

inter alia, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce, as well as enforcement of the Franchise Rule, 16 C.F.R. § 436. The Commission is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act in order to secure such equitable relief as may be appropriate in each case, and to obtain consumer redress. 15 U.S.C. §§ 53(b) and 57(b).

Defendant Holiday Enterprises, Inc. ("Holiday Enterprises") is a Georgia registered corporation with its principal place of business in the Northern District of Georgia. Holiday Enterprises promoted and sold business ventures involving the ink cartridge display rack business opportunity. Holiday Enterprises transacted business in the Northern District of Georgia. The court entered default judgment against Holiday Enterprises on August 3, 2007 [Doc. No. 75].

Defendant Holiday Ink, Inc. ("Holiday Ink") is a Georgia registered corporation with its principal place of business in the Northern District of Georgia. Holiday Ink promoted and sold business ventures involving the ink cartridge display rack business opportunity. Holiday Ink transacted business in the Northern District of Georgia. The court entered default judgment against Holiday Ink on August 3, 2007 [Doc. No. 75].

Defendant Holiday Ink Half Price, Inc. ("Holiday Ink Half Price") is a Georgia registered corporation with its principal place of business in Georgia. Holiday Ink Half Price promoted and sold business ventures involving the ink cartridge display rack business opportunity. Holiday Ink Half Price transacted business in the Northern District of Georgia. The court entered default judgment against Holiday Ink Half Price on August 3, 2007 [Doc. No. 75].

Richard J. Morrell was an officer, director, manager, and/or owner of Holiday Enterprises, Holiday Ink, and Holiday Ink Half Price (collectively referred to as the "Corporate Defendants"). Morrell formulated, directed, controlled, or participated in the acts and practices of the Corporate Defendants, including the deceptive acts and practices set forth below. He transacted business in the Northern District of Georgia.

Richard J. Cascario was an officer, director, manager, and/or owner of the Corporate Defendants and was involved in their operation. Cascario formulated, directed, controlled, or participated in the acts and practices of the Corporate Defendants, including the deceptive acts and practices set forth below. He transacted business in the Northern District of Georgia. Morrell and Cascario are collectively referred to herein as the "Individual Defendants."

Relief defendant N.M.C. Properties, Inc. ("NMC") received funds that came from the corporate defendants' deceptive acts and practices. NMC transacted business in the Northern District of Georgia.

B. The Defendants' Business Activities

Between 2003 and early 2006, the defendants engaged in a course of conduct to advertise, market, promote, offer to sell, and sell to consumers business ventures involving ink cartridge display racks. These display racks contained re-manufactured ink cartridges that were placed in retail locations and sold to the general public.

The defendants promoted their business ventures to prospective purchasers through a variety of media, including newspapers, television advertisements, internet web-sites, written marketing materials, and telephonic and in-person sales pitches. In their newspaper advertisements, for example, the defendants claimed that purchasers taking part in the business opportunity could expect annual incomes ranging from \$50,000 - \$250,000.

The defendants also used a variety of direct sales techniques to convince people to take part in the business opportunity. Scripts used by the defendants' salespeople during telephone sales calls verify that the defendants made a number of false claims to consumers about the business opportunity, including claims that

earnings potential of the business opportunity was \$30,000 or more per year, that purchasers could recoup their initial investment in 6-12 months, and that the defendants would provide the purchasers with location assistance for the products.

After the phone call, the defendants mailed promotional materials to consumers which made additional false claims about earnings and locations. These materials included earnings charts that made income representations varying from \$20,000 to \$200,000 per year, claiming that the figures were based on actual sales. The materials also included claims that the defendants would assist the purchaser in securing high-traffic, high-volume, or profitable locations for the products. The defendants sent some consumers what purported to be the FTC's Franchise Rule disclosure document pursuant to 16 C.F.R. Part 436.

Either in their promotional packet or in a separate mailing, the defendants would supply potential purchasers with a business reference sheet containing the names of supposedly successful distributors. However, these lists of business references contained names of people who were not actual business references, but were instead employees or other associates of the defendants.

C. The Defendants' Violations of Section 5 of the FTC Act

1. Misrepresentations Regarding Income

In the course of offering the business venture for sale, the defendants frequently represented, expressly or by implication, that consumers who purchased the defendants' business opportunity were likely to earn substantial income. Some of the defendants' claims were contained in its promotional pamphlet, as described above. The defendants made claims that purchasers would be likely to sell 3-8 ink cartridges per day, earn income of \$40,000 - \$250,000 per year, and realize profits of \$20,000 - \$140,000 per year. One of the defendants' newspaper advertisements stated the following:

HIGH PROFIT BUSINESS!

140 million faxes/copiers need INK. Nat'l co. expanding:
seeks Distributors. Earn \$50-\$200K. Min. Inv: \$16K.
866-343-7000. (Atlanta Journal/Constitution)

[Doc. No. 62, Ex. 10, p. 8] The defendants placed similar ads on web-sites such as www.betheboss.com and www.franchisedirect.com.

Consumers who called the toll-free number on the ads were told by the defendants or their salespeople that, in exchange for a payment ranging from a low of \$8,500 to more than \$100,000, the purchasers would receive ink cartridge display racks and ink cartridges through which they would derive substantial income. Typically, the defendants' salespeople promised consumers that they

would sell between 3-8 ink cartridges per display rack per day and would be guaranteed profits. Numerous scripts used by the defendants and their salespeople clearly state misleading income claims. Examples include:

Our entry-level investment of \$16,000 dollars offers you the ability to recoup your investment in approximately six months.

[Doc. No. 62, Ex. 1, p. 53](emphasis in original).

The average display will sell between 3 and 5 cartridges per day. Factoring in your cost for replacement product as well as the store's commission that is still enough to yield you an annual income of about \$30,000 per year for about 15 to 20 hours A MONTH of your time.

[Doc. No. 62, Ex. 1, p. 64) (emphasis in original).

With just 3 to 5 sales a day form (sic) these racks, a 5 rack distributorship will generate about \$30,000 a year in net income JUST FROM THE DISPLAYS! That's a great return on a one-time investment of only \$16,000, isn't it?

[Doc. No. 62, Ex. 1, p. 61] (emphasis in original).

The "Proforma" sent to prospective purchasers reaffirms these earnings claims. The defendants' Proforma stated that the purchase of a five-display rack package would earn consumers net profits in excess of \$20,000 a year and that a twenty-display rack package would earn net profits in excess of \$82,000. Another document called the "Yearly Vendor Proforma" illustrated ranges of \$34,000-\$173,000 and \$46,000-\$184,000 in yearly profits. Other promotional material sent to consumers stated, "It is easy to see

that a distributor will more than recoup their investment just on the first inventory," and "expect to generate real profits from \$50,000 - \$200,000" [Doc. No. 62, Ex. 18, p.13].

The defendants misrepresented to consumers that the earnings charts were based on actual sales figures. Many of the proformas stated, "All figures are estimates but based on actual results of operating routes." [Doc. No. 62, Ex. 3, p. 10]. In fact, Richard Morrell wrote in a letter to consumer Leventhal that "any figures shown on our proforma are estimates, but calculated on actual retail displays now operating, (retail figures only)" [Doc. No. 62, Ex. 21, p. 15].

The consumers who took part in the defendants' business opportunity did not actually make money and never received any substantiation for the defendants' claims. The defendants provided the FTC with the names of several consumers who the defendants claim were successful, but could provide no evidence to support these statements. In fact, two of the consumers named by the defendants have provided declarations stating that they were in fact not successful with the defendants' business opportunity.

Consumers purchased the defendants' business opportunity based on the defendants' representations that their display racks would generate substantial income. Ultimately, however, none of the 29 consumers who provided declarations in this cases achieved earnings

anywhere close to those predicted by the defendants. None of these 29 consumers even recouped his or her initial investment. The defendants were aware all along that consumers were not earning substantial income from or achieving the projected sales levels because numerous consumers complained directly to the defendants that their display racks were not generating the levels of income the defendants represented.

2. Misrepresentations Regarding Locations

The defendants told consumers that the defendants would have the consumers' displays placed in high-traffic, high-volume, or profitable locations. Morrell has specifically admitted that this occurred. Consumers purchased the defendants' business opportunity based on these representations.

The defendants did not do as they promised, however. None of the consumer declarants in this case, for example, received high-traffic, high-volume, or profitable locations. In fact, for some consumers, the defendants found no locations at all. Some consumers reluctantly accepted low-traffic, low-volume locations from the defendants merely to have their display racks located. Other consumers secured their own locations, but these locations were not profitable, either. In all, consumers made very little, if any, money in any location.

3. Misrepresentations Regarding References

The defendants gave lists of references to potential purchasers. The defendants portrayed the references as successful participants in the business opportunity. When consumers called any of the references, the references told the consumers that they had a very successful and profitable Holiday distributorship and had recouped their initial investment. The references often told consumers that they were considering expanding or purchasing additional display racks. These references were misleading at best.

The following company-selected references were not actually participants in the business opportunity at all: (1) Rick Lawrence is an alias for defendant Rick Cascario; (2) Mark Shepard was the office manager for the Holiday office in Alabama; (3) Jeff Silverman, who also went by the name of Jeff Myers, was an employee of Future Graphics, the defendants' ink cartridge vendor; (4) Kirk Forchetti and (5) Michael Tornatore were salesmen for Holiday. Other references were participants in the business opportunity who were not actually successful. For example, John Bowlen bought into the business opportunity but was not successful by any measure. Listed reference Lynn Cramer had not been successful distributing ink cartridges until she severed her relationship with the defendants and purchased inventory from other suppliers. Courtney

Allen, a former office manager of the Charlotte, North Carolina office of Holiday Ink, testified that Morrell paid her \$400 per week to pretend to be Kathryn Kennedy, a reference for the Holiday Ink business opportunity. Although Allen never owned any ink cartridge display racks, she told potential purchasers that she was making money and doing well with her distributorship.

D. Procedural History

The FTC sued Corporate Defendants Holiday Enterprises, Holiday Ink, and Holiday Ink Half Price, Individual Defendants Richard J. Morrell and Richard J. Cascario, and relief defendant NMC on December 4, 2006 [Doc. No. 1]. The FTC requested preliminary and permanent relief. On December 7, 2006, the Court granted a temporary restraining order against the defendants [Doc. No. 14]. The defendants were all properly served between December 5, 2006, and December 18, 2006. On December 21, 2006, the Court granted a preliminary injunction against the defendants [Doc. No. 29].

Defendant Morrell filed an answer on January 11, 2007 [Doc. No. 11]. The court later granted the FTC's motion to strike the answer to the extent Morrell purported to answer on the behalf of any other defendants [Doc. No. 68]. Defendant Cascario filed an answer and motion to dismiss the complaint on January 22, 2007 [Doc. Nos. 39 and 40]. The court later granted the FTC's motion to strike Cascario's answer, ordering Cascario to refile an answer

complying with Federal Rule of Civil Procedure 8(b) within 10 days. Cascario did not comply with the order. The court denied Cascario's motion to dismiss on June 26, 2007 [Doc. No. 66].

The FTC filed a request for entry of default against the Corporate Defendants on January 24, 2007 [Doc. No. 38]; the clerk entered the default later the same day. The court granted default judgment against the Corporate Defendants on August 3, 2007 [Doc. No. 75].

Now before the court is the FTC's motion for summary judgment [Doc. No. 62]. As discussed above, Morrell filed a cursory response to the motion on July 6, 2007 [Doc. No. 70]. Because the summary judgment motion was filed prior to the court's grant of default judgment against the Corporate Defendants, the court will now address the motion as it pertains to the remaining defendants.

Legal Analysis

A. Jurisdiction and Venue

The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 53(b) and 57b. This action arises under 15 U.S.C. §45(a)(1). Venue in the United States District Court for the Northern District of Georgia is proper under 28 U.S.C. §§ 1391(b) and (c), and 15 U.S.C. § 53(b). The defendants maintained a substantial course of trade in the offering for sale and sale of a display rack and ink

cartridge business opportunity, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

B. Summary Judgment Standard

Summary judgment is proper when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The movant carries the initial burden and must show the Court that there is "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "Only when that burden has been met does the burden shift to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and to present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Resolving all doubts in favor of the nonmoving party, the Court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id.

The court may not weigh conflicting evidence or weigh the credibility of the parties. See Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 919 (11th Cir. 1993). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. Id.

C. Section 5 of the FTC Act

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2006). Individuals or corporations violate the Section 5 prohibition when they make material misrepresentations or omissions that are likely to mislead consumers acting reasonably under the circumstances. FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir.2003). A representation or omission is material if it is of a kind usually relied upon by a reasonably prudent person. Id. The FTC, however, need not present proof of subjective reliance by each victim:

In an FTC Act Section 13(b) enforcement action in which the government seeks restitution to compensate thousands of individual victims of unlawful practices, in contrast to a private action for fraud, such representative proof of injury suffered is sufficient to justify the requested relief Requiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals of the section.

FTC v. Windward Marketing, No. 1:96-CV-615-FMH, 1997 U.S. Dist. Lexis 17114, at *27 (N.D. Ga. Sep. 30, 1997).

"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." FTC v. Figgie International, Inc., 994 F.2d 595, 605-06 (9th Cir. 1993), cert. denied, 510 U.S. 1110 (1994). Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service are presumed to be material. In re: Thompson Medical Co., 104 F.T.C. 648, 816 (1984), aff'd, 791 F. 2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987). Finally, proof of intent to deceive is not required under Section 5. Sears Roebuck & Co. V. FTC, 676 F.2d 385 (9th Cir. 1982). "A company that deceives consumers through reckless or even simply negligent disregard of the truth may do just as much harm as one that deceives consumers knowingly." Id. at 517 n.9.

D. The Defendants' Violations of the FTC Act

The evidence before the court provides ample proof that the defendants routinely and knowingly made material representations to consumers in connection with the sale of their business opportunity. As detailed in the three counts set out below, there is no material dispute that the defendants violated Section 5 of the FTC Act.

1. Misrepresentations Regarding Income

The defendants falsely represented through their advertisements, printed material, and verbal statements that consumers who purchase Defendants' business opportunity were likely to earn substantial income. Defendants claimed that purchasers could make sales of 3-8 ink cartridges per day, income of \$40,000-\$250,000 per year, and profits of \$20,000-\$140,000 per year.

The defendants placed newspaper and internet ads which led consumers to believe that they could make large amounts of money by investing in the defendants' ink cartridge business opportunity. Consumers who called the toll-free number in the ads spoke with the defendants or their salespeople, who represented that purchasers who bought into the business opportunity would receive ink cartridge display racks and ink cartridges through which they would derive substantial income and guaranteed profits. The defendants also sent out "proformas" claiming that distributors could expect to generate between \$50,000 and \$200,000 per year.

The defendants represented to consumers that the projected earnings figures contained in the ads and proformas were based on actual sales figures. It is clear from the evidence before the court, however, that the defendants had no substantiation for these claims. The defendants can produce no evidence that any of the

consumers were actually successful. To the contrary, the evidence before the court shows that most, if not all, consumers who relied on the bogus earnings projections and participated in the business opportunity lost their entire investment.

2. Misrepresentations Regarding Locations

The defendants falsely represented through their written materials and sales pitches that they would provide purchasers with high-traffic, high-volume, locations in which to place the purchasers' display racks. None of the consumer declarants in the case received such locations from the defendants. Instead, the consumers either found their own locations or accepted low-volume, low-traffic locations from the defendants. Purchasers made very little, if any, money in these locations. The evidence shows that the defendants knew that their representations regarding placement were false.

3. Misrepresentations About References

The defendants gave lists of references to potential purchasers containing names of people the defendants portrayed as successful and profitable distributors. These so-called references were either employees of the defendant or distributors who were not actually successful. One employee of the defendants, Courtney Allen, testified that Morrell paid her \$400 per week specifically to pose as a satisfied distributor for potential purchasers. The

defendants knew at all relevant times that their representations regarding the success of the so-called "references" were false.

4. Materiality

The express claims of the defendants about projected income, quality of locations, and legitimate references were material to consumers and used to induce consumers to purchase into the defendants' business opportunity. "Express claims, or deliberately-made implied claims, used to induce the purchase of a particular product or service are presumed to be material." Windward Marketing, 1997 U.S. Dist. LEXIS 17114 at *28.

E. The Defendants Violated the Franchise Rule

On December 21, 1978, the FTC promulgated the trade regulation rule on Disclosure Requirements and Prohibitions Concerning Franchisees and Business Opportunity Ventures ("Franchise Rule" or "Rule"), 16 C.F.R. Part 436. The Franchise Rule applies to this case because the business opportunities sold by the defendants were franchises, as the term is defined in the Rule.

1. Franchise Rule Requirements

The Franchise Rule mandates certain disclosure requirements for sellers of covered business opportunities. First, 16 C.F.R. § 436.1 requires that certain accurate information be in the franchise disclosure documents, including background information on the principals of the company, litigation information, and lists of previous purchasers. Second, 16 C.F.R. §§ 436(b) and (c) require

that the business opportunity seller provide an earnings claim document and that the seller tell the potential purchasers that they have substantiation for any earnings claims that they make. Third, 16 C.F.R. § 436(e)(3) requires that any generally disseminated ad have additional information next to it, including the number and percentage of previous purchasers of the business opportunity that had the same or better results as those claimed in the ad.

2. The Defendants Violated § 436.1(a)

The defendants violated 16 C.F.R. § 436.1(a) by failing to list the accurate business experiences of their directors and officers. For example, at least two disclosure documents sent to consumers in mid-2004 and mid-2005 list Richard Morrell as the president, director, and sole shareholder of Holiday Ink and another company, Freetel. The documents failed to reveal Morrell's position as an officer or shareholder in the following companies: Golden Sweepstakes, Holiday Health Products, United Locations of America, Golden Moment Greetings Cards, Holiday Wireless, and Holiday Ink Half Price.

Similarly, much of the business experience disclosed about Rick Cascario was false. For example, Cascario was not, as claimed, Vice-President of United Locations of America for four years and was not a Regional Sales Manager for Freetel. Additionally, the disclosure documents fail to list his role as

Vice-President of Holiday Ink Half Price or his involvement with Golden Sweepstakes or Holiday Health Products.

More importantly, the disclosure documents failed to include information on most of the substantial litigation involving the defendants in the last seven years. Many of those cases included allegations of fraud, including Western Services v. Morrell (filed in 2003, allegation of fraud and misrepresentations); Moyle v. Freetel (filed in 2003, allegation of fraud and misrepresentation); McVey v. Holiday (filed in 2003, allegation of fraud and misrepresentation); Koh v. Holiday Enterprises (filed in 2004 by Morrell against Koh, but Koh counterclaimed and received a judgment of \$7,600 for Koh (one of Plaintiff's declarants)); and Purcell v. Freetel, R.J. Morrell, et al. (filed in 2001, claim of misrepresentation).

The defendants also violated 16 C.F.R. § 436.1(a)(16)(iii) by failing to disclose previous purchasers of their business opportunity. The Rule requires disclosure of previous customers by one of three ways: (1) a complete list of all previous purchasers of the business opportunity; (2) a list of the ten previous purchasers closest in location to the prospective purchaser; or (3) a list of all previous purchasers located in the state where the prospective purchaser lives. The defendants never attached such a list to their disclosure documents. Indeed, when one consumer, Sonya Harkins, requested a disclosure of other distributors in her

area, she was affirmatively told by Holiday Ink that it would not provide any such documents to her.

3. The Defendants Violated §§ 436.1(b) and (c)

The defendants violated sections 436.1(b) and (c) by never providing substantiation for the earnings claims they made to prospective customers. Morrell admitted that the defendants never disclosed anything to potential consumers that would constitute a reasonable basis for the earnings claims made in ads and the proformas.

4. The Defendants Violated § 436.1(e)(3)

The defendants never provided consumers with the number and percentage of purchasers known to have achieved the same or better sales results from the business opportunity as those claimed in generally disseminated advertisements. Morrell admits failing to include this information along with the ads.

F. The Individual Defendants are Liable For Violations of the FTC Act and the Franchise Rule

1. Legal Standard

In order to find individual defendants liable for violations of the FTC Act and the Franchise Rule, the FTC must first demonstrate corporate liability. Once the FTC has done so, it "must show that the individual defendants participated directly in the practices or acts or had authority to control them The FTC must then demonstrate the individual had some knowledge of the practices." FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (11th

Cir. 1996). 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." FTC v. Amy Travel Services Co., 875 F.2d 564, 574 (7th Cir. 1989). "An individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation. 'A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception.'" Windward Marketing, 1997 U.S. LEXIS 17114 at *27 (quoting Standard Educators, Inc. v. FTC, 475 F.2d 401, 403 (D.C. Cir. 1973)).

The FTC has presented evidence clearly establishing corporate liability in this case. Accordingly, the FTC next bears the burden of showing that either (1) the Individual Defendants participated directly in the practices or acts or (2) had authority to control them; and if the Individual Defendants had authority to control, that they had some knowledge of the deceptive practices. As discussed below, the evidence is uncontroverted that the Individual Defendants either participated in the deceptive acts and practices of the Corporate Defendants or had control authority coupled with knowledge of the deceptive practices.

2. Morrell is Individually Liable

Richard Morrell participated in the alleged acts and practices of Corporate Defendants. He made earnings claims to consumers; placed advertising that had false claims; passed on scripts with misrepresentations to his sales managers to be used in their sales presentations; designed, wrote, and/or approved promotional material, including earnings charts; signed the promotional letter to consumers; designed, wrote, and/or approved franchise disclosure documents; signed consumers' purchase orders; and signed distributorship agreements.

Moreover, Morrell had the authority to control the acts and practices of the Corporate Defendants, which were closely-held corporations with a few principals, all in the same family (his). He was President or CEO of all the Corporate Defendants. He was an owner of all the companies, had signature authority on bank accounts, wrote checks, and disbursed money. Morrell supervised sales offices and salespeople; wrote, approved, placed, and paid for advertising; approved and sent out the franchise documents; decided whether to give refunds; and put his son's name on the Holiday reference list as an alias.

Morrell had the requisite knowledge of the unlawful acts and practices. He responded to consumer complaints that detailed the misrepresentations made by the Corporate Defendants regarding locations and earnings. Most, if not all, refund requests were

forwarded to him. Morrell admits to knowing that the earnings documents were based on hypothetical figures instead of real data. Richard Cascario testified that he told Morrell about the consumer complaints he received while managing the customer service departments of the Corporate Defendants. Finally, Morrell knew that consumers were not receiving the franchise disclosure document and did not correct the lack of disclosure.

3. Cascario is also Individually Liable

It is undisputed that Rick Cascario participated in the unlawful acts and practices of Corporate Defendants. Cascario spoke to at least two, if not more, consumers where he represented himself as a company-selected reference. In so doing, he used an alias, Rick Lawrence, and made the business opportunity seem profitable and successful. Moreover, Cascario had the authority to control the acts and practices of the Corporate Defendants, which were closely-held corporations with a few principals, all within his family. Cascario was a shareholder in at least two of the corporate Defendants - Holiday Enterprises and Holiday Ink. He was Vice President of Holiday Enterprises, Holiday Ink, and Holiday Ink Half Price; had signature authority on corporate bank accounts, wrote checks on those accounts; and handled Morrell's duties occasionally when Morrell was out of the office. The customer service employees worked and reported directly to Cascario.

Furthermore, the customer service employees could only handle certain responsibilities without involving him.

It is undisputed that Rick Cascario had the requisite level of knowledge regarding the Corporate Defendants' unlawful acts and practices. Cascario knew his statements to consumers, as a false reference, were misrepresentations and not truthful. He received and responded to consumer complaints regarding the lack of earnings from the business opportunity, while he supervised the customer services department. He told Richard Morrell about the consumer complaints, but he never asked him specifically why consumers were being told that the earnings stated by the Corporate Defendants were possible or where these earnings figures came from.

Also, Cascario knew the franchise disclosure documents were not truthful and yet did not correct the misstatements. In addition, Cascario sent out promotional material that reinforced the phony earnings claims to consumers. Numerous consumers complained to Cascario that the earnings figures from the Corporate Defendants were false and sought refunds. Cascario, knowing the company had a no-refund policy, would not tell consumers of this policy. Instead, he referred consumers to the corporate office, further delaying the companies' response to deceived consumers.

Moreover, during the later part of the scam, Cascario operated two other entities, HIT of Georgia and Holiday Ink and Toner, Inc., as Customer Service Departments of Holiday Ink. His operation of

these entities added to his knowledge of the Holiday scheme and his participation in the scheme. He knew that consumers were complaining but did not try to find out more. Thus, he meets at least two of the three separate standards of the knowledge requirement set out in Amy Travel, 875 F.2d 564, 574. He was recklessly indifferent to the truth or falsity of the claims being made, and had an awareness of a high probability of fraud along with an intentional avoidance of the truth. Despite his initial handling of the complaints, he took no steps to correct the deceptive acts of the Corporate Defendants.

Cascario's knowledge of the wrongful acts and practices is underscored by his work as a principal of two other associated companies. Described by Morrell as "associated" with the Corporate Defendants, HIT of Georgia and Holiday Ink and Toner were set up in 2005 and 2006, respectively, to handle customer service for the Corporate Defendants. Adding to the close ties among all of these entities was the fact that Richard Morrell was designated the Chief Operating Officer of HIT of Georgia. All requests for refunds that went to HIT of Georgia or Holiday Ink and Toner were sent by them to Holiday Ink, Holiday Enterprises, and Holiday Ink Half Price.

To demonstrate how closely the entities were tied together, HIT of Georgia and Holiday Ink and Toner sent out "business plans" to consumers after their purchase, which reiterated the income misrepresentations made in the initial Proforma documents sent to

the consumers. Thus, Richard Cascario's participation and his knowledge and positions within Corporate Defendants show that he meets both standards for liability.

G. Liability of NMC Properties

A court may grant equitable relief against a relief defendant against whom no wrongdoing is alleged if the relief defendant possesses property or profits illegally obtained and the relief defendant has no legitimate claim to them. CFTC v. Kimberlynn Creek Ranch, 276 F.3d 187, 190-91 (4th Cir. 2002); SEC v. Cavanagh, 155 F.3d 129, 136 (2d Cir. 1998). In the instant case, relief defendant NMC possesses illegally obtained property or profits.

Richard Morrell incorporated NMC about a year after the business opportunity scam began, on June 15, 2004. Judy Morrell was named president and director of NMC on June 20, 2004. The Morrells individually purchased several properties after the ink cartridge business opportunity business was begun in June 2003. The Morrells purchased the following properties in 2004 and 2005: the Hickory Branch property in February 2004; the Ivy Plantation property in November 2004; the Cherokee Trail property in June 2005; and the Sandalwood Circle property in July 2005. The Morrells then transferred these properties to NMC: Cherokee Trail was transferred on August 1, 2005; Hickory Branch on August 15, 2005; Ivy Plantation on August 1, 2005; and Sandalwood Circle on October 3, 2005.

Relief defendant NMC has no legitimate claim to these properties. NMC did not engage in any activities to earn the properties. Judy Morrell was the sole officer, director and shareholder of NMC Properties after June 20, 2004. She never performed any work for the Holiday companies (except for occasional signing of checks) and would not have a legitimate claim to properties because of any work performed for the Holiday companies.

Judy Morrell claims to have loaned money to Holiday Ink and that the transfers of the properties to NMC were repayment for these loans. From March 21, 2005 to October 1, 2005, Judy Morrell claims that she "lent" \$250,000 to Holiday Ink/Richard Morrell. However, the facts show that she is not due any repayment in the form of these properties (or any other repayment). On January 21, 2005, \$200,000 was transferred from NMC to Judy Morrell on an NMC check signed by Richard Morrell. That same day, \$200,000 was deposited into Judy Morrell's money market account. Judy Morrell could not explain why money went from NMC to her own money market account before any money was loaned by her to Holiday Ink. Thus, Judy Morrell already had funds furnished to her by NMC, which she used (or could have used) to "lend" the funds to Holiday Ink.

Moreover, prior to the January 2005 transfer of funds to Judy Morrell by NMC, sums of money were transferred from the Holiday companies to NMC. On September 20, 2004, Holiday Enterprises paid \$50,000 to R.J. Morrell; later the same day, NMC received \$50,000

in a cashiers check. On October 4, 2004, Holiday Enterprises paid R.J. Morrell \$175,000.88; the same day, \$75,000 was deposited into NMC's account. On October 11, 2004, Holiday Enterprises paid a check directly to NMC for \$50,000.90. On November 3, 2004, Holiday Enterprises paid another check directly to NMC for \$25,000.91. On December 1, 2004, Holiday Ink paid another \$50,000 directly to NMC. Thus, the funds that NMC received prior to January 2005 came originally from Holiday Ink, though Holiday Ink performed no known services for NMC.

Holiday Ink had already transferred to NMC most of the "loan amount," which was subsequently transferred to Judy Morrell's money market account before the loans were made. Therefore, the properties were not repayment to Judy Morrell for loans made from her own personal funds. All funds and properties that were transferred into NMC shall accordingly be made available for consumer redress. See Cavanagh, 155 F.3d at 136 ("Federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds.").

G. Morrell's Bankruptcy

Richard Morrell filed a motion styled as "motion for leave to file personal Chapter Seven bankruptcy" simultaneously with his "response" to the motion for summary judgment on July 6, 2007 [Doc.

No. 71]. The court has no opinion on Morrell's suitability to file for bankruptcy and Morrell is not required to obtain this court's permission to do so. Any bankruptcy filing by Morrell is, however, irrelevant to the instant litigation. According to the Bankruptcy Code, a stay pursuant to the Code does not apply to actions by government agencies seeking to enjoin violations of the law. 11 U.S.C. § 362(b)(4); see SEC v. Keating, No. CV 91-6785(SVW), 1992 U.S. Dist. LEXIS 14630, at *12 (C.D. Cal. July 24, 1992)(striking affirmative defense of bankruptcy stay in SEC enforcement action). Thus, Morrell's reference to his personal bankruptcy cannot serve as a defense in this action and has no bearing on the court's summary judgment ruling.

I. Remedies

The remedies against the Corporate Defendants were set out in the court's judgment of August 2, 2007 [Doc. No. 75]. The remedies applicable to the Individual Defendants and NMC are separately provided for in the final judgment to be issued simultaneously with this summary judgment order.

Conclusion

The evidence submitted in this case shows that no genuine issue of material fact remains in dispute. Accordingly, the court hereby GRANTS the FTC's motion for summary judgment [Doc. No. 62]. Defendants Richard J. Morrell and Richard J. Cascario are individually liable for their egregious violations of the FTC Act

and the Franchise Rule. Additionally, relief defendant NMC Properties, Inc., is liable for its ill-gotten gains. The court will specify the remedies against the defendants in a final judgment issued contemporaneously with this order.

Further, for the reasons stated herein, Morrell's motion for leave to file bankruptcy [Doc. No. 71] is DISMISSED .

SO ORDERED, this 5th day of February, 2008.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge