any retailer. For example, American Financial's scripts stated (after emphasizing that defendants' offer was to help the consumer "rebuild your credit or just establish credit") that:

** "American Financial will give you a $2000 credit limit for purchases, and cash advances up to $1000 after making just one on time payment.

Your interest rate will be fixed at 8.9%."

** the consumer would receive ". . . an unsecured revolving account, which is the highest form of credit you can receive, with a $2,000 credit limit and an 8.9% fixed interest rate."

** "Your initial credit limit will be $2000 with 35% down on all purchases. After your first on-time payment, you may be eligible for up to a thousand dollars in cash advances . . ."; and

** that various fees could be imposed, such as for late payments, bounced checks, and going over the credit limit.

See, e.g., D.6, Ex.1 ¶¶6-7, pp. 34, 35, 37, 40. Substantially the same pitch was made by USA Financial's telemarketers. *See* D.58-1 at 3, 5.

When consumers asked "what kind of card" defendants were offering, defendants' telemarketers, using a prepared script, responded that "It's an unsecured card to help you rebuild your credit . . . . " D.6, Ex.1, at 36; *see also* D.58-1 at 4. Defendants' telemarketers enhanced the impression created by the scripts. *See, e.g.*, D.6, Ex.8 ¶5; D.6, Ex.9 ¶2; D.6, Ex.12 ¶2; D.6, Ex.15 ¶6; D.6, Ex.16 ¶3; D.6, Ex.17 ¶2; D.6, Ex.20 ¶3; D.6, Ex.21 ¶2; D.6, Ex.26 ¶2; D.6, Ex.27 ¶¶3, 6.[4] For example, in one recorded telephone sales conversation, defendants' telemarketer told the consumer that the card was not limited to being used for

[4] Indeed, the Court-appointed Receiver noted that defendants' telemarketers often amended the scripts with handwritten changes with management's knowledge. D.58 at 11.

defendants' catalog, that she was "not restricted with this account," that the card provides cash advance capabilities, that it can be used if the consumer "need[ed] cash in emergencies or want to make a purchase somewhere else," that it allows the consumer to "rebuild and establish credit," and that it has a fixed 8.9% interest rate. D.6, Ex.1 at 6, 43-54.

These and other statements made by defendants' telemarketers led consumers to believe that, in exchange for the $200 advance fee, they would receive a general purpose credit card. While defendants' script also noted that they were offering something called a "merchant finance account," they provided no explanation of what this term meant, or how consumers were supposed to use the account, prior to consummating the sale and debiting $200 from consumers' bank accounts. D.58 at 11-12, 16; D.58-1 at 3,5; D.112-2 ¶¶6-7, D.112-3, D.112-4. Indeed, consumers reported that nothing in the sales pitch caused them to doubt the initial impression created by defendants: for $200, they were offering consumers a general purpose credit card that could be used anywhere. *See, e.g.*, D.6, Ex.4 ¶11; D.6, Ex.25 ¶5; D.6, Ex.27 ¶10; D.112-5; D.112-6; D.112-7; D.112-8; D.112-9; D.112-10; D.112-11; D.112-12.

Soon after making their initial sales pitch, defendants' telemarketers obtained consumers' bank account information (ostensibly because they were "not

going to use a credit report to issue the card"). D.58-1 at 3. Shortly after the sales call concluded, defendants debited consumers' bank accounts, typically in the amount of $200. *See, e.g.*, D.6, Ex. 3 ¶4; D.6, Ex.9 ¶5; D.6, Ex.12 ¶¶5-6; D.6, Ex. 18 ¶3; D.6, Ex.20 ¶4; D.6, Ex.24 ¶5; D.58 at 11-12.

b. Consumers actually received a catalog card or nothing at all

Despite the claims made by defendants' telemarketers, many consumers whose accounts were debited $200 received nothing from defendants. *See, e.g.*, D.6, Ex.9 ¶7; D.6, Ex.10 ¶5; D.6, Ex.11 ¶¶4, 7; D.6, Ex.21 ¶5; D.112-8, pp. 291, 292, 293, 294, 295, 298; D.112-11, p. 19. Those who did receive something received, instead of a general-use credit card, merely a thin plastic card imprinted with the words "USA Platinum Merchandise Card," "American Financial Card," or "Capital Financial Card." *See, e.g.*, D.6, Ex.3 ¶6; D.6, Ex.5 ¶8; D.6, Ex.8 ¶12; D.6, Ex.14 ¶4; D.6, Ex.15 ¶8; D.6, Ex.16 ¶8; D.6, Ex.18 ¶4; D.6, Ex.20 ¶5. Consumers soon discovered that defendants card was nothing more than a catalog card that could only be used to purchase a limited selection of "significantly overpriced" items from defendants' catalogs or online websites, www.americanfinancialcard.net and www.myusafinancialcard.com. *See, e.g.*, D.6, Ex.3 ¶¶5-7; D.6, Ex.4 ¶20; D.6, Ex.5 ¶¶6-7,12; D.6, Ex.6 ¶¶9-11, D.6, Ex.7 ¶¶3-4, 8; D.6, Ex.15 ¶¶ 7-11, 15; D.6, Ex.16 ¶¶5, 8-12; D.6, Ex.18 ¶¶3-4, 8; D.6, Ex.20

¶¶4-6, 10; Ex.19 ¶13 & at 10-390; D.6, Ex.20 ¶¶5,10; D.58 at 17.

Defendants also sent consumers four $50 "vouchers," which defendants claimed could be applied to future purchases. *See, e.g.,* D.6, Ex.3 ¶6; D.6, Ex.4 ¶¶13, 17; D.6, Ex.5 ¶8; D.6 Ex.8 ¶12; D.6, Ex.13 ¶¶10, 12; D.6, Ex.14 ¶4; D.6, Ex.15 ¶8; D.6, Ex.16 ¶9; D.6, Ex.17 ¶13; D.6, Ex.20 ¶5.

Not until after consumers received the packet of materials from defendants (and paid them $200) did most consumers understand that their $200 payment was non-refundable and would be applied to the cost of their purchases limited to defendants' catalog or online website. Consumers stated that they would not have paid the $200 if they knew they were purchasing a catalog card rather than a general purpose credit card. *See, e.g.*, D.6, Ex. 3 ¶¶ 5-7; D.6, Ex.4 ¶¶ 2,4, 9, 20; D.6, Ex.5 ¶¶4-8,12; D.6, Ex.6 ¶¶9-11; D.6, Ex.7 ¶¶3-4, 8; D.6, Ex.8 ¶¶9-14; D.6, Ex.11 ¶¶ 6, 13-14; D.6, Ex.13 ¶¶ 6, 12-13; D.6, Ex.14 ¶¶ 4-5; D.6, Ex.15 ¶¶ 7-11; D.6, Ex.16 ¶¶5, 12; D.6, Ex. 17 ¶¶4, 10,14; D.6, Ex.18 ¶¶ 3-4,8; D.6, Ex.20 ¶¶ 4-6, 10; D.6, Ex.21 ¶¶3-7; D.6, Ex.24 ¶¶ 5-6; D.6, Ex.26 ¶¶ 5,7; D.6, Ex.27 ¶¶7-12. Further, consumers could not even take advantage of this $200 credit until after they paid a cash down payment of 35% of the price of any merchandise they purchased. *See, e.g.*, D.6, Ex.15 ¶¶8-14.

This information was not provided to consumers before they provided their

bank account information to defendants' telemarketers.[5] As the Court-appointed Receiver concluded after reviewing defendants' scripts and recorded conversations, "[c]onspicuously absent from . . . any portion of the call [with defendants' telemarketers], is an explanation that the consumer would be required to purchase merchandise from a limited supply and a limited number of merchants in order to utilize the account," and that "[t]he complete terms and conditions of the account" were not disclosed during the call. D.58 at 14; *see also* D.58-1 at 3, 5 (USA Financial script). He also concluded, after reviewing thousands of complaints against the defendants, that the "common theme" of the complaints was that consumers thought they were purchasing a general purpose credit card that could be used anywhere and instead was limited to a discrete list of overpriced items in defendants' catalogs or online store. D.112-2 ¶¶3-4; *see also* D.112-5; D.112-6; D.112-7; D.112-8; D.112-9; D.112-10; D.112-11; D.112-12. While consumers could close their account with defendants, they would still lose their $200 payment. *See, e.g.*, D.6 Ex.1 at 34, 37.

Many consumers attempted to cancel their order and seek refunds once they

[5] Indeed, defendant USA Financial's rebuttal script reminded its telemarketers (at the top of the page and in over-sized letters): "**Do not give out information about the card until you have verified their banking information!!!**" D.58-1 at 4.

reviewed the packet of materials sent by defendants and discovered that they had not received what they thought they ordered. *See, e.g.*, D.6, Ex.3 ¶¶7-8; D.6, Ex.24 ¶¶6-8. The Receiver concluded that defendants disclosed their no-refund policy (if at all) only after they debited the $200 from consumers' accounts, and that customers who then attempted to obtain a refund from defendants were met with "significant resistance." D.58 at 17-18. Many consumers had difficulty contacting defendants to cancel and were frustrated because they were often unable to find a contact number. Other consumers who were able to contact defendants found their refund requests summarily denied or were told they were not entitled to a refund. For many consumers, the process of seeking refunds stretched on for months, often with no satisfactory resolution. *See, e.g.*, D.6, Ex.4 ¶¶17, 19; D.6, Ex.18 ¶¶5-6; D.6, Ex.24 ¶¶8-9. The only consumers who were able to obtain refunds were those who sought the assistance of a government agency or the BBB. *See, e.g.*, D.6, Ex.3 ¶¶11-12; D.6, Ex.15 ¶¶15-16; D.6, Ex.22 ¶¶4-5; D.6, Ex.23 ¶¶12-13; D.6, Ex.25 ¶¶16-17; D.6, Ex.27 ¶¶12-25; D.58 at 18.[6] Defendant USA Financial often required consumers, as a condition of receiving a refund, to sign a

[6] Indeed, defendants sometimes misrepresented to the BBB that they had refunded consumers' money when, in fact, they had not. *See, e.g.*, D.6, Ex.12 ¶15; D.6, Ex.17 ¶¶8-9.

document stating that the consumer had misunderstood the terms of the offer and that the consumer agreed to withdraw his or her BBB complaint. *See, e.g.*, D.6, Ex. 21 ¶6; D.6, Ex.23 ¶6. All told, defendants scheme caused consumers to lose $17,300,509.[7]

c. The role of the individual defendants in the scheme

The record clearly shows that all three individual defendants established, managed, controlled, and directly participated in, the acts and practices of the corporate defendants as reflected in various corporate and bank records. John F. Buschel, Jr. was variously listed as the President, Vice President, and general manager of American Financial as reflected in bank and corporate documents. D.6, Ex.1 ¶15 & at 421-33; D.28 ¶9; D.34 ¶9. The Court-appointed Receiver, after reviewing corporate records, concluded that Buschel was "the person in charge of [American Financial]." D.58 at 22. Richard R. Guarino was listed as the Vice

[7] Peter Makris, the corporate defendants' accountant, provided undisputed testimony, based upon the corporate defendants' bank statements and tax records, that American Financial's net sales (gross sales minus refunds) were $3,542,849 in 2005; $8,417,281.08 in 2006; and $4,266,663.86 for approximately nine months in 2007. Thus, in total, American Financial's net sales during this period were at least $16,226,793. D.110-9 at 22, 33-40; *see also* D.110-10 at 11 [#5]. Makris also testified that, based upon its bank records, USA Financial's net sales for 2007 were $1,073,716. D.110-9 at 44-45. Collectively, total consumer loss at the hands of defendants was at least $17,300,509.

President, secretary, and sales manager at American Financial as shown in various bank and corporate documents. D.6, Ex.1 ¶¶15-16 & at 424, 428-33, 514-16; D.28 ¶8. Guarino also established USA Financial (along with Deering) as its owner and managing member, and signed bank accounts and state license applications on behalf of USA Financial as the company's President, owner, and manager. D.6, Ex. 1 ¶¶5, 12, 15-16 & at 29-32, 405-12, 435, 518-19; D.28 ¶8.

Jeffrey R. Deering was a manager at American Financial. D.6, Ex.1 ¶¶13, 15, pp. 413-417, 428; D.28 ¶7. Further (along with Guarino) Deering incorporated USA Financial, signed bank accounts as a managing member, signed checks for the company, and arranged for postal and UPS mailbox services. D.6, Ex.1 ¶¶5, 14-15, pp. 29-32, 419, 436-42, 444; D.28 ¶7; D.110-5 ¶3(k); D.110-15.

2. <u>Proceedings below</u>

The Commission's complaint, which was filed in May 2008, had three counts. D.1. Count 1 alleged that defendants' representation that consumers would receive a general purpose credit card constituted a deceptive act or practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a), because consumers did not receive such a card. Count 2 alleged that defendants' statement that their card was a general purpose card and not one that was limited to purchases from the defendants' catalogs misrepresented a material aspect of the performance, efficacy,

nature, or central characteristics of the card in violation of Section 310.3(a)(2)(iii) of the TSR, 16 C.F.R. § 310.3(a)(2)(iii). Count 3 alleged that defendants received payment of a fee in advance of consumers obtaining a credit card when defendants represented a high likelihood of success in obtaining the card for the consumers in violation of Section 310.4(a)(4) of the TSR, 16 C.F.R. § 310.4(a)(4).

On April 5, 2010, the district court issued an amended order[8] and final judgment and order for permanent injunction in favor of the FTC. D.155, 156. The court recognized that "[d]efendants assert that many material facts are disputed." D.155 at 9. However, it granted the FTC's motion for summary judgment and denied defendants' motion, noting the FTC's evidence was "voluminous and uncontroverted," and that "[a]fter consideration of the supporting documents, the Court finds that a reasonable fact finder could reach only one conclusion as to the presence of material misrepresentations which were likely to mislead consumers acting reasonably under the circumstances." *Id.* at 2, 9.

The court held that defendants violated FTC Act § 5 by misrepresenting to consumers that, for a $200 advance fee, defendants would send them a general purpose credit card, because, in fact, consumers received only a catalog card. *Id.* at

[8] The amended order corrected certain typographical errors made in the court's original March 31, 2010 order. D.152.

10. The court concluded that defendants violated Section 310.3(a)(2)(iii) of the TSR "[b]y misrepresenting to thousands of consumers as part of Defendants' sales offer that, after paying Defendants a fee, consumers would receive an unsecured general purpose credit card consumers could use to purchase items anywhere," but instead sent a card "that could only be used to purchase [from] a limited selection of items in Defendants' catalogs." *Id*. at 11-12. The court also held that defendants violated Section 310.4(a)(4) of the TSR by "represent[ing] to thousands of consumers that they were approved for a general purpose credit card and then requested payment of $200 before sending the card." *Id*. at 12.

The court next held that the individual defendants were liable for the acts of the corporate defendants. First, it ruled that, "[a]s owners, officers, or managers of American Financial, Buschel, Deering and Guarino had the authority to control the acts and practices of American Financial." The court reached this conclusion based, in part, on the adverse inferences drawn against them from the individual defendants asserting their Fifth Amendment right against self-incrimination. *Id*. at 13-15. For similar reasons, it held that defendants Deering and Guarino were individually liable for the wrongful conduct of USA Financial. *Id.* at 15-17. The court noted that "USA Financial's scheme is virtually identical to that of its predecessor, making the operations of American Financial and USA Financial a

seamless progression which victimized consumers in the same way." *Id*. at 15.

Finally, the court concluded that all the defendants were jointly and severally liable for restitution to consumers equal to their total loss (gross sales minus refunds) of $17,300,509. *Id.* at 18. The court also held that the individual defendants be permanently enjoined from telemarketing to prevent future violations given the ease with which they created new corporate entities to further their scheme. *Id.* at 18-19. The court imposed the permanent ban and equitable monetary relief (along with other injunctive and scofflaw provisions) in its final judgment entered on April 5, 2010. D.156.

C. Standard of Review

Review of a district court's grant of summary judgment on issues of liability is *de novo*. *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005); *Adkins v. Cagel Foods JV, LLC*, 411 F.3d 1320, 1323 (11th Cir. 2005). In doing so, the appellate court applies the same standard as did the district court, and should affirm an award of summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, "shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court is to review the district court's order granting equitable monetary and injunctive relief for an abuse

of discretion, underlying questions of law *de novo*, and supporting factual findings under the clearly erroneous standard. *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1221 (11th Cir. 2002).

SUMMARY OF ARGUMENT

Defendants violated Section 5 of the FTC Act by misrepresenting to consumers that, for an advance payment of $200, they would receive an unsecured general purpose credit card that could be used at retailers anywhere. Instead, consumers only received a card for which they could purchase a limited selection of items from defendants' catalog or online store. Defendants' telemarketing scripts confirm that they were offering a product with the characteristics of a general purpose credit card, such as an annual interest rate, a credit limit, and cash-advance capabilities. That consumers never intended to purchase a catalog card is shown by the minuscule percentage of defendants' revenue derived from sales from their catalog or online store. Further, thousands of consumers complained that they were duped into purchasing the catalog card after being promised a general purpose credit card. None of defendants' supporting materials creates a genuine dispute of material fact to defeat summary judgment. (Part I.A., *infra*)

Defendants also violated the Telemarketing Sales Rule based on their deceptive scheme. In particular, defendants violated Section 310.3(a)(2)(iii) of the

TSR by misrepresenting a material aspect of the nature or central characteristics of their sales offer by falsely promising that they were offering a general purpose credit card when they were only offering a catalog card. Defendants also violated Section 310.4(a)(4) of the TSR by misrepresenting to consumers that, if they paid $200 in advance, they were approved for a general purpose credit card that had a $2000 credit limit and cash advance capabilities. (Part I.B., *infra*.)

The individual defendants are each individually liable for the corporate violations of the FTC Act and the TSR. More specifically, undisputed evidence shows that defendants Buschel, Deering and Guarino were owners, officers or managers of American Financial. Moreover, evidence of their participation and knowledge is buttressed by adverse inferences from their assertion of their Fifth Amendment right against self-incrimination. Likewise, the incontrovertible evidence together with the adverse inferences shows that defendants Deering and Guarino were in control of, or directly participated in, and had knowledge of, the acts or practices of USA Financial, and are therefore liable for that company's unlawful conduct. (Part II., *infra*.)

This Court should affirm the judgment of the district court imposing monetary equitable relief in the form of restitution consisting of $17,300,509 in net sales (gross sales minus refunds) at both corporate defendants against defendants

Deering and Guarino. The Court should remand to the district court for the limited purpose of amending its award of monetary equitable relief to set the award as to defendant Buschel in the amount of $16,226,793 based on the wrongful activities at American Financial. Further, to prevent future violations, the district court properly imposed a permanent ban on defendants from telemarketing, given the ease with which the individual defendants could resume their deceptive scheme. Similarly, injunctive relief was properly imposed on American Financial even if it had ceased operations prior to issuance of the court's order given the ease with which its operations could resume. Finally, the district court's continuation of the asset freeze in the final judgment was proper and necessary in order to ensure effective final relief. (Part III, *infra*.)

ARGUMENT

I. DEFENDANTS VIOLATED SECTION 5 OF THE FTC ACT AND THE TELEMARKETING SALES RULE

A. The Corporate Defendants Violated Section 5 of the FTC Act

The district court correctly held that the defendants violated the FTC Act by misrepresenting that, for a $200 fee, they would provide consumers with a general purpose credit card. Section 5 of the FTC Act prohibits "deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). To establish a violation of FTC Act

§ 5, the FTC must demonstrate that a defendant made material misrepresentations or omissions that were likely to mislead consumers acting reasonably under the circumstances. *See FTC v. Peoples Credit First*, 244 Fed. Appx. 942, 2007 WL 2071712 (11th Cir. 2007); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006); *FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Commc'ns Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005).

To determine whether particular statements or omissions are deceptive, a court must look beyond the literal words and assess the overall, common-sense, net impression of a defendant's claims. *See, e.g.*, *Cyberspace.com*, 453 F.3d at 1199-1200; *Tashman*, 318 F.3d at 1283 (dissenting opinion); *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *see also Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496-97 (1st Cir. 1989) (courts can determine if deception arises by implication or innuendo, not just by express misrepresentation). Further, defendants violate the FTC Act if they omit a material fact, even if there are no affirmative misrepresentations. *Bay Area Bus. Council*, 423 F.3d at 635. Thus, the fact that the words in the solicitation are literally or technically true is not dispositive; a defendant may be liable if the "material implication in the entirety" of the solicitation is misleading. *Peoples*

Credit First, 244 Fed Appx. at 944, 2007 WL 2071712, at *2; *accord Removatron*, 884 F.2d at 1497. Because the primary purpose of § 5 is to protect consumers rather than to punish the wrongdoer, neither intent to deceive nor reliance by a consumer on a representation is an element of a § 5 violation. *See, e.g.*, *Freecom Commc'ns Inc.*, 401 F.3d at 1202-03; *Bay Area Bus. Council*, 423 F.3d at 635; *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

Applying these standards, it is clear that defendants misrepresented, expressly or by implication, that after paying an advance fee, consumers would receive a general purpose credit card that could be used at any retail location. According to the scripts used by defendants' telemarketers, the cards they were offering had the characteristics of a general purpose credit card, such as an annual interest rate, a $2,000 credit limit, and cash-advance capabilities. Moreover, on many occasions, defendants' telemarketers specifically told consumers that the cards were widely accepted. Consumers who expected to receive a general purpose credit card, and paid the $200 to defendants, realized that they had been duped only after receiving (if they received anything at all) a package of materials from defendants that included a card that could only purchase items from defendants' catalog or online store. *See supra* at 5-13.

Defendants' misrepresentations, described above, were material to

consumers. That is, consumers would not have paid $200 for defendants' card if they were aware that the card could only be used to make purchases from defendants' catalog or online site. Consumers repeatedly stated that, if they had known they were purchasing a catalog card rather than a general purpose credit card, they would not have paid their money to defendants. *See*, *e.g.*, D.6, Ex.3 ¶7; D.6, Ex.4 ¶20; D.6, Ex.5 ¶¶4, 7-8,12; D.6, Ex.7 ¶8; D.6, Ex.8 ¶14; D.6, Ex.13 ¶¶12-13; D.6, Ex.14 ¶5; D.6, Ex.15 ¶¶10-11; D.6, Ex.18 ¶8; D.6, Ex.20 ¶10; D.6, Ex.21 ¶7; D.6, Ex.22 ¶7; D.6, Ex.27 ¶12.

After surveying defendants' business operations, the Court-appointed Receiver concluded that consumers did not understand what they were purchasing:

> In other words, less than 3 percent of [USA Financial's] 2007 revenues were derived from merchandise sales; the rest derived from the $200 initial membership fees. This suggests that ***customers had little interest in utilizing their membership*** after they discovered precisely what it entailed, and that ***customers likely would not have purchased the membership had they understood precisely what it entailed.***

D.58 at 18 (emphasis added); *see also* D.112-2 at 3.

The Receiver similarly concluded that American Financial "engaged in virtually the identical business in which USA Financial business engaged prior to May 13, 2008," and that only 2.2% of its gross revenues in 2005 was derived from merchandise sales, the rest being derived from the initial $200 membership fee.

D.58 at 22-23; D.112-2 at 3. Clearly, the fact that so few sales were made through the defendants' catalog or online store is strong evidence that consumers did not pay for what they thought they were getting. Similarly, it conclusively refutes defendants' argument, App. Br. 27, that consumers understood their $200 advance fee was for a "membership" in a form of buyer's club, as opposed to a way to obtain a general purpose card. A court can infer that consumers did not understand what they were purchasing when, after paying for the service, only a minuscule number of consumers availed themselves of that service. *Cyberspace.com*, 453 F.3d at 1201 (inferring that consumers did not want the internet services that defendants sold when, after paying for the service, fewer than 1% of the purchasers ever used defendants' service).

Any doubt that consumers were misled is further dispelled by the huge number of consumer complaints sent to the defendants directly, to the BBB, and to state and county law enforcement and consumer affairs agencies. *See, e.g.*, D.6, Ex. 1 ¶¶9-11, pp. 55-404; D.112-2 ¶ 4; D.112-5, D.112-6, D.112-7, D.112-8, D.112-9, D.112-10, D.112-11, D.112-12. The Court-appointed Receiver for the corporate defendants, for example, found thousands of complaints against both corporate defendants at the companies' business premises. D.112-2 at 4. After reviewing many of these complaints, the Receiver noted that:

> The recurring theme for the consumer complaints is that at the time consumers paid money to corporate Defendants, the consumers thought they were paying money in exchange for a credit card they could use to buy things they wanted and needed at retail stores anywhere. The complaints also repeatedly indicate that corporate Defendants only informed the consumers that they were actually purchasing something other than a credit card after consumers paid money to corporate Defendants.
>
> *Id.*

This evidence shows that defendants are simply wrong when they argue that the "net impression" of their conduct is a question of fact that precludes the entry of summary judgment. App. Br. 16-17. The undisputed evidence shows that the overall "net impression" of the defendants' solicitations is that they deceived consumers acting reasonably under the circumstances into believing that, after paying the $200 advance fee, they would receive a general purpose credit card that they could use to purchase items anywhere, and that had a credit limit, fixed interest rate and cash-advance capabilities. Instead, consumers received something else: a card and vouchers limited to purchases from defendants' catalog or on-line store.

Defendants have created no genuine issue for trial disputing that the net impression of their solicitations deceived consumers. Courts (including this one) have concluded that summary judgment is appropriate where defendants have failed to dispute the Commission's evidence that the net impression of their solicitations

constituted deception under Section 5 of the FTC Act. *See, e.g.*, *FTC v. Direct Marketing Concepts*, 624 F.3d 1, 22-23 (1st Cir. 2010) (no genuine issue of material fact that defendants failed to substantiate health claims and engaged in deceptive advertising); *Peoples Credit First*, 244 Fed. App. at 944, 2007 WL 2071712, at *2 (no genuine issue of material fact that defendants deceived consumers in promoting advance fee credit card scheme).

Defendants counter, however, that certain materials attached to their motion for summary judgment show that they only offered consumers a "merchant finance card" and never misrepresented that consumers would receive a general purpose unsecured credit card. At the very least, they contend that such materials create a genuine issue of material fact so as to defeat summary judgment. App. Br. 21-27.

For example, defendants claim that they engaged in "comprehensive efforts" to ensure that consumers understood the true nature of their offer, relying on affidavits from company employees and "examinations" purportedly given to their telemarketers to test their knowledge of the program. App. Br. 22-23 (citing D.109-2, Ex.1-7). This material, however, does not create a genuine issue of material fact to defeat summary judgment.

Defendants' cursory affidavits (each barely more than one page in length) from seven of their employees are nearly identical, are largely devoid of any

reference to the record, and amount to no more than unsupported and conclusory denials or assertions of ultimate facts.[9] As such, these affidavits do not create a disputable issue for trial. *See, e.g.*, *FTC v. MacGregor*, 360 Fed. Appx. 891, 893, 2009 WL 5184070, at *1 (9th Cir. 2009) (unsubstantiated and conclusory affidavits failed to rebut evidence of direct participation by individual defendant); *FTC v. Publ'g Clearing House, Inc*., 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."); *Bald Mountain Park, Ltd., v. Oliver*, 863 F.2d 1560, 1563 (11th Cir. 1989) ("[m]ere conclusions and unsupported factual allegations are legally insufficient to create a dispute to defeat summary judgment")*; United States v. W.H. Hodges & Co.*, 533 F.2d 276, 278 (5th Cir. 1976) (proffered affidavits that were "merely conclusory in nature" cannot defeat summary judgment).

[9] For example, six of the affidavits state identically that "[a]t no point in time was there ever any policy used by American to sell or solicit any "general purpose" credit card, or any kind of credit card." *See* Docs. 109-3, 109-4, 109-5, 109-6, 109-7, 109-8. The affidavits do not refute the fact that defendants' preprinted telemarketing scripts were used or the net impression of those scripts (sometimes enhanced by the telemarketer himself) that defendants were offering such a general purpose card. Nor do the affidavits refute that the telemarketers failed to mention the critical fact that the cards could only be used to make purchases from defendants' catalog or online store. *See, e.g.*, D.58-1 at 3, 5, D.6, Ex.1 at 34.

Further, even assuming that the companies had some de facto policy or engaged in some efforts to clarify the nature of their product, the overwhelming and undisputed evidence adduced by the FTC shows that such efforts were neither comprehensive nor effective. Indeed, the record shows that consumers consistently understood that defendants were offering a general purpose credit card that could be used anywhere, as very few consumers actually purchased anything from defendants' catalog or online store. Indeed, defendants failed to submit a declaration from even one satisfied customer.

Defendants also assert that their telemarketing scripts clarified the true nature of their scheme, citing two unauthenticated documents that supposedly were "verification scripts" for each of the corporate defendants. The scripts purport to offer a "new American [or USA] financial merchant catalog finance account with cash advance capability which is not affiliated with visa or mastercard." App. Br. 22-25 (citing D.109-8, 109-9). Defendants offer no evidence, however, that shows the extent to which these scripts were actually used by their telemarketers, were representative of other American Financial or USA Financial telemarketing scripts, or when they were used. To the contrary, there is direct evidence that defendants' telemarketers used scripts that contained no such disclaimer of affiliation with Visa or Mastercard. *See, e g.*, D.6, Ex.1 at 34; D.58 at 3.

Further, even if defendants did, in some instances, disclaim affiliation with Visa or Mastercard, this does not negate the overall "net impression" that they were offering such a general purpose credit card. Consumers are well aware that there are other types of general purpose credit cards (*e.g.*, Discovery Card, American Express, etc.). What counts is that defendants' scripts fail to notify consumers that the cards cannot be used at any retail location or that they can only be used to make purchases from defendants' catalogs or on-line store – critical facts that any reasonable consumer would need to know when deciding whether to purchase the product. It is undisputed that defendants did not disclose the true character of their card – limited to purchasing a restricted list of items from their catalog and online store – (if at all) until *after* consumers paid them $200. *See supra* at 10-13.

Thousands of consumers complained that they believed "that [defendants'] credit card could be used in any major department store," that it was a "complete surprise" that they could only purchase items from "an online store," and were never told that the card was limited to a "merchant account." *See, e.g.*, D.112-2 ¶¶ 6, 7, D.112-3, D.112-4. Hundreds of consumers reported similar stories of how they were duped by defendants or filed complaints with the defendants but were ignored. This undisputed evidence shows defendants engaged in widespread material misrepresentations and other abusive conduct, and that defendants made no

effort to change their procedures or operations even after they received numerous consumer complaints that their solicitations were deceptive. Simply put, defendants' "evidence" does not create a genuine issue of fact with respect to violations of the FTC Act and the TSR found by the district court.

Defendants also contend that they are insulated from liability under FTC Act and the TSR because American Financial and USA Financial held special business licenses to telemarket issued by the State of Florida. App. Br. 23, 27. A clearly fraudulent business, however, is not rendered legal by virtue of the telemarketer having obtained licenses to do business in Florida. State licensure may be a prerequisite to operating a business in Florida, but possessing one does not insulate a telemarketer from liability under federal law if that telemarketer chooses to market fraudulently or to sell an illegal product. State licensure is simply irrelevant and provides no defense to the determination of whether the defendants committed the deceptive acts and practices challenged by the FTC.[10]

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[10] Defendants' argument that summary judgment was improper because the district court failed to strike their affirmative defense of good faith, App. Br. 28, is inapposite, because defendants' good faith is irrelevant as to whether they violated the FTC Act or the TSR. This affirmative defense, like their state-license defense, can be rejected as a matter of law, which is wholly appropriate on summary judgment. In any event, defendants never argued below that the mere existence of an affirmative defense somehow precluded entry of summary judgment. Thus, they are barred from raising this argument on appeal. *See Eagle Hosp. Physicians, LLC v. SRG Consulting,*

Defendants' further contention that an investigation conducted by the State of Florida's Attorney General's Office defeats summary judgment, App. Br. 25-26 (citing D.109-10, D.109-11) is likewise unavailing. The state investigation constituted merely a "preliminary inquiry" of defendants' operations based on limited evidence. More importantly, even assuming *arguendo* that the Florida authorities found no violations of Florida law, that conclusion is not a defense to whether they violated the FTC Act or the TSR, and cannot create a genuine issue of material fact to preclude summary judgment in this action. *See, e.g., Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1144 (9th Cir. 1978) ("[w]hether a state official has approved the advertisements or not is irrelevant to the operation of the federal regulatory scheme set forth in the FTCA."). Indeed, rather than consider the Florida investigation a warning signal that their program might be a problem, defendants continued and even expanded their program of misleading consumers through American Financial and then USA Financial until enjoined by the TRO in May 2008.

Defendants also suggest that the small number of complaints compared to the large number of consumers who paid the $200 advance fee shows that most

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Inc., 561 F.3d 1298, 1303-04 (11th Cir. 2009); *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, SA*, 377 F.3d 1164, 1168-69 (11th Cir. 2004).

consumers understood the true nature of their product. App. Br. 27. Defendants do not, however, contest the FTC's evidence that thousands of consumers made similar complaints about defendants' operations. Defendants have also failed to identify even one satisfied customer. In any event, the ratio of complaints to sales is irrelevant to determining the defendants' liability. The defendants' scripts show *on their face* that defendants routinely failed to disclose, prior to receiving payment from consumers, the critical fact that their "merchant finance account" was a catalog card limited to a discrete selection of merchandise, not a general purpose credit card. *See, e.g.*, D.6, Ex.1 at 34; D.58-1 at 3,5; D.109-9, D.109-10. This material omission was confirmed by the Court-appointed Receiver after reviewing corporate records, and by the fact that so few consumers actually purchased anything from defendants' catalogs or online store.[11]

Finally, case law relied upon by defendants is irrelevant and easily

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[11] It is also unnecessary in this law enforcement action to show that any particular consumer actually relied on or was injured by the unlawful conduct. *See McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000); *Freecom Comm.*, 401 F.3d at 1203. A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated and that consumers purchased the defendant's product. *Chierico*, 206 F.3d at 1388; *FTC v. Peoples Credit First*, 2005 U.S. Dist. LEXIS 38545, at *28-29 (M.D. Fla. Dec. 18, 2005), *aff'd*, 244 Fed. Appx. 942 (11th Cir. 2007). The Commission has made these showings in this case.

distinguished. *See* App. Br. 17-19. For example, in *FTC v. Marketing Response Group, Inc*., No. 96-111-CIV-T-17A, 1996 WL 420865 (M.D. Fla. June 24, 1996), the court denied the FTC's request for a preliminary injunction. The court concluded that defendants had ceased certain land sale promotions that were clearly deceptive, and could not conclude that the defendants were making those misrepresentations in their current sales. *Id.* at *2-3. In contrast, here there is no genuine issue that defendants made misrepresentations, that such misrepresentations were ongoing until the TRO was issued in May 2008, and that the misrepresentations – going to the central characteristics of the card product they were selling – were material. Consumer after consumer complained that he would not have purchased defendants' product if he knew it could only be used to purchase items from defendants' catalog or online store. *See also FTC v. Gibson Products of San Antonio, Inc*., 569 F.2d 900, 908 (5th Cir. 1978) (order may still be appropriate even when the practice has been abandoned).

Defendants also rely on *Millennium Commc'ns & Fulfillment, Inc. v. Office of the AG, Dep't of Legal Affairs,* 761 So. 2d 1256 (Fla. Dist. Ct. App. 3d Dist. 2000), in which a Florida court held that a postcard promoting a credit card program did not violate state law since a reasonable consumer would not conclude that he or she was purchasing a Visa or Mastercard. *Id.* at 1263-64. *Millennium* is not

controlling as it involved different solicitation materials and was based on state law – not the FTC Act. Further, that court noted that consumers who called the telemarketer after receiving the solicitation were "specifically told," before they made any payment, "that the credit to which the advertisement referred was an Advantage credit card to purchase items out of the Advantage catalog." *Id.* at 1264. In contrast, here, consumers consistently complained that defendants' telemarketers stated in their initial sales pitch that they were offering a general purpose credit card and that defendants debited $200 from the consumers' bank accounts without correcting the misrepresentations they made.

In sum, the undisputed facts show that defendants violated Section 5 of the FTC Act based on widespread misrepresentations that they were offering a general purpose credit card. Defendants never disclosed the true nature of their card before they took consumers' money.

B. Defendants Violated the Telemarketing Sales Rule

Defendants' scheme also violated provisions of the Telemarketing Sales Rule, 16 C.F.R. pt. 310. The TSR implements the Telemarketing and Consumer Fraud and Abuse Prevention Act ("the Telemarketing Act"), 15 U.S.C. § 6101, *et. seq*., which prohibits deceptive and abusive telemarketing acts or practices. Pursuant to § 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), violations of the

TSR constitute unfair or deceptive acts or practices in violation of § 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Defendants were "sellers" or "telemarketers" engaged in "telemarketing," as those terms are defined in the TSR.[12] In connection with telemarketing transactions, defendants offered to provide, or arranged for others to provide, general purpose credit cards to consumers in exchange for advance fees. Defendants both initiated and received telephone calls to and from customers throughout the United States.

Section 310.3(a)(2)(iii) of the TSR prohibits telemarketers and sellers from misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer. As made clear in the discussion above, defendants violated Section 310.3(a)(2)(iii) of the TSR by misrepresenting to thousands of consumers that, after paying an advanced fee, consumers would receive an unsecured general purpose credit card consumers

[12] Under the Rule, a "seller" is defined as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." 16 C.F.R. § 310.2(aa). A "telemarketer" is defined as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer." 16 C.F.R. § 310.2(cc). "Telemarketing" is defined in relevant parts as a plan, program, or campaign "conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(dd).

could use to purchase items anywhere. However, consumers either did not receive anything at all for the $200, or they received instead a plastic card that could only be used to purchase a limited selection of items in defendants' catalogs or online store. *See supra* at 10-12. Such misrepresentations were clearly material as consumers stated that they would not have purchased defendants' product if they knew it was a catalog card. *See supra* at 11-12. The record shows undisputedly and conclusively that defendants violated Section 310.3(a)(2)(iii) because they misrepresented material aspects of the performance and nature of the credit card that they offered for sale.

Defendants also violated § 310.4(a)(4) of the TSR, which prohibits telemarketers and sellers from, *inter alia*, requesting or receiving payment of any fee or consideration in advance of obtaining an extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging an extension of credit. *See* 16 C.F.R. § 310.4(a)(4). Defendants violated this section when they represented in their initial telemarketing call that consumers were approved for a general purpose credit card, and then charged consumers a $200 advance fee for that card.

Defendants violated this provision notwithstanding that they only *claimed* to

provide an extension of credit,[13] but instead sent (if anything at all) only a card that could be used to make purchases from defendants' catalogs or online store. "The prohibition against taking an advance fee applies any time a guarantee or representation of likelihood is made, regardless of whether it is made in conjunction with the sale of some other product that is not a loan or extension of credit." *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050, 2004 WL 5149998, at *38-40 (S.D. Fla. Feb. 20, 2004), *aff'd*,, 157 Fed. Appx. 248, 2005 WL 3303985 (11th Cir. 2005); *see also FTC v. Pacific First Benefit, LLC*, 472 F. Supp. 2d 974, 979-80 (N.D. Ill. 2007) (defendants violated Section 310.4(a)(4) where they offered an unsecured credit card for which consumers paid an advanced fee, but instead sent "essentially worthless 'benefit packages'").

In sum, the undisputed evidence shows that defendants violated Sections 310.3(a)(2)(iii) and 310.4(a)(4) of the TSR.

II. BUSCHEL, DEERING, AND GUARINO ARE INDIVIDUALLY LIABLE FOR VIOLATIONS OF THE FTC ACT AND THE TELEMARKETING SALES RULE

Once the FTC has established corporate liability, which it has demonstrated above, the FTC can prove individual liability for the corporate misconduct by

[13] Indeed, defendants reiterate in their Brief that, as "credit providers," they "were the issuers of the lines of credit." App. Br. 27.

showing that "the individual defendants participated directly in the [unlawful] practices or acts or had authority to control them [and] had some knowledge of the practices." *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (*quoting Amy Travel*, 875 F. 2d at 573); *accord Bay Area Bus. Council*, 423 F.3d at 636; *Cyberspace.com*, 453 F.3d at 1202.[14]

The FTC may establish the knowledge requirement by showing "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Bay Area Bus. Council*, 423 F.3d at 636 (quoting *Amy Travel*, 875 F.2d at 574); *Cyberspace.com*, 453 F.3d at 1202. The FTC need not, however, show subjective intent to defraud. *Bay Area Bus. Council*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573-74. Further, the degree of an individual's participation in business affairs is probative as to knowledge. *Cyberspace.com*, 453 F.3d at 1202; *Publ'g Clearing House*, 104 F.3d at 1170-71; *Amy Travel*, 875 F.2d at 574.

The undisputed facts show that individual defendants Buschel, Deering, and

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[14] If the Commission had been seeking only injunctive relief from the individual defendants, it would not have been necessary for the Commission to establish knowledge. *See Freecom Commc'ns.*, 401 F.3d at 1205; *FTC v. Slimamerica, Inc.*, 77 F. Supp. 2d 1263, 1275-76 (S.D. Fla. 1999).

Guarino directly participated in, and had the ability to control, the acts and practices of American Financial. Beginning in late 2004, the individual defendants began operating their advance fee credit card scheme through a company known as Capital Financial, a Florida corporation. D.28, ¶5; D.34, ¶6; D.6, Ex.1 ¶5, pp. 11-12; D.110-11at 18; D.110-12 at 30-31; D.110-13 at 12-14. In February 2007, they changed the company's name to American Financial Card. D.6, Ex.1 ¶15, pp. 19-23. As American Financial, individual defendants continued to deceptively market an advance fee credit card.

The record clearly shows that, as owners, officers, or managers of American Financial, Buschel, Deering, and Guarino all had authority to control – and directly participated in – the acts and practices of American Financial. The three individual defendants are signatories on corporate bank accounts as "managers." Additionally, Buschel is listed as President and Guarino is listed as Vice President for American Financial in the corporate resolution submitted to its bank, and Guarino signed bank applications as secretary of American Financial and signed bank resolutions as American Financial's sales manager. *See supra* at 14-15. As senior managers at American Financial overseeing the company's telemarketing, financial, and logistical operations, the three individual defendants clearly had the requisite degree of control over American Financial to be held individually liable for the corporate

misconduct.[15]

The undisputed evidence also shows that individual defendants Deering and Guarino directly participated in, or had the authority to control, and had the requisite knowledge of the acts and practices of USA Financial. They incorporated USA Financial on August 22, 2006 as its managing members. Further, Guarino signed agreements on behalf of USA Financial as the company's owner and managing member, as the company's representative to establish phone service, and as President on applications to obtain state licenses. *See supra* at 14-15. Deering signed bank account applications, checks, and postal service applications on behalf of USA Financial. *Id.* at 15. The Receiver concluded, after reviewing the corporate records, that Deering was in charge of day-to-day affairs at USA Financial and that Guarino was in charge of marketing. D.58 at 18-19.

The undisputed evidence thus shows that the individual defendants handled the financial, business and logistical operations for the corporate defendants. There is little doubt that Buschel, Deering, and Guarino were the "masterminds" behind

[15] While Deering asserts that there is insufficient evidence to show he participated in the activities of American Financial, App. Br. 30, the undisputed documentary evidence, *supra* at 15, in conjunction with the adverse inferences permissibly drawn from his assertion of the Fifth Amendment in response to requests for admissions, conclusively show that Deering had the requisite control and participation in the unlawful conduct of American Financial.

the telemarketing scheme at American Financial, and that Guarino and Deering held the same senior management roles at USA Financial. They had the requisite authority to control, given their corporate officer positions, and actively participated in the corporate affairs. *See Bay Area Bus. Council*, 423 F.3d at 637 (assumption of the role of corporate officer demonstrates authority to control corporate conduct); *Pub'g Clearing House*, 104 F.3d at 1170 (same).[16]

Further, in depositions and in their responses to the FTC's written discovery, the individual defendants invoked their Fifth Amendment privilege against self-incrimination and refused to answer or respond to substantive questions posed to them.[17] These questions included representations made by the companies' telemarketers to consumers concerning the nature and characteristics of the offered card product, what consumers actually received, the companies' refund practices, as well as the individual defendants' participation in and control over corporate

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[16] Defendants' assertion that they only admitted in their answers that Buschel and Guarino were managers at American Financial, that Guarino was an owner at USA Financial, and that Deering was a manager at USA Financial, App. Br. 29 (citing D.28, D.34) not only ignores other undisputed evidence showing their extensive control and participation in the companies' affairs, but is in itself a sufficient basis to support a finding of individual liability.

[17] The Fifth Amendment provides in relevant part: "No person . . . shall be compelled in any criminal proceeding to be a witness against himself." Only individuals, not corporations, have Fifth Amendment rights. *Braswell v. United States*, 487 U.S. 99, 102, 108 S.Ct. 2284, 2287, 2290 (1988).

conduct and their knowledge of the companies' violative practices. *See infra* at 45-46. It is well established in this Circuit that, in civil cases where there are no criminal charges pending against a party, a court may draw an adverse inference from an individual party's invocation of his Fifth Amendment right against self-incrimination. *See, e.g., Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S. Ct. 1551, 1558 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'"); *accord Eagle Hosp. Physicians,* 561 F.3d at 1304; *United States v. Two Parcels of Real Prop. Located in Russell County, Alabama*, 92 F.3d 1123, 1129 (11th Cir. 1996); *United States v. Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991). Indeed, as Justice Brandeis long ago stated on behalf of a unanimous Supreme Court: "Silence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54, 44 S.Ct. 54, 56 (1923).

Further, while some cases suggest that adverse inferences may not be used as the *sole* basis to support a judgment against a defendant, a court is permitted to draw such inferences when such responses are considered in conjunction with other supporting evidence. *See, e.g., Baxter*, 425 U.S. at 316-19, 96 S. Ct. at 1557-58

(while Fifth Amendment silence "standing alone" may not be sufficient to establish civil liability, court may make adverse inferences when party refused to testify in civil disciplinary hearing "in the face of evidence that incriminated him"); *accord Eagle Hosp. Physicians,* 561 F.3d at 1304-05.

Defendants summarily contend in their Brief that the court "erred in relying upon adverse inferences from Appellants." App. Br. 19-20.[18] However, the authority relied upon by defendants is irrelevant and easily distinguishable from the instant case where there is substantial independent probative evidence of wrongdoing. Defendants' cite *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967), *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir. 1983); and *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387 (7th Cir. 1995), but none of these cases prohibits drawing adverse inferences in the civil context where such inferences are not the sole basis for judgment. While *Spevack* held that an attorney could not be disbarred solely on the basis that he refused to produce demanded financial records or to testify at a judicial inquiry, the Supreme Court in *Baxter* (decided after *Spevack*) held that drawing an adverse inference from an assertion of the Fifth Amendment in a civil action does not make the exercise of the privilege

[18] In contrast, defendants admitted in the district court that a court "may draw an adverse inference from the defendants' silence." D.115 at 13.

sufficiently "costly" to amount to compulsion when combined with other probative evidence. 425 U.S. at 328-29, 96 S. Ct. at 1563.

Similarly, in *National Acceptance,* the Seventh Circuit held that a defendant's assertion of his Fifth Amendment right in his answer could not *by itself* be treated as an admission and therefore result in an adverse judgment without trial or any evidentiary showing. 705 F.2d at 929-932. The same court also held in *LaSalle Bank Lake View* that, while judgment cannot be based solely on adverse inferences, a court may draw such inferences from invocation of the privilege at the summary judgment stage in conjunction with other evidence. 54 F.3d at 390-94. None of these cases bars the Court from relying on adverse inferences where, as here, there is other substantial evidence of defendants' liability under Section 5 and the TSR.[19]

In this case, in their responses to the FTC's First Set of Requests for Admissions, Buschel, Deering and Guarino were specifically asked to admit that:

> 1. they or other people at their direction, had represented, expressly or by implication that, after paying a fee, a customer would, or

[19] In *In re Caucus Distributors, Inc.*, 83 B.R. 921 (E.D. Va. 1988), a bankruptcy court followed the general rule in holding that judgment is inappropriate "as a result of the invocation [of the Fifth Amendment right] alone." *Id*. at 924-26. To the extent the court suggested that adverse inferences cannot be considered in conjunction with independent supporting evidence in evaluating a party's motion for summary judgment, such a ruling runs counter to *Baxter*, *Eagle Hospital*, *Premises Located at Route 13*, and other governing Supreme Court and Eleventh Circuit precedent.

was highly likely to, receive a general purpose credit card. D.110-6 at 9; D.110-7 at 9; D.110-8 at 9.

2. customers who paid them money did not receive a general purpose credit card. D.110-6 at 9; D.110-7 at 9; D.110-8 at 9.

3. they or others at their direction have misrepresented directly or by implication, material aspects of the performance, efficacy, nature, or central characteristics of the credit cards you or any of the other defendants sold, including that the card was a general purpose credit card rather than a card that could be used to purchase items only from a catalog. D.110-6 at 9-10; D.110-7 at 9; D.110-8 at 9.

4. they or other people at their direction have requested or received payment of a fee or consideration in advance of customers obtaining a credit card when they, or others at their direction, guaranteed or represented a high likelihood of success in obtaining or arranging for the acquisition of a credit card for such customers. D.110-6 at 10; D.110-7 at 9; D.110-8 at 9.

5. they or other people at their direction did not refund money to customers unless they filed complaints against the defendants with the Better Business Bureau or a government entity. D.110-6 at 10; D.110-7 at 9; D.110-8 at 9; and

6. they directly participated in, had authority to control, and had knowledge of the violative acts and practices. D.110-6 at 10-13; D.110-7 at 9; D.110-8 at 9.

The individual defendants refused to answer any of those questions, but instead asserted their rights under the Fifth Amendment. Likewise, the individual defendants asserted their Fifth Amendment rights in response to deposition questions regarding their roles, the companies' activities, and telemarketer

representations, at the corporate defendants. *See* D.110-11, D.110-12, D.110-13. Like the district court, this Court should draw adverse inferences from the individual defendants' exercise of their privilege against self incrimination in responding to these discovery requests. That is, this Court may infer that all three individual defendants participated in the misrepresentations that form the basis for this case.

Finally, the undisputed evidence provides strong support that Buschel, Deering and Guarino had the requisite knowledge to be found individually liable. In particular, thousands of complaints were found on the premises of the corporate defendants where the individual defendants worked, D.58 at 20; D.112-2 at 4, and defendants' employees knew that the BBB had received hundreds of consumer complaints. D.6, Ex.2 at 2-5. Again, adverse inferences may be drawn from invocation of their Fifth Amendment in response to the requests for admissions set forth above, and this Court may infer that they had knowledge of the wrongful activities of American Financial and USA Financial. D.110-6 at 11-13; D.110-7 at 9; D.110-8 at 9. Knowledge can also be inferred from their participation and roles as officers at the corporate defendants. *Cyberspace.com*, 453 F.3d at 1202; *Publ'g Clearing House*, 104 F.3d at 1170-71; *Amy Travel*, 875 F.2d at 574. This evidence shows that the individual defendants likely knew of the material misrepresentations

made by their employees to consumers or, at the very least, were recklessly indifferent to the truth.

In sum, the adverse inferences, in conjunction with undisputed evidence as to their status, establish that defendants Buschel, Deering, and Guarino participated directly in, or had the authority to control, and had knowledge of, the violative practices or acts of American Financial. The adverse inferences and undisputed evidence also show that defendants Deering and Guarino directly participated in, or had authority to control, and had knowledge of, the violative practices of USA Financial. This Court should affirm the district court's conclusions the Buschel, Deering and Guarino are individually liable based on their participation and control at American Financial and USA Financial.

III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S ORDER IMPOSING BOTH MONETARY EQUITABLE RELIEF IN THE AMOUNT OF $17,300,509 AND A PERMANENT INJUNCTION FORBIDDING DEFENDANTS FROM ENGAGING IN TELEMARKETING

Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), a district court has broad authority "in proper cases" to impose permanent injunctive relief to bar wrongful conduct. Courts have broadly authorized all types of ancillary equitable relief, including monetary equitable relief, for violations of Section 5(a) of the FTC Act. *See Gem Merch. Corp.*, 87 F.3d at 469; *FTC v. U.S. Oil & Gas Corp.*, 748

F.2d 1431, 1433-34 (11th Cir. 1984); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-19 (5th Cir. 1982). Defendants who have engaged in wrongful conduct may be jointly and severally liable for the total amount of consumer injury. *See, e.g.*, *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1271 (S.D. Fla. 2007); *FTC v. Atlantex Assoc.*, No. 87-0045-CIV-NESBITT, 1987 WL 20384, at *13 (S.D. Fla. Nov. 25, 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989). The individual defendants are liable for monetary equitable relief based on the net sales of the corporate defendant which they controlled and in which they participated. Further, the district court properly imposed a permanent ban on the individual defendants to enjoin them from telemarketing in the future.

A. Monetary Relief

Defendants conclusorily assert in their Statement of Issues (and in the caption to Section VII of their Argument) that the district court erred in awarding consumer redress. App. Br. 1, 33. Because they provide no supporting argument whatsoever to back up this assertion, this challenge must be deemed waived. *See Arrington v. Helms*, 438 F.3d 1336, 1341 n.5 (11th Cir. 2006); *Transamerica Leasing, Inc. v. Institute of London Underwriters*, 430 F.3d 1326, 1331 n. 4 (11th Cir. 2005); *see also* Fed. R. App. P. 28(a)(9)(A) (argument must contain reasons for contentions,

citations to authorities and parts of the record).

Even were this Court to consider this argument, however, it must be rejected. Where the Commission shows that consumers relied on a misrepresentation, the court may properly award monetary equitable relief in the form of restitution equal to the full amount lost by consumers at the hands of defendants. *See Freecom Commc'ns,* 401 F.3d at 1205; *Gem Merch.*, 87 F.3d at 468-70 ("absent a clear command to the contrary, the district court's equitable powers are extensive" and include "the power to grant restitution and disgorgement"); *U.S. Oil & Gas Corp.*, 748 F.2d at 1433-34. Such reliance is presumed where defendants made material misrepresentations likely to mislead consumers, the misrepresentations were widely disseminated, and consumers purchased the product. *Freecom Commc'ns,* 401 F.3d at 1206; *McGregor,* 206 F.3d at 1388. In this case, there is also direct evidence of reliance as reflected in the numerous consumer declarations and complaints. Restitution is appropriate regardless of whether the product sold has some value. *See, e.g.*, *McGregor,* 206 F.3d at 1388-89 (award of gross sales from deceptive scheme appropriate because "the fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds . . .") (*quoting FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993)) Of course, because only a minuscule number of consumers actually used the card defendants provided them,

the evidence shows that the card had no value to those who received it.

Here, consumers paid defendants $200, believing they would receive a general purpose credit card. Undisputed testimony from the corporate defendants' accountant proves that, based upon the corporation's bank and tax statements, defendants' total net sales of the card (gross sales minus refunds) amounted to at least $17,300,509. *See supra* at 14 n.7. In this circumstance, the Court should affirm this amount of restitution to consumers, which is based on the defendants' net sales to consumers, and also equals the total amount of loss consumers suffered at the hands of the defendants.[20]

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[20] Defendants also assert that there was insufficient factual support to show that defendant Buschel participated in or controlled the wrongful conduct at USA Financial. Defendants also argued that the district court erred when it imposed a consumer redress award of $17,300,509 on Buschel based on the activities of both corporate defendants. *See* App. Br. 30, 33. The Commission concedes that there is insufficient support to show Mr. Buschel was individually liable for the activities USA Financial. However, the district court made no error in finding him individually liable for the activities at American Financial. *See* D.155 at 13-15. The district court also properly found that consumer loss (consisting of net sales) resulting from American Financial's telemarketing scheme amounted to $16,226,793. D.155 at 18. This Court should remand this case to the district court for the limited purpose of modifying the judgment against Mr. Buschel so that he is held liable for equitable monetary relief, jointly and severally with the other defendants, in the amount of $16,226,793 based on consumer loss caused by American Financial. This Court should affirm the district court's judgment imposing equitable monetary relief against the other individual defendants, Messrs. Deering and Guarino, in the amount of $17,300,509 based on their involvement in both American Financial and USA Financial.

B. Injunctive Relief

Defendants make two arguments regarding the injunctive relief ordered by the district court. They first argue that the district court should not have ordered injunctive relief against defendant American Financial because it had ceased its operations in late 2007 prior to the court's final judgment, and, as a result, this was not "a proper case" under Section 13(b) of the FTC Act. *See* App. Br. 11-13. This argument is without merit.

While American Financial may have ceased its active telemarketing operations a few months before the TRO in this case was issued in May 2008, the fact remains that the company was (and continues to be) a viable corporate entity that could easily resume its illegal operations. Even if American Financial had voluntarily ceased engaging in outright deception once USA Financial took over the scheme with the same officers, Deering and Guarino, and using nearly identical telemarketing scripts, the voluntary cessation of illegal conduct does not deprive a court of the power to grant injunctive relief. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 897 (1953) ("the court's power to grant injunctive relief survives discontinuance of the illegal conduct"); *Allee v. Medrano*, 416 U.S. 802, 810-11, 94 S. Ct. 2191, 2198 (1974) (injunctive relief not moot "if there is a possibility of recurrence, since otherwise the defendants would be free to

return to their old ways.") (internal citation omitted); *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001) (claim for injunctive relief moot only if no reasonable expectation that alleged violation can occur again and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation") (internal citation omitted). Because the individual defendants could easily resurrect American Financial's deceptive telemarketing scheme, the district court acted squarely within its discretion by imposing injunctive relief against American Financial.

Defendants also assert (in one five-word sentence) that "[t]he lifetime ban [on telemarketing] is excessive." App. Br. 33. Defendants' cursory argument – made in a passing reference without any elaboration or citation to the record or supporting authorities – must be deemed waived. *See, e.g., Doe v. Moore*, 410 F.3d 1337, 1349 n.10 (11th Cir. 2005); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989).

Even if this court were to consider this argument, however, it should be rejected. The broad injunctive provisions imposed by the district court are necessary to prevent future violations. This is particularly true given that the defendants have demonstrated a propensity for engaging in deceptive telemarketing practices, first through Capital Financial, then through American Financial, and

finally through USA Financial. To ensure that final relief is effective, courts in equitable actions may enjoin conduct reasonably related to unlawful acts so long as there is a cognizable danger of recurrent violations. *See Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 132, 89 S. Ct. 1562, 1581(1969); *United States v. Loew's Inc*., 371 U.S. 38, 53, 83 S. Ct. 97, 106 (1962). Past unlawful conduct is "highly suggestive of the likelihood of future violations." *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979).

"In deciding whether to issue an injunction in light of past violations, courts should consider factors such as the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000) (imposing permanent ban on telemarketing based on past conduct), *aff'd*, 312 F.3d 259 (7th Cir. 2002); *see also FTC v. Global Marketing Group, Inc.*, 594 F. Supp. 2d 1281 (M.D. Fla. 2008) (same).

Defendants' egregious conduct cheated consumers out of more than $17 million over the course of several years and involved different corporate entities. In

addition, defendants continued to engage in this conduct even after receiving thousands of consumer complaints. If defendants were barred merely from engaging in the deceptive marketing of catalog cards, it would be all too easy for them to commence a similar deceptive scheme, marketing some other product. For these reasons, this Court should affirm the district court's order permanently banning the individual defendants from engaging in telemarketing in the future.

C. Asset Freeze

Finally, defendants argue that the district court erred by issuing an asset freeze in its final order because the FTC failed to show that defendants would dissipate assets. App. Br. 30-32.[21] The power of a district court to issue an asset freeze in a Section 13(b) case to prevent the dissipation of assets and to assure the availability of final permanent relief is well established in this Circuit. *See, e.g.*, *Gem Merch. Corp*., 87 F.3d at 469; *U.S. Oil & Gas Corp*., 748 F.2d at 1432-34. In addition to freezing corporate assets, courts have frozen individual defendants' assets where the individuals controlled the deceptive scheme and had actual or constructive knowledge of the deceptive nature of the practices in which they

[21] The district court's Final Judgment and Order for Permanent Injunction, provides that the asset freeze imposed on defendants "shall remain in effect until the Defendants have made full payment of the monetary judgment required" under the terms of the Final Order. *See* D.156 at 10.

engaged. *See Amy Travel*, 875 F.2d at 574; *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988).

An asset freeze initially imposed before judgment may remain in effect after a judgment has been entered and defendants have been found liable to ensure the full payment of restitution. *FTC v. Nat'l Bus. Consultants, Inc*., 781 F. Supp. 1136, 1145 (E.D. La. 1991) (maintaining asset freeze "until the money judgment entered in this case is fully satisfied."); *see also FTC v. H.N. Singer*, 668 F.2d 1107, 1113 (9th Cir. 1982) (Section 13(b) provides authority to freeze assets as "ancillary relief necessary to accomplish complete justice"); *FTC v. Think Achievement Corp*., 312 F.3d 259, 262 (7th Cir. 2002) ("The court's authority to order restitution to the victims and as an incident thereto to place the frozen assets in trust for them is not and cannot be questioned."). Thus, it is appropriate for the Final Judgment to provide that the asset freeze shall lift only upon full payment of the monetary judgment. Maintaining an asset freeze to ensure effective final relief falls squarely within the court's broad equitable authority under Section 13(b).

In this case, there is a sufficient factual basis for the asset freeze in the Final Order. The district court concluded based on undisputed evidence that the corporate defendants' business practices were permeated with fraud. Their blatant misrepresentations as to what they were selling were ongoing, were pervasive, and

were carried out by several corporate entities over several years, even though they received thousands of consumer complaints during this period. The monetary equitable relief imposed by the district court, which seeks to deprive defendants of the fruits of their illegal conduct, provides them with ample incentive to conceal or dissipate their assets. There is thus a sufficient factual basis to support the asset freeze in the Final Judgment.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed, except that this Court should remand this case to the district court for the limited purpose of amending its award of monetary equitable relief so that the award of monetary equitable relief imposed on defendant Buschel is set in the amount of $16,226,793.

Respectfully submitted,

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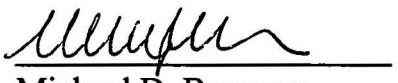
Dated: December 8, 2010

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 13,731 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.



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2010, 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 also served the foregoing Brief by sending two copies by express overnight delivery to counsel for the Appellants at the following addresses:

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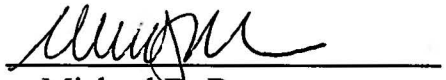

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