

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

FEDERAL TRADE COMMISSION,

Plaintiff,

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

v.

HOME ASSURE, LLC,
a Florida limited liability company,

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

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

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

Defendants.

**PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION
FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT
AS TO DEFENDANTS NICOLAS MOLINA AND MICHAEL TRIMARCO**

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INTRODUCTION¹

There is no genuine dispute of material fact that (a) Home Assure, LLC (“Home Assure”) violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), by misrepresenting to consumers that Home Assure would save their homes from foreclosure in virtually all instances or Home Assure would refund their money with a 100% Satisfaction Guarantee promise; and (b) defendants Nicolas Molina (“Molina”) and Michael Trimarco (“Trimarco”) are personally liable for Home Assure’s misrepresentations.² As a result, the Federal Trade Commission (“FTC”) is entitled to summary judgment on liability.

The liability issues here are straight forward. Home Assure preyed on desperate consumers facing foreclosure and told them the company could negotiate affordable plans with lenders to save their homes from foreclosure or they would be refunded 100% of their money. These deceptive representations were made on Home Assure’s website and emphasized again during high pressure sales calls, as reflected in telemarketing scripts and undercover recorded calls. Home Assure did not do what it promised. The resulting injury to consumers was severe. After paying a sizeable fee, many consumers did not receive an affordable plan through Home Assure and lost their homes or filed for bankruptcy.

Molina and Trimarco were the principal owners of Home Assure and held themselves

¹ An Appendix is filed concurrently with this motion. Citations to the Appendix are noted as “App. [Tab number], at [Page cite or Exhibit number].” Other record citations are to docket entries under the notation “DE ___”.

² The other two individual defendants, Brian Blanchard (“Blanchard”) and Michael Grieco (“Grieco”), stipulated to final judgments, which were entered on November 24, 2009. [DE 140; 141.] The two corporate defendants, Home Assure and B Home Associates, LLC (doing business as Expert Foreclosure), are in default. [DE 91, 93, 94.]

out as the chief executives of this closely-held company. At a minimum, they are responsible for failing to ensure that their company's stock-in-trade was not in overreaching and deception – particularly where the resulting consequences were so dire.

Summary judgment is also appropriate as to the monetary and injunctive relief sought against Molina and Trimarco.³ There is no genuine issue as to the proper amount of monetary relief. Defendants' own records establish that the total amount of consumer payments received by Home Assure minus refunds equals \$3,721,807.05.⁴ By their own admission, Defendants did not maintain complete records that would demonstrate for which customers Home Assure actually negotiated an affordable plan that prevented foreclosure. As a result, the FTC has expended substantial efforts to provide a more precise estimate of the percentage of customers who did not receive the promised services. The FTC retained an outside expert to conduct a survey of Home Assure's former customers. In addition, an FTC economist spent over 200 hours analyzing lender files subpoenaed from third party lenders and information in Home Assure's records to provide a conservative estimate as to the percentage of customers who may have received an affordable plan through Home Assure. Both undertakings establish as a reasonable approximation that 75% of Home Assure's customers were injured, and therefore \$2.775 million (or, 75% of \$3.7 million) is a proper measure of monetary relief. The record further supports the issuance of permanent

³ The FTC also seeks prejudgment interest and will submit briefing as to the proper calculation and amount based on the award for monetary relief.

⁴ The North Carolina Attorney General recovered \$12,741 in its lawsuit against Home Assure and Grieco. *See, infra*, pp. 21, n. 26. The total consumer payments reduced by this amount still exceed \$3.7 million.

injunctive relief against Molina and Trimarco as outlined in the attached proposed order.

FACTUAL BACKGROUND

The following pertinent facts are uncontroverted unless otherwise noted.

I. HOME ASSURE'S FORMATION

The four individual defendants founded Home Assure in 2007. In February 2007, Home Assure filed its Articles of Organization, listing Trimarco as one of the managing members. App. 27, at ¶ 4 & Ex. A(1). On August 8, 2007, Molina was added as a managing member.⁵ *Id.*, Ex. A(2). Molina took the title of CEO; Trimarco took the title of President. App. 17, at 67; App. 16, at 331. Home Assure's website also identified Molina and Trimarco as the co-founders and the top executives of the company: Molina was identified as the "CEO and Co-Founder;" while Trimarco was "the company's president and Co-Founder." App. 27, Ex. B at HA 77090-91. Grieco was identified as "VP of Mitigation Services;" Blanchard was not identified. *Id.*

The four individual defendants signed an ownership agreement dated August 13, 2007. App. 16, at 50-51 & Ex. A; App. 17, at 78-79. Molina signed the agreement as "President," while Trimarco signed as the corporate "Secretary." App. 16, Ex. A at HA 4. As set forth in the agreement, Molina and Trimarco were the principal shareholders — each having a 40% ownership interest. *Id.* at HA 2. The agreement also outlined "management and duties of each owner:" (a) Trimarco "[w]ill have full time responsibility for tech-ops and financial management. Marketing support;" (b) Molina "[w]ill have full time responsibility

⁵ Molina and Trimarco were later removed as registered managing members on December 11, 2007, leaving Blanchard as the only registered manager. App. 27, at 4 & Ex. A(3).

for marketing and lead generation;” (c) Blanchard is “[r]esponsible for Management Sales Operations in Tampa Office” and is referred to as “Lead Sales Rep;” (d) Grieco is “[r]esponsible for general day to day operations and mitigation operation.” *Id.*

According to Blanchard, at least during the beginning of Home Assure’s operations, “I was to run the sales force. Grieco was to take care of mitigation. Mike Trimarco was to ... oversee everything . . . and Nick Molina was in charge of the lead generations.” App. 18, at 114-18. Molina told Blanchard that he would make the “phones ring” at the call center. *Id.* at 157. Molina “purchas[ed] client leads for the company on an ongoing basis . . . contracted with outside firms to run and manage search engine campaigns for Home Assure . . . [and] contact[ed] Home Assure sales representatives to obtain feedback on the quality of purchased client leads.” App. 24, at ¶6. Trimarco provided “tech-ops,” and “monitor[ed] the company’s finances and communicate[d] that information to Home Assure’s operations team so they could do their jobs.” App. 23, at ¶ 5.

The owners, including both Molina and Trimarco, typically had calls twice a month to discuss the performance of the business, including sales projections, the effectiveness of different lead vendors and marketing programs, the amount of refunds given out, and the level of customer complaints. Brent Duffield (“Duffield”), who became manager of the call center, also participated in these calls. App. 16, at 148-152, 155, 160, 173; App. 17, at 61-62; App. 19, at 31, 209; App.18, at 179-80; App. 21, at 31-36, 41, 164.

Blanchard was the only owner with any prior experience in the foreclosure assistance industry, having worked as a sales representative at three foreclosure assistance companies. App. 18, at 11, 33-34, 67-68, 80, 88-89. All three companies were subject to multiple

government enforcement actions.⁶ Home Assure used the forms Blanchard took from these companies, including telemarketing scripts and a form contract called a “Working Agreement.” *Id.* at 70-71, 74, 133.

On August 13, 2007, Home Assure set up a call center with Blanchard as the day-to-day manager. App. 19, at 22; App. 16, at 70; App. 18, at 130. In the fall of 2007, Home Assure also opened an office in North Carolina to handle the mitigation services, with Grieco overseeing that office.⁷ App. 19, at 40; App. 25, at ¶ 3.

II. HOME ASSURE’S HIGH PRESSURE SALES ENVIRONMENT

A. Home Assure’s “Boiler Room”

In February 2008, Brent Duffield was hired to run and expand Home Assure’s call center. App. 21, at 14, 17, 23; App. 16, at 125, 302; App. 17, at 69. Both Molina and Trimarco were involved in hiring Duffield. App. 21, at 13-14; App. 16, at 124; App. 17, at 69. Duffield reported to all four owners. App. 21, at 23, 55-56, 71-72. Duffield tripled the number of call center sales representatives from about 10 to 30. *Id.* at 148-50.

Duffield told the sales force that the company’s target customers were “people that were in distress,” who were several months late on their mortgage payments. App. 22, at 15-16. Home Assure required its sales force to bring in a certain dollar amount of sales every week. *Id.* at 16, 32-33. Home Assure posted the amount of sales each representative made

⁶ Certified copies of these complaints are in the Appendix at Tabs 9 to 14. The lawsuits outlined deceptive conduct similar to the practices here. *See, e.g.*, App. 13, at ¶¶ 28-33.

⁷ The Home Assure website advertised that it had an office in the Empire State Building – which was identified as the “Corporate Office” and its “Marketing, Advertising & Business Dev.” App. 27, Ex. B at HA 77100. That was Trimarco’s office. App. 16, at 262-63.

on a large board in the middle of the call center each week. *Id.* at 104-05. Duffield distributed to the sales force “Office Rules and Expectations,” which stated in part:

You are expected to make at least 1 sale every day. It cost Home Assure \$4,000 a week to have you working here between marketing cost, your hourly rate and benefits. If you are not able to consistently produce \$7,500 on a weekly basis after your first 30 days on the job, this is not the place for you.

You can make a lot of money working here if you follow the script. . . .

App. 21, at 62-63 & Ex B. Home Assure typically charged customers \$1,500, or more if the representative could get the customer to pay more. App. 22, at 71-72, 101; App. 31, at ¶ 17. The sales force received a 10% commission of their sales up to a certain amount (i.e., \$1,500), and received an even higher commission of 40% (referred to as “overage”) for any extra amount Home Assure was able to charge a customer. App. 22, at 98-99 & Ex. A.

Home Assure gave the sales force several phone scripts to follow. App. 21, at 57, 65; App. 22, at 25-26, 33-35. One script dealt with “Common Objections,” and stated in part:

How do you determine your fee?

Our base fee is \$1500.00 and we charge additional fees for sale dates and second mortgages. That fee is considered a reasonably acceptable fee by HUD. We also have the right to charge a minimum of \$1500.00 or up to one full mortgage payment, but we decided to stick to the HUD guidelines.

How does the guarantee work and what assurances do I have that you will honor the money back guarantee.

If we do not provide you with a reasonable resolution and to save your home from foreclosure, we refund your money. Our success rate is somewhere between 95%-98%. It varies from month to month. To be honest, the only time we have to refund money is if the lender refused to work with us.

App. 21, Ex. G at HA 2079, emphasis in original; *see also* App. 21, at 89-91. Another part of that script touted the guarantee and high success rate:

Ok, if I can prove to your mortgage company that you can afford your home, we will accept you as a client and help you save your home by getting you an affordable solution. We offer a money back guarantee on our work. We are the only company in the industry that offers that to our clients. We can do this because if we accept you as a client, we have a very high success rate.

* * *

We do charge a fee to do this. Our fee is ___ for our services and we are the only company in the country that offers you a 100% money back guarantee in writing. You can go to our website and print it out.

App. 21, Ex. H; *see also* App. 21, at 99-103.

Duffield created this script and discussed it with Blanchard. Blanchard told Duffield that he would run the script by the other owners. After Blanchard told him it was “ok,” Duffield gave it to the sales force, which began using the script in March or April 2008.⁸ App. 21, at 89-92, 99-01. The sales force used other scripts when dealing with “short sales,” and when getting a consumer’s voice mail. *Id.* at 77-79, 115-17. The “short sale script” touted Home Assure’s “90% success rates with short sales.” *Id.*, Ex. J. The voice mail message script touted the 100% Guarantee: “It is imperative that you call me right away, we are the only company in the country that has a 100% guarantee that we can save your home.” *Id.*, Ex. C at HA 2080.

⁸ In June or July 2008, Duffield provided the sales representatives a revised “phone script” to reflect the process change to get around state regulations barring advance fees. App. 21, at 108-111, 113. This revised script also touted the “100% money back guarantee,” and Home Assure’s purported experience in negotiating with lenders to save homes from foreclosure. *Id.*, Ex. I at HA 4518.

Home Assure utilized other high-pressure sales techniques to handle customer objections.⁹ App. 22, at 25. For example, the sales representatives used a document titled “Rebuttals,” which contained responses to overcome consumers’ questions, including about Better Business Bureau complaints and high fees. App. 21, at 86-87 & Ex F. Similarly, Duffield distributed to the sales force a document titled “Increasing Reach From the Caller,” which Duffield wrote on the top “create sense of urgency,” and which stated:

The Mitigation Department does not have very many spots open so we have to fill them with people who are absolutely committed to saving their home. If you are not, we’ll fill your spot with someone who is. . . . It isn’t a matter of what you think of us or about your doubts about us. It [is] a matter of, will we take you on as a client. Last year alone over 24,000 people called into us asking for help. We accepted only 1 out of 10 of those who called for a program.

Id., Ex. D at HA 2085-86; *see also* App. 21, at 83-85. In addition, Duffield circulated to the sales force examples of emails to send customers during the pitch. *Id.*, Exs. M, N & O. For example, one email that was circulated to the sales force by Duffield as “a great response to someone that is concerned about RIP OFF report,” stated that Home Assure: “ha[d] saved over 3000 homes from foreclosure;” is “HUD approved and regulated by the Attorney General;” and “[w]e are hugely successful and have a remarkably high customer satisfaction percentage.”¹⁰ *Id.*, Ex. N.

⁹ Home Assure’s training packet for its sales force included “hard sell” materials that preyed on the fear of losing a home, stating in part: “Here is what happens next: the Sheriff shows up and takes you and your kids and all of your personal belongings and physically removes you from your house. . . .” *See* App. 21, at 85-86 & Ex. E (HA 2088).

¹⁰ Home Assure was not a “HUD approved housing counseling agency.” *See* App. 7.

B. Home Assure Hired Third Parties to Drive Traffic to the Call Center

Home Assure used several channels to target customers facing foreclosure and drive them to its call center. First, Home Assure contracted with at least two outside companies (Position2 and The Search Agency) to help drive customer traffic to its website and call center. Trimarco had an ownership interest in one of these companies, and referred them to Molina, who set up the arrangements.¹¹ App. 17, at 24-25, 44; App. 16, at 67-70, 139. The Search Agency provided “search engine optimization” services designed to have the link to Home Assure’s website listed higher by Google for consumer searches. App. 17, at 35-36. They did this in part by posting online articles that contained “hidden” links to Home Assure’s website. *Id.*, at 38, 42-43.

According to Molina, Position2 ran the company’s “paid search initiative” – placing “text ads” that appeared on Google during a consumer’s search. These ads would direct consumers to either the Home Assure website or another website that posted the number to Home Assure’s call center. *Id.*, at 29-30, 32-33. For example, one website called “MortgageBuyersBasics,”¹² stated it “is a Home Assure website,” and identified Home Assure as “the nation’s leading Foreclosure Mitigation Company” that has “help[ed] thousands of customers in avoiding foreclosure and keeping their homes.” App. 30, at ¶¶ 4-6 & Ex. B at HA 135160, -175. In addition to this website, there were online comments posted

¹¹ According to Molina, Home Assure shifted its resources from these search engine campaigns to buying leads from outside vendors. App. 17, at 26-27, 103. Molina signed up the lead vendors for which Home Assure paid a rate for each lead (or consumer) that met Home Assure’s criteria – customers more than two months past due on their mortgage. *Id.*, at 54-55, 98-100 & Ex. B at 587-88.

¹² Position2 registered the “MortgageBuyersBasics.com” domain name. *See* App. 5.

on other sites by individuals posing as legitimate customers making referrals to the “MortgageBuyerBasics” website. *Id.* at ¶ 3 & Ex. A at HA 136445-6, 49, 51, 53, 57, 59, 67 & 76. Once the consumer went to the MortgageBuyerBasics website, they were directed to the Home Assure call center. *Id.*, Ex. B at HA 135160, HA135175.

In addition, Home Assure used “affiliate marketing,” paying other parties who promoted Home Assure’s services for any resulting “conversions” – leads or sales. Home Assure used a network called Commission Junction to make offers and sign up affiliates. Molina set up this program with Commission Junction. App. 17, at 46-49. The affiliates promoted Home Assure’s services by posting online classified ads that included a statement in caps, “If Home Assure is unable to solve your problem, then you will get a 100% Money Back Guarantee,” or online articles that promoted Home Assure as “the experts” in foreclosure assistance. These ads and articles also contained links directing the consumer to Home Assure’s website. App. 17, at 224-29 & Exs. F & G.

III. HOME ASSURE’S DECEPTIVE SALES PITCH

A. Home Assure’s Website Representations

Home Assure’s website touted the company’s purported experience in negotiating with lenders to stop foreclosures and its 100% money back guarantee. The website stated Home Assure could negotiate a resolution with the lender “*usually within two weeks,*” stressing the urgency to call for a “free consultation.” See App. 27, at ¶6 & Ex. B, at HA 77074, 77078. For example, Home Assure represented:¹³

¹³ The representations are from a May 12, 2008 website capture. App. 27, Ex. B. Identical representations are in website captures on June 25, 2008 (*Id.*, at ¶9 & Ex. C), September 9, (continued...)

- Under a header “Let Us Negotiate With Your Lender For You,” “The single-most important factor in stopping foreclosure is SPEED. Time is not your friend. You don’t have a lot of time. Our counselors know exactly what to do and will work diligently with your lender and provide you with all options that are available for your situation to Stop Your Foreclosure Quickly!”

“Here are some of the basic options available to you when you work with us: Restructure (Most Popular Alternative) - We can negotiate with your lender to get your loan in good standing again. This can be accomplished through a separate payment plan for your delinquency or even adding the delinquency to the end of your loan. Sometimes we can even lower your monthly payment!”

“ . . . You need professional help at a time like this. Give us a call today. . . then just sit back and relax. . . .” *Id.*, at HA 77084-85.

- At the “About Us” page: “Home Assure is the nation’s leading Foreclosure Mitigation Company. The Company and It’s Management Team have assisted thousands of customers in avoiding foreclosures and keeping their homes....The Company is backed by over 30 years of foreclosure assistance experience. . . .If mitigation is an option, our mitigation specialists, through their existing relationships with most lenders, can propose a resolution and negotiate with your lender on your behalf, usually within two weeks. . . .” *Id.*, HA 77088.

Home Assure’s website similarly touted purported ongoing relationships with lenders and government entities: “[t]he company also has an Institutional Services Division that works with Lenders and Government Entities.” *Id.* However, Trimarco admitted that the company never had contracts with lenders or government entities.¹⁴ App. 16, at 250-51.

Home Assure’s website also promised a 100% Money Back Guarantee. As shown in

¹³ (...continued)

2008 (App. 21, Ex. A at HA 136192, 136201-02); October 28, 2008 (App. 27, at ¶21 & Ex. J at HA 077302-03); and November 19, 2008 (*Id.*, at ¶10 & Ex. D at HA 77133, 77137-38).

¹⁴ Although Trimarco also claimed that Home Assure had discussions with Broward County for “them to off load or send over clients” (App. 16, at 335-36), Grieco and Duffield both testified that nothing came out of such discussions. App. 19, at 239; App. 21, at 194-95.

a website capture in June 2008, Home Assure promised consumers:

We stand firmly behind our promise to try and help you. Our Guarantee insures that if we are unable to negotiate a plan with your lender that improves your situation or gives you a viable strategy to avoid or stop foreclosure, we will refund 100% of your money...No questions asked!"¹⁵

App. 27, Ex. C at HA 77114; *see also* App 27, Ex. B at HA 77089 (“[w]e’re so confident in the abilities of our trained personnel, we offer a money back guarantee.”)

The website directed consumers to call for a “FREE consultation,” or to submit an online form with their contact information. App. 27, Ex. B at HA 77074; App. 16, at 241-42.

B. Home Assure’s High Pressure Sales Pitch

When consumers called Home Assure, they received a sales pitch that reiterated Home Assure’s purported expertise or “connections” with lenders to prevent foreclosure, as well as the company’s “money back guarantee.” App. 22, at 61-64; App. 32, at ¶¶ 17-19.

Indeed, the high-pressure sales pitch to obtain the customer’s payment immediately is illustrated in undercover recorded calls with Home Assure on July 25, 2008 and August 5, 2008. App. 27, at ¶¶ 16-17 & Ex. F; App. 28, at ¶¶ 4-9 & Ex. A. The sales pitch on the recorded calls track one of the later phone scripts Duffield distributed to the sales force. *See* App. 21, at 108 & Ex. I. For example:

- When the consumer calls in to the call center, he or she is greeted with an automatic recording that Home Assure is “the most trusted name in foreclosure assistance,” and then prompted on whether they want to speak to

¹⁵ This guarantee language appears on other website captures. *See* App. 21, Ex. A at HA 136213. Initially, the language of the guarantee on the website read, “Home Assure.com Can Save Your Home From Foreclosure 100% Guaranteed!” App. 16, Ex. H at HA 174616. The guarantee language was later modified to “100% Satisfaction Guaranteed Or Your Money Back.” App. 21, at 44-46 & Ex. A at HA 136213.

“a foreclosure specialist.” *See* App. 27, Ex. F at p.3.

- Home Assure then asks for the client code on the website (used to assess the effectiveness of various search engine and lead generation campaigns), and then Home Assure asks for basic information about the consumer’s mortgage. *See* App. 27, Ex. F at pp.6-12; App. 21, Ex. I at HA 4516.
- After obtaining the consumer’s mortgage information, Home Assure tells the consumer: “if I can prove to [your mortgage company] that you can afford your home... we’ll accept you as a client in our hardship program. We’ll help you save your home and get you an affordable solution. Is that what you’d like?” *See* App. 27, Ex. F at p.12; App. 21, Ex. I at HA 4516.
- Home Assure then tells the consumer that underwriting will review their financial situation and, if approved, they will be assigned to a mitigator. Home Assure then touts the experience of the company’s mitigators: “They all have over 10 years...of experience working [for these mortgage companies] on the inside. They know how to get the best plans for you.” *See* App. 27, Ex. F at pp.12-13; App. 21, Ex. I at HA 4517.
- Home Assure next lists various options available to the consumer, and then touts the company’s money back guarantee: “. . . one of the main reasons why we can offer a money-back guarantee on our work is because our mitigation team has the experience and expertise to negotiate a resolution . . . to your situation. And to be honest . . . they make it look easy, but it’s not.” *See* App. 27, Ex. F at p.14; App.21, Ex. I at HA 4517.
- Home Assure then attempts to close the deal: “Now, if I can get you qualified, are you serious about getting started today to save your home from foreclosure,” and instructs the customer not to speak with anyone from the mortgage company. *See* App. 27, Ex. F at pp.14; App.21, Ex. I at HA 4517.
- Home Assure then asks how much the customer can save up in the next month and a half, and then discusses the fee. App.27, Ex. F at pp.16-17; App. 21, Ex. I at HA 4517. Home Assure again tells the consumer that it offers a money back guarantee and directs the consumer to the website: “we offer a 100 percent money back guarantee in writing. You can go to our website and print that out.” App. 27, Ex. F at p.21; App. 21, Ex. I at HA 4518.

At no point during the entire sales pitch does the company tell the consumers that there are any limitations or conditions to the “100 percent money back guarantee.”

C. The Working Agreement and Enrollment Process

At around the same time or after the consumer sent payment to Home Assure, Home Assure sent the customer a package that included a Working Agreement and enrollment forms.¹⁶ App. 21, Ex. K. Through at least June or July 2008, Home Assure typically sent the Working Agreement (along with the other forms in the package) to the consumer after payment was collected.¹⁷ App. 21, at 81-82, 124-27, 130-31, 133-34; App. 32, at ¶¶ 12, 14. As Trimarco testified, the Working Agreement and consumer payment were sent “simultaneously” – “[t]hey kind of like passed in the night, so to speak.” App. 16, at 211.

The Working Agreement contained refund conditions and qualifications that were diametrically at odds with the 100% money back guarantee promise displayed on the website and reiterated during the sales pitch by call center representatives.¹⁸ App. 21, at 129 & Ex. K. For example, according to the “Working Agreement,” the mere “act, method or process of solving a problem, the answer to a problem, explanation, clarification, etc.” constitutes a “Solution,” which entitled Home Assure to its fee “at the point of solution is recommended regardless of outcome.” App. 21, Ex. K at HA 77403-04. Additionally, the Working Agreement contained numerous “NO REFUND” provisions, which virtually nullified the 100% “no questions asked” money back guarantee featured on the website. Those provisions

¹⁶ The Working Agreement used by Home Assure is identical to the one used by Blanchard’s prior company, Foreclosure Assistance Solutions. *See* App. 18, Ex. A(1).

¹⁷ Consumers also stated that during this period they paid Home Assure before receiving the Working Agreement. *See* App. 38, at ¶7; App. 39, at ¶ 7; App. 40, at ¶¶7-8; App. 42, at ¶¶ 8-9; App. 47, at ¶¶ 8-9; App. 48, at ¶¶ 8-9; App. 51, at ¶¶ 8-10.

¹⁸ Home Assure used at least two other versions of the Working Agreement. The provisions discussed above appear in all three versions. App. 18, Exs. B & C.

purported to nullify Home Assure's refund guarantees when a homeowner (1) provides "incorrect and/or insufficient" information causing "results not satisfactory to the intent of this working agreement;" (2) independently seeks "a solution" (as defined above) "which HA has been hired to perform;" (3) "fails to make payments or initial contribution towards arrears and/or fees as directed by lienholder(s) in any reinstatement schedule negotiated by HA;" (4) "chooses not to comply with the results of HA's analysis;" or (5) "fails to maintain constant communication" (defined as a failure to respond within 24 hours to phone calls to written communication). *Id.* at HA 77404-05.

Other provisions required the homeowner to "not contact their lender," but still submit any refund claim within 90 days of enrollment – thus purporting to insulate Home Assure from its guarantee promise when the consumer learned only after 90 days that Home Assure failed to perform any meaningful negotiation with the lender. *Id.* at 77405-06.

In July or August 2008, Home Assure changed its enrollment process as a result of state regulations that prohibited advance fees in this industry. App. 25, at fn.1; App. 21, at 134 & Ex. L; App. 19, at 192-93. As Trimarco testified, Home Assure made "some efforts to delay the payment a little bit more" App. 16, at 215. Under this process, Home Assure comes up with a so-called "plan" to the consumer prior to payment. App. 25, at ¶ 4; App. 21, at 127-28. Home Assure's "plan" is its own standardized letter that "recommended" one of the basic options generally available to consumers (such as a forbearance plan). *See* App. 25, Ex. A. The letter included form language stating that the recommended plan was based on a "conversation with your lender," and that the plan was "approved" or "preapproved." *See id.*; App. 49, at ¶ 10, Ex B. However, Grieco admitted that Home Assure sent these letters to

consumers after having only a hypothetical conversation with the lender and *before* Home Assure received the customer's "necessary financial documents." App. 19, at 100, 120-21; App. 25, at ¶ 5; *see also* App. 28, Ex. A at 13, 16 ("we literally have your plan within two days," although "we're not going to tell you exactly what the plan is until you pay your fee").

IV. HOME ASSURE'S CUSTOMER EXPERIENCES

A. Home Assure Failed to Perform as Promised

Contrary to what Home Assure promised, many customers did not in fact receive a viable plan from their lender after paying Home Assure, and Home Assure did not refund their money. The FTC has submitted declarations from 19 customers and complaints from over 60 customers to Better Business Bureaus ("BBB") and state Attorney Generals. *See* App. 34 to 52 (consumer declarations); App. 29 (attaching consumer complaints); *see also* App. 53 to 55. Many consumers ended up losing their homes and/or filing for bankruptcy.¹⁹

The customers' statements consistently indicate they never received any plan from their lender after paying Home Assure, or if they received a "plan" from their lender through Home Assure, it was simply a reinstatement plan that required the consumer to pay all or most of the arrears immediately and was therefore not affordable.²⁰ *See also* App. 32 at ¶¶ 27-30; App. 33, at ¶ 17. In many instances, after paying Home Assure, consumers could not

¹⁹ *See* App. 36, at ¶ 26-27; App. 38, at ¶¶ 12-14; App. 39, at ¶ 11; App. 43, at ¶ 23-24; App. 46, at ¶ 21; App. 50, at ¶ 14; App. 51, at ¶ 15.

²⁰ *See* App. 34, at ¶¶ 11-13, 20 (deed in lieu denied); App. 35, at ¶¶ 21-23 (plan increase monthly payments 40%); App. 36, at ¶¶ 9, 13-21 (short-sale denied); App. 38, at ¶¶ 7-10 (plan increase monthly payments 30%); App. 45, at ¶ 24 (plan required entire arrears to be paid); App. 41, at ¶¶ 12-15 (no plan through Home Assure); App. 42, at ¶¶ 15-19 (no plan); App. 44, at ¶¶ 16-24 (no plan); App. 46, at ¶ 13-18 (no plan); App. 49, at ¶¶ 15-16 (no plan); App. 50, at ¶¶ 10-11 (no plan); App. 52, at ¶¶ 7-8 (no plan); App. 51, at ¶¶ 12-15 (no plan).

even reach someone at Home Assure that had any information on their situation, or they simply did not hear back from Home Assure.²¹

When customers requested a refund, Home Assure in some instances failed to even respond. *See* App. 36, at ¶ 25; App. 43, at ¶¶ 15, 19; App. 49, at ¶¶17-20. In other instances, Home Assure denied refund requests if the customer merely hired an attorney or spoke to their mortgage company, or cited to immaterial inconsistencies in the paperwork. *See* App. 37, Ex. E; App. 39, at ¶¶ 11-13; *see also* App. 19, at 223-25 & Ex. B at p.1 (denying refund because “customers took matters into her own hands and negotiated with her lender to get a plan on her own”); App. 32, at ¶¶ 30, 35-37; App. 33, at ¶11. Other customers were offered refunds (or partial refunds) *only after* complaining to a BBB or government agency. *See* App. 34, at ¶¶ 17-20; App. 35, at ¶¶ 25-27; App. 40, at ¶¶ 21-22.

B. Home Assure’s “Success” Rate and its Incomplete Customer Files

While Defendants touted a high “success” rate to lure customers, Home Assure did not formally track how many or what percentage of its customers received a viable plan from a lender, and the “success rate” was speculation at best. App. 19, at 27-29; App. 18, at 64-66, 187-88, 296-97. Defendants have provided no substantiation during discovery. The only document submitted in this case by defendants that purports to identify the number of consumers who Home Assure was able to negotiate an affordable plan was a declaration by Grieco that provides no information about how he derived those figures from Home Assure’s

²¹ *See* App. 34, at ¶¶11-14; App. 36, at ¶¶16-18, 22; App. 37, at ¶¶14-15; App. 39, at ¶¶9-11; App. 41, at ¶¶12-15; App. 42, at ¶¶15-19; App. 43, at ¶¶ 15-19; App. 44, at ¶¶16-20; App. 46, at ¶15; App. 49, at ¶15-16; App. 50, at ¶¶10-11; App. 51, at ¶11; App. 52, at ¶¶ 7-8.

database.²² Indeed, Grieco could not even recall during his deposition the process by which he came up with the statistics in his declaration. App. 19, at 133-38, 259-60.

In addition, the company failed to retain complete customer files. Despite a court order to preserve all company business and financial records (*see* App. 27, Ex. L at 2-3), Grieco admitted that the company destroyed files when it closed down at the end of 2008. App. 19, at 188. Home Assure's customer database (referred to as "FATS") contained only conversational log entries inputted by Home Assure employees at their discretion, and typically the customer's Working Agreement and other enrollment forms. App. 21, at 75; App. 19, at 85-87. Grieco acknowledged that the FATS database was not created for an "internal audit," and did not include the actual plan from the lender. App. 19, at 92-93, 125.

C. The FTC's Expert Reports

The FTC commissioned the reports of two experts concerning the percentage of Home Assure customers who may have received an affordable plan from their lender through Home Assure's negotiation.²³ Indeed, while the experts analyzed different samples of the Home Assure customer database and employed different analytical methods, their results largely corroborate each other and are consistent with the large volume of consumer

²² In his declaration, Grieco stated: "[o]f the 2,350 customers who retained Home Assure, approximately 1,763 (over 75%) received a resolution from their lender. . . . these individuals were provided some form of loan modification plan and/or workout plan from Home Assure, and the individual and their respective lender accepted the plan." App. 25, at ¶14.

²³ A complete copy of Dr. Kivetz's final report dated September 30, 2009 is attached at Appendix Tab 1. A copy of Dr. Kelly's report dated September 17, 2009, and Supplemental Report dated October 13, 2009, are attached at Appendix Tabs 2 & 3.

complaints the FTC received about Home Assure.²⁴

The FTC retained Dr. Ran Kivetz, a professor at Columbia Business School and an expert in marketing and survey design and analysis, to conduct a telephone survey of a sample of Home Assure customers. *See* App. 1, Ex. A. The report submitted by Dr. Kivetz describes the survey's purpose (at ¶¶ 16-19), the survey methodology including the survey universe and screening criteria and the survey questionnaire (at ¶¶ 20-41), and the survey results on which his opinions and based (at ¶¶ 42-62).

Dr. Kivetz reported, *inter alia*, that: (1) 63% (or 97 of the 153 customers surveyed) indicated that Home Assure never arranged for them any workout plan for their mortgage issues and/or foreclosure situation; (2) among the respondents for whom Home Assure did arrange some type of a workout plan, 42% (or 22 of the 53 respondents) indicated the plan was not helpful; and (3) thus, 78% (or 119 of the 153) respondents did not receive any help or value from Home Assure, either because Home Assure did not arrange any workout plan for them, or because the workout plan arranged by Home Assure was unhelpful. *See id.* at ¶¶

²⁴ Defendants submitted a rebuttal report from Dr. Kenneth Clarkson. App. 4. Dr. Clarkson performed no independent analysis of customer experiences; instead, his report is limited to merely criticizing the analysis submitted by the FTC's experts. Dr. Clarkson spent approximately 10 hours analyzing Dr. Kivetz's report and his critique regarding Dr. Kivetz's report is largely limited to identifying four "potential biases" for which he made no assessment as to their magnitude. App. 58, at 42, 132, 145; App. 4, at ¶¶ 27-30. Dr. Clarkson could not recall ever submitting testimony or publishing any articles in the survey research area before. App. 58, at 38. He admitted he was not making any statements that Dr. Kivetz's survey design and methodology was inconsistent with the prevailing research standards. *Id.* at 137-38, 145. Dr. Clarkson also did not review any of the underlying materials which Dr. Kelly considered, and thus made no independent assessment as to Dr. Kelly's findings. Instead, Dr. Clarkson's analysis regarding Dr. Kelly's report is largely confined to taking Dr. Kelly's own assessments and measuring Home Assure's "nonperformance" with the Working Agreement. *Id.* at 13-17, 45-46, 108-110; App. 4, at 6.

13, 54-57. Dr. Kivetz also reported a 95% confidence interval of 71% to 84%, meaning there is a 95% likelihood that the actual percentage for the entire population of Home Assure customers for whom Home Assure did not arrange a helpful workout plan was between 71% and 84%. *See id.* at ¶ 55.

In addition, the FTC retained Dr. Kenneth Kelly (an FTC economist) to examine records for a separate sampling of Home Assure's customers from the company's database and other records subpoenaed by the FTC from the mortgage lenders for these customers. *See App. 2.* Dr. Kelly's report described the survey universe and how he selected the sample. *See id.* at ¶¶ 10-15, 19-25. Dr. Kelly reported that the company's own database and the bank files indicated that **at most** 50.54% (or 93 of the 184 customers he analyzed) were offered "plans" that Home Assure **may** have had a role in negotiating. *See id.* at ¶ 6. Dr. Kelly further reported that he defined "plan" very broadly to include reinstatement plans that required the consumer to pay the full arrears immediately. *Id.* at ¶¶ 31-32. As a result, Dr. Kelly also assessed whether consumers were able to make three monthly payments under the "plan" as a measure of the plan's viability or helpfulness – which Dr. Kelly reported was the same measure used by mortgage services as to a plan's affordability. *Id.* at ¶ 7. Based on this viability measure, Dr. Kelly reported that **at most** 26.09% (or 48 of the 184 customers he analyzed) accepted a viable plan that Home Assure **may** have played some role in negotiating. *Id.* at ¶ 8. Dr. Kelly reported a 95% confidence interval between 19.9% and 33.06%. *Id.* at ¶ 49.²⁵

²⁵ Dr. Kelly submitted a Supplemental Report that slightly revised his classifications based on the receipt of additional lender files after the filing of his initial report. *App. 3.* Based on (continued...)

V. HOME ASSURE'S "WIND DOWN"

Home Assure began winding down its operations in September 2008. App. 24, at ¶ 10; App. 23, at ¶ 9. By that time, one state Attorney General had sued Home Assure for its deceptive marketing practices.²⁶

Home Assure took most of the money it received from consumers and spent it on further marketing and sales efforts. Specifically, Home Assure spent more than \$1.5 million on "Affiliate Commissions," "Leads," "Paid Search," and "Marketing Expense - Other." In addition, another \$1.1 million was spent on labor at the Florida call center. App. 16, Ex. G at "0001." Conversely, the North Carolina mitigation office spent less than \$370,000 on labor expenses – an amount even less than the \$463,000 paid to the four owners for "total management comp." *Id.*

Molina and Trimarco "resigned" from Home Assure in September and October of

²⁵ (...continued)

his supplemental analysis, he reported that one more customer accepted a plan that Home Assure may have played a role in negotiating, and thus he reported that **at most** 26.63% (or 49 of the 184 customers he analyzed) accepted a viable plan that Home Assure **may** have played a role in negotiating. *Id.* at ¶ 4.

²⁶ Minnesota filed a complaint in April 2008, alleging that Home Assure made false, misleading, or deceptive statements to consumers and received advance fees for foreclosure relief services in violation of state law. App. 27, at ¶ 20 & Ex. G. Home Assure answered the complaint, but did not respond to discovery requests or appear for scheduled conferences. *Id.*, Ex. H & I. In December 2008, the Minnesota court entered a default judgment against Home Assure, granting the Attorney General's request for a permanent injunction, restitution, civil penalties, and attorneys' fees. *Id.*, Ex. I.

North Carolina filed a similar complaint against Home Assure and Michael Grieco in October 2008. *Id.* at ¶21 & Ex. J. The North Carolina action resulted in a consent judgment for a permanent injunction and restitution. App. 8. The North Carolina Attorney General recovered \$12,741 from Grieco. *See* App. 19, at 254-55.

2008, respectively. App. 24, at ¶8; App. 23, at ¶ 6. In early October 2008, Trimarco told Molina that the “business is shutting down,” and asked Molina to “put in money” for the wind down. App. 17, at 150, 268. Trimarco testified that the decision to close down Home Assure and “dissipate the assets” occurred sometime before he resigned on October 17, 2008.²⁷ App. 16, at 224-25.

Despite the decision to close down Home Assure and dissipate the assets, Home Assure continued to solicit new customers and take their money. The call center did not shut down until “about a month or two” after the decision was made. App. 18, at 235, 288-89. Home Assure’s financial records indicate that Home Assure collected consumer payments through at least the middle of November 2008. *See* App. 26, at ¶¶ 3-5.

While Trimarco and Molina have stated they “loaned” money to Home Assure after they resigned in order to pay for consumer refunds (*see* App. 16, at 177-78; App. 24, at ¶ 9), the company’s financial records show that the bulk of Home Assure’s funds spent following their “resignations” went to pay off credit cards in Molina’s and Trimarco’s names. These credit cards were used to charge company expenses, but for which both had personal liability on the outstanding balances.²⁸ Specifically, the General Ledger shows that the company paid

²⁷ In November 2008, after they resigned from Home Assure, Molina and Trimarco launched a company, “Advanced Wellness Research, Inc.,” which marketed purported weight reduction, anti-aging, and tooth whitening products online with a “Satisfaction Guarantee.” Molina was the CEO until May 2009. App. 17, at 7-8; *see also* App. 57. In September 2009, the Florida Attorney General’s Office sued Advanced Wellness Research and Molina and Trimarco for deceptive marketing practices. *See* App. 15.

²⁸ Home Assure charged expenses on at least four credit cards. At least one card was Molina’s personal credit card (ending in 1008). Another card was Trimarco’s personal credit card (01000). There were also at least two corporate credit cards that were in the name of

(continued...)

off more than \$111,000 of the credit card balances in October and November 2008 (including over \$43,000 on Trimarco's personal credit card (ending in 01000), and \$88,000 on Molina's personal card (ending in 41001); and over \$13,000 on account ending in (01008). At the same time, the company issued less than \$40,000 in refunds during that period. *See* App. 26, at ¶¶ 6-7.

ARGUMENT

Summary judgment is properly granted when the pleadings, depositions, admissions, answers to interrogatories, and affidavits together demonstrate that no genuine issue of material fact remains. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is appropriate “[w]here the record taken as a whole could not lead to a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To avoid summary judgment, the non-moving party must set forth specific facts showing that a genuine issues remains for trial. Fed. R. Civ. P. 56(c). To meet this standard, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. If the non-movant's response consists of nothing “more than a repetition of his conclusional allegations,” summary judgment is required. *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981).

²⁸ (...continued)

Trimarco for which he had personal liability. App. 16, at 96, 100-01, 107, 111, 120-121, 123; App. 16, Ex. E; App. 17, at 102-04 & Ex. D at HA 78238-44; *see also* App. 23, at ¶ 7.

I. HOME ASSURE VIOLATED THE FTC ACT

Section 5 of the FTC Act provides that “deceptive acts or practices in or affecting commerce” are unlawful. 15 U.S.C. § 45(a)(1). The FTC may establish corporate liability under Section 5 with evidence that a corporation made material representations or omissions likely to mislead a reasonable consumer. *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988). “Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service are presumed to be material.” *FTC v. Transnet Wireless Corp.*, 506 F. Supp.2d 1247, 1267 (S.D. Fla. 2007). Proof of intent to deceive is not required. The FTC is required to show only that the defendant had, or should have had, knowledge or awareness of any relevant misrepresentations. *FTC v. Amy Travel Serv., Inc.* 875 F.2d 564, 573 (7th Cir. 1989). “A company that deceives consumers through reckless or even simply negligent disregard of the truth may do just as much harm as one that deceives consumers knowingly.” *Sears, Roebuck & Co. v. FTC*, 95 FTC 406, 517 n.7 (1980).

The undisputed evidence establishes that Home Assure made material misrepresentations, express or implied, that were likely to mislead reasonable consumers to believe: (1) Home Assure would stop consumers’ foreclosures in all or virtually all instances; and (2) Home Assure would refund consumers’ fees in all instances when foreclosure was not stopped. *See supra*, pp. 10-14. The company’s website represented that: Home Assure had “assisted thousands of customers in avoiding foreclosures;” its “mitigation specialists, through their existing relationships with most lenders, can propose a resolution and negotiate with the lender on your behalf, usually within two weeks. . . ;” and a “No questions asked”

100% Money Back Guarantee if Home Assure was “unable to negotiate a plan with your lender that improves your situation or gives you a viable strategy to avoid or stop foreclosure.” *See* App. 27, at ¶¶6, 9 & Ex. B at HA 77088; Ex. C at HA 77114. As evidenced in the recorded sales call and various phone scripts, Home Assure reiterated the 100% Money Back Guarantee and the company’s purported experience and success rate in negotiating with lenders to avoid foreclosure. *See* App. 27, at ¶¶16-17 & Ex. F; App. 21, Exs. C, H, I & J; App. 21, at 77-79, 99-103, 108-111, 115-18.

In actuality, Home Assure failed to either stop foreclosure or fully refund consumers in the vast majority of instances. That many consumers were misled is demonstrated by the numerous consumer declarations submitted that consistently describe how after paying Home Assure a substantial fee, they did not receive any helpful plan from Home Assure. *See* Apps. 34 to 52. This uncontroverted evidence is corroborated by the results of the customer survey conducted by Dr. Kivetz as well as Dr. Kelly’s analysis of Home Assure’s database and lender files. *See* pp. 18-20.

In addition, the consumer complaints submitted to various enforcement agencies and BBBs further evidence the widespread nature of these misrepresentations. *See* Apps. 29, 53 to 55. Admission of these complaints is proper under the residual exception to the hearsay rule.²⁹ Fed. R. Evid. 807; *see also* *FTC v. Kuykendall*, 312 F.3d 1329, 1343 (10th Cir. 2002) (affirming district court’s ruling that consumer declarations and consumer complaints are admissible); *FTC v. Figgie Int’l Inc.*, 994 F.2d 595 (9th Cir. 1993) (finding complaint letters

²⁹ The complaints are also admissible for the purpose of establishing that Home Assure had notice that consumers were complaining and deceived by the company’s sales pitch.

to the FTC admissible under Rule 807's predecessor).

The fact that some consumers may have been satisfied or received refunds is irrelevant in determining whether there is a violation. *Amy Travel Serv.*, 875 F.2d at 572 (“[t]he existence of some satisfied consumers does not constitute a defense under the [FTC Act]”); *see also FTC v. Peoples Credit First, LLC*, No. 8:03-cv-2353, 2005 U.S. Dist. LEXIS 38545, at *25 (M.D. Fla. Dec. 18, 2005) (“[t]hat a large number of consumers did not complain or the fact that the FTC came forward with relatively few consumer declarations in support of its motion does not bar the court from entering [summary judgment]”).

Nor can Home Assure shield itself from its deceptive sales pitch by relying on the purported disclaimers contained in the form Working Agreement. As an initial matter, Home Assure typically provided the contracts to consumers simultaneously or even after the consumer paid Home Assure. Courts have rejected similar attempts by companies to disavow misleading representations, and held the FTC Act “is violated if [the company] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.” *FTC v. Munoz*, No. 00-55319, 2001 U.S. App. LEXIS 19438, at *4 (9th Cir. 2001) (quoting *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975)); *see also CFTC v. Sidoti*, 178 F.3d 1132, 1136 (11th Cir. 1999) (rejecting appellants’ argument that “various disclosures of risk in account opening documents and post-solicitation compliance interviews. . . rendered those misrepresentations immaterial,” and stating “[w]e seriously doubt whether boilerplate risk disclosure language could ever render an earlier material misrepresentation immaterial”); *FTC v. Atlantex Assocs.*, No. 87-0045-CIV, 1987 U.S. Dist. LEXIS 10911, at *29 (S.D. Fla. Nov. 25, 1987) (finding “overall

impact of [d]efendants' practices as deceptive is apparent in this case despite isolated or ambiguous disclosures of the risks of investment made by [d]efendants"). This is particularly true where, as here, the company is preying on vulnerable and desperate consumers by fostering a sense of urgency in the transaction. Indeed, the disclaimers in the contracts (which are diametrically at odds with Home Assure's overall sales pitch) only underscores the company's knowledge that the guarantee representations on Home Assure's website and in sales scripts were false and deceptive.

II. MOLINA AND TRIMARCO ARE EACH LIABLE FOR HOME ASSURE'S MISREPRESENTATIONS

Individual defendants are not only directly liable for their own violations of the FTC Act, but may also be held liable for the corporate defendant's violations if the FTC demonstrates that: (1) "the individual defendants participated directly in the practices or acts or had authority to control them;" and (2) "the individual had some knowledge of the practices." *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (quoting *Amy Travel Serv.*, 875 F.2d at 573); see also *FTC v. Para-Link Int'l, Inc.*, No. 8:00-cv-2114, 2000 U.S. Dist. LEXIS 21509, at *13 n.5 (M.D. Fla. Nov. 21, 2000) ("Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had the authority to control them.")

As shown below, the record conclusively establishes that, at a minimum, both Molina and Trimarco: (1) had authority to control Home Assure, and (2) had some knowledge of the company's wrongful acts or practices. Summary judgment is therefore warranted as to their liability for Home Assure's violation of the FTC Act.

A. Molina and Trimarco Each Had Authority to Control Home Assure

As the chief executives and majority owners of Home Assure, both Molina and Trimarco clearly had the authority to control Home Assure. “Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.” *Amy Travel Serv.*, 875 F.2d at 573; *see also FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005) (defendant “would be hard-pressed to establish that he lacked authority or control” given status as a corporate officer); *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (finding that an individual defendant’s assumption of the role of company president and authority to sign documents on behalf of the corporate defendant were sufficient to demonstrate the requisite control). “An individual’s status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation. A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception.” *Transnet Wireless Corp.*, 506 F. Supp.2d at 1270 (internal quotation marks omitted) (finding individual who held himself out as corporate officer and had signature authority on company bank accounts and power to hire employees had requisite control).

The following uncontroverted facts establish Molina and Trimarco’s authority to control Home Assure:

- Molina and Trimarco were the principal owners – each having at least a 40% ownership interest. App. 17, at 67; App. 16, at 84.
- Both Molina and Trimarco took salaries from Home Assure and both also took *all* of Home Assure’s 2007 deductions for their own personal tax returns

– which they classified as “non-passive” losses. App. 17, at 67, 86; App. 16, at 72, 84; App. 16, Exs. B (HA 82399) & C; App. 17, Ex. A.

- Both Molina and Trimarco held themselves out as the chief executives of Home Assure. Molina executed contracts with third parties as the company’s CEO. Trimarco corresponded with outside parties as the company’s President. App. 16, at 330-32; App. 17, at 67, 86, 96, 104-05, 117-19; App. 17, Ex. B, at 591, 593-94, 603, 611, 614; App. 27, Ex. B, at HA 134999.
- Molina and Trimarco signed applications to open Home Assure’s bank accounts. App. 27, at ¶12 & Ex. E; App. 17, Ex. C.
- Molina and Trimarco had company credit cards in their names that were used to charge company expenditures, including marketing expenses. Molina also used a personal credit card to charge company expenses which he submitted to Home Assure’s accountant for payment. App. 16, at 96, 107, 111, 119-123 & Ex. E; App. 17, at 158-59 & Ex. D at HA 78238–44.
- Molina and Trimarco authorized payment for certain invoices and company expenditures. In addition, each resolved company billing disputes that were “escalated” to them. App. 17, at 96, 124-28, 133-35, 137-38; App. 16, at 91-93, 95 & Ex. D at HA 80123.
- Home Assure’s accountant signed corporate checks using a stamp bearing Trimarco’s name based on an agreement with Trimarco. Trimarco also admitted that he would “monitor the company’s finances and communicate that information to Home Assure’s operations team so they could do their jobs.” App. 16, at 89, 199; App. 23, at ¶ 5.

There can be no genuine dispute that both Molina and Trimarco – in their roles as the principal owners and chief executives of a closely-held company – had the requisite authority to control Home Assure to be held individually liable for its FTC Act violations.

B. Molina and Trimarco Each Knew or Should Have Known About Home Assure’s Deceptive Practices

Upon showing individual participation or authority to control, “[t]he FTC must then demonstrate that the individual had some knowledge of the practices.” *Gem Merch. Corp.*, 87 F.3d at 470. The knowledge requirement can be satisfied by demonstrating

“actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud with an intentional avoidance of the truth.” *Amy Travel Serv.*, 875 F.2d at 574 (quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985)). “Also, the degree of participation in business affairs is probative of knowledge.” *Id.*

The FTC “need not demonstrate . . . that the individual defendants possessed the intent to defraud,” nor that the defendants had actual knowledge of the misrepresentations. *FTC v. Jordan Ashley, Inc.*, No. 93-2557, 1994 U.S. Dist. LEXIS 7494, at *11 (S.D. Fla. April 5, 1994); see also *FTC v. Global Mktg. Group*, 594 F. Supp. 2d 1281, 1289 (M.D. Fla. 2008) (finding defendant’s handling of law enforcement inquiries and review of scripts and reports detailing sales force conversion rates indicates sufficient knowledge); *FTC v. Patriot Alcohol Testers*, 798 F. Supp. 851, 856, 859-60 (D. Mass. 1992) (finding the disparity between the promised high earnings to consumers and the actual earnings indicates defendant acted at least with reckless indifference). “The relevant principle is that one may not enjoy the benefits of fraudulent activity and then insulate oneself from liability by contending that one did not participate directly in the fraudulent practices.” *FTC v. Int'l Diamond*, No. C-82-0878, 1983 U.S. Dist. LEXIS 11862, at *13 (N.D. Cal. Nov. 8, 1983), see also *Atlantex Assocs.*, 1987 U.S. Dist. LEXIS 10911, at *32 (holding one defendant who had controlling authority liable even though he was not an active participant).

The undisputed record here demonstrates that, at a minimum, Molina and Trimarco each should have known about Home Assure’s deceptive practices, and that – despite blanket assertions that they had “delegated” the responsibility to others – neither Molina nor

Trimarco took any specific steps to prevent Home Assure from misleading consumers. First, the Minnesota Attorney General complaint and the relative large number of refunds should have alerted both Molina and Trimarco about the high probability of deceptive sales conduct. However, neither investigated the fraud allegations in the Minnesota Attorney General lawsuit nor made any attempt to change Home Assure's sales practices. While Trimarco testified that he made sure complaints from government agencies "got filtered up to me," and that he saw the Minnesota Attorney General complaint, he did no personal investigation as to the merits of the lawsuit, and did not look into the representations contained on Home Assure's website as a result of the lawsuit. App. 16, at 216-17, 221, 223. Similarly, Molina admitted that while the owners discussed "communications" with state Attorney Generals, he could not recall any discussion about changing any practices as a result. App. 17, at 166-67, 169-70.

Both also reviewed company financial reports showing the company was issuing a relatively large number of refunds – almost 10% of total revenues. In fact, both refer to the fact that Home Assure issued so many refunds as the sole basis for their belief that the company was honoring its guarantee. However, both admitted that they were not aware of how many or what percentage of refund requests were being denied. App. 16, at 254-55; App. 17, at 195-96. Nor were they aware of any credible evidence showing how many or what percentage of Home Assure customers had been helped or received any viable plan from a bank. Molina did not recall ever discussing with the other owners what percentage of Home Assure customers had accepted or received a viable plan. He did not even know if the mitigation department ever developed any metric to measure their ability to obtain viable

plans. App. 17, at 190-91. Trimarco claimed only to have heard some “anecdotal” reporting or “stories” from Grieco as to Home Assure’s success ratio. App. 16, at 342-46.

Additionally, while both were aware that Home Assure used a contract that contained limitations and exceptions to the 100% Satisfaction Guarantee displayed prominently on the company’s website, neither knew whether their customers were ever made aware of these limitations and conditions before paying Home Assure. Indeed, Trimarco even testified that he believed that payment was made “simultaneously” to when the contract was received by the customer – “[t]hey kind of like passed in the night.” App. 16, at 211; App. 17, at 191-95, 198-99.

Moreover, while their personal involvement in the misrepresentations is not a requirement of liability, the record shows that Molina and Trimarco both participated in and furthered Home Assure’s deceptive marketing practices.³⁰ The evidence clearly indicates that both were involved in retaining outside vendors to drive more consumer traffic to Home Assure’s website and call center. *See* App. 16, at 67-70, 139; App. 17, at 24-25, 44; App. 24, at ¶6. Indeed, Molina said his job was to “make the phones ring” in the call center. App. 18, at 157. Both were also involved in hiring a new director of the call center to expand its operations. App. 16, at 124; App. 17, at 69; App. 21, at 13-14. Additionally, Trimarco admitted that he went to the call center “a handful of times,” and that he “from time to time would listen to [telemarketer] calls when [he] was in the [sales] office,” and that he saw

³⁰ While both claimed no knowledge of any of the scripts, emails produced by the outside vendor Position2 show Molina and Trimarco discussing a radio ad script using the “100% satisfaction guarantee” (HA 180253-54, 56), as well as Molina forwarding one of the call center phone scripts to the vendor, with a note “here is our script as we discussed” (HA 180328-32). *See* App. 6; *see also* App. 56.

telemarketers “generally making outbound phone calls to contact clients who came in as leads . . . as well as follow-up calls on existing clients. . . .” App. 20, at 7-8. Molina for his part posted responses (identifying himself as Home Assure’s CEO) to at least two online consumer complaints about Home Assure’s deceptive practices. App. 17, at 207-13 & Ex. E at HA 10579, 10586.

In sum, the record conclusively establishes that both Molina and Trimarco had control of Home Assure, and were, at least, recklessly indifferent to the truth or falsity of representations made by Home Assure. As a result, they are both personally liable for Home Assure’s misrepresentations under the FTC Act.

III. THE REQUESTED RELIEF IS PROPER

Section 13(b) of the FTC Act authorizes district courts to grant permanent injunctions against practices that violate any laws enforced by the FTC. 15 U.S.C. § 53(b); *Gem Merch. Corp.*, 87 F.3d at 468. As this Court has held, Section 13(b) imposes no limit on a district court’s equitable powers, which include “the power to grant restitution and disgorgement.” DE 65, at 5, *quoting Gem Merch. Corp.*, 87 F.3d at 469. In addition, “[i]n a Section 13(b) action of this kind, the proper amount of restitution has been held to be the purchase price of the relevant product or business opportunity, less any refunds.” *Id.* at 6.

The FTC seeks an Order holding both Molina and Trimarco jointly and severally liable for consumer redress or disgorgement in the amount of \$2.775 million. The undisputed evidence establishes that Home Assure’s deceptive representations were widespread. Home Assure’s own records provide that the total amount that consumers paid Home Assure minus refunds made is \$3,721,807.85. App. 16, Ex. G at “00001.” Based on

findings from the FTC's expert reports, a reasonable approximation of the percentage of Home Assure customers that did not receive an affordable plan from Home Assure is 75%. *See, e.g., FTC v. QT, Inc.*, 472 F.Supp 2d 990, 995 (N.D. Ill. 2007) ("the FTC must show that its calculations reasonably approximated the amount of customers' net losses, and then the burden shifts to the defendants to show these figures were inaccurate"); *see also FTC v. Stefanichik*, 559 F.3d 924, 929 (9th Cir. 2009) (affirmed summary judgment where defendants submitted experts that "criticized the FTC's survey methodology" but "offered no competent affirmative evidence of their own"). Moreover, an adverse inference against Defendants is warranted here as a result of their failure to retain complete business records despite a court order to preserve such materials. *See Martinez v. Brinks, Inc.*, 171 Fed. Appx. 263, 269 n. 7 (11th Cir. 2006) (noting an adverse inference for spoliation of evidence is an inherent power of federal courts).

In addition, the FTC requests that the Court permanently enjoin Molina and Trimarco from engaging in similar deceptive conduct in the future. For the issuance of a permanent injunction under §53(b)(1), the FTC must demonstrate that there is "some cognizable danger of recurrent violation, something more than the mere possibility." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). This standard permits inquiry into the defendant's past violations as well as whether their "current occupation position[s] them to commit future violations" *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp.2d 1167, 1209 (N.D.Ga. 2008) (granting permanent injunction even though defendants no longer marketed the same product), *aff'd* 2009 U.S. Dist LEXIS 27388 (11th Cir. 2009). "[T]he fact that illegal conduct has ceased does not foreclose injunctive relief." *Id.* (quoting *FTC v. Citigroup Inc.*,

239 F.Supp.2d 1302, 1306 (N.D.Ga.2001)). Indeed, a court has the “discretion to model injunctive orders to fit the exigencies of the particular case, and the power to enjoin related unlawful acts” in order to prevent transgressors from violating the law in a new guise. *FTC v. SlimAmerica, Inc.*, 77 F. Supp.2d 1263, 1275 (S.D.Fla.1999).

Molina and Trimarco’s “current business endeavors could serve as a platform for continuing violations of the FTC Act.” *Nat’l Urological Group, Inc.*, 645 F. Supp.2d at 1209-10. Since Home Assure, they have continued to target consumers through similar online marketing schemes for other products. Molina and Trimarco have confirmed their expertise in “online marketing” and “tech ops” allows them “to start businesses relatively cheaply” – “no matter what the product is” App. 16, at 27-28; App.17, at 14. This history of Home Assure’s unlawful past conduct coupled with the continuing alleged violations by Advanced Wellness demonstrates the defendants’ proclivity for sustained deception that presents a “cognizable danger of recurrent violations” necessary to warrant a permanent injunction. *W.T. Grant Co.*, 345 U.S. at 633.

Respectfully submitted:

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Date: January 25, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiff's Motion for Summary Judgment and Memorandum in Support as to defendants Molina and Trimarco was served via email on the 25th day of January, 2010 upon counsel who has accepted service via electronic mail:

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