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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 19-1333 JVS (KESx)	Date	July 6, 2020
Title	**Federal Trade Commission v. Elegant Solutions, Inc. et al**		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Cross Motions for Summary Judgment**

Before the Court are two motions.

First, Defendants Elegant Solutions, Inc., Trend Capital, Ltd., Dark Island Industries, Inc., Heritage Asset Management, Inc., Tribune Management, Inc.,[1] Mazen Radwan, Rima Radwan, Labiba Radwan, and Dean Robbins[2] (collectively, "Defendants") moved for summary judgment. Def's Mot., Dkt. No. 131. Plaintiff the Federal Trade Commission (FTC) opposed. FTC Opp'n, Dkt. No. 148. Defendants replied. Def's Reply, Dkt. No. 162.

Second, the FTC moved for summary judgment. FTC Mot., Dkt. No. 132. Defendants opposed. Def's Opp'n, Dkt. No. 150.[3] The FTC replied. FTC Reply, Dkt. No. 163.

For the following reasons, the Court **DENIES** Defendants' motion for summary judgment and **GRANTS** the FTC's motion for summary judgment.[4]

[1] These entities are also referred to in this Order as the "Corporate Defendants."

[2] These individuals are referred to collectively, in this Order, as the "Individual Defendants."

[3] Defendants also requested time to seek additional discovery pursuant to Fed. R. Civ. P. 56(d).

[4] Defendants submitted requests for a hearing. Dkt. Nos. 171, 172. The Court finds that oral argument would not be helpful in this matter. Fed. R. Civ. P. 78; L.R. 7-15.

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I. BACKGROUND

A. Factual Background

The Court will address the parties' contentions that certain facts are disputed where they pertain to material facts the Court relies upon in reaching its decision.

Defendants marketed their purported services to consumers with substantial student loan debts. FTC Statement of Undisputed Facts ("FTC SUF"), Dkt. No. 132-3 ¶¶ 149, 151. Defendants provided telemarketers with scripts that instructed them to tell consumers that Defendants were a student loan management company that would help consumers save money by consolidating their federal student loans, enrolling them in an income-based repayment program, or qualifying them for a loan forgiveness program. Id. ¶¶ 152-53, 160.

Defendants' telemarketers also made more specific loan forgiveness claims, such as that consumers' loan balances would be forgiven after the consumers made lower monthly payments for a specific span of years, such as three or seven. Id. ¶ 154. There are no federal loan forgiveness programs with repayment terms of three or seven years. Id. ¶¶ 179-180.

Defendants typically quoted consumers a monthly payment amount that was significantly less than what consumers were paying at the time, and that all or most of their payment would be applied to their student loans. Id. ¶¶ 156-57, 161. And, Defendants represented that they would be purchasing, taking over, or handling servicing of consumers' loans. Id. ¶ 167-72.

After consumers agreed to enroll in Defendants' program, Defendants emailed consumers a pre-filled enrollment packet to sign electronically using DocuSign. Id. ¶ 174. The packet included a privacy policy, service agreement, and an debit authorization form. Id. ¶ 175.

After collecting consumers' bank account information, but before providing any debt relief, Defendants began debiting consumers' accounts via ACH transfer. Id. ¶ 217. Defendants charged consumers annual management or service fees, paid monthly, and

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processing fees. Id. ¶¶ 218. For a discrete period of time, Defendants also charged a 'down payment" or "initiation fee." Id. ¶ 219.

After debiting consumers' accounts, payment processors placed the funds in a "holding" account. Id. ¶ 221. From there, the management fees were disbursed to the "operating" account. Id. ¶ 222. The remaining funds were transferred to a "trust" account. Id. ¶ 223-24. Defendants did not pay consumers' interest on their "trust" balances. Id. ¶ 226.

Defendants transferred funds from the "trust" account into their "operating" and personal accounts. Id. ¶ 208. In March 2018, Mazen Radwan wrote himself a $60,000 check from the "trust" account and deposited it into his personal bank account. Id. ¶ 209.

Defendants represented on income-driven repayment ("IDR") applications that consumers were unemployed, and thus had no income, when those consumers had told Defendants they were employed and/or had submitted forms of income verification. Id. ¶ 187, 190-91.

Prior incarnations of the Corporate Defendants failed to make timely minimal payments to lenders. Id. ¶ 197. Defendants conducted an "audit" in 2018 of their "legacy" accounts to determine how much they owed consumers' lenders. Id. ¶ 199. This "audit" showed the customers had a combined balance of at least $2,718,728 in "trust" that Defendants should have paid to lenders. Id. ¶¶ 200, 207.

After verifying that customers had money in the "trust" account, Defendants would decide on a case-by-case basis whether to make payments to customers' lenders. Id. ¶ 201. These payments frequently were for less than the amount consumers had in "trust." Id. ¶ 202-04.

Defendants are not federal student loan servicers and did not purchase consumers' student loans. Id. ¶ 181. Defendants used consumers' usernames, passwords, and FSA PINs to change consumers' contact information with their federal student loan servicing accounts to Defendants' contact information. Id. ¶ 212. Consumers, in many cases, did not know that Defendants had not paid payments on their loans for months. Id. ¶ 214.

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Rima and Mazen Radwan and Dean Robbins were equal owners of Heritage Asset Management, Inc. and Tribune Management, Inc. Id. ¶ 109. Tribune, doing business as Student Loan Group, became responsible for acquiring new customers. Id. ¶ 110. Heritage, doing business as National Secure Processing, took over responsibility for managing clients' loans, including the loans of clients signed up by D.O.R.M. Group and the partnership. Id. ¶ 111. The two companies shared an office building, located at 6A Liberty, Aliso Viejo, CA 92656, and officers: Rima Radwan was the Chief Executive Officer, Mazen Radwan was the Chief Financial Officer, and Dean Robbins was the Chief Technology Officer. Id. ¶¶ 129-30.

A Washington state court entered a consent decree against D.O.R.M. Group, Inc. on July 26, 2016, regarding alleged violations of the State's consumer protection and debt law, including failing to make required disclosures, false advertising, and failing to deliver promised services. Id. ¶ 112-13. And North Carolina permanently prohibited Heritage, Tribune, and D.O.R.M. Group, along with Mazen Radwan, Rima Radwan, and Dean Robbins, from operating in the state, as of March 6, 2017. Id. ¶ 114-16.

According to Defendants' general manager, Daisy Lopez, the student loan businesses were having "issues" with payments not being sent to consumers' lenders and re-branded "to kind of get away from all that." Id. ¶ 120.

Defendants ceased doing business as Student Loan Group and National Secure Processing and transferred their assets, operations and a number of employees to two new companies—Elegant Solutions, Inc. and Trend Capital, Ltd. Id. ¶ 122. Rima Radwan, Mazen Radwan, and Robbins are equal owners of Trend and Elegant. Id. Elegant and Trend shared an office building, located at 3 Studebaker, Irvine, CA 92618, and officers: Rima Radwan (CEO), Mazen Radwan (CFO), and Robbins (CTO). Id. ¶¶ 3, 10, 30-31, 52-53, 76-77. The two companies used the same Customer Relationship Management ("CRM") program. Id. ¶ 133.

Elegant, doing business as Federal Direct Group, was responsible for acquiring new customers and managing those customers' loans. Id. ¶ 123. Trend, doing business as Mission Hills Federal, took over responsibility for servicing the loans of Defendants' "legacy" clients—i.e., the clients signed up by Tribune, D.O.R.M. Group, and the

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partnership. Id. ¶ 124. Elegant and Trend continued signing up new customers and managing existing customers' loans as Federal Direct Group and Mission Hills Federal until July 10, 2019, when the Court-appointed Receiver took control of the Corporate Defendants and temporarily suspended their operations. Id. ¶ 126.

Rima Radwan, Mazen Radwan, and Robbins also incorporated Dark Island Industries, Inc. ("Dark Island"). Id. ¶ 136. Dark Island also operated from 3 Studebaker, Irvine, CA 92618; Trend paid its rent. Id. ¶ 135. Dark Island contracted with Automatic Funds Transfer Services, Inc. ("AFTS") to process payments from clients of the enterprise's student debt relief business; Dean Robbins signed this contract. Id. ¶¶ 137-38. AFTS sent monthly invoices identifying Dark Island as a customer. Id. ¶ 139. In addition to participating in the student debt relief operation, Dark Island operated a classic car business from 3 Studebaker. Id. ¶¶ 44, 134.

Rima Radwan was an equal owner of all five Corporate Defendants, the CEO of Elegant, Trend, Tribune, and Heritage, and the CFO of Dark Island. Id. ¶ 50. She also was a signatory on Corporate Defendants' bank accounts and held one or more corporate credit cards. Id. ¶ 57. She was familiar with law enforcement actions brought by the FTC and other government agencies against other student debt relief companies for making misrepresentations and taking upfront fees, including the action brought by the Consumer Financial Protection Bureau against her former employer, StudentLoanProcessing.US. Id. ¶¶ 58-60, 70.

Mazen Radwan was an equal owner of all five Corporate Defendants, the CFO of Elegant, Trend, Tribune, and Heritage, and the CEO of Dark Island. Id. ¶ 28. He also was a signatory on Corporate Defendants' bank accounts and held one or more corporate credit cards. Id. ¶ 29. He provided funding to start the student debt relief business. Id. ¶ 45. And he applied for payment processing services for certain of the Corporate Defendants. Id. ¶ 42. He managed the relationship with Payment Automation Network, one of Defendants' payment processors. Id. ¶ 43.

Dean Robbins was an equal owner of all five Corporate Defendants and the CTO of Elegant, Trend, Tribune, Heritage, and Dark Island. Id. ¶ 74. He was a signatory on Corporate Defendants' bank accounts and held one or more corporate credit cards. Id. ¶ 83. He was responsible for developing and maintaining the student loan business'

Customer Response Management software ("CRM") and handling other technology issues. Id. ¶ 81. His other responsibilities included: purchasing web-hosting and domain name services, (id. ¶ 84), creating and maintaining websites, (id. ¶ 85), buying and evaluating leads, (id.¶ 86), setting up virtual office and mail forwarding services, (id. ¶ 87), obtaining payment processing services, (id. ¶ 88), and providing payment information to Defendants' payment processors to allow them to debit consumers' accounts. Id. ¶ 89.

Labiba Valazquez[5] was the Director of Operations for Elegant, Trend, Tribune, and Heritage. Id. ¶ 94. She received sales reports from Elegant's sales floor manager, ensured "that operations processes stay within agreed upon budgets and timelines," was responsible for addressing issues with Defendants' payment processors, and was responsible for handling Human Resources issues. Id. ¶¶ 95-96, 100-01. And she held a corporate Amex card. Id. ¶ 94. She shared an office with Rima Radwan. Id. ¶ 98.

B. Procedural Background

The FTC brought this suit on July 8, 2019. Dkt. No. 1.

On July 8, 2019, the Court entered a temporary retraining order (TRO) against Defendants and appointed a receiver to manage $4,005,430.16 in frozen assets. Dkt. No. 23. In granting the TRO, the Court found that there is good cause to believe Defendants "have engaged in and are likely to engage in acts or practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310," ("TSR") and that "the FTC has established a likelihood of success in showing that Defendants have made deceptive representations in the marketing and sale of student loan debt relief services and collected unlawful advance fees from consumers." Id. ¶ 3. The Court also found good cause to believe that Defendants have caused consumer harm of at least $23 million. Id. ¶ 5. The Court appointed Thomas W. McNamara to act as the Receiver. Id. XIV.

On July 17, 2019, the Court entered the parties' stipulated preliminary injunction.

[5] Her legal name is Labiba Radwan; she was used both names in connection with the student loan debt relief operations. Id. ¶ 104.

Dkt. No. 52.

On May 8, 2020, the Court granted the FTC's motion to strike the declarations of Rima Radwan and Dean Robbins. Dkt. No. 170.

II. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "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); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.[6]

The moving party has the initial burden of establishing the absence of a material fact for trial. Anderson, 477 U.S. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . .

[6] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][7] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

Where the parties have made cross-motions for summary judgment, the Court must consider each motion on its own merits. Fair Hous. Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. See id. at 1137.

When resolving a motion for summary judgment, courts may only consider admissible evidence. Fed. R. Civ. P. 56. On a motion for summary judgment, a party may object that the material used to "dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). A court must rule on material evidentiary objections. Norse v. City of Santa Cruz, 629 F.3d 966, 973 (9th Cir. 2010)

When the order cites evidence to which the parties have objected, the objection is impliedly overruled. Additionally, the Court declines to rule on objections to evidence upon which it did not rely. The Court further notes that it gives little weight to blanket objections. See Amaretto Ranch Breedables v. Ozimals Inc., 907 F. Supp. 2d 1080, 1081 (N.D. Cal. 2012) ("This Court need not address boilerplate evidentiary objections that the parties themselves deem unworthy of development . . . ."); Californians for Disability Rights, Inc. v. California Dep't of Transp., 249 F.R.D. 334, 350 (N.D. Cal. 2008) ("The Court declines the defendants' invitation to analyze objections that defendants did not themselves bother to analyze, and the objections are overruled on those grounds alone."); Communities Actively Living Indep. & Free v. City of Los Angeles, 2011 WL 4595993, at *8 (C.D. Cal. Feb. 10, 2011) ("It is not the Court's responsibility to attempt to discern

[7] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

the City's grounds for objecting to evidence submitted by Plaintiffs where the City merely repeats the same categorical objections but provides little to no explanation as to why the subject evidence is objectionable.").

B. Defendants' Request to Conduct Additional Discovery

Federal Rule of Civil Procedure 56(d) provides that "if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." A district court should generally rule on a party's Rule 56(d) request before ruling on the merits of a summary judgment motion. See Garrett v. City & Cty. of S.F., 818 F.2d 1515, 1518–19 (9th Cir. 1987). A court may deny the request if further discovery would not impact the summary judgment ruling. Bank of Am., NT & SA v. PENGWIN, 175 F.3d 1109, 1118 (9th Cir. 1999).

A party seeking relief under Rule 56(d) must show "(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." Family Home and Finance Ctr., Inc. v. Federal Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008) (citation omitted). Failure to comply with these requirements is grounds for denying discovery and proceeding to summary judgment. Id. "The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment." Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001). "Bare allegations or vague assertions of the need for discovery are not enough" to satisfy the Rule 56(d) standard. Livingston v. 3M Co., 2013 WL 12129394, at *11 (C.D. Cal. July 11, 2013) (internal quotation marks omitted). Furthermore, "[d]iligence in seeking discovery is required before relief may be granted pursuant to Rule 56(d)." Russell v. Aurora Bank, FSB, 2014 WL 12603076, at *2 (C.D. Cal. Sept. 19, 2014) (Selna, J.) (citing Panatronic USA v. AT&T Corp., 287 F.3d 840, 846 (9th Cir. 2002)).

III. DISCUSSION

A. Defendants' Request to Conduct Additional Discovery

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Defendants request that the Court defer ruling on the FTC's motion to allow them to conduct further discovery. In support of this request, Defendants offer the declaration of Stephen R. Cochell. Cochell Decl., Dkt. No. 150-11, Ex. H. Cochell declares that the FTC did not produce documents "related to the Company's Customer Relationship Manager (CRM) system, Quickbooks, and the initial sales calls that were recorded between customers and the Corporate Defendants." Id. ¶ 3. The initial sales call recordings were requested in Defendants First Request for Production of Documents and Second Request for Production of Documents. Id. ¶¶ 4, 8.

Defendants received a hard drive from the FTC (which, in turn, received the drive from the Receiver), but Cochell states that this drive does not contain "recordings of initial sales calls." Id. ¶ 13. Accordingly, Defendants request that the Court defer ruling on the summary judgment motion "until such time as the Receiver either produces the initial summary judgment recordings or explains what happened to the recordings." Id. ¶ 15. Defendants argue that "there are thousands of recordings that show that Defendants acted in good faith to comply with the FTC Act," and that the recordings "are material and necessary to resolving this case." Id. ¶ 16.

The FTC declares that it complied with Defendants' discovery requests, including by turning over two hard drives and copies of all electronic data collected by the FTC from Defendants' offices. Declaration of K. Michelle Grajales ("Grajales Decl."), Dkt. No. 163-1 ¶¶ 20-23. The FTC notes that Defendants did not file any discovery motions in this case. Id. ¶ 20. Defendants also visited the Receiver's storage facility and reviewed evidence there. Id. ¶ 25. Defendants could have imaged the servers held by the Receiver, but did not do so. Id., Ex. E.

The Court finds that relief under Fed. R. Civ. P. 56(d) is inappropriate because Defendants were not diligent in seeking these initial sales recordings, if they were indeed not contained on the hard drives Defendants received from the FTC. Further, Defendants only set forth a vague assertion that they need this additional discovery to show they acted in good faith, and do not explain what "specific facts" they would elicit if they obtained additional sales call recordings.

B. Defendants' Evidentiary Objections

Defendants assert various material evidentiary objections. See Defendants' Statement of Genuine Disputes ("Defendants' SGD"), Dkt. No. 152. The Court addresses each in turn.

1. Declaration of Michael B. Goldstein ("Goldstein Decl.," Dkt. No. 25, PX 20)

Defendants object that portions of the Goldstein declaration are "without foundation," and "documents are not authenticated." See SGD ¶¶ 152-153, 155, 160-70, 212-14, 224, 227-228, 240, 242.

The Court overrules Defendants objections to the Goldstein Declaration. Defendants objections are boilerplate; Defendants merely repeat the same categorical objections based on lack of foundation and lack of authentication but provide no further explanation as to what specific evidence is objectionable.

2. Declaration of Scott Lause ("Lause Decl.," Dkt. No. 27, PX 21)

Defendants "[o]bject to Scott Lause's declaration as lacking foundation and is hearsay," and argue that he "renders expert opinions for which he is not qualified . . . and for which he was not disclosed." SGD ¶ 183. Defendants expand on this objection by arguing that Lause "renders numerous opinions that are not supported by any showing that he has qualifications to render his opinions or that he reviewed documents specific to this case." Id. ¶¶ 229, 233-36.

The FTC argues that Lause does not render any expert opinions and only offers fact testimony. Reply at 18. Lause is Assistant General Counsel for the Higher Education Loan Authority of the State of Missouri ("MOHELA"). Lause Decl. ¶ 2.

The Court has reviewed Lause's declaration and determines that it is not expert testimony. His fact testimony is based on his personal knowledge assisting borrowers who worked with student loan debt relief companies. Id. ¶ 4. Lause also adequately testifies as to his personal knowledge and ability to certify the authenticity of records produced by MOHELA. Id. ¶ 31. Therefore, the Court **overrules** Defendants' objections to the cited portions of this declaration.

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3. Declarations of Richard Kaplan, Calvin Brown, and Ajay Patel (Dkt. Nos. 134-1, 134-2, 134-3, PXs 28-30)

Defendants object to these declarations because they were not timely disclosed under Rule 26(a)(2) governing the disclosure of expert testimony. See, e.g., SGD ¶¶ 155, 219-20, 230-32.

Kaplan, Brown, and Patel are Technical Computer Forensic Examiners with the FTC. See, e.g., Kaplan Decl., Dkt. No. 134-1 ¶ 2. The FTC uses their testimony to establish the chain of custody for business records and data forensically examined in connection with the Receiver's investigation. Id. ¶¶ 9-10. Accordingly, the Court **overrules** Defendants' objections to these declarations, because they are not presented as expert testimony.

4. Declaration of Emilie Saunders ("Saunders Decl.," Dkt. No. 134-4, PX 31)

Defendants object that the testimony of the FTC's paralegal, Emilie Saunders, "relied on unauthenticated documents that do not provide foundation for this claim. Her testimony is hearsay." SGD ¶ 239. The Court **overrules** this objection because it is made in a boilerplate fashion, does not identify the specific documents that lack adequate authentication, and does not specifically explain what about her testimony is hearsay.

5. Declaration of Connor Geiran ("Geiran Decl.," Dkt. No. 135-1, PX 32)

Defendants object that Geiran was not disclosed as an expert witness and that the statistics he provides "are derived from unauthenticated documents and which are incomplete and misleading." See, e.g., SGD ¶¶ 151, 192, 219-20. Defendants also object that Geiran's declaration lacks foundation and is hearsay. Id. ¶¶ 183-84

Geiran's declaration is based on his review of CRM data the FTC collected from Defendants' business premises. Geiran Decl. ¶¶ 1-2. The Court **overrules** Defendants' authentication objection, as Defendants do not seriously contest the authenticity of the

data or specifically identify what about the data is inauthentic.[8]

The Court **overrules** Defendants' objection that this evidence is inadmissible as hearsay. The Court finds that the data falls under the hearsay exception as record of a regularly conducted activity. F.R.E. 803(6). The data is also admissible under Federal Rule of Evidence 1006, which permits the FTC to "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court."

6. Declaration of Rufus Jenkins ("Jenkins Decl.," Dkt. No. 135-2, PX 33)

Defendants object to Jenkins' Declaration "as it contains Inadmissible Expert Testimony lacking foundation, failure to disclose per Rule 26." SGD ¶¶ 230-32. They also "[o]bject based on F.R.Civ.P. 26(a)(2)(B) and (D); Inadmissible Lay Opinion lacking foundation under Rule 701, 702." Id. Jenkins, they argue, "is an accountant not disclosed as an expert witness (Exhibit B) and has no personal knowledge of how company records were maintained." Id. "Moreover, Jenkins' conclusions are also incomplete, misleading and flawed because he also failed to review: (1) all bank statements of various companies, failing to specify which balance sheets, profit and loss statements, balance sheets cash flow statements and financial disclosures 'and other financial supporting records[.]' that he reviewed; and (2) failed to identify which company had net revenues using which tax returns or profit and lost statements." Id. Defendants argue this testimony should be excluded "because the data upon which relies lacks foundation and is inadmissible under Rule 803(6), Federal Rules of Evidence." Id.

Jenkins is an investigator for the FTC. Jenkins Decl. ¶ 1. He calculates Defendants' "net revenue" by subtracting customer refunds or payments to lenders from Defendants' gross revenues. Id. ¶¶ 2, 4. He declares that much of the information he reviewed for his summary was produced by Defendants' counsel. Id. ¶ 3.

The FTC notes that Jenkins' summary **is** based on tax returns and profit and loss

[8] Defendants attempt to support their contention that the CRM data Geiran analyzed is incomplete and misleading with the late-filed Declaration of Dean Robbins. The Court granted the FTC's motion to strike this declaration on May 8, 2020. Dkt. No. 170.

statements for Elegant, Tribune and Heritage, which Defendants produced to the FTC pursuant to the TRO's financial disclosure provisions, and Trend's bank statements, which the FTC obtained from Bank of the West pursuant to a civil investigative demand. See TRO Order, Dkt. No. 23 at 14; Goldstein Decl. ¶¶ 68-71. As Rule 1006 requires, the FTC provided copies of Defendants' bank records to Defendants during discovery. Grajales Decl. ¶ 23.

The Court **overrules** Defendants' objections to the Jenkins Declaration. It is admissible under Federal Rule of Evidence 1006 as a summary of Defendants' financial records. Jenkins simply ran calculations; he does not offer additional opinion evidence. See F.T.C. v. AMG Svs., Inc., 2016 WL 1275612, at *5, n.5 (D. Nev. March 31, 2016). Therefore, Jenkins' testimony is not inadmissible expert opinion testimony that the FTC failed to disclose under Federal Rule of Civil Procedure 26(a)(2). Further, the documents were produced by Defendants, pursuant to the TRO. Therefore, Defendants' authenticity and lack of foundation objections lack merit. See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 972 (C.D. Cal. 2006).

C. FTC's Motion for Summary Judgment

1. Violations of the F.T.C. Act (Count I)

Section 5 of the F.T.C. Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). "An act or practice is deceptive if 'first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.'" F.T.C. v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009) (quoting F.T.C. v. Gill, 265 F.3d 944, 950 (9th Cir. 2001)). A representation is "likely to mislead consumers" when (1) the representation is false; or (2) the advertiser lacked a reasonable basis for its claims. F.T.C. v. John Beck Amazing Profits, LLC, 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012) (citing F.T.C. v. U.S. Sales Corp., 785 F .Supp. 737, 748 (N. D. Ill.1992); In the Matter of Thompson Med. Co., Inc., 104 F.T.C. 648, 64 (1984)). Material misrepresentations are those that involve information important to consumers and thus are "likely to affect their choice of, or conduct regarding, a product." F.T.C. v. Cyberspace.Com LLC, 453 F.3d 1196, 1201 (9th Cir. 2006). Express representations are presumed to be material. F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994).

However, a court may consider "the overall 'net impression' that Defendants' representations make upon consumers." Id. at 1200.

The FTC describes three categories of false or unsubstantiated representations Defendants made to consumers. FTC Mot. at 18-19.

First, the Court finds that there is no genuine dispute of fact that Defendants made false, material representations regarding enrollment in repayment plans**.** Defendants represented that consumers would be enrolled in a repayment plan that would reduce their monthly payments to specific lower amounts or result in their loan balances being forgiven, including after a specific number of years. FTC SUF ¶¶ 154-59. But there are no federal loan forgiveness programs with repayment terms of three or seven years. Id. ¶¶ 179-180.

In addition, Defendants falsely represented on income-driven repayment ("IDR") applications that consumers were unemployed, and thus had no income, when those consumers had told Defendants they were employed and/or had submitted forms of income verification. Id. ¶ 187, 190-91.

Second, Defendants do not genuinely dispute that they made false, material misrepresentations regarding payments towards loans**.** Defendants represented that most or all of consumers' monthly payments to Defendants would be applied toward consumers' student loans. FTC SUF ¶ 161. But Defendants often failed to apply these "trust" payments to students' loans, and would decide on a case-by-case basis whether to make payments to customers' lenders. Id. ¶¶ 200, 201, 202-04, 207.

Defendants dismiss these misrepresentations, and even admit to them, stating that "[a]t best, Corporate Defendants' failure to timely pay student loans was a *technical contract breach* and not a violation of the FTC Act." Opp'n at 17.

Third, there is no genuine dispute of fact that Defendants misrepresented that they would assume responsibility for students' loans. For example, Defendants told one consumer they were "a servicer" and would "service [her] loans directly through the Department of Education." FTC SUF ¶ 168. Another consumer was told "the main goal is to eliminate your middle lender and get you back on track with paying the main source,

which is going to be the Department of Education." Id. ¶ 169. But Defendants do not genuinely dispute that they are not federal loan servicers and despite their representations to consumers, have not taken over or purchased consumers' student loans. See SGD ¶ 181.

The Court agrees with the FTC that these claims were likely to deceive consumers because they were false and/or unsubstantiated. The Court notes that the application consumers would sign automatically jumped from signature block to signature block instead of requiring consumers to scroll through each page, diminishing the likelihood that consumers would review Defendants' disclosures. FTC SUF ¶ 177; see Dean Robbins Depo., Dkt. No. 137-2 at 216:5-25, 217:1-8.

It is also undisputed that Defendants emailed consumers the enrollment packet to sign *after* consumers agreed to enroll in Defendants' program. FTC SUF ¶ 174. The Court finds that the disclosures in Defendants' application do not cure misrepresentations that were made before consumers read the agreements. See FTC v. Gill, 71 F. Supp. 2d 1030, 1044 (C..D. Cal 1999) ("a disclaimer does not automatically exonerate deceptive activities"); see also Resort Car Rental v. FTC, 518 F.2d 962, 964 (9th Cir. 1975) (FTC Act violated if advertising "induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.").

Defendants argue that consumers were not deceived by these sorts of misrepresentations because Defendants explained how their services worked to consumers when they entered into their Service Agreements. Opp'n at 9. Defendants suggest that consumers acted unreasonably under the circumstances by not reading all of the disclosures in the forms provided. Id. at 9-10. However, the Court finds that the disclosures in the Service Agreements were not prominently made and given after-the fact (i.e., after the initial sales pitch), and therefore inadequate to cure misleading initial impressions consumers would reasonable take away about Defendants' services. These misleading impressions were compounded by the fact that some telemarketers would deviate from the scripts they were provided. See FTC v. Cyberspace.com, 453 F.3d 1196, 1200 (9th Cir. 2006); FTC SUF ¶¶ 152, 174-77.

The Court concludes that there are no genuine disputes of fact that Defendants made material misrepresentations that were likely to deceive consumers. Accordingly,

the Court **grants** the FTC's motion for summary judgment on Count I, for violations of Section 5 of the F.T.C. Act.

2. Violations of the TSR (Counts II and III)

Count II charges Defendants with collecting advance fees for debt relief services and Count III charges Defendants with making material misrepresentations.

The TSR prohibits "sellers" and "telemarketers" from:

> Requesting or receiving payment of any fee or consideration for any debt relief service until and unless: (A) The seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer; [and] (B) The customer has made at least one payment pursuant to that settlement agreement, debt management plan, or other valid contractual agreement between the customer and the creditor or debt collector[.]

16 C.F.R. § 310.4.

The TSR also prohibits misrepresentations as to a "seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity." 16 C.F.R. § 310.3(a)(2)(vii).

Additionally, the TSR prohibits misrepresentations as to:

> Any material aspect of any debt relief service, including, but not limited to, the amount of money or the percentage of the debt amount that a customer may save by using such service; the amount of time necessary to achieve the represented results; the amount of money or the percentage of each outstanding debt

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 19-1333 JVS (KESx) Date July 6, 2020

Title **Federal Trade Commission v. Elegant Solutions, Inc. et al**

> that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors or debt collectors or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt. . .

16 C.F.R. § 310.3(a)(2)(x).

In regards to Count III, the Court has already found that Defendants have not genuinely disputed that they made material misrepresentations to consumers. There are undisputed facts regarding Defendants' misrepresentations to consumers regarding how they would take over servicing or purchasing loans, the monthly payments they would obtain, and the application of payments to loans. Accordingly, the Court **grants** the FTC's motion for summary judgment on Count III.

As for Count II, Defendants do not seriously dispute that they did not segregate the funds in the "trust" account by consumer and that consumers could not withdraw funds from the account. See SGD ¶ 225. It is also not disputed that after debiting consumers' accounts, payment processors placed the funds in a "holding" account. FTC SUF ¶ 221. From there, the management fees were disbursed to the "operating" account. Id. ¶ 222. The remaining funds were transferred to a "trust" account. Id. ¶ 223-24.[9] Finally, Defendants did not pay consumers' interest on their "trust" balances. Id. ¶ 226. The absence of genuinely disputed facts regarding this "trust" account system establishes that Defendants violated the TSR, which has specific requirements for the placement of consumers' payments in escrow. 16 C.F.R. § 310.4(a)(5)(ii)(B-E).[10]

Even Defendants admit that "the trust/holding account maintained by Elegant and Trend was not a formal 'trust' account . . . but was simply a 'business' account." Opp'n at 15. But Defendants argue that they "complied or substantially complied with the TSR because they did not receive payment of fees until the work was actually completed." Id.

[9] Defendants attempt to dispute these facts with Rima Radwan's late-filed declaration, which the Court struck.

[10] The TSR requires that Defendants allow the customer to be able to "withdraw from the debt relief service at any time."

These bare assertions do not create fact disputes or excuse the failure to comply with the escrow requirements for consumer payments. Therefore, the Court **grants** the FTC's motion for summary judgment on Count II.

3. The Corporate Defendants Formed a Common Enterprise

"Where one or more corporate entities operate in common enterprise, each may be held liable for the deceptive acts and practices of the others." F.T.C. v. John Beck Amazing Profits, LLC, 865 F. Supp. 2d 1052, 1082 (C.D. Cal. 2012) (citing F.T.C. v. Think Achievement Corp., 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000)). In determining whether a common enterprise exists, courts consider whether there is (1) common control; (2) sharing office space and offices; (3) whether business is done through interrelated companies; and (4) whether funds are commingled. Id.

Defendants offer the same boilerplate, blanket objection to nearly every item of the FTC's evidence: that each fact is "[n]on-specific as to companies," and that "[t]he only relevant companies are Elegant and Trend." They also repeatedly object that RCC "did not conduct student loan debt relief activities." The Court again notes that it gives little weight to boilerplate, blanket objections. Defendants suggest that Trend "entered into a purchase agreement for legacy clients and did not do business with Elegant," but do not offer any evidence of this purchase agreement. Opp'n at 21-22.

It is undisputed that Mazen and Rima Radwan and Dean Robbins owned the Corporate Defendants. FTC SUF ¶ 122, 128. The Radwans and Robbins had signatory control over the corporate funds in all five Corporate Defendants' bank accounts; they also all had corporate credits cards for the various entities. Id. ¶ 29, 57, 83. All three individuals held themselves out as officers of the Corporate Defendants. Id. ¶ 130. In addition, Velazquez was the Director of Operations and had a corporate card. Id. ¶¶ 94. She shared an office with Rima Radwan. Id. ¶ 98. Defendants also do not seriously dispute that the Corporate Defendants shared some employees. See SGD ¶ 131. Heritage and Tribune were located in the same office building. SUF ¶ 129. Elegant, Trend, and Dark Island operated out of the same office building; Trend paid Dark Island's rent. Id. ¶¶ 129-30, 135. Dark Island set up payment processing. Id. ¶¶ 137-39. Finally, the FTC has produced evidence Defendants fail to dispute regarding the commingling of funds. Id. ¶ 132.

Based on these undisputed facts, the Court finds that the evidence is indicative of a common enterprise. The Corporate and Individual Defendants shared offices and employees, conducted business through interrelated companies, and transferred funds among the Corporate Defendants.

4. The Individual Defendants are personally liable

Individuals are liable for corporate violations of the F.T.C. Act if (1) they "participated directly in the deceptive acts or had the authority to control them and (2) [] had knowledge of the misrepresentations, [were] recklessly indifferent to the truth or falsity of the misrepresentation, or [were] aware of a high probability of fraud along with an intentional avoidance of the truth." John Beck, 865 F. Supp. 2d at 1082 (citing F.T.C. v. Stefanchik, 559 F.3d 924, 931 (9th Cir. 2009)) (internal quotations omitted).

The Court finds that Labiba,[11] Rima, and Mazan Radwan, and Dean Robbins, may be held individually liable for the Corporate Defendants' violations of the F.T.C. Act. Each was an officer of the companies. See F.T.C. v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1170 (9th Cir. 1997) ("[individual defendant's] assumption of the role of president . . . and her authority to sign documents on behalf of the corporation demonstrate that she had the requisite control over the corporation."). As noted above, each of these individual defendants were equal owners of all five Corporate Defendants, were signatories on the Corporate Defendants' bank accounts, and held credit cards for the Corporate Defendants.

With respect to the knowledge element, the Radwans and Robbins knew about the North Carolina, Oregon, and Washington actions against the Corporate Defendants (Heritage and Tribune) and their predecessors based upon similar violations of consumer protection laws. FTC SUF ¶¶ 46-48, 58-60, 70-72, 90-91, 93, 102, 112-16. Further, notice is established because according to Defendants' training materials, two of the top five reasons consumers cancelled was because they did not realize they were paying fees and thought the money they paid to Defendants went towards their loans and because they felt their loan manager lied to them. Id. ¶ 242. Defendants admit that the Corporate Defendants "did have problems with" third party processors responsible for paying the

[11] She was also knows as Velasquez.

loans to lenders and that is why they felt it was necessary to undertake an audit. SGD ¶ 182.

The Court addresses further evidence in support of individual liability below.

a. Labiba Radwan

Defendants argue that Labiba Radwan did not have ownership or control over the companies' policies or procedures and merely performed "ministerial" tasks. Opp'n at 24; SGD ¶ 94. They also argue that although she provided "guidance on amounts to be paid to Lenders," she was not a manager making the decision. Opp'n at 25; SGD ¶ 94, 96-97.

Labiba was a customer contact for merchant processing services. FTC SUF ¶ 100. She also received sales reports, handled HR for the Corporate Defendants, addressed issues with payment processors, and made decisions about how much money to pay to lenders. Id. ¶¶ 94-96, 99, 101-01.

b. Rima Radwan

Defendants argue that Rima Radwan should not be held individually liable for any "misconduct by individual employees." Opp'n at 25. But, she handled employee payroll, trained customer service representatives, drafted sales scripts, and otherwise set company policy. FTC SUF ¶¶ 61-68.

c. Mazan Radwan

Defendants contend that Mazan Radwan "had nothing to do with the management or control of the student loan debt relief companies." Opp'n at 25; SGD ¶ 28. But Defendants did not contest that he provided "some of the funding" for the student debt relief businesses. See SGD ¶ 45. And, he opened corporate bank accounts, leased office space in South Dakota, arranged for Internet services on behalf of the Corporate Defendants (including Trend and Elegant), managed the relationship with Payment Automation Network, one of Defendants' payment processors, and flew to North Carolina to meet with an Assistant State Attorney prosecuting the State's case against

certain of the Defendants. SUF ¶¶ 29, 39, 41-43, 47.

d. Dean Robbins

Defendants argue that Dean Robbins "did not hire, fire or supervise employees and the policies and procedures for student loan debt relief companies were created and maintained at the direction and control of Rima Radwan." Opp'n at 24; SGD ¶ 74, 83, 94. Regardless, Robbins set up Defendants' virtual offices and created the CRM software that Defendants used to operate their debt relief operation. FTC SUF ¶¶ 81, 87.

5. The FTC May Obtain Injunctive Relief and the Equitable Relief it Seeks is Appropriate

Defendants argue that "[t]he principles enunciated in Kokesh v. SEC, 137 S.Ct. 1635 (2018) bar restitution in this case because it is nothing more than a penalty and therefore not an equitable remedy." Opp'n at 27. Accordingly, Defendants argue that "the maximum liability should be the amount the individuals profited; that is, their incomes or salaries," and that "setting damages based on gross revenues is contrary to established principles of restitution." Id. at 27-28.

The Court notes that in Kokesh, the Supreme Court expressly limited its holding to the issue of whether SEC disgorgement is subject to a five-year statute of limitations. See Kokesh, 137 S. Ct. at 1642.n.3. In addition, the Ninth Circuit has "repeatedly held that § 13 'empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.'" F.T.C. v. AMG Capital Mgmt., LLC, 910 F.3d 417, 426 (9th Cir. 2018) reh'g denied, 2019 U.S. App. LEXIS 18551 (9th Cir. June 20, 2019) (citing F.T.C. v. Commerce Planet, Inc., 815 F.3d 593, 598 (9th Cir. 2016) and F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994)). Based on such precedent, the Court finds that the FTC has the authority to seek injunctive relief.

Defendants also argue that the FTC's proposed permanent injunctions are "disproportionately severe" because the FTC fails to acknowledge that Elegant and Trend protected clients "through DocuSign and customer service." Opp'n at 29. The Court finds that whatever policies Defendants had in place were not adequate to protect consumers against the well-documented violations of federal law that occurred.

The Court finds that the proposed permanent injunctions and monitoring provisions are appropriate because there is a reasonable likelihood of future violations of the FTC Act and TSR. See CFTC v. CoPetro Mktg Grp., Inc., 680 F.2d 573, 582 n.16 (9th Cir. 1982); see also FTC v. Elec. Payment Sols. of Am., Inc., 2019 WL 4287298, at *9 (D. Ariz. Aug. 28, 2019) (internal citation and quotation marks omitted) ("an injunction will issue under § 53(b) if the FTC has reason to believe that the past conduct is likely to recur."). To determine the appropriate scope of an injunction, courts analyze: "(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claims may be transferred to other products [or services]; and (3) whether the [defendant] has a history of prior violations." FTC v. Grant Connect, LLC, 763 F.3d 1094, 1055 (9th Cir. 2014) (citation omitted). The uncontroverted facts illustrate a pattern of Defendants corporate repackaging and rebranding of the same fraudulent scheme. Despite investigations in multiple states, they continued to engage in violations of the FTC and TSR Acts. The Court believes that the proposed injunctive relief is necessary to protect consumers.

The Court finally finds that the evidence supports the entry of an equitable monetary award of $27,584,969.00 against all Defendants.[12] See F.T.C. v. Stefanchick, 559 F.3d 924, 931 (9th Cir. 2009) ("[b]ecause the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits.").

D. Defendants' Motion for Summary Judgment

1. Defendants Have Not Established An Absence of Fact Disputes Regarding Violations of the FTC Act

Defendants argue that the FTC's consumer declarations are "inaccurate representations" of sales calls and that consumers cannot claim they were deceived after reviewing Defendants' Service Agreements, which informed them of the nature, type, and cost of services to be rendered. Mot. at 1, 8-9. Notably, Defendants do not submit

[12] The FTC arrived at this amount by calculating Defendants' net revenues. See Jenkins Decl. ¶ 4, Table 1. Apart from evidentiary objections, which the Court has overruled, the calculation and its components are uncontested by Defendants.

evidence of any sales calls that support their assertions.[13]

As discussed above, the FTC has provided evidence that Defendants promised to get consumers a specific, lower repayment amount or into a forgiveness program, apply all or most of consumers' payments to their student loans, and purchase or take over servicing of consumers' loans. See FTC SUF ¶¶ 149-77. But Defendants instead falsified applications, failed to make payments on loans, and did not purchase or take over servicing of loans. Id. ¶¶ 178-211. The disclosures Defendants provided did not alert consumers to these issues.

Defendants insist that they "did their best to create a system that complied with the FTC Act," by using an in-house lawyer. Reply at 8. But Defendants cannot avoid liability under Section 5 of the FTC Act by showing that they acted in good faith because the statute does not require an intent to deceive. FTC v. Commerce Planet, Inc., 878 F. Supp. 2d 1048, 1084 (C.D. Cal. 2012), aff'd in relevant part, 815 F.3d 593 (9th Cir. 2016).

Therefore, the Court **denies** Defendants' motion for summary judgment as to violations of the FTC Act.

2. Defendants Have Not Established an Absence of Fact Disputes Regarding Violations of the TSR

Defendants argue that the Corporate Defendants were not offering "debt relief services" within the meaning of 16 CFR § 310.2(o). Under the TSR, "Debt relief service means any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." Id.

[13] In any event, Defendants' sales floor supervisor, Kendra Sanchez, testified that telemarketers routinely deviated from Defendants' scripts and that the scripts were only "guidelines." FTC SUF ¶ 152.

Defendants insist that they engaged in mere document preparation for clients. Mot. at 10. But this argument is not a defense to the TSR. See FTC v. Am. Fin. Benefits Ctr., 324 F. Supp. 3d 1067, 1082 (N.D. Cal. 2018) ("Defendants' characterization of their services as mere document preparation and processing, to the exclusion of any service defined as debt relief under the TSR, is unavailing."). The FTC also notes that one of defendants' Service Agreements states that the company "shall engage each of Client's applicable lenders to initiate and complete either a federal student loan consolidation through DOE, principal reduction, interest rate reduction, deferment, forbearance, and/or a reduced payment option on behalf of the Client." See Dkt. No. 131-2, Ex. A-8. This Court has also previously rejected the argument that similar services involving federal student loans are not covered by the TSR. See Mot. at 10; Consumer Fin. Prot. Bureau v. IrvineWebWorks, Inc., 2016 WL 1056662, at *7 (C.D. Cal. Feb. 5, 2016).

"Even assuming that the TSR rule applied," Defendants argued that they "complied or substantially complied" with the Act because they placed funds "in a trust account and segregated from operating funds." Mot. at 11. The Court has already addressed this argument above; there is no dispute of fact that Defendants' "trust" account system did not comply with the TSR's requirements for placing consumer funds in escrow. See 16 C.F.R. § 310.4(a)(5)(ii). Defendants do not seriously contest this point; they even state that Elegant's lawyer "should have recommended an escrow account under TSR." Reply at 12.

Accordingly, the Court **denies** Defendants' motion for summary judgment as to violations of the TSR.

3. Injunctive Relief Is Appropriate

Defendants also claim they "modified and improved their sales policies and procedures in November 2017," and therefore the FTC is not entitled to injunctive relief to prevent future violations of the FTC Act. Mot. at 2, 11; see FTC v. Evans, 775 F.2d 1084, 1087 (9th Cir. 1985) ("[Defendant's] view that § 13(b) cannot be used to remedy past violations is supported by the statutory language," and "[t]he FTC may only seek a temporary restraining order or a preliminary injunction when it believes a person 'is violating, or is about to violate' any law enforced by the FTC; the statute does not mention past violations.").

However, the FTC has offered evidence that Defendants were engaging in ongoing violations of the law beyond November of 2017. Telemarketing scripts from this time period continued to include deceptive representations.[14] Opp'n at 17. For example, one script directed telemarketers to state, "I'm calling regarding your federal student loans to inform you that you qualify for a lower payment, reduced rate, and possible loan forgiveness." See Dkt. No. 136-1 at 1949. Another script instructed telemarketers to tell consumers, "Your monthly payments are going to be _____, which we can start as soon as tomorrow . . . ." Id. at 1950.

Further, there is evidence that Defendants continued to collect advance fees from clients who enrolled prior to November of 2017. FTC SUF ¶ 127.

Finally, the Court has already concluded that future violations of the FTC Act are likely to recur based upon Defendants' history of corporate shape-shifting to evade investigations into their student loan business.

4. The FTC May Obtain Equitable Restitution

Section 13(b) of the FTC Act states "[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).

Defendants generally challenge the FTC's authority to sue in federal court for injunctive relief and equitable restitution, arguing that Section 13(b) "is limited to matters involving ongoing or imminent future conduct when there is a need for prospective relief." Mot at 20.

Defendants cite F.T.C. v. Credit Bureau Center, LLC, 937 F.3d 764, 767 (7th Cir. 2019), where the Seventh Circuit held that Section 13(b) does not authorize restitutionary monetary relief. Mot. at 17. Defendants also cite Meghrig v. KFC W., Inc., which explained that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Mot. at 19; 516 U.S. 479, 487-88 (1996). Defendants further argue that

[14] See FTC SUF ¶ 178, 187, 190-92, 197, 207-11.

the Ninth Circuit's holding in Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ), bars the Court from granting equitable restitution here. 632 F.3d 1111, 1121 (9th Cir. 2011). In Owner-Operator, the Court found that ancillary remedies including restitution and disgorgement were not appropriate as to Truth-in-Lending regulations because the statute confined the court's equitable powers to injunctive relief. Id. ("Unless otherwise provided by statute, the court retains its full equitable powers . . . . In this case, by contrast, the statute has done precisely that; it has provided a different scheme of enforcement, listing only injunctive relief to the exclusion of other equitable remedies. Indeed, it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (internal citations and quotations omitted)).

Nonetheless, F.T.C. v. Credit Bureau Center, LLC, is an out of circuit case that does not control here. As the Court noted above in granting the FTC's motion, the Ninth Circuit has "repeatedly held that § 13 'empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.'" F.T.C. v. AMG Capital Mgmt., LLC, 910 F.3d 417, 426 (9th Cir. 2018) reh'g denied, 2019 U.S. App. LEXIS 18551 (9th Cir. June 20, 2019) (citing F.T.C. v. Commerce Planet, Inc., 815 F.3d 593, 598 (9th Cir. 2016) and F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994)). Based on such precedent, the Court finds that it has the authority to grant equitable restitution here.

The Supreme Court's reasoning in Liu v. SEC further supports this conclusion. The Court notes that when equity jurisdiction has been invoked, the district court may exercise its "inherent equitable powers . . . for the proper and complete exercise of that jurisdiction," including ordering monetary remedies. 2020 WL 3405845, at *2 (June 22, 2020) (internal citation omitted). The Court also reasoned that "[t]he equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit." Id. at 9. And the Court recognized that "collective liability" has been imposed "for partners engaged in concerted wrongdoing," when they "knowingly connected [themselves] with and aided in . . . fraud." Id. at 7, 11.

Defendants also argue that equitable restitution is a prohibited penalty under Kokesh v. SEC, 137 S. Ct. 1635 (2017). Mot. at 25-56. The Court already rejected this argument in deciding the FTC's motion. In Kokesh, the Supreme Court explicitly limited

its holding, stating that the "sole question presented" was "whether disgorgement, as applied in SEC enforcement actions, is subject to [the five-year statute of limitations]." 137 S. Ct. at 1642 n.3. Indeed, the Ninth Circuit noted that "*Kokesh* itself expressly limits the implications of the decision . . . ." AMG Capital, 910 F.3d at 427.

5. Defendants Have Not Established An Absence of Fact Disputes Regarding Individual Liability

Defendants contend **"t**here is no evidence that Mazen Radwan, Labiba Radwan or Dean Robbins had any control over the policies or practices in the student document preparation companies." Mot. at 27. But, as the Court reasoned in granting the FTC's motion, Defendants' status as officers of the various Corporate Defendants, and their authority to sign documents on the companies' behalf, gives rise to a presumption that they had the authority to control the businesses. See FTC v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1170-71 (9th Cir. 1997). Defendants' argument that Mazen and Labiba Radwan and Dean Robbins did not set company policy is irrelevant and does not negate the ample evidence of their respective forms of authority and participation in the businesses, which establish their ability to control the Corporate Defendants' practices.

Defendants also have not presented evidence that establishes there is no dispute of fact regarding the Individual Defendants' knowledge of the Corporate Defendants' misrepresentations, or their reckless indifference or awareness of the truth or falsity of the representations. See Commerce Planet, 815 F.3d at 600. Given their degree of participation and control of the Corporate Defendants, Mazen Radwan, Rima Radwan, Robbins, and Velazquez were or should have been aware of consumer complaints regarding misrepresentations and consumer cancellations. See FTC v. Affordable Media, 179 F.3d 1228, 1234 (9th Cir. 1999). And, as discussed above, there is evidence that each knew about the various state enforcement actions based upon violations of state consumer protection statutes.

6. Defendants Have Not Established An Absence of Fact Disputes Regarding Dark Island's Participation in the Common Enterprise

According to Defendants, "the only connection between Dark Island Industries . . . and the other Corporate Defendants was common ownership, but not control." Mot. at

29. The FTC has presented evidence that Dark Island's initial funding came, at least in part, from Rima Radwan, when she had no source of funding other than the student loan business. See FTC SUF ¶ 136. Trend paid Dark Island's rent. Id. ¶ 135. Dark Island contracted with AFTS to provide payment processing services to the student loan business. Id. ¶ 137. And, Dark Island set up the internet services the other defendants used to operate the student loan business. Id. ¶ 140.

Defendants have failed to offer evidence that establishes uncontroverted facts regarding Dark Island's separation from the student loan business. Meanwhile, the FTC's uncontroverted facts show that the Corporate Defendants were under common control and conducted their businesses through "a maze of interrelated companies." See, e.g., FTC v. J.K. Pub'ns, Inc., 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000).

In sum, the Court concludes that Defendants have failed to show undisputed facts that support their arguments. Indeed, the Court has held above just the contrary: there is no genuine dispute of fact that the FTC has established the liability of all defendants on all claims. In addition, their legal conclusions do not compel summary judgment in their favor. Therefore, the Court **denies** Defendants' motion.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' motion for summary judgment and **GRANTS** the FTC's motion for summary judgment.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 19-1333 JVS (KESx) Date July 6, 2020

Title **Federal Trade Commission v. Elegant Solutions, Inc. et al**

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