UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION, Plaintiff, v. MICHAEL RANDO, et al., Defendants.	**Case 3:22-cv-487-TJC-MCR** **PLAINTIFF'S REPLY IN SUPPORT OF THE ENTRY OF A PRELIMINARY INJUNCTION**

Defendants' arguments that the Preliminary Injunction should not issue, or alternatively, that the asset freeze should be sharply curtailed fail for three reasons: 1) satisfied customers (much less very few such customers) are not a defense to FTC Act violations; 2) Defendants apply the incorrect standard for individual liability in arguing Ms. Rando should not be subject to the asset freeze; and 3) Defendants do not refute either the basis for or the scope of the asset freeze. Accordingly, the Preliminary Injunction proposed by the FTC is warranted.

I. SATISFIED CUSTOMERS ARE NOT A DEFENSE.

The only evidence Defendants proffer in opposition to entry of the Preliminary Injunction are four "support" emails from purported customers. Opposition (Doc. 36), Exhibit 1. However, "it is well settled that the existence of some satisfied customers . . . is not a defense to liability" for FTC Act violations. *FTC v. Capital Choice Consumer Credit, Inc.*, 2003 WL 25429612, at *8 (S.D. Fla. June 2, 2003); *see also FTC v. Tashman*, 318 F.3d 1273, 1278 (11th Cir. 2003) (finding clear

error when focusing "on a few satisfied customers" and the "utility of the product" instead of defendants' misrepresentations); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) ("The existence of some satisfied customers does not constitute a defense under the FTC [Act]"). In fact, the FTC need not "prove actual deception, only the likelihood that a consumer [] acting reasonably under the circumstances, would be deceived." *FTC v. LoanPointe, LLC*, 525 F. App'x 696, 701 (10th Cir. 2013) (citing *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir.1992)). Thus, the existence of four supposedly satisfied consumers out of the thousands who purchased Defendants' credit repair and business opportunity scheme does not alter the FTC's likelihood of success on the merits.[1]

II. DEFENDANTS ARGUE THE WRONG INDIVIDUAL LIABILITY STANDARD AND MS. RANDO IS PROPERLY SUBJECT TO THE ASSET FREEZE.

As discussed in the TRO Motion (Doc. 4), individuals are liable for monetary and injunctive relief for a corporation's violations "if they 1) participated in the acts or practices or had authority to control them, and 2) had some knowledge of the practices." TRO Motion at 37-38 (citing, *e.g.*, *FTC v. On Point Cap. Partners LLC*, 17 F.4th 1066, 1083 (11th Cir. 2021)). Defendants misstate this standard in two ways.

First, Defendants claim, "in this District, '[a]uthority is established by proof that the individual *participated in* corporate activities by *performing* the duties of a

[1] Of course, at this time, it is unknown whether Defendants have informed these supposedly satisfied consumers their marketing claims were false or unsubstantiated and violated the FTC Act and whether, if so fully informed, the consumers would still be satisfied.

corporate officer' not solely being listed as such," quoting *FTC v. Global Marketing Group, Inc.*, 594 F. Supp. 2d 1281 (M.D. Fla. 2008). However, *Global Marketing Group* misinterpreted the well-established individual liability standard by seeming to require *both* "authority to control" *and* "participation." In fact, the Eleventh Circuit has made clear the FTC need only show *either* "authority to control" *or* "participation."[2] *On Point*, 17 F.4th at 1066.

Second, Defendants misstate the knowledge requirement in arguing "the FTC has not and cannot prove Ms. Rando had knowledge of any alleged 'material misrepresentations' made by the Defendant Entities or Mr. Rando." Opposition at 6. The FTC need not establish a "defendant had actual and explicit knowledge of the particular deception at issue." *FTC v. Moses*, 913 F.3d 297, 307 (2d Cir. 2019). Instead, knowledge "may be established by showing the individual had actual knowledge of the deceptive conduct, was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning of the truth." *FTC v. Primary Grp., Inc.*, 713 F. App'x 805, 807 (11th Cir. 2017) (quoting *FTC v. Ross*, 743 F.3d 886, 892 (4th Cir. 2014)). Additionally,

[2] Indeed, *Global Marketing Group* purportedly relies upon *FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005), *Glob. Mktg. Grp.*, 594 F. Supp. at 1289, but, like *On Point*, *World Media Brokers* is clear that "[u]pon establishing corporate liability, the FTC is obligated to demonstrate that the individual defendants *either* participated directly in the deceptive acts or practices *or* had authority to control them." *World Media Brokers*, 415 F.3d at 764 (also holding "[w]hether [the defendant] personally made misrepresentations is irrelevant so long as the FTC has shown that [the defendant] had authority to control the corporations' deceptive practices"). *World Media Brokers* is equally clear that assuming the status of a corporate officer gives rise to a presumption of control. *Id.* at 764 ("Given his status as a corporate officer of multiple corporations, [defendant] would be hard-pressed to establish that he lacked authority or control over them.").

"participation in corporate affairs is probative of knowledge," *FTC v. Wilcox*, 926 F. Supp. 1091, 1104 (S.D. Fla. 1995), and "[t]he extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability." *FTC v. Affordable Media*, 179 F.3d 1228, 1235 (9th Cir. 1999).

The record is clear, Ms. Rando unequivocally participated in, controlled, and had knowledge of Defendants' scheme. First, the FTC has proffered overwhelming evidence of Ms. Rando's direct involvement in the scheme.[3] *See, e.g.*, PX3 (purchasing tradeline database); PX4 (same); PX78 & PX79 (registering phone number for Elite Deletions); PX86 (serving as signatory for Defendants' business accounts); PX88 (same); PX75 (hosting Defendants' live event); PX95 (displaying telemarketing data through "4/17") ; PX128 (handling consumer complaint); PX140 (serving as "Marketing Director"); PX141 (setting "850 Calls/Day to Biz" as goals for 2022 to 2025 for "Val"). Notably, Defendants submit no evidence to the contrary.[4] *See* Opposition, *passim*; *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017) ("Attorney argument is not evidence."). Second, during

[3] Defendants argue "there is no evidence that Ms. Rando was involved in" the rebranding from Wholesale Tradelines to the Credit Game. Opposition at 7. That is not so, as Mr. Rando admitted, "*Val* and I sincerely apologize to each and every one of you guys for the delay in time in which *we* have decided to actually close down Wholesale Tradelines" and that it "was *our* decision, ok, no one else's decision but *Val* and I's." PX34 at 0:17, 1:00 (emphasis added); *see also* PX3 (contract signed *solely* by Ms. Rando purchasing tradeline database); PX4 at 5 (Ms. Rando "agree[ing] to the terms" of the Letter of Intent purchasing tradeline database including legality disclosure).

[4] Nor are Defendants likely to do so now that they are invoking their Fifth Amendment right against self-incrimination.

the Receiver's May 24, 2022, deposition, Ms. Rando admitted she worked in Defendants' marketing department, oversaw employees marketing on social media, and personally received referral fees from third-party affiliates. Similarly, Mr. Rando testified Ms. Rando's duties involved marketing for Defendants.[5] Third, a search of accessible **business** cloud accounts for the email addresses "val.10xlife@gmail.com," and "valsingles2016@gmail.com," which Defendants admit are Ms. Rando's email addresses,[6] returned over 900 responses for the period between May 1, 2020, to April 19, 2022. Indeed, evidence showing Ms. Rando's liability for Defendants' scheme grows ever larger as the FTC and the Receiver gain access to more of Defendants' records.

Finally, Ms. Rando is properly subject to the asset freeze because when a common enterprise is present, as alleged here, an individual is jointly and severally liable for monetary relief with all entities participating in the scheme. *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1211-14 (N.D. Ga. 2008), *aff'd*, 356 F. App'x 358 (11th Cir. 2009).

III. THE SCOPE OF THE ASSET FREEZE IS ENTIRELY PROPER.

Defendants argue "there is no evidence of any likelihood of asset flight."[7] However, that is not the standard for issuing an asset freeze. The Court need not

[5] Transcript to be submitted at upcoming Preliminary Injunction hearing.
[6] Doc. 31 at 3; Receiver's Deposition Transcript.
[7] Defendants omit any mention of their attempted $500,000 post-TRO wire transfer. *See* Plaintiff's Filing in Supp. of the Entry of a Prelim. Inj. at 14 (Doc. 28). Defendants also have the means to move assets, hypothetically, beyond the reach of the FTC and the Receiver into the "MR Protection Trust" which Mr. Rando admitted to using as an investment vehicle to receive monthly dividends. May 24, 2022, Receiver Deposition (transcript to be submitted at hearing).

find a likelihood the funds "will be spirited away in secret, but only that they will be dissipated, (*i.e.*, there will be "less money . . . available for consumer redress.") *FTC v. Simple Health Plans LLC*, 379 F. Supp. 3d 1346, 1364 (S.D. Fla. 2019) (finding "dissipation of assets" includes requests for legal fees and living expenses), *aff'd*, 801 F. App'x 685 (11th Cir. 2020).

Defendants also argue the FTC has not "established the amount of assets subject to a potential judgment" as reasons the asset freeze is improper. However, Defendants ignore completely their own customer tracking document showing they charged consumers at least $14 million, which is presently the best estimate of Defendants' net revenues. Plaintiff's Filing in Supp. of the Entry of a Prelim. Inj. at 12 (Doc. 28); PX93 ¶¶ 31-33.[8] In this case, Defendants' net revenues are the "appropriate measure of consumer redress." *FTC v. QYK Brands LLC*, No. 20-cv-1431, 2022 WL 1090257, at *8 (C.D. Cal. Apr. 6, 2022); *United States v. MyLife.com, Inc.*, No. 20-cv-6692, 2021 WL 4891776, at *13 (C.D. Cal. Oct. 19, 2021); *see also FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) (finding defendants' "unjust gains as the measure of equitable relief").

Defendants' own business records establishing their sales more than meets "[t]he FTC's burden of proof in the asset-freeze context [which] is relatively light." *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1234 (11th Cir. 2014) (citing *SEC v. ETS*

[8] At present, these figures represent only revenues obtained by Defendants for The Credit Game phase of the scheme. To date, neither the Receiver nor the FTC have been able to ascertain sales for the Wholesale Tradelines phase of the scheme, which could cause the total consumer harm figure to increase.

Payphones, Inc., 408 F.3d 727, 735 (11th Cir.2005) (per curiam) (explaining only a "reasonable approximation" is required for an asset freeze)). Further, because uncertainty exists over the total amount of Defendants' proceeds and where those proceeds are located, Defendants' failure to furnish complete financial disclosures (including their stated intention to assert their Fifth Amendment privilege against self-incrimination in response to further questions concerning their finances) demonstrates the continuing need for the asset freeze.[9] *See FTC v. John Beck Amazing Profits, LLC*, No. 2:09-cv-4719, 2009 WL 7844076, at *15 (C.D. Cal. Nov. 17, 2009) (discussing "additional factors" that support an asset freeze).

Dated: June 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2022, I served a true and correct copy of the foregoing via CM/ECF to those listed on the CM/ECF system.

/s/ Brian M. Welke
Brian M. Welke

[9] Defendants peripherally argue *AMG Cap. Mgmt. v. FTC*, 141 S. Ct. 1341 (2021), somehow "limit[s]" the FTC's "jurisdiction" in this case. Opposition at 3. Tellingly, Defendants ignore *AMG*'s clear affirmation that "[n]othing we say today, however, prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers." *Id.* at 1352; *see also* TRO Motion at 39-40, n.21 (citing post-*AMG* asset freeze cases). Here, because each sale to consumers results from one or more Rule violations, Section 19 permits the FTC to obtain redress on behalf of all consumers who purchased Defendants' products and services since May 2, 2019.