UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CASE NO: 8:09-cv-547-T-23 TBM

HOME ASSURE, LLC,
a Florida limited liability company,

B HOME ASSOCIATES, LLC,
a Florida limited liability company, d/b/a
EXPERT FORECLOSURE,

BRIAN BLANCHARD,
individually and as a member officer,
or director of Home Assure, LLC, and
B Home Associates, LLC,

MICHAEL GRIECO,
MICHAEL TRIMARCO, and
NICOLAS MOLINA,
individually and as members, officers, or
directors of Home Assure, LLC,

Defendants.

PLAINTIFF FEDERAL TRADE COMMISSION'S OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

On January 25, 2010, the Federal Trade Commission ("FTC") moved for summary judgment against Defendants Nicolas Molina ("Molina) and Michael Trimarco ("Trimarco") for violating Section 5 of the FTC Act, 15 U.S.C. § 45. The cross-motion for summary judgment submitted by Molina and Trimarco presents no genuine dispute of material facts that precludes judgment *against* them on the FTC's summary judgment motion – much less points to any *specific* material facts that would warrant judgment in their favor.

Defendants' motion consists almost entirely of broad, self-serving statements from the four individual defendants. The Defendants ignore altogether Home Assure's deceptive representations on its website and reiterated in telemarketing calls. Defendants instead rely on disclaimers contained in form contracts sent to consumers – in most cases after payment – to argue that Home Assure's deceptive practices did not violate the FTC Act. The purported disclaimers do not, as a matter of law, cure Defendants' deceptive practices. Additionally, Defendants' self-serving denials of participation in the wrongdoing are of no consequence under the governing liability standard. In their roles as the chief executives and principal owners of a small, closely-held company, Defendants had an obligation under the FTC Act to ensure that Home Assure's stock-in-trade was not overreaching and deception. Moreover, the *specific* uncontroverted facts establish that both Defendants were involved in Home Assure's marketing activities. As a result, there is no genuine factual dispute as to Defendants' liability for Home Assure's deceptive activity. Lastly, Defendants' motion raises no factual dispute as to the appropriate measure of monetary relief as well as the need for prohibitory conduct relief against both Molina and Trimarco.

ARGUMENT[1]

I. THE RECORD CONCLUSIVELY ESTABLISHES THAT HOME ASSURE VIOLATED THE FTC ACT

The standard for finding liability under the FTC Act, 15 U.S.C. § 45(a), is well-established and not in dispute. Section 5(a) prohibits "unfair or deceptive acts or practices." 15 U.S.C. § 45(a). An act or practice is *deceptive* if "(1) there was a representation or omission, (2) the representation or omission was likely to mislead customers acting reasonably under the circumstances, and (3) the representation or omission was material." *FTC v. Peoples Credit First, LLC.*, No. 8:03-cv-2353, 2005 U.S. Dist. LEXIS 38545, at *19-20 (M.D. Fla. Dec. 18, 2005); *see also FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). Misrepresentations of material facts made to induce the purchase of goods or services constitute deceptive acts or practices. *See, e.g., Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *National Trade Publications Service, Inc. v. FTC*, 300 F.2d 790, 792 (8th Cir. 1962). Deception may be found based on the "net impression" created by a representation. *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009); *see also Peoples Credit First*, 2005 U.S. Dist. LEXIS 38545, at * 24 ("being mindful of the fact that the buying public does not weigh each word in an advertisement or a representation, the Court will consider the impression that is likely to be created upon the prospective purchaser").

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[1] Citations to the FTC's Motion for Summary Judgment and Defendants Molina and Trimarco's Motion for Summary Judgment are noted as "FTC's Mot. at [page]" and "Defs' Mot. at [page]," respectively. References to exhibits previously submitted in the Appendix to FTC's Motion for Summary Judgment are noted as "App. Tab [number] at [cite].

Here, the undisputed evidence establishes that Home Assure made material misrepresentations in connection with the sale of mortgage foreclosure rescue services. Consumers were led to Home Assure's website in some cases from links embedded in online comments posted by fictitious customers or other websites set up by Home Assure's marketing contractors. *See* FTC Mot. at 9-10. Home Assure's website touted its purported relationships with lenders and government entities, and its ability to stop foreclosure and negotiate loan modifications that would result in reasonable, or even lower, monthly payments. The website also promised a 100% money back guarantee and encouraged customers to call for a "free consultation." *See* FTC's Mot. at 10-12.[2] During the "free consultation," consumers received a sales pitch from a Home Assure telemarketer, touting Home Assure's claimed expertise in foreclosure mitigation, its success rate, and its purported years of experience working with lenders and negotiating repayment plans. The Home Assure telemarketer also reiterated the 100% money back guarantee. *See* FTC's Mot. at 12-13. Home Assure's sales calls emphasized the need for consumers to act quickly and make immediate payment to Home Assure. *See* FTC's Mot. at 5-18; *citing to* "Home Assure Phone Script," at App. Tab 21(H), at HA 2436 (stressing urgency to send payment through moneygram). Despite the touted money back and service guarantees, many customers paid for services they did not receive. Contrary to Home Assure's advertised refund guarantee, it did not refund many consumers their substantial payments to Home Assure. *See* FTC Mot. at 16-20. There is thus no genuine factual dispute that Home Assure violated the FTC Act.

[2] *See also* Grieco Dep. Tr., attached hereto at Exhibit 1, at 58 (admitting that Home Assure had no relationships with lenders)

Ignoring, but not disputing, these facts, Defendants contend there is no violation because form contracts sent to consumers contained disclaimers that negated the touted money back and service guarantees made to consumers. In addition, Defendants argue that Home Assure's 100% money back guarantee was not deceptive because some refunds were in fact given out, and that Home Assure only failed to provide refunds that were not allowed under the form contracts and because the company lost money. *See* Def's Mot. at 11-15. Neither argument is true.

A. As a Matter of Law, The Working Agreement's Disclaimers Do Not Cure Home Assure's Earlier Deceptive Representations.

Defendants cannot shield themselves from Home Assure's deceptive sales pitch by relying on the purported disclaimers in the Working Agreement for two reasons. First, the "net impression" of Defendants' representations govern a Section 5 deception claim. As a result, courts have held the FTC Act is violated when the defendant induces the first contact through deception. Second, the uncontroverted record demonstrates that many consumers did not have a chance to review the Working Agreements (anything but a model of clarity, as Defendants assert), before paying Home Assure.

1. The FTC Act is violated if the "net impression" of Defendants' conduct is likely to mislead customers.

Courts have universally rejected similar attempts by companies to disavow misleading representations, holding that the FTC Act "is violated if [the company] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract." *FTC v. Munoz*, No. 00-55319, 2001 U.S. App. LEXIS 19438, at *4

(9th Cir. 2001), quoting *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).[3]

None of the cases cited in Defendants' motion (at 12-13) are germane. Virtually all the cases Defendants cite to relate to enforcement of private contractual obligations between sophisticated parties or commercial entities. *See Saunders Leasing System, Inc. v. Gulf Central Dist. Ctr.*, 513 So. 2d 1303, 1306-07 (Fla. 2d D.C.A. 1987) (dispute over lease agreement which "was intensely negotiated" and revised by counsel); *General Electric Co. v. Latin America Imports, S.A.*, 126 Fed. Appx. 209 (6th Cir. 2005) (dispute over exclusive distributorship agreement); *Eclispse Medical Inc. v. American Hydro-Surgical Instr. Inc.*, 262 F. Supp.2d 1334 (S.D. Fla. 1999) (action brought by medical supply distributors against their supplier); *Benoay v. E.F. Hutton & Co., Inc.*, 699 F. Supp. 1523 (S.D. Fla. 1988) (enforcing arbitration clause).

By contrast, this case is a Section 5 public enforcement action. The elements of proof for a Section 5 case "are markedly different than in a fraud action between private litigants." *FTC v. Minuteman Press*, 53 F. Supp.2d 248, 262 (E.D.N.Y. 1998) (noting while written disclaimers "may be germane to the issue of reliance" in a private fraud suit, "it is the

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[3] *See also FTC v. Cyperspace.com, LLC*, No. C00-1806L, 2002 WL 32060289, at *4 (W.D. Wash. July 10, 2002) (granting FTC's motion for summary judgment as to liability and finding that check solicitations were deceptive despite disclosures on the back of checks); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) (granting FTC's motion for summary judgment, rejecting defendants' reliance on disclaimers that "were not included in the representations" but rather "found on the contract that consumers eventually sign[ed] with the defendant," and concluding that "a disclaimer does not automatically exonerate deceptive activities"); *FTC v. Atlantex Assoc.*, No. 87-0045, 1987 WL 20384, at *11 (S.D. Fla. Nov. 25, 1987) (finding that defendants violated Section 5 of the FTC Act and noting that the "overall impact of [d]efendants' practices as deceptive is apparent in this case despite isolated or ambiguous disclosures of the risks of investment made by [d]efendants").

'common-sense net impression' which controls" an FTC action); *FTC v. Bronson Partners, LLC*, No. 3:04CV1866, 2006 WL 197357, at *2 (D. Conn. Jan. 25, 2006) ("[t]he FTC's authority to bring an action under section 13(b) of the FTC Act is not derived from the defendants' contracts with individual consumers, and individual consumers' reliance on misrepresentations is not required"); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985) (stating that "the FTC Act differs from a private suit for fraud . . . [the FTC Act] serves a public purpose by authorizing the Commission to seek redress on behalf of injured consumers."). Thus, "a conflict between a specific disclaimer and a contrary oral representation – typically fatal to a reasonable reliance argument in a purely private suit – is . . . actionable by the FTC." *Minuteman Press*, 53 F. Supp.2d at 263.

The only *FTC* case cited by Defendants, *FTC v. IFC Credit Corp.*, 543 F. Supp.2d 925 (N.D. Ill. 2008), relates to an unfairness claim which is governed by a different standard than claims of deceptive practices – as the ones here – and thus is also not applicable. In *IFC Credit Corp.*, the FTC brought an unfair practice claim against a defendant that acquired and enforced allegedly worthless telecommunications equipment leases. *Id.* at 945-46. The district court noted that the leases "were not the prototypical 'take it or leave it' deals" since the consumers "already had telecommunications services, but were hoping to find a cheaper deal." *Id.* at 946 n. 11. The district court denied Defendant's motion to dismiss the unfairness claim, but noted that the leases may be relevant to assess whether the consumer injury was "reasonably avoidable" for an *unfairness* claim under Section 45(n) of the FTC

Act, 15 U.S.C. 45(n).[4] *Id.* at 947. The court made clear that the unfairness claims are "analyzed under a different standard from 'claims of deceptive practices.'" *Id.* Specifically, for claims of deceptive practices, "Section 45(n) does not apply, and the focus is on the deceptive act, not on whether the injury could reasonably have been avoided notwithstanding the deception." *Id.*

In sum, the form contracts do not cure Home Assure's deceptive conduct that lured consumers to its website and pressured them to pay substantial fees immediately during high pressure sales calls, promising a negotiated affordable plan to stop foreclosure within weeks, and a 100% money back guarantee. *See* FTC's Mot. at 10-13.

2. Many consumers did not get a chance to review the Working Agreements

Defendants further ignore the uncontroverted evidence that Home Assure typically provided the form Working Agreement simultaneously or even after the consumer paid Home Assure. In fact, the evidence shows that from July 2007 through at least June or July 2008, Home Assure typically sent the Working Agreement (along with the other forms in the company's initial package) to the consumer **after** payment was collected.[5] *See* FTC's Mot.

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[4] Section 45(n) codifies the principle of "reasonable avoidance." It states in pertinent part: "[t]he Commission shall have no authority under this section or section 18 [15 USCS § 57a] to declare unlawful an act or practice on the grounds that such act or practice is *unfair* unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable to consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n) (emphasis added).

[5] Defendants rely solely on general statements made by Grieco and Blanchard for their assertion that the customers reviewed and signed contracts before payment. Def's Mot. at 3. These statements from the other two individual defendants do not create any genuine dispute with the contrary specific evidence. *See FTC v. Career Assistance Planning, Inc.*, No. 1:96-cv-2187, 1997 U.S. Dist. LEXIS 17191, at *7 (N.D. Ga. Sept. 19, 1997) ("in light of FTC's overwhelming evidence to the contrary,

(continued...)

at 14.[6] Even by Trimarco's own admission, the Working Agreement and consumer payment were sent "simultaneously." *See* Trimarco Dep. Tr., at App. Tab 16 at 211.

Further, the Working Agreement itself is unclear. *See* App. Tab 21(K); later versions attached at App. Tabs 18 (B) & (C). It defines "solution" so broadly to include "the answer to a problem, explanation, clarification, etc," that it is meaningless. *See* App. Tab 21(K), at HA 77403. While the form contains several "No refund" provisions covering a broad and ill-defined range of situations (*e.g.* "Homeowner chooses not to comply with the results of HA's analysis"), nowhere does it explain when a consumer is entitled to a refund.[7]

After July 2008, Home Assure changed its enrollment process to ostensibly address state laws prohibiting foreclosure consultants from collecting advance fees. *See* FTC's Mot.

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[5] (...continued)
defendants' self-serving statements alone cannot create a genuine issue of fact"). Moreover, Blanchard's statement has no time reference. Grieco was in the North Carolina office and not even involved in the sales process run out of the call center in Florida. *See* Grieco Dep. Tr., attached hereto at Exhibit 1 at 21.

[6] *See, e.g.*, Consumer declarations referenced at FTC Mot. at 14 n. 17; Duffield Dep. Tr. at App. Tab 21 at 81-82, 130-31, 133-34. The phone script used by Home Assure beginning in March or April 2008 directs the sales force to collect payment before sending out forms. *See* "Home Assure Phone Script," at App. Tab 21(H) at HA 2436-36 ("Once accounting gets your payment, they will contact me...at that time I will need to contact you and gather additional information to put in your paperwork"); Duffield Dep. Tr. at App. Tab 21, at 99-100 (discussing script).

[7] The confusing and illogical nature of the form is further illustrated when Defendants tried to explain how it operated. For example, the form provides that "if this working Agreement is terminated prior to conclusion of HA's services, the right of HA to retain fees earned form efforts prior to termination of services under the working Agreement shall not be divested...." *Id.* at HA 77404. According to Trimarco, this provision applied only if the consumer said the words "I would like to terminate the contract," yet would not apply if they asked "for the money back guarantee." In the latter situation, Home Assure could deny the request as long as "the bank was still pondering [the plan]," which Trimarco admitted later could "be an 8, 10, 12-week time frame" – essentially the same time period (90 days) that all refund claims had to be made. *See* Trimarco Dep. Tr., attached hereto at Exhibit 2, at 292-93, 295.

at 15-16.[8] Contrary to the impression left by Defendants' description of Home Assure's operations (see Defs' Mot. at 3), Home Assure did not provide consumers a "formal written plan" until late in the life of the scheme – *i.e.*, just prior to their decision in September 2008 to wind down the business. *See* FTC's Mot. at 15-16. And to the extent it was used at all, the "formal written plan" was actually a letter in which Home Assure informed the consumer that it had purportedly obtained preapproval for a specific repayment plan – but not a plan from the lender. *See id.*

Even under this process, Home Assure's sales force pressured consumers to make a quick decision and pay Home Assure immediately in order to get the purported plan Home Assure negotiated with the lender. *See* FTC's Mot. at 12-13 (going through sales script Duffield created around July 2008 incorporating enrollment changes and recorded call on July 25, 2008); *see also* Duffield Dep. Tr. at App. Tab 21 at 107 ("we're trying to create a sense of urgency, is really the bottom line here.") For example, an undercover recorded call between an FTC investigator and Home Assure telemarketer on August 5, 2008 illustrates the high pressure and hard sell tactics employed:

> [Customer]: So, my question probably would be here, if this also could be spread out over time?
> [Home Assure]: No, the fee has to be collected because we work so fast to get your plan – . . . that we literally have your plan within two days. And, so, this is what happens, let's say I take all of your information, I see if I can get you approved. We contact the bank.
> * * *

[8] *See, e.g.*, Duffield Dep. Tr. at App. Tab 21, at 124-27 (explaining process change); Grieco Dec. at App. Tab 25 at 2 n. 1 (admitting "[w]hen Home Assure first operated it generally charged customers prior to providing a formal plan").

> [Home Assure] And then the mortgage company says, sure, we'll do that. So, we get the approval. Then we start authorization forms. We send those out and we have your plan back in about two days. So, let's say that we have your plan back tomorrow and we have the plan, but you can't pay until two, three weeks from now.
> * * *
> [Home Assure] Well, then your plan is no longer going to be good because we've already done the [ ]– work and the plan is just sitting there and the mortgage company is not going to leave the approval open for that long.
> * * *
> [Home Assure] So, that's why we have to make sure ahead of time that you are able to pay that fee. Otherwise we did all the work – and we're not going to tell you exactly what your plan is until you pay the fee. . . .

See Recorded Call Tr. (Aug. 5, 2008), at App. Tab 28, at 13-14, 15-16. In short, there is no genuine factual dispute that many customers in desperate situations were pressured by Home Assure to pay before they even received or had a chance to review the Working Agreement.

B. As a Matter of Law Home Assure's Payment of Some Refunds Is Not A Defense under the FTC Act.

There is no dispute that Home Assure did not comply with the 100% money back guarantee touted on its website and during sales calls. Indeed, Defendants admit they never intended to comply with the 100% money back guarantee, but intended to enforce the refund disclaimers in the Working Agreement. *See* Defs' Mot. at 14-15. The record further shows that, in some instances, Home Assure failed to even respond to the refund request. *See* FTC's Mot. at 17. In other instances, Home Assure denied refund requests if the customer merely contacted their lender. *Id.* Other customers were offered a refund (or partial refund), but only after they complained to a law enforcement agency. *Id.*

Defendants' assertion (at p. 14) that Home Assure issued some customers refunds is no defense. *Cf. FTC v. SlimAmerica, Inc.*, 77 F. Supp.2d 1263, 1272 (S.D. Fla. 1999) (existence of money back guarantee is "is neither a cure for deception nor a remedy for consumer injury.") Similarly, Defendants (at p. 14-15) erroneously indicate that it was not deceptive for Home Assure to fail to give refunds because the company was "unprofitable." *See Career Assistance Planning, Inc.*, 1997 U.S. Dist. LEXIS 17191 at *7 (rejecting defendant's argument that "it was not 'deceptive' for [the company] to refuse to give refunds when the company was financially unable to do so.") The Defendants ignore that Home Assure continued to solicit customers with a 100% money back guarantee and refund promise even after the four individual defendants agreed to wind down its operations. *See* FTC's Mot. at 21-23.

II. THE RECORD CONCLUSIVELY SHOWS THAT BOTH MOLINA AND TRIMARCO ARE LIABLE FOR HOME ASSURE'S VIOLATIONS

There is no dispute as to the governing standard for determining individual liability under the FTC Act. Defendants acknowledge that individuals may be held liable for the corporate defendant's violations where (1) "the individual defendants participated directly in the practices or acts *or had the authority to control them*;" and (2) "the individual had some knowledge of the practices."[9] *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996)

[9] Defendants argue (at pp. 15-17) that the FTC cannot seek "secondary forms of liability" against them based on the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). In *Central Bank*, the Court held that private plaintiffs may not maintain an "aiding and abetting" suit under Section 10(b) of the Securities Exchange Act. 511 U.S. at 191. Here, it is unnecessary for the Court to consider aiding and abetting liability. There is no question that direct liability under the standard set forth in *Amy Travel* and *Gem Merch. Corp.* is appropriate here. Defendants Molina and Trimarco violated Section 5 of the FTC Act based on their direct liability from their control, participation, and knowledge of the deceptive acts.

(emphasis added) (quoting *FTC v. Amy Travel Serv.*, 875 F.2d 564, 573 (7th Cir. 1989)). *See* Defs' Mot. at 15, 18, n.19, citing to *Amy Travel & Gem Merch. Corp.* The undisputed specific facts establish that Molina and Trimarco: (1) had authority to control as well as directly participated in the deceptive practices at issue; and (2) had the requisite knowledge of the practices at issue. *See* FTC's Mot. at 28-33.

A. There is No Genuine Factual Dispute that Molina and Trimarco Had Authority to Control and Directly Participated in the Deceptive Practices.

As the principal owners and the top executives of a small, closely-held company, Molina and Trimarco had authority to control the deceptive sales operation and all other aspects of the business. *See Amy Travel Serv.*, 875 F.2d at 574 (finding individual defendants had the requisite authority to control where they were the "principal shareholders and officers of the closely held defendant corporations"). Moreover, they funded Home Assure's operations, controlled the company's financial affairs, and reviewed sales and financial information.[10] *See* Defs' Mot. at 7-10; *see also* FTC's Mot. at 4 (Molina and Trimarco participated in bi-weekly owner calls about the company's financial performance) and 29 (Molina and Trimarco approved expenditures "escalated" to them; Trimarco authorized an outside accountant to issue company checks under his name).

Defendants' broad self-serving claims of non-involvement in the sales activities (*see* Defs' Mot. at 19), cannot avoid summary judgment against them. *See Smith v. Federal Express Corp.*, 101 F.App'x 852, 855 (11th Cir. 2006) (party's "own self-serving

[10] Defendants' description of themselves as "passive owners" (at 7) is contrary to their assumption of titles and duties of corporate officers and taking salaries. Their "passive investor" label is also contrary to how Defendants classified their tax deductions from Home Assure's losses as "*non-passive*" losses – which affords more favorable tax treatment. *See* FTC's Mot. at 28-29.

statements" cannot defeat summary judgment motion); *FTC v. Publishing Clearing House*, 104 F.3d 1168, 1171 (9th Cir. 1996) (finding an officer's "conclusory, self-serving statements" of non-participation insufficient to create a genuine issue of material fact). As an initial matter, the FTC is not required to show an individual participated directly in a business entity's deceptive practices to warrant monetary relief. *See Gem Merch. Corp.*, 87 F.3d at 470 (holding a showing of participation *or* control may justify final monetary relief). Moreover, Defendants' broad denials of participation do not create a dispute when the following *specific* uncontroverted facts demonstrate their direct involvement:[11] (1) both were involved in retaining search engine optimization companies with a clear purpose of inducing customers to Home Assure's website and its call center;[12] (2) both hired a director of the call center to expand the company's telemarketing operations; (3) Trimarco's own admission that he visited the call center a "handful of times," and monitored the telemarketing calls; (4) Molina's own admission that he personally responded to customer complaints about Home Assure's deceptive practices; and (5) both reviewed and discussed various sales scripts with

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[11] The fact that Blanchard ran the call center while Grieco ran the mitigation office does not insulate Defendants from liability based on their own control of and participation in the deceptive practices. Additionally, contrary to Defendants' conclusory statements that Grieco and Blanchard "ran every operational aspect of Home Assure" (at p. 6, 19), these defendants admitted their limited roles. Blanchard did not know who Home Assure's lead generators were; was not involved in paying Home Assure's bills; did not look at Home Assure's website; had no involvement in marketing campaigns created by the outside vendors; did not have a corporate credit card; had no involvement in Home Assure's affiliate program; and did not even know what Home Assure's "Institutional Services Division" did. *See* Blanchard Dep. Tr. attached hereto at Exhibit 3, at 122, 143, 149, 158, 165-66. For his part, Grieco did not know where Home Assure got its customer leads and had no involvement with the company's marketing affiliates. Grieco Dep. Tr., attached hereto at Ex. 1, at 181, 256-57. Grieco, who has an ongoing business relationship with Trimarco, claimed Home Assure had no president, although he later claimed Blanchard was "the acting president." *Id.*, at 11, 61,63.

[12] By Defendants' own admission, the bulk of Home Assure expenses – $1,516,595.27 – was devoted to the marketing activities of these outside vendors. *See* Defs' Mot. at 2.

the outside vendors. *See* FTC's Mot. at 32-33. Indeed, contemporaneous correspondence produced by the search engine optimization companies retained by Home Assure clearly show that Molina and Trimarco were both directly involved in and controlled Home Assure's marking program and expenditures throughout Home Assure's entire operations. *See* Composite Exhibit 5 attached hereto; *see also* Exhibit 6 and App. Tab 56.

Additionally, Defendants' assertion that "formal titles do not control the Court's analysis" of the requisite control element (*see* Defs' Mot. at 19-20), is both unremarkable and beside the point where the record establishes that both Molina and Trimarco assumed offical duties and held themselves out to third parties as the chief corporate officers. *See* FTC's Mot. at 28-29. Defendants' reliance on *FTC v. QT, Inc.*, 448 F. Supp.2d 908 (N.D. Ill. 2006), is also misplaced. In *QT, Inc.*, the district court held that the president of the corporate defendant "possessed the authority to control the corporate Defendants' deceptive acts or practices," while his wife (Jung Joo Park), who was listed as the corporate secretary and had no involvement in the marketing practices, did not. *Id.* at 973. In this case, Defendants Molina and Trimarco each were the principal owners and assumed the top corporate officer positions. Each also funded Home Assure's operations. *See* Defs' Mot. at 7-8. Moreover, the uncontroverted records demonstrates they were involved in the marketing practices - including arranging for outside vendors to lure customers to Home Assure's website and telemarketers. *See* FTC's Mot. at 32.

B. There is Also No Genuine Factual Dispute that Both Molina and Trimarco Had the Requisite Knowledge of the Practices At Issue.

There is no dispute that the knowledge requirement is satisfied by a showing that the Defendants had "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." Defs' Mot. at 20, citing *Amy Travel Serv.*, 875 F.2d at 574.

The following undisputed specific facts are more than sufficient to make this showing: (1) both were aware of lawsuits brought by (or "communications with") state Attorneys General; (2) both had knowledge of Home Assure's high refund rates; (3) both provided the start-up funding for a call center run by Blanchard - whose prior employers in this industry were all sued by government law enforcement agencies for similar deceptive marketing practices; (4) both were involved in hiring Duffield as the call center director to expand the telemarketing operations; (5) both periodically reviewed financial information which would have shown that the vast majority of resources were being devoted to sales and marketing not mitigation; and (6) both participated in the marketing practices and, in particular, hiring outside vendors to lure consumers to the company's high-pressure telemarketers. *See* FTC's Mot. at 30-33; *see also FTC v. MacGregor*, No. 08-55838, 2009 WL 5184070, at *3 (9th Cir. Dec. 9, 2009) (affirmed summary judgment, finding "evidence showing the high volume of consumer complaints, the high refund and return rates, and the number of investigations of state Attorneys General and the Better Business Bureau" was "sufficient to show [defendant] likely knew of material misrepresentations made by the Companies to consumers, or was at least recklessly indifferent to the truth.") Moreover, the

level of Defendants' admitted participation in Home Assure's business alone is sufficient. *See* FTC's Mot. at 28-29, 32-33.

Defendants broadly claim they believed that Home Assure was honoring its guarantee promise because refunds were issued and their "managers" told them the company was helping people (*see* Defs' Mot. at 21); however, they each admitted to having seen **no** verification or data measuring the company's performance or knowing the amount of refund requests that were denied. *See* FTC's Mot. at 31-32 (citing to Trimarco's Dep. Tr. at App. Tab 16 at 254-55, 342-46; Molina's Dep. Tr. at App. Tab 17 at 190-91, 195-96.) Defendants' conclusory assertions are simply not credible given their level of participation in Home Assure's operations. Even if credited, Defendants' speculative beliefs cannot insulate them from their obligations of taking steps to prevent Home Assure's deceptive practices from continuing – particularly once they learned of the state Attorney General lawsuits alleging the same deceptive conduct and consumer complaints discussed during the bi-monthly owner meetings. *See* FTC's Mot. at 4.

III. THERE IS NO FACTUAL DISPUTE CONCERNING THE PROPER MONETARY AND ANCILLARY EQUITABLE RELIEF

As this Court has held, "[i]n a Section 13(b) action of this kind, the proper amount of restitution has been held to be the purchase price of the relevant product or business opportunity, less any refunds." DE 65, at 6. There is no dispute that Home Assure's own records provide that the total consumer payments minus refunds is $3,721,807.85. *See* FTC's Mot. at 33. Likewise, the FTC's affirmative evidence showing that, at a minimum, approximately 75% of Home Assure's customers did not receive a viable plan through Home

Assure is uncontroverted. *See* FTC's Mot. at 17-20. Defendants point to no affirmative evidence of their own measuring their customers' outcomes. Accordingly, the FTC's proposed order seeking to hold Molina and Trimarco jointly and severally liable for $2.775 million (75% of $3.7 million) is proper.

Defendants argue that the monetary award against them should be limited to their salaries or "actual distributions they received directly from Home Assure." Defs' Mot. at 22. That argument, however, has been squarely rejected by this Court. DE 65, at 4-9.[13]

Additionally, permanent injunctive relief prohibiting Defendants from engaging in similar deceptive conduct is also proper and necessary. The governing standard for issuing a permanent injunction against conduct is not in dispute. The FTC must demonstrate "some cognizable danger of recurrent violation."[14] *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also* Defs' Mot. at 22, 23 n.21. Under that standard, the Court may look at

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[13] Defendants also ignore the "distributions" they received from the company in paying off credit cards balances in their names – thereby reducing their personal liability. *See* FTC's Mot. at 22-23. According to Home Assure's General Ledger, the company paid off more than $ 1.3 million from the Defendants' credit card balances. *See* A. Weintraub Decl., attached hereto at Exhibit 4.

[14] Defendants refer to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to argue that the Court lacks authority to issue "injunctive relief for past violations of the Act." Defs' Mot. at 24 (emphasis in original). However, Section 13(b) imposes no such limitation. The statutory language quoted by Defendants (at 23) – "is violating, or about to violate" -- is from the first proviso in Section 13(b)(1), which authorizes the Commission to file a complaint for equitable relief when it has "reason to believe" that "any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission . . . ." 15 U.S.C. § 53(b)(1). This "reason to believe" determination, however, is merely "a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." *See FTC v. Standard Oil Co.*, 449 U.S. 232, 241 (1980). The second proviso in Section 13 provides: "[t]hat in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). Thus, under Section 13(b), once the Commission has made the "reason to believe" determination and has brought a case invoking a district's plenary equitable authority, the court's authority to grant permanent injunctive relief under Fed. R. Civ. P. 65 is governed by the usual equitable standards. *See* DE 65 at 5 ("Section 13(b) imposes no limit on a district court's equitable powers").

defendants' past violations as well as whether their "current occupation position them to commit future violations . . . ." *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp.2d 1167, 1209 (N.D. Ga. 2008), *aff'd,* 2009 U.S. App. Lexis 27388 (11th Cir. Dec. 19, 2009). The Court has "discretion to model injunctive orders to fit the exigencies of the particular case, and the power to enjoin related unlawful acts." *SlimAmerica, Inc.*, 77 F. Supp. at 1275. Indeed, "[b]road injunctive provisions are often necessary to prevent transgressors from violating the law in a new guise." *Id.* (internal quotation marks omitted.)

Defendants contend (*see* Defs' Mot. at 24-25) that they cannot be subject to any conduct prohibition order since they have not marketed mortgage foreclosure rescue programs since Home Assure closed down, and they contend "nothing has changed" since Magistrate Judge McCoun made a tentative finding after the preliminary injunction hearing that "the FTC is unable to demonstrate that Trimarco, Molina, or Home Assure are currently violating, or are apt to violate any provision of law enforced by the FTC." DE 54, at 13.

As an initial matter, contrary to Defendants' claim, the evidence is now more developed since the preliminary injunction stage as to the pervasive nature of the deceptive representations and the degree of Defendants' participation in, and control over, these deceptive practices. *See David Vincent, Inc. v. Broward County,* 200 F.3d 1325, 1331 (11th Cir. 2000) (noting "denial of a preliminary injunction does *not* preclude the subsequent grant of permanent equitable relief") (emphasis in original). Additionally, the record now shows that after "resigning" from Home Assure, Defendants continued to directly target consumers online, through a different enterprise that marketed and sold various purported health care products. *See* FTC's Mot. at 22 n.27, 35. Defendants' new enterprise is subject to an

enforcement action brought by the Florida Attorney General. *Id.* According to the Florida Attorney General's complaint, since November 2008, Defendants were involved in "the internet sales of various personal care and health care products, including sales of acai berry;" "routinely advertised on the Internet, through a multitude of websites seeking customers for their products, offering advertisements claiming 'Free Samples' 'Free 30 Day Supply' or 'Free 15 Day Trial;'" and "failed to adequately notify the consumers that signing up for the 'free' trial would subject them to continuous and ongoing charges to their credit card for future unwanted purchases."[15] *Id.* at 22 n.27, citing to App. Tab 15, at ¶¶ 15-17.

Furthermore, the fact that Defendants have not marketed the same product in the same industry since Home Assure does not preclude injunctive relief. *See Nat'l Urological Group, Inc.*, 645 F. Supp.2d at 1209 ("the fact that illegal conduct has ceased does not foreclose injunctive relief.") Instead, the following factors should be considered:

> [T]he 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.

CFTC v. Wilshire, 531 F.3d 1339, 1346 (11th Cir. 2008) (alteration in original) (quoting *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982). These factors undisputably warrant imposition of permanent prohibitory conduct relief. Here, Home Assure's

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[15] The Better Business Bureau listed the "Top 10 Scams and Rip-offs of 2009," which included Defendants' two more recent enterprises: "ads offering trial offers for teeth whiteners, acai anti-aging pills and other miracle supplements;" and "mortgage foreclosure rescue/debt assistance." *See* Better Business Bureau News Center, Top 10 Scams and Rip-Offs of 2009, "http://www.bbb.org/us/article/bbb-lists-top-10-scams-and- rip-offs-of-2009- 14436" (last visited Feb. 9, 2010).

misrepresentations were not isolated occurrences but pervaded the entire marketing scheme. Molina and Trimarco both participated in and furthered Home Assure's marketing scheme and had control over it. The deception targeted desperate consumers who faced foreclosure. Moreover, the deceptive scheme continued largely unabated despite the filing of several state Attorneys General lawsuits. While Defendants have not marketed the same product to consumers since Home Assure, they have continued to target consumers with different products (of dubious worth) with similar guarantee gimmicks – again prompting consumer complaints and law enforcement scrutiny. Equitable prohibitory conduct relief is necessary to protect consumers and ensure that Defendants do not perpetrate new frauds.

CONCLUSION

This Court should deny Defendants' motion for summary judgment; grant the FTC's summary judgment motion; and enter a final order against Molina and Trimarco holding them jointly and severally liable for $2.775 million, and containing the conduct relief set forth in the FTC's proposed order.

Date: February 11, 2010

Respectfully submitted:

s/ Ann F. Weintraub

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served via this Court's CM/ECF electronic filing system on this 11th day of February, 2010 upon the following CM/ECF participant:

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