UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-61017-CIV-ALTONAGA/McAliley

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

POINTBREAK MEDIA, LLC, *et al.*,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION THAT THE COURT GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Magistrate Judge McAliley correctly determined that there was no genuine issue of material fact regarding Dustin Pillonato and Justin Ramsey's (the "Defendants") violations of the FTC Act and Telemarketing Sales Rule. Defendants' Objections (the "Objections") to Judge McAliley's Report and Recommendation (ECF No. 251, the "R&R"), and the Court's Order requesting supplemental briefing (ECF No. 254), focus on Judge McAliley's conclusion that Defendants are liable for the Modern Spotlight Defendants' deceptive sales. That conclusion is correct for the reasons discussed below. Moreover, Defendants' remaining objections to the R&R are equally meritless.

I. DEFENDANTS PILLONATO AND RAMSEY ARE LIABLE FOR THE MODERN SPOTLIGHT DEFENDANTS' DECEPTIVE SALES PRACTICES.

Defendants are liable for the Modern Spotlight Defendants' deceptive sales practices for two independent reasons. First, as explained in the R&R, Defendant Michael Pocker's Modern Spotlight Defendants were part of a common enterprise with the remaining Pointbreak

Defendants. Thus, Pillonato and Ramsey, as control people who participated in, and had knowledge of, the common enterprise's unlawful acts, are responsible for the conduct of each member of the enterprise, including the Modern Spotlight Defendants. Second, even if the Modern Spotlight Defendants were not part of the common enterprise, Defendants are still liable for the Modern Spotlight Defendants' deceptive sales because they directly participated in the sales and had knowledge of the deceptive practices.

A. Pillonato and Ramsey Are Liable for the Modern Spotlight Defendants' FTC Act Violations Because the Modern Spotlight Defendants Were Part of the Pointbreak Defendants' Common Enterprise.

1. The Modern Spotlight Defendants Were Part of the Common Enterprise.

Judge McAliley's explanation of the common enterprise doctrine, R&R at 19-21, is correct, and Defendants do not challenge her statement of the law. In particular, although courts generally consider certain factors in evaluating the existence of a common enterprise, there is no "universal or mandatory 'factor test.'" *FTC v. HES Merch. Servs. Co.*, 2014 WL 6863506, at *5 (M.D. Fla. Nov. 18, 2014), *aff'd*, 652 F. App'x 837 (11th Cir. 2016). Rather, "the pattern and frame-work of the whole enterprise must be taken into consideration." *Id.* (citation omitted). As Judge McAliley explained, "entities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests." R&R at 21 (quoting *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010)).

Judge McAliley applied this standard to uncontested facts, rightly concluding that Pocker's Modern Spotlight Defendants were part of a common enterprise with, *inter alia*, Pillonato and Ramsey's Pointbreak Media and Modern Source Media ("Modern Source"). R&R at 19-22. Specifically, the R&R explains the extensive cooperation between Pocker's Modern

Spotlight Group and Pillonato and Ramsey's Modern Source to induce customers to purchase their services. R&R at 21. The companies, for example, shared client data, with Modern Spotlight Group selling its "claiming and verification" customer leads exclusively to Modern Source and Modern Source selling its Citation Program services exclusively to Modern Spotlight Group customers. *Id.* (citing ECF No. 229-111 (PX 161) ¶¶ 56, 58). In fact, Modern Spotlight Group scheduled Citation Program sales calls for Modern Source, and Modern Source provided phone numbers to which Modern Spotlight Group placed claiming and verification robocalls. ECF No. 229-111 ¶ 57; ECF No. 241-2 ¶ 4. Based on these facts, Ramsey acknowledged that his and Pillonato's Modern Source was completely dependent for its survival on Pocker's Modern Spotlight Group, explaining that he did not like "all our lively hoods [sic] being with pocker . . . [because] [r]ight now we have 0 back up its pocker and pocker only." R&R at 14 (citing ECF No. 229-59 at 3). Therefore, the parties clearly had "strongly interdependent economic interests." *Network Servs. Depot*, 617 F.3d at 1142-43.

There is more. As Judge McAliley explained, there is no dispute that: (1) Pointbreak Media and Modern Spotlight LLC shared a credit card merchant account; (2) Pointbreak Media and the Modern Spotlight Defendants used similar robocall and live sales agent scripts; (3) Pocker, Pillonato, and Ramsey discussed the companies' sales scripts with each other; (4) Pointbreak Media's office space and employees became Modern Spotlight Group's offices and employees; and (5) Modern Spotlight Group used substantially similar customer contracts and welcome emails as did Pointbreak Media. R&R at 20-21 (citing, *inter alia*, SUMF ¶¶ 5, 7, 14, 15, 27, 28, 29; ECF No. 229-111 ¶ 15).

Even Modern Source's own employees did not distinguish between their employer and Pocker's Modern Spotlight Group, repeatedly telling consumers that the companies were a single business. During Modern Source's Citation Program sales calls, for example, the company's

agents told consumers that they would receive a Citation Program discount because "[y]ou're already a client of ***ours***," ECF No. 229-36 at 8 (emphasis added), notwithstanding the fact that those consumers were customers of Modern Spotlight Group, not Modern Source. Likewise, Modern Source employees told an FTC investigator that Modern Source was "***a branch*** of Modern Spotlight," was "***under the same umbrella***" as Modern Spotlight, that "Modern Spotlight [is] a ***sister company*** of ours," and that "we work ***hand-in-hand*** with [Modern Spotlight]." ECF No. 229-24 at 205-206, 248-249 (emphases added). Furthermore, as Pocker acknowledged, the name "Modern Source" "did breed familiarity with the customers of Modern Spotlight Group." ECF No. 229-111 ¶ 56.

Tellingly, Defendants do not challenge any of these facts. Instead, they accuse Judge McAliley of "effectively ignor[ing]" the Declaration of Michael Pocker and of insufficiently adhering to the factors that courts frequently consider in evaluating whether there exists a common enterprise. Objections ¶¶ 1-2. Both arguments fail.

First, Judge McAliley did not ignore Pocker's declaration. Rather, she considered the declaration, R&R at 20, but decided that Defendants' exclusive reliance on the declaration was "too narrow a view of a common enterprise" because the Defendants ignored all of the facts described above. *Id.* Significantly, Defendants still have not identified any disputed issue of material fact created by Pocker's declaration. They simply disagree with the legal conclusion that Judge McAliley draws from the undisputed facts.

Second, Defendants' myopic focus on the common enterprise factors frequently used by courts not only miscasts those factors as a mandatory test, but also interprets them too narrowly. The factors take into account whether the entities at issue "share office space and employees, commingle funds, coordinate advertising efforts, and operate under common control." R&R at 19 (quoting *FTC v. Lanier Law, LLC*, 715 F. App'x 970, 979 (11th Cir. 2017)). Defendants do

not object to the R&R's conclusion that the Modern Spotlight Defendants and Pointbreak Media commingled funds or coordinated their sales efforts. *See* Objections ¶¶ 1-2.

Instead, they focus on the three remaining factors: shared office space, shared employees, and common control. Here again, Defendants are wrong. Even though they concede that Modern Spotlight Group took over Pointbreak Media's office space and its employees in November 2017, they contend that the FTC still does not satisfy the shared office space and employee factors because the companies did not *simultaneously* share employees or office space.

The recently decided *FTC v. Life Mgmt. Servs. of Orange Co., LLC*, 350 F. Supp. 3d 1246 (M.D. Fla. 2018), is instructive. There, the Court found that two companies—"Loyal" and "LMS"—were both part of a common enterprise in part because employees of Loyal became employees of LMS upon LMS's formation, even though those employees never *simultaneously* worked for the two companies. *Id.* at 1258. In fact, the reason for this change in employers from Loyal to LSM in *Life Management* is almost identical to the reason for the change from Pointbreak Media to Modern Spotlight Group. *Compare id.* at 1257 (LMS took over Loyal's operations because Loyal was "subject to criminal investigations and civil liabilities"), *with* ECF No. 229-94 at 5 (Ramsey explaining that he and Pillonato turned "the front end over somewhere else"—i.e., to Modern Spotlight Group—so that they did not have to "worry about lawsuits").

The *Life Management* court further explained that the common enterprise members had "overlapping addresses," even though they had different incorporation addresses. *Id.*at 1259 & n.10. Thus, the Defendants' insistence that a common enterprise cannot exist where the Defendants did not simultaneously share employees and addresses is misplaced. *See also FTC v. Kennedy*, 574 F. Supp. 2d 714, 722 (S.D. Tex. 2008) (FTC need not "prove any particular number of entity connections and any specific connection. Instead, it must be proved that the defendants maintained an 'unholy' alliance.")

2. Because the Modern Spotlight Defendants Are Part of the Common Enterprise, Ramsey and Pillonato Are Liable for the Modern Spotlight Defendants' Deceptive Sales.

Pillonato and Ramsey are legally responsible for the entire common enterprise's wrongdoing—even for those entities that they did not own. *See, e.g.*, *FTC v. Spectrum Res. Grp., Inc.* 107 F.3d 877 (Table), 1997 WL 103406, at *2-3 (9th Cir. Mar. 6, 1997) (holding individuals who each owned one half of the common enterprise jointly and severally liable for the revenues of the entire enterprise); *FTC v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 472-73 (S.D.N.Y. 2014) (individuals who served as officers of some entities within a common enterprise had authority to control the entire enterprise). In fact, Defendants have never disputed that *if* the common enterprise exists, they are responsible for the harm caused by each of its members.

B. Pillonato and Ramsey Are Also Liable for the Modern Spotlight Defendants' Deceptive Sales Because They Directly Participated in, and Had Knowledge of, Those Sales.

Individual Defendants are directly liable for Corporate Defendants' FTC Act violations if they (1) "participated directly in the practices or acts or had the authority to control them" or (2) "had some knowledge of the practices." *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). Here, even if the Court concludes that the Modern Spotlight Defendants were not part of the common enterprise, Pillonato and Ramsey remain liable for those entities' sales because they directly participated in them and had knowledge of the deceptive sales practices.[1]

[1] Although the R&R does not address this argument, the FTC included the argument in its Reply in Support of its Motion for Summary Judgment, in response to the Defendants' newly disclosed Declaration of Michael Pocker. ECF No. 241 at 9-10. Defendants had an opportunity to address the argument in their sur-reply (ECF No. 244), but failed to do so. It is appropriate for the Court to consider this alternative basis for granting the FTC's motion for summary judgment. *See, e.g.*, *Nieves v. Colvin*, 2014 WL 5089536, at *3 (S.D.N.Y. Sept. 22, 2014) (affirming R&R after modifying it to include additional reason for affirmance); *see also Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009) (district court "retain[s] total control and jurisdiction of the entire process if it refers dispositive motions to a magistrate judge for recommendation" (internal quotation marks omitted)).

First, Pillonato and Ramsey each participated in the Modern Spotlight Defendants' deception by, among other things: providing phone numbers for the Modern Spotlight Defendants to robocall and a merchant account for them to use; sharing welcome emails and contracts with them; and coordinating with them on how to transfer customers to Modern Source. SUMF ¶¶ 27, 29; ECF No. 241-2 ¶¶ 4, 6, 9-10. Day-to-day involvement in the Modern Spotlight Defendants' operations is not necessary to establish direct participation, especially where an individual defendant "participates in acts crucial to the success" of those entities. *FTC v. Ivy Capital, Inc.*, 2013 WL 1224613, at *14 (D. Nev. Mar. 26, 2013) (internal citation omitted), *vacated in part on other grounds*, 616 F. App'x 360 (9th Cir. 2015). For example, courts have found that where individual defendants "obtain[ed] merchant bank accounts for an entity"—as Pillonato and Ramsey did for Modern Spotlight (SUMF ¶ 27)—those individual defendants directly participated in the entity's wrongdoing because, in so doing, they "played an integral role in the commitment of unfair practices by the corporate defendants." *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1206 (C.D. Cal. 2000).

Second, Pillonato and Ramsey plainly had knowledge of the Modern Spotlight Defendants' sales practices. Pocker confirmed this knowledge, and Pillonato pleaded the Fifth Amendment when asked about it. SUMF ¶ 27; ECF No. 229-100 at 74:10-75:6. In fact, Defendants have not challenged the R&R's conclusion that "Pillonato and Ramsey knew the content of the deceptive robocalls that the Modern Spotlight entities used." R&R at 24-25.

II. DEFENDANTS' REMAINING OBJECTIONS ARE MERITLESS.

Pillonato and Ramsey also object that (1) they "did not support" the Pointbreak Defendants' deceptive sales practices (Objections ¶ 7), (2) Judge McAliley's proposed bans on remotely created payment orders and telemarketing are "too broad" (Objections ¶¶ 4-5), (3) they

should not have to turn over the jewelry listed in the proposed order (Objections ¶ 3), and (4) the judgment amount is too high (Objections ¶ 6). These arguments all fail.

A. Ramsey and Pillonato Knew of the Pointbreak Defendants' Deceptive Sales Practices.

Defendants object to the R&R's finding that they are personally liable for the Pointbreak Defendants' deceptive sales because, they claim, Judge McAliley "ignored the testimony of Beau Strickland." Objections ¶ 7. Defendants are wrong. The R&R expressly considers Strickland's testimony. R&R at 23. However, Judge McAliley correctly determined that in "the context of the record as a whole, [the testimony] amounts to a 'mere scintilla of evidence,' and it is well-established that the non-moving party must do more to create a genuine dispute of material fact." R&R at 24 (citing *Fedolfi v. Banyan Air Servs., Inc.*, 258 F. App'x 274, 276 (11th Cir. 2007)). The overwhelming, undisputed evidence establishes Defendants' participation, control, and knowledge of the deceptive sales, and thus the Defendants' liability. *See* R&R at 22-25.

B. The Proposed Order's Bans on Remotely Created Payment Orders and Telemarketing Are Appropriate.

Defendants object to Judge McAliley's recommended bans on telemarketing and remotely created payment orders ("RCPOs") because they are "too broad." Objections ¶¶ 4-5. Because the Defendants did not raise these objections during the summary judgment briefing, the Court need not consider them here. *See Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009). In any event, the objections are meritless because they misread the Proposed Order.

1. Defendants Misread the Proposed Ban on RCPOs.

Defendants object that the RCPO ban would prevent them from accepting "any and all checks"—and not simply the *remotely created* checks that they abused in this case. Objections ¶ 4. Defendants are again wrong. The Proposed Order only prohibits Defendants from accepting a check if, *inter alia*, it is "initiated or created by or on behalf of the ***payee***." ECF No. 251-1 at 5

(emphasis added). This feature distinguishes an RCPO from a conventional check. An RCPO is created not by the party on whose account it draws (the payor), but rather by the party accepting payment (the payee). Therefore, Defendants would still be able to accept checks if those checks were written by their customers, rather than by Defendants themselves.

2. Defendants Misread the Proposed Ban on Telemarketing.

Defendants also object that the telemarketing ban would "effectively prohibit[] them from using a telephone in any manner whatsoever in conducting any business whatsoever." Objections ¶ 5. Again, Defendants are wrong. The Proposed Order's telemarketing ban only precludes using telephones as part of a "plan, program, or campaign which is conducted to induce the purchase of goods, services, or charitable contributions." ECF No. 251-1 at 5. The Proposed Order therefore allows Defendants to use telephones in connection with any job or business, provided they are not doing so as part of a telemarketing sales campaign. That ban is appropriate in light of Defendants' history of unlawful telemarketing. *See* R&R at 15.[2]

C. The Proposed Judgment Amount is Appropriate.

Defendants object to Judge McAliley's recommended judgment of $3,367,666.30, asserting that this amount "does not take into account amounts the Plaintiff has already collected from co-defendants." Objections ¶ 6.[3] This objection ignores FTC jurisprudence and well-established principles of joint and several liability. "Defendants who have violated Section 5 of the FTC Act can be held jointly and severally liable for the total amount of consumer injury."

[2] Courts have ordered telemarketing bans, even outside of settlement agreements, in numerous FTC cases. *See, e.g.*, *McGregor v. Chierico*, 206 F.3d 1378, 1386 n.9 (11th Cir. 2000) (affirming ban on telemarketing); *FTC v. John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1013-15 (C.D. Cal. 2012), *aff'd*, 644 F. App'x 709 (9th Cir. 2016); *FTC v. NHS Sys., Inc.*, 936 F. Supp. 2d 520, 536-37 (E.D. Pa. 2013); *FTC v. Vocational Guides, Inc.*, 2009 WL 943486, at *20 (M.D. Tenn. Apr. 6, 2009).

[3] Once again, Defendants did not raise this argument during the summary judgment briefing, and the Court may therefore decline to address it here.

FTC v. Transnet Wireless Corp., 506 F. Supp. 2d 1247, 1271 (S.D. Fla. 2007) (citations omitted). "If two or more defendants jointly cause harm, ***each defendant is held liable for the entire amount of the harm***; provided, however, that the plaintiff recover only once for the full amount." *Honeycutt v. United States*, 137 S. Ct. 1626, 1631 (2017) (emphasis added). Although the FTC cannot, and will not, collect from Defendants any amounts that it has already recovered from other parties, that limitation does not change the extent of Defendants' liability.

D. The Proposed Order's Assert Turnover Provisions Are Appropriate.

Finally, Defendants object to the Proposed Order's requirement that they turn over jewelry to the Receiver, claiming that they do not possess this jewelry. Objections ¶ 3. Defendants yet again provide no evidence supporting their assertion. By contrast, the FTC has submitted evidence—primarily receipts showing Justin Ramsey as the purchaser of this jewelry—indicating that Defendants do possess these items. *See* ECF No. 241-3. This evidence corroborates the adverse inference that can be drawn from Defendants' Fifth Amendment invocation when asked questions concerning these items at their depositions. *See* ECF No. 229-99 at 150:24-152:22, 157:25-184:3; ECF No. 229-100 at 164:5-176:25, 181:2-202:17. It is therefore proper to enter an order requiring turnover of these items. *Cf. Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991) (holding that party defending against a contempt allegation must "offer proof beyond a mere assertion of inability [to comply] and introduce evidence supporting his claim").[4]

[4] If Defendants can prove that compliance with this provision is impossible, and that they did not cause that impossibility, they cannot be held in contempt. *See In re Lawrence*, 279 F.3d 1294, 1299-1300 (11th Cir. 2002).

Dated: March 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 21, 2019, a true and correct copy of the foregoing was served on all counsel or parties of record on the Service List, via the method indicated below.

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