UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION, Plaintiff, v. NETWORK SERVICES DEPOT, et al., Defendants.	2:05-cv-0440-LDG-LRL **ORDER**

Plaintiff Federal Trade Commission ("FTC") has filed a motion for summary judgment against defendants Network Services Depot, Inc. ("NSD"), Network Marketing, LLC, Network Services Distribution, Inc., Sunbelt Marketing, Inc. (collectively, the "corporate defendants"), Charles Castro ("Castro"), Elizabeth Castro ("Ms. Castro"), and Gregory High (the "individual defendants"), and Phillis Watson (the "relief defendant") for violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Franchise Rule, 16 C.F.R. § 436 (#78, response #79, objections to declarations #81-#116, reply #127). The FTC requests injunctive relief and restitution for injured consumers pursuant to § 13(b) and §19(a)(1) of the FTC Act, 15 U.S.C. § 53(b) and § 57(b). The FTC also requests that the corporate defendants, Castro and High be ordered to pay consumer redress, and that funds held in the Castro Children's Trust (controlled by relief defendant Watson) and certain monies transferred to defendants' attorneys be so used.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56 ©. The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. Id. at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative, admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence supporting the claim or defense. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable inferences are to be drawn in its favor. Anderson, 477 U.S. at 255 (citing Adickes v. S. H. Kress and Co., 398 U.S. 144 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient to create a genuine issue of material fact. Anderson, 477 U.S. at 252; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 474 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial").

Summary judgment is not treated as "a disfavored procedural shortcut," but as "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327 (quoting Fed.R.Civ.P. 1). While the court may not weigh evidence or judge witness credibility, the court must assess whether the jury, drawing all inferences in favor of the nonmoving party, could reasonably render a verdict in favor of the nonmoving party in light of the substantive law. Anderson, 477 U.S. at 249-52. The determination requires application of the standard that courts apply in motions for judgments as a matter of law. Id. at 251.

A. FTC's showing

The FTC presents evidence that Castro is the president and owner of each corporate defendant, including NSD. Castro has admitted that he controlled the corporate defendants and was active in their business affairs. Ms. Castro is an owner and officer of NSD and Network Marketing. She has admitted that she controlled the corporate defendants and was active in the business affairs of the companies. The FTC presents evidence that High was active in, and had the ability to control, the affairs of the corporate defendants. The FTC has also presented evidence that the corporate defendants comprise a common enterprise, and are each liable for NSD's violations.

The FTC's evidence shows that, from 2001 through the beginning of 2004, NSD marketed and sold kiosk business opportunities to consumers, including free-standing kiosks, called "internet kiosks" or "internet access terminals," which house a computer and a mechanism to accept payment. The internet kiosks are designed to allow the public to access the internet, for a fee, from locations such as hotels, restaurants, casinos, and stores.

In late 2001, Castro, on behalf of NSD, entered into a working relationship with Ed Bevilacqua and his former internet kiosk companies, including Bikini Vending Corp. ("BVC"). BVC agreed to purchase, find locations for, install, and manage internet kiosks, and NSD agreed to promote, offer and sell the business opportunities to the public. NSD offered the business opportunities to the public at prices ranging from $4,400 to $7,000. A consumer purchasing the kiosk business from NSD with BVC as their management company purportedly received ownership of an internet kiosk bearing a trademark of BVC or another of Bevilacqua's kiosk companies.

NSD promoted the business opportunities through independent sales agents, typically financial planners and insurance agents, located around the country. Sales agents earned commissions from selling kiosk business opportunities directly, and from those sold by agents they recruited into the program. Some sales agents also purchased the kiosk business opportunities. NSD provided sales agents with marketing materials, conducted seminars and provided materials and presentations to agents to give to prospective purchasers. NSD made the following statements in an offering circular apparently developed to comply with the Franchise Rule, and received by consumers:

> "We will sell you one or more publicly-accessible Internet access terminal businesses, fully installed at a specific location selected by you from among available Sites we have identified . . . or at a Site which you own or lease or have secured yourself,"
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> "Once you notify us of the Site you have chosen . . . we will . . . install an Internet Access terminal at that site," [and]
>
> "Since you are purchasing one or more fully-operational Business(es), you will begin operation of your Business(es) immediately upon the Closing, which barring unforseen circumstances will occur no later than 60 days after the Effective Date of your Sales Agreement, or 30 days after you have submitted a Site Acceptance Notice for each Business, whichever is later."

The purchase transaction involved a series of agreements between NSD, BVC and the purchaser. Under the agreements the purchasers transferred the purchase price to NSD. In return, the purchasers received a bill of sale, sales agreement, and letter of assignment signed by Castro transferring NSD's rights, title and interest in the specific internet kiosks and related equipment. In the sales agreement, NSD expressly agreed to secure locations for the kiosks and provide purchasers with a choice of three locations per unit.

NSD provided the purchasers with BVC management agreements. In the management agreement, BVC agreed to manage and maintain the kiosks and to pay the purchaser the first $44 of the net adjusted revenue, and 30% of all monthly net adjusted revenue in excess of $550.

According to the FTC's evidence, NSD represented to agents and purchasers that the internet kiosks would generate substantial revenues; specifically identifying a fixed minimum monthly payment amounting to an annual return of approximately 12 percent. The FTC's evidence further indicates that NSD's promotional material suggested that the purchasers would earn far more than one percent per month minimum. NSD represented that well-placed kiosks could generate $1,000 per month, and certain presentations represented that kiosks would generate $600 per month at a minimum. NSD and its agents also offered consumers a financial guarantee or bond that purportedly protected their investment against default, bankruptcy and fraud. One other aspect of the business was for BVC to buy back the kiosks after a number of years, and then sell the company to a third party. This plan included compensation to the agents upon selling the business, and therefore created a strong incentive for agents to write business for NSD.

The FTC submits evidence that, contrary to NSD's representations, consumers never received from BVC more than the minimum monthly payments, and that those payments were received only because of the infusion of money from new investors, not because of the successful operation of the particular kiosk. FTC also submits evidence indicating that the financial guarantee aspect of the program was insubstantial because the head of the company backing the bonds was indicted and fled the country. The FTC also shows that, contrary to its representations, NSD had not located and installed the kiosks. Indeed, FTC presents evidence that NSD, or BVC, did not even have the right to install kiosks in most of the locations designated on NSD's agreements with purchasers. Finally, the FTC demonstrates that, contrary to NSD's representation, consumers did not acquire ownership of operating internet kiosks. The evidence submitted by the FTC indicates that out of the thousands of kiosks purchased by consumers by early 2004, BVC had only located 300 units, and fewer than 160 kiosks had operational connections to the internet.

The FTC has also presented evidence that under the working arrangement between NSD and BVC, the two companies did not intrude upon each other's areas of responsibility, jointly creating a form of "Chinese Wall" between the companies. The FTC maintains that defendants did nothing to verify that consumers had actually acquired ownership of an operating kiosk, or that kiosks had even been located as promised.

By early 2004, more than 450 consumers had purchased thousands of kiosk business opportunities from NSD. The FTC has presented consumer affidavits that the above misrepresentations were central to the consumer's decision to purchase the business opportunity from NSD; in particular the represented guaranteed monthly return on the investment, and the buyback offer. For many consumers, the investments represented all or a significant portion of their retirement savings.

The FTC has further established that defendant High was involved in the marketing and selling of business opportunities, and in charge of, among other things, "compliance issues, legal questions, document questions, offering circulars, and program descriptions." High helped create NSD's marketing material, and disseminated these materials at presentations to agents and clients. He approved advertising for agents, and answered questions from agents about the program. High was also in charge of assigning NSD clients sites for their kiosks. In January 2004, Bevilacqua gave High permission to sign on his behalf the notices of assignment, which assigned BVC's rights to operate kiosks at particular locations to NSD. High continued to assign locations even though he was aware of occasions when kiosks were not installed, and that BVC was behind in installation. Significantly, High actually visited several locations and found that kiosks had not been installed. He did not, however, take any steps to determine if these kiosks had ever been installed, or whether the non-installation problem was endemic.

The FTC has met its initial burden on summary judgment of demonstrating the absence of a genuine issue of material fact as to its claims against defendants and its entitlement to injunctive relief and consumer restitution.

B. Defendants' showing

Defendants address their burden of raising a genuine issue of material fact by basically claiming that they are the victims of a fraudulent scheme perpetrated by BVC and Bevilacqua. According to defendants, BVC and Bevilacqua falsely represented that they were properly installing internet kiosks on behalf of the kiosk purchasers all the time that they were receiving from NSD millions of dollars in purchasers' monies. Defendants argue, for instance, that in March 2004 Bevilacqua sent an email to Castro representing that 3,940 internet kiosks purchased from NSD had been manufactured and installed by BVC in various locations throughout the United States when, in fact, only 270 had been installed. Defendants assert that BVC and Bevilacqua intentionally concealed the scheme from NSD and Castro in order to continue receiving the payments from NSD, which defendants claim totaled approximately $10.5 million. In light of the fraud being perpetrated by Bevilacqua and BVC, defendants argue that the FTC cannot prove that the individual defendants knew or were recklessly indifferent to the validity of the representations. Defendants further maintain that Castro did not become aware of BVC and Bevilacqua's scheme until early March 2004, and that once he did, he immediately notified the FBI and began cooperating with the authorities. Defendant also notes that in March 2004, NSD returned and refunded approximately $5 million (an amount disputed by the FTC) to NSD kiosk purchasers.

Defendants also argue that BVC, not NSD, had the responsibility to locate and install the kiosks. Defendants deny that they made any false claims related to earnings, and that they were acting in accordance with a researched business model and its projections.

C. Procedural and Evidentiary Considerations

In many instances, defendants rely upon the declarations of Castro and High that are contradicted by their own prior testimony, discovery responses, business records and the weight of other corroborating evidence. As the FTC points out, "[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact. FTC v. Publishing Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1996).

Defendants have objected on hearsay and foundation grounds to the consumer declarations submitted in support of its motion. Since the declarations, however, are sworn to be based on personal knowledge, including the content of representations made to the declarants, they are admissible under Rule 56(e). Morever, the FTC has painstakingly and convincingly addressed each of defendants' objections to show that representations were nonhearsay because they were made by agents of the defendants, are not being offered to prove the truth of the matters asserted, or are otherwise admissible for summary judgment purposes.

Defendants argue that the FTC did not comply with Local Rule 56-1, which requires that motions for summary judgment include "a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue." The FTC complied with this rule, and referenced it in section III of its motion for summary judgment.

Defendants also appear to assert that the FTC is required to seek judicial notice of record evidence it presents. The court disagrees with defendants that Fed.R.Evid. 201(a) applies such a standard.

D. Substantive Law and Analysis

Section 5(a) of the FTC Act prohibits deceptive acts and practices in or affecting commerce. To prevail under Section 5(a), the FTC must demonstrate that "first, there is a representation, omission or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission or practice is material. FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2001). The FTC need not prove the elements of common law fraud, in particular the subjective reliance by injured consumers; rather, the FTC must show that the alleged fraudulent practices were the type of misrepresentation on which a reasonably prudent person would rely, that they were widely disseminated, and that the injured consumers actually purchased the product. FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1293 (D.C. Minn. 1985); see also FTC v. Figgie Intern., Inc., 994 F.2d 595, 605 (9th Cir. 1993). Based on its evidence and defendants' opposition, the FTC argues that there is no genuine issue of fact that NSD misrepresented the amount of income that purchasers would earn, the availability and existence of profitable locations for their kiosks, the source of monthly payments, and the very existence of the kiosks.

Individuals are personally liable for restitution for corporate misconduct if they "had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that consumer injury resulted." FTC v. Affordable Media, 179 F.3d 1228, 1234 (9th Cir. 1999). The knowledge requirement is satisfied by establishing that individuals had "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of the representations, or an awareness of a high probability of fraud coupled with intentional avoidances of truth." FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994). The FTC, however, "is not required to show that a defendant intended to defraud consumers in order to hold that individual personally liable." Affordable Media, 179 F.3d at 1234.

In this case, the court finds it pivotal that NSD remained obligated when selling the kiosks to secure locations for and install them. This, despite the fact that NSD delegated the tasks of locating and installing the kiosks to BVC. In other words, BVC did not contract with the purchasers to locate and install the kiosks, nor were purchasers made aware that NSD would not be responsible for those obligations.[1] Thus, it makes little difference that NSD executed documents with purchasers that disclaimed any earnings, profits or other representations. Those documents do not disclaim NSD's responsibility for securing and installing the kiosks, and defendants have raised no genuine issue of fact that NSD performed pursuant to its agreements with consumers or even intended to. Although defendants claim that BVC alone agreed with purchasers to install the kiosks, defendants have not substantiated that claim. BVC's service agreement contains no obligation to install a kiosk, let alone take the full responsibility for it from NSD. NSD's sales agreement and offering circular, however, incontrovertibly obligated NSD to locate and install the kiosks, and it was a misrepresentation for NSD to so promise given defendants' knowledge that the installations were not being done, or their reckless disregard for why.

Despite the fact that NSD was ultimately responsible for locating and installing the kiosks, it did next to nothing to verify that purchasers had actually acquired ownership of an operating kiosk, or that the kiosks actually had been placed as promised. Castro claims that he would visit Bevilacqua's offices on a consistent basis, and would be shown on

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[1]Despite Castro's deposition testimony and the documentary evidence that establishes that NSD contractually agreed to locate and install the kiosks, defendants assert in their opposition that the sales agreement was a contract (named "Internet Kiosks Business Sales Agreement") solely between the purchaser and BVC or MyMart. Defendants have not shown, however, that any such agreements, even if in place, would have relieved NSD of its co-extensive obligation to locate and install the kiosks.

Bevilacqua's computer that the online revenue from the kiosks was within expectations. Castro also claims to have seen units in Bevilacqua's corporate office which were identified to an owner and destination, and argues that employees at Bevilacqua's offices were instructed not to give him any access to information on those visits.

However, at a minimum, Castro should have verified that NSD's obligation to locate and install the kiosks was being accomplished by Bevilacqua by (1) checking on at least some of the physical sites where the kiosks were located, or even asked for photos to confirm the placements, (2) requesting some kind of documentary evidence that the kiosks had been located at the specified sites (for instance, contracts between Bevilacqua and the owners of locations where the kiosks had been placed), or (3) requiring some form of verifiable information regarding the usage or profitability of the kiosks that BVC claimed to have installed. Indeed, the fact alone that in all of his supposed visits to Bevilacqua's offices Castro never once came away with reliable information regarding the actual installation of the kiosks should have put Castro on notice that further due diligence was necessary. Instead, not only did Castro take a hands-off approach to Bevilacqua's operation, but he complied with and perpetuated a "Chinese Wall" between NSD and BVC regarding installation and maintenance activities. Castro himself explained: "Ed's favorite saying was, 'Charlie and I have, like, a Chinese wall built between us. That was his – and to some degree that was true. My role was to sell the machines. His role was to install, maintain, service, et cetera, the machines, submit payments to the client of the machines. We were very careful not to cross those boundaries." Unfortunately, by not crossing those boundaries when, in fact, NSD had promised to provide consumers with a functioning kiosk, Castro, High and NSD, as a matter of law, were recklessly indifferent to the truth or falsity of the representations it was making to consumers.

In addition, Castro also testified that the estimates that Bevilacqua gave for installing machines (20,000 over eighteen months, or even thirty months) "made [Castro] want to choke." Castro was therefore not only aware of such exaggerations, but indifferently accepted Bevilacqua's words and excuses even though he knew Bevilacqua to stretch the truth. For instance, Bevilacqua claimed to have relationships with various large corporate entities for the placement of the kiosks; but Castro knew that BVC had not received any commitments at the corporate level allowing BVC to install kiosks at particular locations, and that at most, BVC enjoyed only a "preferred vendor" status allowing BVC to negotiate agreements with specific locations. Still, Castro never tried to verify what he certainly knew were uncertain claims by Bevilacqua, or even check on the status of such "relationships" during the venture. Again, this demonstrates not only reckless indifference to the truth, but also an awareness of a high probability of fraud coupled with intentional avoidances of truth.

Castro claims that he was not told of abnormalities at BVC until March 2004. The FTC evidence, however, establishes that numerous notices of concern about BVC were received by Castro and NSD. Emails dating back to early 2002 complained about not receiving accounting statements and BVC's lack of responsiveness to questions from agents. Significantly, Castro and NSD also received expressions of concern about installations, BVC's failure to provide existing kiosk locations, and once received a forwarded email to an agent in which Bevilacqua refused to disclose how many of the kiosks were operating in the black. What's more, even after NSD admittedly received definitive notice from agents in November 2003 that they had checked on the supposed location of their kiosk to find nothing there, Castro went no further than to make inquiry of Bevilacqua, merely accepting his explanation about the moving of the kiosk to another location, or the lack of internet service to a particular location. In sum, there is no room for defendants to claim that Castro was being duped by Bevilacqua about there being no significant problems with the installation of the kiosks. The facts put Castro and High, as sophisticated businessmen in the field, on notice of installation and other problems, and they recklessly disregarded those warnings.

Defendants argue that Bevilacqua falsely represented on March 15, 2004, that 3,940 kiosks had been installed. However, it is not the face value of this representation, but defendants' acceptance of it, given the prior history of concerns and complaints, and defendants' lack of due diligence regarding BVC's operations, that is significant. Morever, the FTC has shown that High had access to the database on the internet that purported to list installed kiosks before Bevilacqua's representation was sent. Therefore, NSD had notice that BVC had not, in fact, installed 3,940 kiosks. Also, as the FTC points out, Castro knew, as of at least December 2003, that BVC was seriously behind in installations (even though he apparently did not even attempt to independently clarify to what extent). Also, the evidence indicates that the total number of kiosks sold, not installed, was at most approximately 3,000. So, Castro could not have reasonably been assured that Bevilacqua's installation number was accurate. Furthermore, the email does not expressly state that 3,940 kiosks had actually been installed. On the contrary, it states that "I have started the process of determining exactly: 1) how many machines are installed, 2) scheduled to be installed, 3) paid for by net depot."

Defendants have also failed to raise a genuine issue of material fact with respect to the FTC's showing that defendants made false earnings claims. Defendants rely heavily on the fact that NSD required each purchaser to sign documents called a "Business Opportunity Offering Circular" and an "Internet Access Terminal Sales Agreement." These documents proposed, in part, to disclaim to purchasers that NSD made any representation that any of the business opportunities would be successful, or earn a profit. The Internet Access Terminal Sales Agreement, in particular, linked the success of the businesses to the purchaser's appropriate site selection. It also expressly indicated that the NSD did not represent that the business was a "safe" investment, or that there was no risk of loss.

In the first place, the FTC has established that not all purchasers signed these documents. Morever, defendants do not contest that they made the specific claims regarding kiosk income previously identified. As to the claim that purchasers would earn a fixed monthly payment of one percent, which was especially attractive to potential purchasers, defendants assert that BVC made it. However, the FTC's evidence is uncontested that NSD disseminated the claim to BVC and agents at sales meetings and approved materials containing it. NSD, therefore, is still liable for the representation. See Porter v. Dietsch, Inc. v. FTC, 605 F.2d 294, 309 (7th Cir. 1979). In any event, it is not the existence of a disclaimer, but the net impression that consumers are left with that governs whether the false statements were material. See Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1496-97 (1st Cir. 1989). Defendants have not contested that not all of the purchasers signed the disclaiming documents, or that the discrete, specific representations made by NSD regarding substantial earnings left a greater impact on the purchasers than the general disclaimers.

Defendants also argue that the claims made about the profitability of the kiosks are not false because they were based on a viable business model. However, the court agrees with the FTC's argument, and defendants have not shown otherwise, that what is material is not theoretical profitability, but the actual profitability of the businesses being marketed.[2] At no time over the two years that NSD sold the kiosks did NSD ever make or request an accounting of the kiosks it had sold. Rather, defendants showed the tendency to intentionally avoid making any independent assessments or perform minimal due diligence on BVC's operation.

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[2]As the FTC points out, even reliance on the business model that defendants claim would have provided warnings about the relative success of kiosk. The Summit Research reports indicated that for kiosks to be profitable, they must be accessible to people with time to spend, and function correctly for each client. The report warned to expect owners to receive lower profits over time due to the decrease of per minute charges, and made each reference to potential earning power conditional on various factors.

Castro places much emphasis on his cooperation with the authorities. Of course, once it became apparent that BVC's house of cards was collapsing, it would have served any of defendants' self-interest to distance themselves from BVC. Castro's cooperation and unsubstantiated claims about the amount of refunds that he provided to consumer victims simply does not assuage his prior actions and responsibilities.

The court further finds that defendants have failed to adequately contest that customers paid millions of dollars to purchase the business opportunities, or that the corporate defendants formed a common enterprise. Regarding the FTC's showing of High's participation in NSD and BVC, defendants have failed to raise an issue of fact that High so participated, and that circumstances put him on notice that serious performance problems existed at BVC.

Regarding the Castro Children's Trust, Castro admits that the $270,000 remaining derives from NSD. Also, bank records indicate that the majority of this money is traceable to the corporate defendants, which have been found to form a common enterprise. Defendants do not contest the allegations relating to these specific monies; therefore, they will be subject to the court's judgment based on the theory of constructive trust on behalf of the injured customers. See FTC v. Crittenden, 823 F. Supp. 669, 703 (C.D. Cal. 1993), aff'd, 19 F.3d 26 (9th Cir. 1994). State law governs the imposition of a constructive trust, and in California, the state in which the transfers and parties to the transfers are located, constructive trusts have been recognized. Id. See also Namow Corp. v. Egger, 99 Nev. 590, 668 P.2d 265, 267-68 (1983) (application of constructive trust in Nevada for misappropriation).

The Franchise Rule requires franchisors and franchise brokers to provide prospective franchisees with a complete and accurate basic disclosure document. The FTC argues that the disclosure documents in question contained false incorrect information regarding earnings claims, among others. Defendants hinge their opposition to the FTC's motion for summary judgment in this regard on their assertion that they engaged in no improper conduct and did not make misrepresentations of any kind. Since the court has rejected that position, there exists no genuine issue of fact regarding defendants' violation of the Franchise Rule.[3] Under § 19(a)(1) of the FTC Act, 15 U.S.C. § 57(b), the Franchise Rule, the FTC may seek "such relief as the court finds necessary to redress injury to consumers . . . resulting from [the violation]." The Franchise Rule, therefore, provides an alternative basis for the court's judgment.

The court will grant the FTC's motion for summary judgment with one exception. The court wishes to revisit the issue of whether funds transferred to Jeffrey Benice and Goe & Forsythe, the attorneys representing the defendants, should be sought for redress of consumer injury. On March 22, 2006, the court deferred ruling on this issue in part because the parties' summary judgment motions were outstanding. Accordingly, the court will defer entering the judgment in this matter, and require limited supplemental briefing on whether, or to what extent, the funds transferred to the attorneys in this action should be recovered in light of the issues resolved herein. Following the resolution of that issue, the court will enter a permanent injunction and order proposed by the FTC, or modified accordingly.

Finally, in the disposition of the FTC's motion for summary judgment, the court has considered defendants' motion for summary judgment (#69, response #76, reply #136), and finds that the arguments made therein have been addressed herein, previously rejected by the court, or otherwise lack merit. Accordingly, that motion will be denied. Similarly, other pending motions related to this decision will be summarily ruled upon herewith.

E. Order

THE COURT HEREBY ORDERS that the following motions for leave to file excess pages (#120, #128) are GRANTED.

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[3]Substantively, the FTC has shown that the venture satisfies the criteria for a traditional services franchise, with BVC as the franchisor and NSD as the franchise broker.

THE COURT FURTHER ORDERS that the Federal Trade Commission's motion for summary judgment (#78) is GRANTED, as set forth above.

THE COURT FURTHER ORDERS that within sixty days from the date of the filing of this order, the Federal Trade Commission shall file a supplemental brief on the limited issue of whether, or to what extent, the funds transferred to the attorneys in this action should be recovered in light of the issues resolved by this order. Responsive and reply briefs shall be filed according to local rules. Following the court's ruling on that issue, the Federal Trade Commission is DIRECTED to file a proposed permanent injunction and order.

THE COURT FURTHER ORDERS that defendants' motion for summary judgment (#69) is DENIED.

THE COURT FURTHER ORDERS that the defendants' motions for judicial notice (#72 and #134) are DENIED.

THE COURT FURTHER ORDERS that the Federal Trade Commission's motions to strike (#77, #121 and #129) and motion to amend motion to strike (#133) are DENIED as moot.

DATED this 29 day of September, 2006.

Lloyd D. George
United States District Judge