No. 16-10063

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

CHRIS LENYSZYN,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:14-cv-01599-HLM
Hon. Harold L. Murphy

BRIEF OF THE FEDERAL TRADE COMMISSION

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Murphy, Harold L. (Hon.) – United States District Judge

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Shonka, David C. – Acting FTC General Counsel

Sterling Ross Payment Systems LP – Georgia limited partnership, affiliate of Williams Scott & Associates, LLC and WSA, LLC, defendants below

The Law Offices of Careton R. Matthews – Counsel for John Williams; WSA, LLC; and Williams Scott & Associates, LLC (defendants below)

Warrant Services Administration – Assumed business name used by WSA, LLC (defendant below)

Williams Scott & Associates, LLC – Defendant below, a Georgia limited liability company

Williams, John – Defendant below

WSA, LLC – Defendant below, a Nevada limited liability company

The Federal Trade Commission further states that, to the best of its knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

The FTC does not believe oral argument will materially assist the Court in its consideration of this appeal and therefore does not request it.

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Appellant Chris Lenyszyn and his co-defendants below operated a fraudulent debt collection scheme known as WSA. Lenyszyn and his fellow collectors posed as law enforcement officials, sought payment for debts that consumers did not owe or that WSA had no authority to collect, and falsely threatened to prosecute consumers or revoke their driver's licenses unless they paid. All of those practices violated the Federal Trade Commission Act and the Fair Debt Collection Practices Act. The district court entered summary judgment against Lenyszyn, holding him jointly and severally liable for money that WSA unlawfully took from consumers while he was a managing member of the company. The questions presented are:

1. Whether, in granting the FTC's motion for summary judgment, the district court properly declined to consider Lenyszyn's unsworn witness statements, unauthenticated purported business records, and self-serving written testimony on subjects for which he had previously invoked his Fifth Amendment right not to testify.

2. Whether the district court correctly granted summary judgment and held Lenyszyn personally liable for WSA's violations of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692c-1692e, 1692g.

3. Whether the district court properly imposed joint and several liability on Lenyszyn for the amount WSA received from its violations during the period he was a managing member.

STATEMENT OF THE CASE

A. The WSA Debt Collection Scheme

Williams, Scott & Associates, LLC and WSA, LLC operated a debt collection firm under the names "WSA" and "Warrant Services Association."[1, 2] Between 2010 and 2014, WSA made false threats that led consumers to pay roughly $4 million to satisfy debts they did not owe or that WSA had no right to collect.[3] Lenyszyn was a managing member of WSA, LLC between September 2013 and November 2014.[4] During that period, he provided crucial support that enabled WSA to defraud consumers. *See* pp. 6-8, 11, *infra.*

[1] "WSA" refers to all these entities collectively. Each record citation includes the district court document and page number ("Doc. [number] at [page]") and the corresponding page number in either Lenyszyn's Appendix ("App.") or the FTC's Supplemental Appendix ("Supp.").

[2] *E.g.*, Doc. 2-3 at 41-42, 157, 162 (Supp. 58-59, 174, 179); Doc. 41-5 at 28 (Supp. 282); Doc. 121-34 at 62 (Supp. 690).

[3] *E.g.*, Doc. 2-3 at 18-21, 172, 175 (Supp. 35-38, 189, 192); Doc. 55-4 at 4-5 (Supp. 354-55); Doc. 94-2 at 2-3, 5-7 (Supp. 441-42, 444-46); Doc. 121-30 at 1-3 (Supp. 547-49).

[4] Doc. 2-2 at 69-70, 72 (Supp. 10-11, 13).

WSA's business consisted of purchasing lists of individuals who had applied for or received consumer loans,[5] contacting them, accusing them of being delinquent on their debts, and falsely claiming that the lenders had hired or authorized WSA to collect the debts.[6] The WSA caller gave the false impression that WSA was a legitimate firm collecting on proper debts by revealing that it possessed consumers' sensitive personal information, including their Social Security numbers and bank account information, data that a consumer could believe a legitimate debt collector would have.[7] WSA's collectors also routinely pretended—also falsely—to be affiliated with law enforcement agencies or law firms.[8]

WSA used threats and harassment to extract payment. Its collectors, including Lenyszyn himself (*see* p.8, *infra*), regularly accused consumers of

[5] *E.g.*, Doc. 121-4, 121-23, 121-25, 121-26 (Supp. 447, 516-17, 520-21).

[6] Doc. 2-3 at 18, 41, 60, 79-80, 84, 105, 136, 145-47, 157, 172, 175 (Supp. 35, 58, 77, 96-97, 101, 122, 153, 162-64, 174, 189, 192); Doc. 41-5 at 7, 28 (Supp. 261, 282); Doc. 55-4 at 4-5 (Supp. 354-55); Doc. 121-31 at 27 (Supp. 561); Doc. 121-33 at 23-24 (Supp. 633-34); Doc. 121-34 at 44-45, 61-62 (Supp. 672-73, 689-90).

[7] Doc. 2-3 at 72, 79-80, 84, 97, 125, 178, 199 (Supp. 89, 96-97, 101, 114, 142, 195, 216); Doc. 121-31 at 24 (Supp. 558); Doc. 121-34 at 61 (Supp. 689).

[8] Doc. 2-3 at 10, 33, 50, 71, 100, 116, 136-37, 156-58, 162, 169, 177 (Supp. 27, 50, 67, 88, 117, 133, 153-54, 173-75, 179, 186, 194); Doc. 41-5 at 7, 10-11 (Supp. 261, 254-65); Doc. 121-31 at 50, 64 (Supp. 584, 598).

committing crimes, including bank fraud and theft by deception.[9] They told consumers that unless they paid WSA immediately, the company would arrange their arrest, prosecution, and cancellation of their driver's licenses.[10] WSA also called consumers at their workplaces, used abusive or profane language, and placed repeated calls to consumers in a short timeframe in order to intimidate them.[11] WSA even contacted the co-workers, relatives, and friends of the alleged debtors and revealed information about their supposed debts.[12]

All of these practices violated the FTC Act and the Fair Debt Collection Practices Act (FDCPA), in numerous ways. The FTC Act prohibits "deceptive" or "unfair" practices. 15 U.S.C. § 45(a). Section 807 of the FDCPA bars debt collectors from, *inter alia*, deceptively claiming to be attorneys or law enforcement personnel; misrepresenting the character, amount, or legal status of a debt; and falsely accusing the consumer of a crime. 15 U.S.C. § 1692e. Section 806

[9] Doc. 2-3 at 33, 52, 54, 71-72, 97, 136-38, 146, 198-200 (Supp. 50, 69, 71, 88-89, 114, 153-55, 163, 215-17); Doc. 41-5 at 7, 17 (Supp. 261, 271); Doc. 121-31 at 82 (Supp. 616); Doc. 121-33 at 47 (Supp. 657).

[10] Doc. 2-3 at 10, 12-13, 35, 41-43, 50-51, 60, 79, 105, 116, 124, 156, 177-78 (Supp. 27, 29-30, 52, 58-60, 67-68, 77, 96, 122, 133, 141, 173, 194-95); Doc. 41-5 at 13, 15-16, 28 (Supp. 267, 269-70, 282); Doc. 121-31 at 66 (Supp. 600); Doc. 121-33 at 46 (Supp. 656); Doc. 121-34 at 45, 62-63 (Supp. 673, 690-91).

[11] Doc. 2-3 at 18, 35, 51-55, 62, 73-74, 128, 155, 200 (Supp. 35, 52, 68-72, 79, 90-91, 145, 172, 217); Doc. 41-5 at 26-27 (Supp. 280-81).

[12] Doc. 2-3 at 10, 52-53, 105, 155 (Supp. 27, 69-70, 122, 172); Doc. 121-31 at 92 (Supp. 626).

prohibits obscene or abusive language and repeated calls with the intent to annoy, abuse, or harass the consumer. 15 U.S.C. § 1692d. Section 805 forbids unwanted calls to consumers' employers and other third parties. 15 U.S.C. § 1692c.

The FDCPA also requires debt collectors to make disclosures that WSA failed to make. Its collectors did not reveal, in their first communication with consumers, that they were debt collectors attempting to collect a debt and that any information obtained would be used for that purpose.[13] *See* 15 U.S.C. § 1692e(11). After WSA's initial communications with consumers, it failed to provide a written notice containing the debt amount; the creditor's name; a statement that the debt will be assumed valid unless the consumer disputes it; and an offer to provide written verification of the debt if the consumer disputes it in writing.[14] *See* 15 U.S.C. § 1692g(a). WSA also failed to provide proof of the alleged debts when consumers requested it.[15] *See* 15 U.S.C. § 1692g(b).

[13] Doc. 2-3 at 10, 33, 50-51, 60, 71, 79, 96-97, 105, 117-18, 124-25, 137, 156, 177, 198 (Supp. 27, 50, 67-68, 77, 88, 96, 113-14, 122, 134-35, 141-42, 154, 173, 194, 215); Doc. 121-33 at 29-30, 46-49 (Supp. 639-40, 656-59).

[14] Doc. 2-3 at 11, 19, 34, 41, 55, 60-61, 74, 79-80, 84, 98, 106, 118, 124-25, 137, 179 (Supp. 28, 36, 51, 58, 72, 77-78, 91, 96-97, 101, 115, 123, 135, 141-42, 154, 196).

[15] Doc. 2-3 at 11, 34, 55, 98, 106, 117, 179 (Supp. 28, 51, 72, 115, 123, 134, 196).

B. Lenyszyn's Role In WSA

Lenyszyn was a managing member of WSA, LLC between September 2013 and November 2014.[16] WSA's other managing member, John Williams, has certified under oath and penalty of perjury that Lenyszyn was both an officer and a 25 percent owner of WSA. Doc. 41-5 at 32, 34-35, 46 (Supp. 286, 288-89, 300).

Among other things, WSA paid Lenyszyn for at least one debt portfolio containing the names of new potential victims.[17] He also maintained an account with TLO, a "skip tracing" service,[18] which provided WSA with consumers' addresses, Social Security numbers, and other sensitive information.[19] WSA's

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[16] Doc. 2-2 at 69-70, 72 (Supp. 10-11, 13). *See also* Doc. 41-2 at 13 (Supp. 235) (Lenyszyn encourages fellow officer to file corporate documents and make payments to Nevada Secretary of State).

[17] Doc. 121-4 (Supp. 447) (Lenyszyn sends ACE Cash accounts to Williams); Doc. 121-56 at 16 (Supp. 893) (Lenyszyn receives payment for BMG accounts); Doc. 121-23; Doc. 121-24; Doc. 121-25; Doc. 121-26; Doc. 121-46 at 32; Doc. 121-56 at 13-15 (Supp. 516-21, 816, 890-92) (other payments).

[18] Skip tracing is "the collection agency practice of tracking down debtors whose whereabouts have become unknown." *Slough v. FTC*, 396 F.2d 870, 872 n.2 (5th Cir. 1968).

[19] *See* Docs. 121-10 & 121-11 (Supp. 450-504) (invoices showing skip tracing searches performed by WSA staff); Doc. 121-12 (Supp. 505) (email from Lenyszyn to Williams providing login credentials for WSA staff); Doc. 41-4 at 22 (Supp. 253) (WSA employee roster with names matching authorized users of Lenyszyn's TLO account); Doc. 55-3 at 24-25, 27-29 (Supp. 345-46, 348-50) (same). Lenyszyn received several payments from WSA for his TLO account. Docs. 121-15, 121-16, 121-17, 121-18, 121-19, 121-20, 121-21; Doc. 121-46 at 32 (Supp. 506-14; Supp. 816).

collectors used this information to create a veneer of legitimacy needed to persuade consumers to pay the alleged debts. *See* p. 3, *supra*. To advance WSA's fraudulent scheme Lenyszyn also attempted (without success) to obtain a credit card processing merchant account for WSA, which would have allowed it to charge consumers' cards.[20]

At critical times, Lenyszyn identified himself as an owner or officer of WSA and agreed to undergo background checks as a company representative. For example, before obtaining the TLO skip tracing account, he tried to obtain the same services from a different provider, CBC Innovis, and identified himself as WSA's sole "owner."[21] Doc. 139-1 (App. 416-37); Doc. 121-53 (Supp. 818-19). He similarly held himself out as WSA's sole owner or sole managing member in his merchant account applications. Doc. 121-55 (Supp. 857-77); Doc. 121-57 at 1-10 (Supp. 905-14); *see also* Doc. 136 at 13-14 (App. 277-78) (Lenyszyn admits holding himself out as managing member in one application).

[20] *E.g.*, Doc. 41-2 at 9 (Supp. 231); Doc. 121-7 (Supp. 448); Doc. 121-8 (Supp. 449). *See United States v. Dabbs*, 134 F.3d 1071, 1074 (11th Cir. 1998) ("In order to conduct credit card sales, a business must first enter into a merchant account agreement with a bank (merchant bank) pursuant to which the merchant bank agrees to process future credit card transactions.").

[21] In contrast, when Lenyszyn obtained the TLO account, he did not reveal his ties to WSA, but instead applied in the name of a separate business that he controlled. Doc. 121-29 at 2-3 (Supp. 523-24).

In addition to his role as a top manager of WSA, Lenyszyn admits he personally engaged in debt collection for WSA during April and May 2014.[22] Using the pseudonym "Investigator Dan Miller" (*see* Doc. 41-4 at 22 (Supp. 253)), he falsely accused consumers of crimes and asserted that their creditors had hired WSA to obtain an arrest warrant for them, or to revoke their driver's licenses, if they did not pay. He described WSA as a company that "process[es] the warrants in the division for criminal offenses for theft of services." Doc. 121-34 at 61:8-61:15 (Supp. 689). Even though Ace Cash Express had never hired WSA to collect debts, he told at least one consumer that her creditor, "Ace Cash Express[,] has hired us to go ahead and issue the warrant," but that, as a "favor," he would allow her to handle the payment "on a volunteer basis" instead. Doc. 2-3 at 171-75 (Supp. 188-92); Doc. 41-5 at 28:15-28:20 (Supp. 282). He warned another consumer that unless she "c[a]me up … with a strong payment," she would need to "use … that money to bail [he]rself … out of jail." Doc. 121-34 at 45:9-45:11 (Supp. 673).

Apart from his personal involvement in WSA's fraud, Lenyszyn had ample notice that WSA was deceiving consumers. For example, when applying for merchant accounts, he disclosed WSA's 4 to 5 percent chargeback rate (Doc. 41-2

[22] Br. 2; Doc. 93 pp. 7-9 ¶¶ 12-15 (App. 116-18) (Answer); Doc. 137 at 15-18 ¶¶ 31-39 (App. 347-50) (Response to Statement of Material Facts).

at 5-6 (Supp. 227-28))—a key red flag for unauthorized transactions[23]—and learned that banks considered WSA's business to be "high risk" (Doc. 121-8 (Supp. 449)). *See also* Doc. 121-36 at 15-16 (Supp. 742-43) (pleading the Fifth Amendment when asked about WSA's chargeback rates and whether they were "indicative of possible fraudulent activity"). He also learned that Nevada and Colorado had ordered WSA to cease and desist from collecting debts without a license. Doc. 2-2 at 127-32 (Supp. 20-25) (Nevada); Doc. 2-2 at 122-25 (Supp. 15-18) (Colorado).

C. Lenyszyn Helped WSA Defy A Preliminary Injunction

In May 2014, the FTC sued the WSA corporate defendants and Williams under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 814 of the FDCPA, 15 U.S.C. § 1692*l*, seeking preliminary and permanent injunctions barring their unlawful practices and an award of equitable monetary relief for consumers.[24] Doc. 1 (App. 1-17). The court issued a temporary restraining order, and later a

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[23] A "chargeback" occurs when a customer "challenges the validity of the charge without a dispute from the merchant bank. … [T]he issuing bank [then] credits the customer's account and asks the merchant bank for a refund." *Dabbs*, 134 F.3d at 1074. A chargeback rate of 1 percent or more can trigger sanctions. *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1222 & n.3 (D. Nev. 2011), *aff'd in part*, 763 F.3d 1094 (9th Cir. 2014). *See also FTC v. Click4Support, LLC*, Civ. No. 15-5777, 2015 WL 7067760, at *5 & n.8 (E.D. Pa. Nov. 10, 2015) (3 percent chargeback rate is "extremely high"), *appeal pending* No. 15-3937 (3d Cir.).

[24] Violations of the FDCPA "shall be deemed an unfair or deceptive act or practice in violation of" the FTC Act. 15 U.S.C. § 1692*l*(a).

stipulated preliminary injunction, barring the corporate defendants and Williams from engaging in collection practices similar to those alleged in the complaint, freezing their assets, and appointing a receiver to supervise the business. Docket Nos. 6 & 13. Shortly after the TRO, officials from the FTC and FBI gained access to WSA's business premises and secured relevant evidence. Doc. 121-30 at 2 ¶¶ 4-5 (Supp. 548).

Boldly defying the preliminary injunction, Williams and WSA revived the debt collection scheme just weeks after its entry. Although the business sought to evade the injunction by using two new names,[25] it employed the same personnel as WSA,[26] used WSA's debt portfolios,[27] and relied on the same deceptive and abusive tactics as WSA.[28] As before, Lenyszyn provided essential help to the revived scheme.[29]

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[25] Doc. 55-3 at 3-4 (Supp. 324-25).

[26] Doc. 55-3 at 5, 25, 27-29 (Supp. 326, 346, 348-50); Doc. 55-6 at 20-26 (Supp. 378-84).

[27] Doc. 55-3 at 11-12 (Supp. 332-33); Doc. 55-4 at 3-8 (Supp. 353-58).

[28] Doc. 55-2 at 2-4 (Supp. 319-21); Doc. 55-3 at 3-4, 13, 15 (Supp. 324-25, 334, 336).

[29] The court held the WSA corporate defendants and Williams in civil contempt (Doc. 66 (Supp. 391-414); Doc. 79 (Supp. 418-35)), and required them to disgorge the net revenues that they derived from engaging in contumacious debt collection between July and November 2014. Doc. 79 at 14-16 (Supp. 431-33).

Lenyszyn supplied the new office space, which he leased in his own name. Doc. 121-54 (Supp. 820-56). In leasing the space, Lenyszyn identified himself as a financial guarantor and "managing member" of Legacy Payment Systems, one of WSA's two new business names. Doc. 121-54 at 33-37 (Supp. 852-56). Lenyszyn again furnished his TLO skip tracing account to the "new" enterprises, which used it to find Social Security numbers and other personal information and defraud consumers. *See* Doc. 121-10 at 27-54; Doc. 121-11 (Supp. 476-504). Lenyszyn was rewarded for those services.[30]

D. The FTC's Action Against Lenyszyn And The Court's Decision

After discovering Lenyszyn's critical role in WSA, the FTC amended its complaint in September 2014 to add him as a defendant, charging that he "controlled, had authority to control, or participated in" WSA's unlawful practices. Doc. 32 at 5 ¶ 9 (App. 44). In late October 2014, the court entered a preliminary injunction against Lenyszyn, froze his assets, and barred him from engaging in debt collection practices similar to the alleged violations. Doc. 50 (App. 77-108).[31] In December 2015, Lenyszyn and the FTC agreed to several minor amendments to

[30] Doc. 121-18; Doc. 121-19; Doc. 121-20; Doc. 121-21; Doc. 121-22; Doc. 121-46 at 32 (Supp. 510-15, 816).

[31] A few weeks later, in November 2014, Lenyszyn was arrested on criminal charges related to his involvement in WSA. Lenyszyn Br. 4.

the preliminary injunction, which the court then entered.[32] Doc. 80 (Supp. 436-39). In April 2015, the district court issued a default judgment against the corporate defendants and Williams, granting a permanent injunction and monetary relief to the FTC. Doc. 101 (App. 127-58).

The FTC then moved for summary judgment against Lenyszyn. Doc. 121 (App. 163-97). Although Lenyszyn proffered nine exhibits in his opposition to the Commission's motion (Docs. 136-1 through 136-10 (App. 293-332)), the court ruled all of them inadmissible and refused to consider them. Order at 4-17.[33] *See* Fed. R. Civ. P. 56(c)(2).

First, the court declined to consider Lenyszyn's self-serving affidavit in which he testified about the very subjects for which he had previously asserted his Fifth Amendment right against self-incrimination. DX5, Doc. 136-6 (App. 301-05). The court rejected the affidavit on the basis that at his earlier deposition

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[32] Lenyszyn concedes that the preliminary injunction is no longer appealable, but he complains for the first time that the district court issued it before he had been served with the complaint. Br. 3 & n.2. Lenyszyn evaded the FTC's seven attempts to serve him personally and two attempts to schedule a face-to-face meeting with him (Doc. 58 at 4 (Supp. 388)), which led the court to eventually grant the FTC's request to serve him by publication (Doc. 67 (Supp. 415-17)). Once Lenyszyn formally became a party in early December 2014 (Doc. 71 (App. 109)), he did not file any objections to the preliminary injunction or pursue an interlocutory appeal. *See* 28 U.S.C. § 1292(a)(1). To the contrary, he consented to a modified version of the injunction.

[33] The court's order granting summary judgment (Doc. 146) appears at pages 447 through 545 of Lenyszyn's Appendix.

Lenyszyn refused to answer "every substantive question … including the matters set forth in his affidavit," and that he never moved to withdraw that objection. Order at 13-14. Lenyszyn thus could not "attempt to testify via affidavit as to matters for which he previously asserted the Fifth Amendment privilege." Order at 14. For the same reason, the court rejected "as a substitution for his testimony during discovery" a form that Lenyszyn had filed with the State of Nevada (after being sued by the FTC) in which Lenyszyn asserted under oath that he never authorized WSA to list him as a managing member in corporate records. DX8, Doc. 136-9 (App. 325-27). The court noted that even if the document were admissible, the ruling on summary judgment "would not change." Order at 9-10.

Next, the court rejected Lenyszyn's proffers of Williams's unsigned interrogatory responses (DX6, Doc. 136-7 (App. 310-17)), and three letters that Williams had sent to various government agencies (DX2, Doc. 136-3; DX3, Doc. 136-4; DX4, Doc. 136-5 (App. 298-300)). In each of these unsworn documents, Williams denied that Lenyszyn had been an officer of WSA—directly contradicting his earlier sworn statement that Lenyszyn was both an officer and minority owner. *See* Doc. 41-5 at 32, 34-35, 46 (Supp. 286, 288-89, 300). The court deemed these documents inadmissible hearsay and declined to consider them because Williams did not sign them under oath and under penalty of perjury (*see* 28 U.S.C. § 1746; Fed. R. Civ. P. 33(b)(3)). Order at 5-8.

Finally, the court held that Lenyszyn's three remaining exhibits (part of a purported bank statement, alleged printouts of text messages, and an incomplete copy of a lease) had not been properly authenticated and were therefore inadmissible and could not be used to support his opposition to the summary judgment motion. Order at 4-6, 8, 11-12.

The court then turned to the evidence submitted by the FTC. It concluded that the FTC had established beyond any genuine dispute that Lenyszyn and the corporate defendants violated the Section 5 of the FTC Act, 15 U.S.C. § 45(a), and Section 807 of the FDCPA, 15 U.S.C. § 1692e, by misrepresenting their identities as debt collectors, their authority to collect debts, consumers' obligations to pay those debts, and the consequences of failure to pay. Order at 50-57, 62-63; *see also id.* at 19-28, 31-33, 38-39, 41. The court held that Lenyszyn and the corporate defendants also undisputedly violated the FDCPA by failing to make required disclosures (*see* 15 U.S.C. §§ 1692e(11), 1692g) and by engaging in abusive practices (*see* 15 U.S.C. §§ 1692c-1692d), such as calling consumers repeatedly at work despite knowing those calls were inconvenient or prohibited. Order at 59-64; *see also id.* at 28-32.

Next, the court ruled that Lenyszyn was liable not just for his own conduct, but also for the corporate defendants' violations during his tenure as managing member. Order at 65-81. The FTC's undisputed evidence showed that between

September 2013 and November 2014, Lenyszyn "either had the authority to control the corporate Defendants or participated directly in the debt collection acts and practices." Order at 69-70; *see also id.* at 79-80. Lenyszyn failed to rebut evidence that he (1) was a managing member and identified himself as such; (2) provided the company with skip tracing services to "locate the consumers who were later contacted by the collectors"; (3) attempted to help the company find a new merchant account to process credit card payments; (4) provided WSA with "at least one debt portfolio"; and (5) "act[ed] as a collector himself [by] making numerous collection calls" as "Investigator Dan Miller." Order at 70-71; *see also id.* at 35-40. The uncontroverted evidence also showed that Lenyszyn's involvement with WSA continued when it resumed its fraudulent practices in July 2014 in Lenyszyn's office space and contacted consumers using personal information obtained through Lenyszyn's skip tracing account. Order at 79-80; *see also id.* at 40-41.

Additionally, the court concluded that Lenyszyn "had the requisite knowledge [of wrongdoing] for individual liability" because, among other things, he directly engaged in consumer fraud, served as an officer of the closely held company, knew or should have known that the company was subject to cease-and-desist actions in two states, and learned from a third party that the business was "high risk." Order at 71-74; *see also id.* at 36, 38-39, 42-43.

The district court drew an "adverse inference" against Lenyszyn because he had pleaded the Fifth "with respect to virtually every substantive question that counsel for the FTC asked him during his deposition."[34] Order at 47. The court noted that this adverse inference did not *automatically* warrant summary judgment against Lenyszyn, but the FTC had met its burden to establish each of its claims through "independent evidence." Order at 48.

The court imposed a permanent injunction and equitable monetary relief against Lenyszyn. Order at 78-99. It held Lenyszyn jointly and severally liable for the corporate defendants' "net revenue from their illegal activities during the period of [his] participation," and directed him to pay $565,816.71 in monetary relief. Order at 78-79, 86-87. Because the court found that Lenyszyn was reasonably likely to violate the law in the future (Order at 80), it permanently

[34] Specifically, Lenyszyn refused to testify about his role as managing member (Doc. 121-35 at 14-23, Doc. 121-40 at 5-6 (Supp. 705-14, 795-96)); his sale of debt portfolios to WSA (Doc. 121-35 at 28-31 (Supp. 715-18)); his receipt of payments from WSA for those portfolios (Doc. 121-39 at 39-42 (Supp. 780-83)); his negotiations with CBC Innovis for skip tracing services (Doc 121-39 at 44-46 (Supp. 785-87)); his purchase of a TLO skip tracing license and decision to share that license with WSA (Doc. 121-39 at 18-31, 49-51 (Supp. 759-72, 790-92)); his receipt of payments from WSA for the TLO license (Doc. 121-39 at 33-39 (Supp. 774-80)); his efforts to obtain merchant accounts (Doc. 121-36 at 5-23 (Supp. 732-50)); his personal involvement in debt collection and threats to prosecute consumers (Doc. 121-35 at 45-57, Doc. 121-39 at 32-33 (Supp. 719-31, 773-74)); his signing of WSA's office lease (Doc. 121-39 at 46-49 (Supp. 787-90)); or other income he received from WSA (Doc. 121-39 at 43-44, Doc. 121-40 at 3-7 (Supp. 784-85, 793-97)).

enjoined him from engaging in debt collection (*id.* at 81-83), required him to destroy all consumer information in his possession (*id.* at 84-85), and imposed several monitoring, recordkeeping, and notification requirements (*id.* at 88-98).

Lenyszyn filed a timely notice of appeal. Doc. 148 (App. 548-50).

STANDARD OF REVIEW

1. The Court "review[s] a district court's evidentiary rulings at the summary judgment stage only for abuse of discretion." *Wright v. Farouk Sys., Inc.*, 701 F.3d 907, 910 (11th Cir. 2012). Such abuse occurs if the judge applies the wrong legal standard, fails to follow proper procedures in making his or her decision, or bases the decision on clearly erroneous findings of fact. *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013).

2. The Court reviews a grant of summary judgment de novo. *SEC v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014). The Court "appl[ies] the same legal standards" as the district court, and "construe[s] the facts and draw[s] all reasonable inferences in the light most favorable to the non-moving party." *Id.*

3. The Court reviews the district court's order granting equitable monetary relief for abuse of discretion. *Washington Data Res.*, 704 F.3d at 1325; *CFTC v. Wilshire Inv. Mgmt.*, 531 F.3d 1339, 1343 (11th Cir. 2008).

SUMMARY OF ARGUMENT

Lenyszyn does not dispute that WSA systematically defrauded consumers in violation of the FTC Act and the FDCPA. Nor does he deny that he is liable for his conduct during April and May 2014, when he personally made collection calls for WSA. Instead, he challenges only the court's decision to hold him liable for WSA's practices during the period from September 2013 to November 2014 when he was a managing member of WSA and directly participated in its fraud. His arguments are meritless.

1. The district court properly concluded that the only evidence Lenyszyn proffered in opposing summary judgment was inadmissible and thus could not create a triable factual issue. The district court correctly prevented Lenyszyn from relying on his own written statements, because he had refused to be examined on those subjects during his deposition. The Fifth Amendment is not a stratagem for litigants to provide a self-serving narrative that is shielded from cross-examination. Additionally, the settled law in this Circuit is plain that a party may not resist summary judgment with unsworn witness statements or unauthenticated "business records."

2. Lenyszyn identifies no genuine issue as to any material fact that would preclude summary judgment regarding his personal liability for WSA's wrongdoing. The undisputed record shows that he served as a managing member,

personally engaged in fraudulent debt collection, and kept the fraud alive by (among other things) obtaining lists of potential debtors, providing access to those consumers' sensitive personal information, and securing office space for the operation. Lenyszyn had full knowledge that WSA's business was unlawful. His level of engagement and control makes him liable for all the harm he and WSA caused.

3. The district court properly held Lenyszyn jointly and severally liable for WSA's net receipts during his time as an officer. This Court has repeatedly upheld joint and several liability as a form of equitable monetary relief where multiple parties act in concert to deceive consumers.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED LENYSZYN'S EXHIBITS INADMISSIBLE AND REFUSED TO CONSIDER THEM.

The district court properly declined to consider each of the nine exhibits that Lenyszyn filed in opposition to summary judgment. Lenyszyn had the burden to rebut the FTC's motion by "producing affidavits or other relevant and *admissible* evidence beyond the pleadings." *Josendis v. Wall To Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1315 (11th Cir. 2011) (emphasis added); *see also Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1249 (11th Cir. 2007) ("[E]vidence inadmissible at trial cannot be used to avoid summary judgment.") (quotation omitted); Fed. R. Civ. P. 56(c)(1)-(2). His proffered evidence was not admissible.

A. The Court Properly Excluded Lenyszyn's Written Testimony Because He Asserted His Fifth Amendment Rights To Avoid Cross-Examination On The Same Subjects.

Lenyszyn does not challenge, and therefore concedes, that the district court properly ruled his affidavit (DX5, Doc. 136-6 (App. 301-05)) inadmissible. By invoking his Fifth Amendment right not to testify, Lenyszyn decided that "the advantages of silence—avoiding incrimination in a criminal investigation" outweighed "the potential advantages" of attempting to refute the FTC's evidence against him. *See Arango v. U.S. Dep't of Treasury*, 115 F.3d 922, 927 (11th Cir. 1997). Having made that choice, Lenyszyn could not then "convert the privilege from [a] shield … into a sword" by putting his version of the facts into written affidavits and avoiding cross-examination. *See United States v. Rylander*, 460 U.S. 752, 758, 103 S. Ct. 1548, 1553 (1983).

Although Lenyszyn does not challenge the district court's refusal to consider his principal affidavit, he nonetheless argues that the court should have considered a sworn complaint form he filed with the State of Nevada (DX8, Doc. 136-9 (App. 325-27)), in which he claimed that he had never agreed to become a managing member of WSA. Because the Nevada complaint asserts the same facts that Lenyszyn refused to testify about at his deposition, the district court correctly prevented him from using that complaint to manufacture a genuine factual issue about his role at WSA. *See* Order at 9-10, 13-14.

Lenyszyn asserted his Fifth Amendment rights in response to virtually every question at his deposition (*see* p. 16 n.34, *supra*), including the following:

- "Q. Now, when WSA, LLC, was formed you agreed that your name could be placed on there as a managing member; isn't that true?" Doc. 121-40 at 5:16-5:19 (Supp. 795).
- "Q. So in order to apply for the merchant account in your own name, you were aware that your name had been added to the WSA managing member list that was filled out on March 14, 2014; isn't that true?" Doc. 121-36 at 12:16-12:22 (Supp. 739).
- "Q. And you're identified [in an application for skip tracing services] as the owner of WSA; isn't that correct? … Q. So you allowed your name to be used to obtain the skip tracing, didn't you?" Doc. 121-39 at 44:23-45:3 (Supp. 785-86).
- "Q. You signed [the office lease] – that's your signature where it says Chris Lenyszyn; isn't that correct? … And your title is managing member; isn't that correct?" Doc. 121-39 at 48:5-48:11 (Supp. 789).

Because Lenyszyn pleaded the Fifth when asked whether he was a managing member, the district court correctly prevented him from resisting summary judgment with the Nevada complaint, which contained written testimony addressing that same question. Order at 9-10, 13-14. When, as here, a defendant

attempts to testify on matters subject to his or her Fifth Amendment plea, this "frustrat[es] the [FTC's] attempts to test the veracity of his claim." *United States v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 642 (9th Cir. 2012) (district court properly struck claimant's interrogatory response on summary judgment because he had invoked the Fifth Amendment regarding the same subjects).[35] Thus, Lenyszyn may not "invoke the Fifth Amendment to avoid discovery while offering an affidavit to compel a certain result on summary judgment." *Edmond v. Consumer Prot. Div.* (*In re Edmond*), 934 F.2d 1304, 1308 (4th Cir. 1991); *see United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) (upholding district court's decision to "strike [defendant's] affidavit after he invoked the fifth amendment and refused to answer the government's deposition questions").

Still, Lenyszyn argues that the court should have considered his Nevada complaint because he filed it "*before* he was arrested" on criminal charges and (he asserts) before his Fifth Amendment privilege was "triggered." Br. 12-13 (emphasis in original). But he failed to raise this argument in the district court, and has therefore waived it. *See Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1168-69 (11th Cir. 2004); *see also* Doc. 136 at 14 (App.

[35] "By striking testimony that a party shields from cross-examination, a court can respect the witness's constitutional privilege against self-incrimination while preventing the witness from using the privilege to 'mutilate the truth a party offers to tell.'" *$133,420.00*, 672 F.3d at 641 (quoting *Brown v. United States*, 356 U.S. 148, 156, 78 S. Ct. 622, 627 (1958)).

278) (response to summary judgment motion); Doc 143-1 at 2-4 (App. 441-43) (surreply).

Moreover, the timing of Lenyszyn's arrest has no bearing on whether the district court properly excluded the Nevada complaint. What matters is that Lenyszyn is attempting to offer a "testimonial statement" in the "same proceeding" in which he "shielded his account of the 'facts' from scrutiny by invoking the fifth amendment at his deposition." *See Parcels of Land*, 903 F.2d at 43-44. Perhaps equally important, Lenyszyn's argument about timing makes no sense. He filed his Nevada complaint in late October 2014, three months *after* the district court entered a TRO (Docket No. 6) and FBI and FTC officials removed evidence from WSA's business premises (Doc. 121-30 at 2 (Supp. 548)), and one month *after* the FTC added him as a defendant (Doc. 32 (App. 40-57)). By the time Lenyszyn filed his Nevada complaint, the possibility of a criminal prosecution, and his right to invoke the Fifth Amendment, were patently obvious. *See United States v. Balsys*, 524 U.S. 666, 672, 118 S. Ct. 2218, 2222 (1998) (Fifth Amendment may be invoked "in any proceeding …in which the witness reasonably believes that the information sought … could be used in a subsequent … criminal proceeding") (quotation omitted). Lenyszyn prepared the Nevada complaint fully aware that his statements might become evidence in a pending civil case and a potential criminal

case against him—and may have drafted the complaint hoping to ward off those charges.[36]

Finally, as the district court held, even if Lenyszyn's Nevada complaint were admissible, his assertion in that complaint that he did not know his name was on corporate documents "does not directly refute any material fact" regarding his personal liability for WSA's fraudulent behavior. Order at 9. Regardless of whether Lenyszyn knew he was a managing member on official government documents, he does not rebut evidence that he *held himself out as* an owner or officer in various settings. *See* pp. 7, 11, *supra*. In fact, he admits doing so. *See* Doc. 136 at 13-14 (App. 277-78) (memorandum in response to summary judgment motion). Nor does Lenyszyn's opening brief rebut—or even address—other key evidence of his role in WSA, including his provision of skip tracing services, his solicitation of merchant accounts, and his leasing of office space for WSA's use. *See* pp. 6-7, 11, *supra*.

[36] Lenyszyn mistakenly relies (at Br. 13) on *United States v. Hubbell*, 530 U.S. 27, 120 S. Ct. 2037 (2000). That case held that a subpoena for documents may violate the Fifth Amendment if "the act of producing [those] documents" has a "testimonial aspect" by "implicitly communicat[ing]" a self-incriminatory message. 530 U.S. at 36-37; 120 S.Ct. at 2043-44. It did not address the circumstances under which a witness may reasonably anticipate future prosecution.

B. The Court Properly Excluded Unsworn Statements By John Williams.

The district court correctly refused to consider John Williams's letters to the FTC and two other government agencies (DX2, Doc. 136-3; DX3, Doc. 136-4; DX4, Doc. 136-5 (App. 298-300)), and Williams's interrogatory responses (DX6, Doc. 136-7 (App. 310-17)), all of which claimed that Lenyszyn was not a managing member of WSA.[37] As the district court explained (Order at 5-7), these documents were unsworn and did not declare under penalty of perjury that the facts stated were true and correct. *See* 28 U.S.C. § 1746. Williams did not even sign his interrogatory responses, as the Federal Rules require. *See* Fed. R. Civ. P. 33(b).

Courts need not consider unsworn witness statements when deciding a motion for summary judgment. *See, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 n.17 & n.19, 90 S. Ct. 1598, 1608-09 n.17 & n.19 (1970). The Federal Rules require that affidavits "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Unsworn statements do not meet these requirements. *Adickes*, 398 U.S. at 158 n.17, 90 S. Ct. at 1608 n.17; *Bozeman v. Orum*, 422 F.3d 1265, 1267 n.1 (11th Cir. 2005);

[37] As discussed, Williams had previously certified under oath that Lenyszyn was an officer and 25 percent owner of WSA, LLC. *See* Doc. 41-5 at 32, 34-35, 46 (Supp. 286, 288-89, 300).

Carr v. Tatangelo, 338 F.3d 1259, 1273 n.26 (11th Cir. 2003). They are thus inadmissible hearsay when offered to prove the truth of the matter asserted.

Lenyszyn argues that Williams's unsworn statements were admissible because they are "statements against interest." Br. 9-10. But he fails to mention that this hearsay exception applies only when the "declarant is unavailable as a witness." Fed. R. Evid. 804(b)(3); *see United States v. Costa*, 31 F.3d 1073, 1077 (11th Cir. 1994). Lenyszyn does not claim that Williams was unavailable. To the contrary, he concedes that Williams will be available to testify at trial. *See* Br. 10 (asserting that the statements in Williams's unsigned interrogatory responses "could all have been proven at trial through (1) the testimony of Mr. Williams …"). Br. 10. Thus, the Rule 804(b)(3) hearsay exception does not apply and the district court properly excluded Williams's unsworn statements.[38]

C. The Court Properly Excluded Unauthenticated Business Records.

The district court also correctly refused to consider three unauthenticated documents that Lenyszyn claimed as business records:

[38] Even if Williams were unavailable to testify, Lenyszyn fails to explain how Williams's statements were against his personal interest. Lenyszyn simply asserts that Williams's "criminal exposure" would be reduced if "others were involve[d] with WSA" (Br. 9-10), but he does not attempt to explain how or why this might be so.

- Exhibit DX1 (Doc. 136-2 (App. 297)) appears to be a bank statement reflecting a deposit of $880 in an unidentified person's account. Lenyszyn claims (at Br. 7-8) that the account belonged to him and that the statement suggests that he made little money from WSA.
- Exhibit DX7 (Doc. 136-8 (App. 318-24)) appears to contain printouts of text messages between two unidentified individuals. Lenyszyn asserts (at Br. 11-12) that the conversations were between Williams and himself and help establish that he did not give consent to become an officer of WSA. The purported messages are dated October and November 2014, shortly *after* the FTC added Lenyszyn to the Complaint.[39]
- Exhibit DX9 (Doc. 136-10 (App. 328-32)) purports to contain the lease Lenyszyn signed on WSA's behalf when it reopened using new business names in contempt of the preliminary injunction. *See* p. 11, *supra*. Unlike the properly authenticated version of the lease (*see* Doc. 121-54 (Supp. 820-56)), Lenyszyn's version is incomplete,

[39] Even if the text messages were properly authenticated, they are unsworn statements that constitute inadmissible hearsay. *See* pp. 25-26, *supra*. Lenyszyn's self-serving statements in those conversations are also inadmissible because they address issues within the scope of his Fifth Amendment plea. *See* pp. 20-22, *supra*.

contains pages out of order, and omits the pages identifying Lenyszyn as a managing member.

Because Lenyszyn did not submit affidavits from a qualified witness establishing the documents' authenticity, they do not qualify for the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6).

Lenyszyn has the "burden … to show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed. R. Civ. P. 56 advisory committee notes (2010). The law in this Circuit is clear that a party cannot avoid summary judgment with unauthenticated or improperly authenticated business records. *Compare First Nat'l Life Ins. Co. v. Cal. Pac. Life Ins. Co.*, 876 F.2d 877, 881 (11th Cir. 1989) (summary judgment "properly granted" because nonmoving party's exhibits were "not properly authenticated"), *with Eli Lilly & Co. v. Air Express Int'l USA, Inc.*, 615 F.3d 1305, 1317 (11th Cir. 2010) (district court did not err when considering business records supported by an affidavit from a person "qualified to testify concerning the documents").[40] Documentary exhibits "must be properly authenticated as a condition precedent to their admissibility 'by evidence sufficient to support a finding that the matter in question is what its

[40] *See also Asociación de Periodistas de Puerto Rico v. Mueller*, 529 F.3d 52, 57 (1st Cir. 2008) (district court properly excluded from summary judgment record a DVD lacking "affidavits attesting to the DVD's authenticity").

proponent claims.'" *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (quoting Fed. R. Evid. 901(a)).

Nor should the Court credit Lenyszyn's assertion (at Br. 7, 15) that he might have been able to authenticate his exhibits at some future date before trial. Lenyszyn misconstrues case law allowing district courts to consider on summary judgment hearsay statements that ultimately could be "reduced to admissible form." *See, e.g. McMillian v. Johnson*, 88 F.3d 1573, 1584-85 (11th Cir. 1996). This Court has explained that the term "reduced to admissible form" refers to hearsay statements *embedded within a witness's sworn testimony*. "We believe that the courts have used the phrases 'reduced to admissible evidence at trial' and 'reduced to admissible form' to explain that the out-of-court statement made to the … Rule 56(c) affiant or the deposition deponent … must be admissible at trial for some purpose." *Macuba v. Deboer*, 193 F.3d 1316, 1323 (11th Cir. 1999).[41] For example, the district court may consider a witness's sworn testimony about what a third person told her, if the third person's statement qualifies under an exception to the hearsay rule.

Here, Lenyszyn has attempted to submit purported business records without *any* sworn testimony demonstrating their authenticity. "To be admissible in

[41] *Macuba* reaffirmed that, as a "general rule … inadmissible hearsay cannot be considered on a motion for summary judgment." 193 F.3d at 1322 (quotation omitted).

support of or in opposition to a motion for summary judgment, a document must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) [now 56(c)(4)] and the affiant must be a person through whom the exhibits could be admitted into evidence." *Saunders v. Emory Healthcare, Inc.*, 360 F. App'x 110, 113 (11th Cir. 2010) (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2722 at 382-84 (3d ed. 1998)). The mere "possibility" that a witness "will emerge to provide testimony" authenticating Lenyszyn's exhibits is "insufficient to establish that the hearsay statement[s] could be reduced to admissible evidence." *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1294 (11th Cir. 2012).

Finally, Lenyszyn incorrectly suggests (at Br. 7) that his unauthenticated bank statement "may well have been admissible under the residual hearsay exception" of Fed. R. Evid. 807. That exception applies only when a statement is "not specifically covered" by another exception and "has equivalent circumstantial guarantees of trustworthiness." *Id.*; s*ee United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1279 (11th Cir. 2009) ("Congress intended the residual hearsay exception to be used very rarely, and only in exceptional circumstances … and … only when certain exceptional guarantees of trustworthiness exist….") (citation and quotation

omitted). It does not permit reliance on unauthenticated documents, which lack any guarantees of trustworthiness.[42]

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT AND HELD LENYSZYN PERSONALLY LIABLE FOR WSA'S VIOLATIONS.

The district court's grant of summary judgment against Lenyszyn was proper. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Once the movant adequately supports its motion, the burden shifts to the nonmoving party to show that specific facts exist that raise a genuine issue for trial." *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 815 (11th Cir. 2010); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). "[O]nly the existence of a genuine issue of material fact will preclude grant of summary judgment." *Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1313 (11th Cir. 2007). An issue is genuine if "a reasonable [factfinder] could return a verdict for the nonmoving party," and is material "if it may affect the outcome of the suit under governing law." *Id.*

[42] Lenyszyn mistakenly asserts (at Br. 7) that the court in *United States v. Ismoila*, 100 F.3d 380, 393 (5th Cir. 1996), applied the residual hearsay exception to admit unauthenticated "bank statements." The documents at issue were statements from cardholders notifying their banks that their credit cards had been stolen, and bank personnel testified to authenticate them. *See id.* at 390-93 & n.8.

Here, the undisputed record shows that Lenyszyn is personally liable for WSA's violations between September 2013 and November 2014, when he was a managing member. *See* Order at 65-75, 79-80.

A. Lenyszyn Is Personally Liable Under Established Law.

An individual is liable for a corporation's violations of the FTC Act when he or she "participated directly in the [deceptive] practices or acts or had authority to control them." *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1233 (11th Cir. 2014) (*quoting FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)); *see also FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). Lenyszyn satisfies both tests. He participated directly in WSA's violations by holding himself out as "Investigator Dan Miller" and fraudulently threatening to arrest consumers or revoke their driver's licenses unless they paid off bogus debts. *See* p. 8, *supra*. And he perpetuated the fraud by equipping WSA with debtor accounts and skip tracing services and attempting to obtain merchant accounts. *See* pp. 6-7, 11, *supra*. These services were essential for WSA to locate, deceive, and take money from vulnerable consumers. Lenyszyn was thus a key participant in WSA's fraudulent scheme during the relevant period.

The evidence of Lenyszyn's ability to control WSA is overwhelming and unrebutted. He was a managing member who held himself out as an officer or owner on several key documents. *See* pp. 6-7, 11, *supra*. This, in itself,

establishes control. *See, e.g.*, *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997) (corporate officer with authority to sign documents had the "requisite control over the corporation"); *Amy Travel Serv.*, 875 F.2d at 573 ("Authority to control the company can be evidenced by active involvement in business affairs … including assuming the duties of a corporate officer.").

Additionally, when assessing Lenyszyn's corporate control, any "gaps" in his responsibilities are irrelevant. "The question is whether he could have nipped the offending [conduct] in the bud." *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 13 (1st Cir. 2010). Here, rather than stopping the fraudulent conduct, Lenyszyn was a key participant in the fraud. Among other things, he provided office space, lists of debtors, and the means to locate and learn sensitive information about them. *See* pp. 6-7, 11, *supra*.

Lenyszyn also had "knowledge of the [wrongful] practices," the final predicate for holding an individual monetarily liable for corporate wrongdoing. *See IAB Mktg. Assocs.*, 746 F.3d at 1233 (quoting *Amy Travel Serv.*, 875 F.2d at 573). The FTC can meet this 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." *Amy Travel Serv.*, 875 F.2d at 574 (quotation

omitted). Lenyszyn's "participation in business affairs" as managing member "is probative of knowledge." *See id.* at 574.

Here, Lenyszyn plainly knew that WSA was defrauding consumers by collecting on fake debts—he engaged in this practice himself. *See* p. 8, *supra*. And he confronted an important red flag when WSA received orders from Nevada and Colorado to cease and desist from collecting debts without a license. *See* p. 9, *supra*. He also knew that WSA had a high chargeback rate and that the payment processing industry considered its business model "high risk" (s*ee* pp. 8-9, *supra*), which provided further grounds to suspect that WSA was cheating consumers. *See Amy Travel Serv.*, 875 F.2d at 574-75 (high chargeback rate put officers on notice of misrepresentations).

B. Lenyszyn Has Not Established A Genuine Factual Dispute.

Lenyszyn makes three arguments against summary judgment, all meritless. *First*, he contends that the district court should have denied summary judgment by assuming his answer to the complaint and other judicial pleadings were true. Br. 17-18. But once the FTC met its initial burden to show the lack of a genuine dispute, Lenyszyn, as "the non-moving party[,] must then '*go beyond the pleadings*,' and by [his] own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-

94 (11th Cir. 1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324; 106 S. Ct. 2548, 2553 (1986)) (emphasis added). It is irrelevant that Lenyszyn allegedly drafted his answer *pro se*.[43] Lenyszyn's attorneys prepared his opposition to summary judgment, and those papers offered no admissible evidence to support his defenses. His "pleadings are only allegations, and allegations are not evidence of the truth of what is alleged." *Wright v. Farouk Sys., Inc.* 701 F.3d 907, 911 n.8 (11th Cir. 2012). They do not create a genuine dispute of material fact.

Second, although Lenyszyn did not file any admissible affidavits, he *speculates* that, at trial, he might receive favorable "testimony by non-party witnesses such as Susan Williams and Margarita Yearwood." Br. 10. But Lenyszyn's papers opposing summary judgment did not even *mention* these individuals, let alone include sworn statements from them. Doc. 136 (App. 265-92) (response); Doc. 143-1 (App. 440-46) (surreply). Lenyszyn's naked "suggestion that admissible evidence might be found in the future is not enough to defeat a motion for summary judgment." *McMillian*, 88 F.3d at 1584.

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[43] Lenyszyn's attorneys were actively involved in his defense long before filing their appearances in September 2015. For example, they participated in the December 2014 negotiations to modify the preliminary injunction and asset freeze (Doc. 80 at 3 (Supp. 438)), and advised Lenyszyn during his April and May 2015 depositions (Doc. 121-35 at 5-6 (Supp. 701-02); Doc. 121-39 at 7-10 (Supp. 755-58)). *See also* Doc. 121-35 at 10:24-11:2 (Supp. 703-04) ("MR. LOTITO: I have been advising [Lenyszyn] even though he's appearing pro se. I haven't entered an appearance, but I have been advising him during the course of these proceedings.").

Third, Lenyszyn asserts—without citing any authority—that he cannot be personally liable for WSA's wrongdoing because he did not make capital contributions. Br. 15-16.[44] That is not the test for personal liability for corporate wrongdoing. The FTC Act imposes such liability when a defendant participates in, or is able to control, corporate wrongdoing regardless of the person's status as an owner or investor. For instance, in *Publishing Clearing House*, the Ninth Circuit held a telemarketer personally liable when she became company president "at the direction of" a person facing criminal charges who thought it would be best to apply for a business license in that telemarketer's name. 104 F.3d at 1169-71. *See also FTC v. World Media Brokers*, 415 F.3d 758, 765-66 (7th Cir. 2005) (upholding liability of an officer who "should have known" of wrongdoing, with no mention of whether she was an owner).

Thus, the district court was plainly correct when it held that there are no triable issues concerning Lenyszyn's personal liability for WSA's violations. His refusal to testify on virtually all relevant issues only bolsters this conclusion. *See* p. 16 n.34, *supra*. "[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative

[44] Notably, however, Lenyszyn invoked the Fifth Amendment in response to virtually every financial question at his deposition. *See, e.g.*, Doc. 121-39 at 33:15-44:5 (Supp. 774-85) (regarding financial transactions between him and WSA); Doc. 121-40 at 3:14-4:16, 6:18-7:3 (Supp. 793-94, 796-97) (concerning why income from WSA does not appear on his tax returns).

evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558 (1976); *see SEC v. Monterosso*, 756 F.3d 1326, 1336 n.19 (11th Cir. 2014) (affirming summary judgment in SEC's favor and "not[ing] the evidence of scienter is reinforced by the adverse inference from [defendant's] invocation of the Fifth Amendment privilege at his deposition").

III. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN IMPOSING JOINT AND SEVERAL LIABILITY.

The district court properly held Lenyszyn jointly and severally liable for the $565,816.71 WSA unlawfully collected from consumers when he was a managing member. Order at 78-79, 86-87. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), permits district courts to order "the full range of equitable remedies, including the power to grant consumer redress and compel the disgorgement of profits." *Gem Merch.*, 87 F.3d at 468. Disgorgement under Section 13(b) is measured by the defendants' "net revenue (gross receipts minus refunds)." *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013).

Lenyszyn's only argument (at Br. 19-22) is that the district court should have limited its disgorgement award to the amount he personally received. But this Court has repeatedly upheld joint and several liability against culpable individuals, such as Lenyszyn, who bear personal responsibility for corporate violations of the FTC Act. *See IAB Mktg. Assocs.*, 746 F.3d at 1233-34; *Washington Data Res.*, 704 F.3d at 1325-27; *Gem Merch.*, 87 F.3d at 468-70.

Equity dictates that when a specific defendant is unable to pay its share of the judgment, "joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall." *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 221, 114 S. Ct. 1461, 1471 (1994). This Court, in a recent SEC enforcement matter, explained that "a personal financial benefit is not a prerequisite for joint and several liability" when the defendants "acted in concert" to violate the law. *Monterosso*, 756 F.3d at 1337-38 (quotation omitted).[45] The same principles apply under the FTC Act. As the Ninth Circuit recently confirmed, courts may hold defendants liable for "the unjust gains [they] *collectively* received" from violating the FTC Act, not merely the amount each "personally received from the wrongful conduct." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 601 (9th Cir. 2016).

Finally, even if a defendant's lack of personal revenue were relevant to the question of relief, Lenyszyn prevented the FTC from understanding his revenue here by pleading the Fifth when asked about cash and other payments he received from Williams and WSA. *See* p. 36 n.44, *supra*.

[45] Likewise, this Court has explained that "joint and several liability is appropriate in securities laws cases where two or more individuals or entities have close relationships in engaging in illegal conduct … even where one defendant is more culpable than another." *See SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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July 7, 2016

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 9,275 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word 2010 in 14 point Times New Roman type.

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CERTIFICATE OF SERVICE

I certify that on July 7, 2016, I served the foregoing on the following counsel of record for appellant Chris Lenyszyn using the Court's electronic case filing system and by FedEx. All counsel of record are registered ECF filers.

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