No. 16-13532

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

GAIL DANIELS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:15-cv-01645-MHC
Hon. Mark H. Cohen

ANSWERING BRIEF OF THE FEDERAL TRADE COMMISSION

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No. 16-13532
FTC v. Gail Daniels

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit R. 26.1-1 to 26.15, the Federal Trade Commission certifies to the best of its knowledge that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in this case or appeal.

Cohen, Hon. Mark H. — District Court Judge

Daniels, Gail — Defendant-Appellant

Federal Trade Commission — Plaintiff-Appellee

Grajales, Michelle — FTC attorney

Hector, Colin — FTC attorney

Kappler, Burke — FTC attorney

Marcus, Joel — FTC attorney

The Primary Group, Inc. — Defendant

Rock, Robin — FTC attorney

Shonka, David C. — FTC Acting General Counsel

To the best of the FTC's knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

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

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JURISDICTION

This is an appeal from a final judgment of the district court entered on May 19, 2016, disposing of all parties' claims. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345 and under 15 U.S.C. §§ 45(a), 53(b), and 1692*l*. Appellant filed a timely notice of appeal on June 14, 2016. To the degree appellant seeks review of the summary judgment, this Court has appellate jurisdiction under 28 U.S.C. § 1291. To the degree appellant seeks review of the district court's issuance of a temporary restraining order, any appeal is barred both because TROs are not generally appealable, *Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982), and because appellant has already challenged the TRO on appeal and her case was dismissed with prejudice, *see* Argument II, *infra*.

On October 7, 2016, this Court dismissed the appeal for failure to prosecute because Daniels did not file a brief and appendix. Following Daniels's motion to reinstate, however, the Court reinstated the appeal effective January 12, 2017.

QUESTIONS PRESENTED

The FTC sued The Primary Group and its founder, Gail Daniels, for violating the Federal Trade Commission Act and the Fair Debt Collection Practices Act. Defendants operated a debt collection scheme that relied on unlawful threats of lawsuits or criminal prosecution. Their employees falsely claimed to be

"agents" or "process servers" in an ongoing legal proceeding and withheld information they were legally required to provide. Further, defendants unlawfully harassed consumers and their families with repeated calls and text messages.

The district court granted summary judgment for the FTC against Daniels, the appellant here, and her company, which has not appealed. Daniels's brief raises a large number of scattershot issues, but the principal ones are:

1. Whether the district court properly deemed the government's statement of facts to be uncontested because Daniels did not respond to them;

2. Whether the district court correctly held Daniels individually liable for the corporation's misdeeds;

3. Whether the district court correctly relied on Daniels's sworn testimony to award $980,000 in equitable monetary relief; and

4. Whether a minor error in the district court's issuance of a temporary restraining order presents a live issue for review.

STATEMENT OF THE CASE

A. The Primary Group's Unlawful Debt Collection Practices

Gail Daniels founded The Primary Group in 2012. From its inception, the company pursued debt collection aggressively and deceptively, preying on consumers' unfamiliarity with the legal system to extort payments through bogus threats of potential criminal or civil actions, all in violation of the Fair Debt

Collection Practices Act (FDCPA) and the Federal Trade Commission Act (FTC Act).

In the course of the FTC's investigation and litigation, the FTC obtained over one hundred complaints and multiple declarations from consumers relating their experiences with The Primary Group's debt collectors. The FTC also obtained sample scripts these collectors followed in contacting consumers and recordings of actual consumer calls placed by The Primary Group's debt collectors.

This evidence showed that defendants' deception began from the start of a call. The Primary Group was based exclusively in Atlanta, but the debt collectors were instructed to tell consumers that the company had "field agents in your local area." PX 18 at 6-7 ¶ 18, Att. D at 49, Att. T at 146 (Dkts. 28-2 at 7-8, 50; 28-4 at 6) [FTC App. 0517-18, 0560; 0657].[1] To support the deception, The Primary Group used out-of-state phone numbers that made it appear as though the calls had originated near the call recipient. *Id.*; *see also* PX 11 at 2 ¶ 4 (Dkt. 5-40 at 3) [FTC App. 0269].

[1] "FTC App." refers to the FTC's Supplemental Appendix, provided consistent with 11th Cir. R. 30-1(b). "Dkt." refers to entries on the district court docket by number. Page numbers for "Dkt." entries refer to numbers in ECF-added headers, where available. "PX" refers to plaintiff FTC's exhibits by number. An index of plaintiff's exhibits can be found at Dkt. 78-4 [FTC App. 1284-85].

The FDCPA requires a debt collector to identify himself as such. 15 U.S.C. § 1692e(11). Working from scripts, The Primary Group's callers did not do so; instead, they identified themselves as "process servers," "agents," or "investigators." *See, e.g.*, PX 18 at 3 ¶ 10, 7 ¶ 20, 12-13 ¶ 34, Att. B at 22, Att. F, Att. G, Att. L at 72 (Dkt. 28-2 at 4, 8, 13-14, 23, 60-63, 73) [FTC App. 0514, 0518, 0523-24, 0533, 0570-73, 0583].[2] To hide their identities further, The Primary Group's employees frequently used aliases in the course of their debt collection activities. PX 18, Atts. F, G (Dkt. 28-2 at 60-63); PX 23 at 2 ¶ 7 (Dkt. 78-8 at 2) [FTC App. 0570-73; 1390].

The FDCPA deems it a "false or misleading representation" for a debt collector to make a "false representation or implication that the consumer committed any crime" or to make a "threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5), (7). Callers for The Primary Group nevertheless threatened consumers that they had committed a

[2] The firm also pursued its victims through text messages. The FTC recovered templates of such messages in which the senders, like the callers, claimed to be "process servers" and threatened to serve papers on the consumer at their place of employment. PX 18 at 9 ¶ 23, Att. L (Dkt. 28-2 at 10, 72-77) [FTC App. 0520, 0582-87]. A failure to respond, the senders warned, could result in a "default judgment." PX 18 at 9-10 ¶ 25, Att. O (Dkt. 28-2 at 10-11, 93-96) [FTC App. 0520-21, 0603-06]. Several consumer declarants corroborated receiving such texts and further reported getting multiple texts to the point of harassment. PX 05 at 2 ¶ 4 (Dkt. 5-34 at 3); PX 06 at 1 ¶ 2 (Dkt. 5-35 at 2); PX 07 at 1-2 ¶¶ 3, 5 (Dkt. 5-36 at 2-3); PX 09 at 1-2 ¶¶ 4-5 (Dkt. 5-38 at 2-3); PX 11 at 2 ¶ 5 (Dkt. 5-40 at 3) [FTC App. 0234; 0236; 0244-45; 0259-60; 0269].

crime and that legal action was pending or imminent. One script directed the callers to tell consumers they are "facing charges of *fraud by check* as well as *theft by deception* which is also known as *theft by conversion*." The script continues, "[t]hey do have enough evidence against you to have you prosecuted" and that the consumer will "have to go before a *magistrate judge* for the charges against you." PX 18 at 3-4 ¶¶ 9-12, Att. B at 22 (Dkt. 28-2 at 4-5, 23) (emphasis in original) [FTC App. 0514-15, 0533].

Having directed this threat, the script then instructs the callers to extract as much money from the consumer as possible, guiding the caller to set a figure for the consumer to pay that is "a large $ amount over restitution" but then offer an "out of court" settlement for the actual balance of the debt. PX 18, Att. B. at 23 (Dkt. 28-2 at 24) [FTC App. 0534]. The script tells the caller to "**[g]ive no hope**" and to advise the consumer "if I were you I would do everything in my power to prevent a criminal record" and "stay out of jail." *Id.*, Att. B at 22, 24 (Dkt. 28-2 at 23, 25) (emphasis in original) [FTC App. 0533, 0535].

Another script includes directions for the "agents" to inform consumers that "[w]e're in the process of forwarding paperwork" to the courts and "[a]t this point the client is looking to move forward on all levels possible, **proving some foul play may have been involved** . . . . Under some circumstances a balance over $500 can escalate passed [sic] civil court." *Id*., Att. C at 30 (Dkt. 28-2 at 31)

(emphasis in original) [FTC App. 0541]. This script further directed the "agents" to secure an immediate payment:

> However if it's pursued further it's a little different because from the clients [sic] perspective you defrauded a financial institution using deceptive practices which is against the law. To have something like that associated with you from a simple payday loan in my opinion just isn't worth the trouble, so did you want to see if this is something that could be settled outside of court?

Id., Att. C at 31 (Dkt. 28-2 at 32) [FTC App. 0542].

The FTC's evidence confirmed that The Primary Group's callers followed these scripts. Numerous recordings documented representations that consumers committed civil or criminal fraud in connection with their debts. *See, e.g.*, PX 18, Att. S at 114:3-23 (Dkt. 28-3 at 15); PX 23 at 6 ¶ 16 (Dkt. 78-8 at 6) [FTC App. 0625; 1394]; *see also* PX 02 at 1 ¶ 2 (Dkt. 5-31 at 2); PX 03 at 1 ¶ 2 (Dkt. 5-32 at 2) [FTC App. 0218; 0226]. Further, multiple consumer declarants reported being threatened with criminal or civil penalties, including arrest, felony charges, or repossession, for debts ranging from $500 to $1,700. *See* PX 02 at 1 ¶ 2 (Dkt. 5-31 at 2); PX 03 at 1 ¶ 2 (Dkt. 5-32 at 2); PX 04 at 1 ¶¶ 2-3 (Dkt. 5-33 at 2); PX 08 at 1 ¶ 2 (Dkt. 5-37 at 2); PX 10 at 1-2 ¶ 4 (Dkt. 5-39 at 2-3); PX 12 at 1 ¶¶ 2-3 (Dkt. 5-41 at 2); PX 13 at 2 ¶ 7 (Dkt. 5-42 at 3) [FTC App. 0218; 0226; 0230; 0256; 0264-65; 0272; 0277]. In some cases, The Primary Group's callers also threatened to have the consumer's spouse arrested. *See* PX 07 at 1 ¶ 2 (Dkt. 5-36 at 2); PX 10 at 1-2 ¶ 4 (Dkt. 5-39 at 2-3) [FTC App. 0244; 0264-65]. Consumers had

complained to the FTC about similar threats. *See* PX 01 at 19-20 ¶¶ 63-68 (Dkt. 5-3 at 23-24) [FTC App. 0098-99].

In addition to making direct threats, The Primary Group's scripts also contained deceptive rebuttals to anticipated consumer objections. For example, if a consumer responded, "I just want to pay this; I didn't know anything about it[,]" the caller was instructed to respond with nonsensical but grave-sounding legalese:

> Well, ma'am/sir to be quite honest with you, the goal of my client at this time is to obtain a court injunction of a criminal arrest warrant for check fraud and theft by conversion.

PX 18, Att. B at 26 (Dkt. 28-2 at 27) [FTC App. 0537].

If the consumer asked if collection of the debt was time-barred, or "out of status," the script directed caller to respond with more threatening jargon:

> Well ma'am/sir when criminal intent is involved it at [sic] the judges' [sic] discretion to determine whether criminal intent was involved or not. If the *assigns* in this case can prove criminal intent they are not governed on a surrounding time frame that the warrant application has to be submitted. This means that that will not stop the process of the warrant being issued. You can take that up with the judge once you are arraigned in court.

Id. (emphasis in original).

If a consumer protested that their government assistance income was not subject to garnishment, the script instructed the caller to respond that the consumer was risking a possible loss of benefits:

> Keep in mind in order to keep your government benefits you have to have case reviews every 6 to 12 months so if check fraud or theft

> shows up in your background during a review it could definitely affect your eligibility which personally, I don't think is worth the trouble, so did you want to see if this is something that can be settled out of court?

PX 18, Att. C at 40 (Dkt. 28-2 at 41) (emphasis in original) [FTC App. 0551].

The FDCPA requires a debt collector to provide a consumer with a written notice containing the amount of the debt and the name of the creditor, along with a statement that the debt collector will assume the debt is valid unless the consumer disputes the debt within 30 days. 15 U.S.C. § 1692g(a). Heedless of this requirement, The Primary Group instructed its callers to withhold documentation even when a consumer requested it.

For instance, if a consumer said "Send me something in writing," one script told the caller to say that the records were sealed per "the evidential disclosure clause":

> That means that we just are not at liberty to release any evidence . . . . However once you are detained there will be and [sic] evidence hearing known as a discovery. The *assigns'* attorney will then produce a copy of the check, collection notices, subpoena drivers license and the signature analysis page showing proof that you are indeed the issuer of the check.

PX 18, Att. B at 27 (Dkt. 28-2 at 28) (emphasis in original) [FTC App. 0538].

Another script directed the caller to pressure the consumer into agreeing to make a payment as a condition for receiving the Validation of Debt ("V.O.D.") notice required by the FDCPA:

> Once a resolution is discussed we usually can send a V.O.D. immediately, so what are your intentions upon receiving this information? For example, if we send it to you ***right now*** are you planning to pay the balance in full or set up an arrangement ***right now***?

PX 18, Att. C at 38 (Dkt. 28-2 at 39) (emphasis in original) [FTC App. 0549]. And, if the consumer requested that the debt validation notice be sent by mail, the "agent" renewed the threat of legal action, stating "Well this account is a few days away from being forwarded to the county court for further legal actions." *Id.*; *see also* PX 03 at 1-2 ¶ 4 (Dkt. 5-32 at 2-3) [FTC App. 0226-27].

In response to a consumer request for evidence of the debt, such as video, electronic evidence, or a signature, the script instructed the caller to withhold information while simultaneously threatening action and cajoling payment:

> Sir/ma'am because this is considered to be sensitive information, it is held until legal action is needed. Where all evidence in its entirety will be provided in court. [sic] You'll then be able to physically see the evidence I'm referring to, as it will be used against you. Also at that point additional fees may be added and you may not be in a position to negotiate any type of settlements.

PX 18, Att. C at 39 (Dkt. 28-2 at 40) [FTC App. 0550].

A recorded call between a manager of The Primary Group named Cecil Presley and a consumer shows that The Primary Group employees followed the scripts. On the recording, Presley identifies himself with the alias "Agent Walker." PX 18, Att. S at 112: 4-5 (Dkt. 28-3 at 13) [FTC App. 0623]. He states that the text message the consumer received was likely from a "process server" trying to

set a time and place for service. *Id.*, Att. S at 112:22-113:11 (Dkt. 28-3 at 13-14) [FTC App. 0623-24]. Presley then says that The Primary Group can help the consumer "withdraw[] the case before it completely goes to court" but warns that "foul play may have been involved." *Id.*, Att. S at 113:5-7, 114:4 (Dkt. 28-3 at 14-15) [FTC App. 0624-25]. He cautions that if the matter ended up in court, "court fees, late fees and penalties will be included in the current balance" and that his client would seek "garnishment of wages." *Id.*, Att. S at 114:24-115:4 (Dkt. 28-3 at 15-16) [FTC App. 0625-26]. Presley states that the consumer had "defrauded a financial institution using deceptive practices, which is against the law," but that the consumer could stop the proceedings by agreeing to a settlement plan. *Id.*, Att. S at 115:15-17, 115:24-116:1 (Dkt. 28-3 at 16-17) [FTC App. 0626-27].

The Primary Group's collection efforts did not stop at the consumers themselves. The company also tried to increase the pressure by contacting third parties close to consumers, including their spouses, relatives, and employers. The FDCPA prohibits such practices with limited exceptions. *See* 15 U.S.C. § 1692c(b); *see also Berg v. Merchs. Ass'n Collection Div.*, 586 F. Supp. 2d 1336, 1341 (S.D. Fla. 2008). But The Primary Group's scripts for third-party calls directed the caller to state that the third party was contacted "because there's an ongoing investigation" regarding the consumer. To tighten the screws further, the script directs the caller to refuse to disclose what the call is regarding except that

"it is a legal matter." PX 18, Att. T at 137 (Dkt. 28-3 at 38) [FTC App. 0648]. Another script calls for the debt collector to threaten to subpoena the third party. *Id.*, Att. X at 161 (Dkt. 28-5 at 11) [FTC App. 0672]. Several consumers submitted declarations to the FTC confirming that The Primary Group in fact contacted their relatives, one reporting this occurring "over 100 times." *See* PX 06 at 2 ¶ 4 (Dkt. 5-35 at 3) [FTC App. 0237]; *see also* PX 11 at 1-2 ¶ 3 (Dkt. 5-40 at 2-3); PX 12 at 2-5 ¶¶ 5, 7, 8 (Dkt. 5-41 at 3-4) [FTC App. 0268-69; 0273-74].

Despite the bluster, all of these threats were empty. The Primary Group never filed a single lawsuit against a consumer and lacked any basis for claiming that the original creditor would do so. Nor were consumers arrested or prosecuted by criminal authorities for "fraud," as threatened. *See generally* PX 02 to PX 14 (Dkt. 5-31 to 5-44) [FTC App. 0217-85].

B. Gail Daniels's Role in The Primary Group

Documents and information obtained from The Primary Group, confirmed by Daniels's own sworn deposition testimony, showed that Daniels was the driving force and prime mover in establishing and operating The Primary Group. The evidence showed that Daniels participated, controlled, and had knowledge of The Primary Group's activities through her deep involvement in the company.

Corporate formation and officer status. Daniels incorporated the firm in 2012. Preliminary Injunction Hearing Tr. 140:25-141:15 (June 4, 2015) (Dkt. 47

at 141) [FTC App. 0910] [hereinafter "PI Hg. Tr."]; *see also* PX 01, Att. A (Dkt. 5-4 at 2-5) [FTC App. 0102-05]. That same year, she filed an application to conduct business under the trade name "Primary Solutions Associates Investigation."[3] The application describes the nature of the business as "debt collections and asset investigations and fraud investigations." PX 01 at 4 ¶ 15, Att. A at 26 (Dkts. 5-3 at 8; 5-4 at 5) [FTC App. 0083; 0105]. Daniels also authorized the filing of the 2014 Annual Registration for The Primary Group and, in other state filings in 2012, 2013, and 2014, stated that she was the Chief Financial Officer and Secretary for the corporation. Daniels Dep., PX 21 8:25-10:14, 15:9-17:17, Ex. 1 (Dkt. 78-5 at 5-7, 9-11, 32) [FTC App. 1290-92, 1294-96, 1317]; *see also* PX 01 at 4-6 ¶¶ 16-19, Att. B at 28, Atts. D, E (Dkts. 5-3 at 8-10; 5-5; 5-7; 5-8) [FTC App. 0083-85; 0106-07; 0111-12; 0113-14].

Finances. Daniels had signatory authority over all of The Primary Group's principal bank accounts. PX 01 at 11-23 ¶¶ 34-62, Atts. O, P, R, V, Y, Z (Dkts. 5-3 at 15-23; 5-18; 5-19; 5-21; 5-25; 5-28; 5-29) [FTC App. 0090-98; 0150-51; 0152-60; 0177-80; 0194-96; 0206-08; 0209-13]. Daniels herself applied for the bank accounts, holding herself out as the firm's Manager, Vice President, Secretary, and Treasurer in doing so. PX 01 at 12 ¶ 38, 14 ¶ 46, 15-16 ¶ 52, Atts.

[3] It was under this name that The Primary Group's callers contacted consumers, and the name "PSA Investigations" appears on at least one of the documents obtained by the FTC. PX 18, Att. V at 155 (Dkt. 28-5 at 5) [FTC App. 0666].

O, R, V (Dkts. 5-3 at 16, 18, 19-20; 5-18; 5-21; 5-25) [FTC App. 0091, 0093, 0094-95; 0150-51; 0177-80; 0194-96].

Day-to-day management and administration. Daniels testified that she considered herself the President of The Primary Group. Daniels Dep., PX 21 10:25-11:5 (Dkt. 78-5 at 7-8) [FTC App. 1292-93]. She had the power to hire and fire employees, and she set protocols for other employees to follow in hiring. PI Hg. Tr. 141:21-142:25; 143:21-144:7 (Dkt. 47 at 141-44) [FTC App. 0910-13]. Daniels herself was the only person with the power to fire managers. *Id.*, 165:1-4 (Dkt. 47 at 165) [FTC App. 0934].

Daniels was involved with the day-to-day operations of The Primary Group.[4] *Id.*, 148:4-6 (Dkt. 47 at 148) [FTC App. 0917]. She fielded inquiries from the Better Business Bureau. *Id.*, 149:24-150:5 (Dkt. 47 at 149-50) [FTC App. 0918-19]. She also controlled the office environment, issuing a ban on personal cell phone use and having cameras installed to monitor employees. *Id.*, 144:8-148:6 (Dkt. 47 at 144-48) [FTC App. 0913-17].

Daniels helped The Primary Group operate. Using her own credit card, she paid for the company's websites, APrimaryGroup.com and

[4] Indeed, Daniels was present at one of The Primary Group's business premises when the FTC entered to preserve evidence. She identified herself to the investigator by her middle name and claimed she was there for "cleaning." *See* Daniels Dep., PX 21 at 41:11-14 (Dkt. 79-1 at 41) [FTC App. 1459]; *see also* PI Hg. Tr., 160:9-164:21 (Dkt. 47 at 160-64) [FTC App. 0929-33].

PrimarySolutionsAssociates.org. PX 01 at 9 ¶ 27, Att. J (Dkts. 5-3 at 13; 5-13) [FTC App. 0088; 0131-32]. She also authorized The Primary Group's agreements with TransUnion Risk and Alternative Data Solutions that enabled the callers to locate and contact consumers; further, she arranged for utility service under the name Allied Consumer Systems. Daniels Dep., PX 21at 42:25-43:25, 92:23-93:9 (Dkts. 79-1 at 42-43; 79-2 at 23-24) [FTC App. 1460-61; 1510-11]; *see also* PX 01 at 10-11 ¶¶ 32-33, Att. N (Dkts. 5-3 at 14-15; 5-17) [FTC App. 0089-90; 0141-49].

Compensation. The Primary Group collected a total of $980,000 from consumers; Daniels drew approximately $6,500 per month directly from the corporate bank account. PI Hg. Tr. 143:4-12 (Dkt. 47 at 143) [FTC App. 0912]; *see also* Daniels Dep., PX 21, 72:24-73:4 (Dkt. 78-5 at 26-27) [FTC App. 1311-12].

C. The FTC's Enforcement Lawsuit

On May 11, 2015, the FTC sued The Primary Group for violating the FTC Act and the FDCPA.[5] Dkt. 1 [FTC App. 0001-18]. The complaint alleged that The Primary Group's debt collection tactics were deceptive acts or practices in

[5] The complaint originally named The Primary Group as a corporate defendant and Daniels and her mother June Fleming as individual defendants. No counsel ever appeared on behalf of The Primary Group. Although the FTC sought entry of a default judgment against the corporation, the Court dismissed this as moot and simply granted summary judgment. Dkt. 112 at 17-19 [FTC App. 1641-43]. The Primary Group has not appealed. The FTC dismissed the case against Fleming before summary judgment was entered. Dkt. 108 [FTC App. 1615-16].

violation of the FTC Act. The complaint also charged that these tactics violated the FDCPA because The Primary Group contacted third parties without the consumers' consent, made false and misleading representations, and failed to provide statutorily-required notices. Violations of the FDCPA are deemed violations of the FTC Act. 15 U.S.C. § 1692*l*(a).

1. The Temporary Restraining Order

On the day it filed the complaint, the FTC also filed an *ex parte* motion for entry of a temporary restraining order (TRO), a freeze of defendants' assets, and a grant of immediate access to their business premises. Dkts. 5, 5-1 [FTC App. 0019-62]. The court granted the TRO and asset freeze that day, ordered a hearing on June 4, 2015 (24 days later), and set an expiration date for the TRO of June 10, 2015 (30 days later). Dkt. 8 at 27, 29 [FTC App. 0312, 0314]. In granting a TRO that lasted 30 days, the court did not comply with Fed. R. Civ. P. 65(b)(2), which limits a TRO to 14 days "unless before that time, the court, for good cause, extends it for a like period or the adverse party consents to an extension."

Daniels challenged the TRO, in part on the ground that it expired of its own force after 14 days. *See* Dkts. 16; 17; 23 [FTC App. 0345-75; 0376-94; 0446-64]. In response, the FTC asked the court to extend the TRO in light of evidence showing that Daniels had attempted to withdraw money from a frozen account and was hiding from the FTC's process server. Dkt. 22 at 2-3 [FTC App. 0398-99].

The FTC asked the court to extend the TRO to June 10, 2015. The court ordered that, under Rule 65(b)(2), the TRO had expired on May 26, 2015, 14 days after its entry. Dkt. 21 [FTC App. 0395-96]. It agreed with the FTC, however, there was good cause to reinstate the TRO and set an expiration date of June 8, 2015—the 28th day after the original entry of the TRO, the maximum period allowed by Rule 65(b)(2). Dkt. 24 at 6-8, 9 [FTC App. 0470-72, 0473].

At a preliminary injunction hearing on June 4, 2015, Daniels, representing herself, appeared, presented witness testimony and cross-examined the FTC's witness. The court entered a preliminary injunction on June 8, 2015. *See* Dkts. 47 (PI Hg. Tr.); 36 (order) [FTC App. 0770-0982; 0716-54].

2. Daniels's Litigation Strategy and Activities

Daniels continued to represent herself throughout the litigation, doing so despite the fact that the court advised her to retain counsel and even offered to unfreeze assets to enable her to pay for a lawyer. *See* PI Hg. Tr. 3:22-4:9, 6:5-6:9 (Dkt. 47 at 3-4, 6) [FTC App. 0772-73, 0775]. The court "urge[d]" her to do so three times at the outset of the preliminary injunction hearing, warning her that "no matter what happens with respect to the . . . injunction, this case is going to continue and it's to your advantage to get represented," particularly because an attorney could "file some limiting motions [and] seek relief from any injunction

that is entered." *Id.*, 3:22-4:3, 5:25-6:6; 7:5-7:7 (Dkt. 47 at 3-4; 5-6; 7) [FTC App. 0772-76]; *see also* Dkt. 30 at 4 [FTC App. 0715].

As discovery began, Daniels largely ignored and avoided the process. Although she filed an Answer and Counterclaim (*see* Dkt. 39 [FTC App. 0755-57]), she did not confer with the FTC to develop a Preliminary Report and Discovery Plan. Dkt 44-1 at 1 n.1 [FTC App. 0760-61]. Daniels propounded no requests of her own during the discovery period, and she refused to respond to the FTC's requests.

The FTC moved to compel. Dkt. 63 [FTC App. 1011-34]. In response, Daniels's purported justification for not engaging in discovery was that she suffered from a number of medical ailments: a transient ischemic attack (a "warning stroke" with stroke-like symptoms but no brain damage) for which she was briefly hospitalized, autoimmune disorders, iritis, myasthenia gravis, and post-traumatic stress disorder. *See, e.g.*, Dkt. 65 at 1-2 [FTC App. 1038-39].

The court granted the FTC's motion. Dkt. 66 [FTC App. 1050-61]. Addressing the purported medical issues, the court directed Daniels to participate in discovery unless she filed

> a motion to stay these requirements with supporting documentation from a Georgia licensed medical professional that provides a medical basis for the inability to presently comply with any of these mandates. The motion to stay must also specify a date by which the Defendant (1) will be medically able to comply with this Order and to respond to

> Plaintiff's discovery requests, and (2) will be available to be deposed by Plaintiff.

Dkt. 64 at 2 [FTC App. 1036].

In the wake of that order, Daniels filed multiple pleadings alleging that her medical conditions affected her ability to litigate the case, but none of them contained a compliant doctor's statement or a date by which Daniels could resume. *See*, *e.g.*, Dkts. 69; 70; 83; 84 (Daniels's filings) [FTC App. 1062-68; 1069-78; 1556-59; 1560-69]; Dkts. 74 at 18; 89 at 9-11, 14 (court's rulings) [FTC App. 1186; 1578-80, 1583].[6] Despite the district court's offer to unfreeze assets that would have permitted her to retain counsel, Daniels never did so.

Following the court's order to compel, Daniels appeared for a deposition on October 14, 2015. In order to accommodate Daniels's claims of fatigue and vision problems, FTC staff agreed to limit the deposition to four hours, to take breaks as needed, and to help Daniels read the exhibits. Daniels Dep. 4:10-5:21 (Dkt. 79-1 at 4-5) [FTC App. 1422-23].

Notwithstanding her medical issues, Daniels proved to be an active and relatively sophisticated *pro se* litigant. She filed multiple pleadings substantively attacking the FTC's case. She challenged her individual liability, citing authorities

[6] Over the course of the case, Daniels's asserted medical pathologies continued to multiply, although she never produced a doctor's certification consistent with the court's requirement. *See* Dkt. 84 at 2, 9 (claiming acute renal failure, diabetes mellitus, fever, face weakness, weakness in upper extremities, myopathy, and back pain and weakness) [FTC App. 1561, 1568].

ranging from the FTC's Operating Manual to a district court order in *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564 (7th Cir. 1989). *See* Dkt. 71 at 1-5 [FTC App. 1079-83]. She also kept up a steady motions practice, filing four in one day: (1) a motion to compel[7] (Dkt. 81); (2) an emergency motion for a hearing to impeach an FTC investigator (Dkt. 82); (3) a motion to stay the proceedings to enable Daniels to depose the FTC's investigator (Dkt. 83); and (4) a motion to stay on the grounds that her medical conditions prevented her from defending herself (Dkt. 84). [FTC App. 1549-51; 1552-55; 1556-59; 1560-69].

Daniels litigated not only in the district court, but in several courts of appeals as well. She filed a mandamus petition with this Court regarding the court's orders reinstating the TRO. *See* Case No. 15-12395 [FTC App. 1793-94]. She filed a separate appeal in the Federal Circuit of the district court's order granting the preliminary injunction. That court transferred the matter to this Court. *See* Cases No. 15-1820 (Fed. Cir.), 15-13947 (11th Cir.); Dkt. 58 [FTC App. 1795-97; 1007-10]. Daniels filed yet a third appeal challenging the district court's extension of the preliminary injunction and its denial of several of her motions. Case No. 16-10194 [FTC App. 1798-1800]; *see also* Dkts. 89; 91 [FTC App. 1570-

[7] This motion, filed after discovery closed, sought to have the FTC or the court respond to certain interrogatories, such as "Is Gail Daniels the majority stockholder of the primary group [sic]?" Dkt. 81 at 2 [FTC App. 1550]. The court denied this motion on the grounds that it was untimely and also largely sought information available to Daniels herself. *See* Dkt. 89 at 11-13 [FTC App. 1580-82].

84; 1585-90]. All of these appeals were dismissed for want of prosecution. The present appeal is Daniels's fourth.

3. Daniels's Motions Before Summary Judgment

Discovery closed on November 15, 2015 (after having been extended at Daniels's request), *see* Dkt. 66 at 8 [FTC App. 1057], and the FTC filed its summary judgment motion and supporting documentation, including a statement of undisputed material facts, on November 24, 2015. Dkts. 78 – 78-13 [FTC App. 1189-1416]. Despite receiving additional time from the court, Daniels filed no opposition and did not dispute the FTC's material facts. Instead, on November 30, 2015, Daniels filed the four concurrent motions described above (Dkts. 81-84).

Separately, Daniels asked for a hearing, which the court granted on December 16, 2015. She reasserted her medical conditions, claiming they affected her ability to proceed. *See* Dkt. 123 at 5:16-6:13 [FTC App. 1686-87]. The court responded that it had reviewed Daniels's submissions but that none of the medical records established that her conditions prevented her from litigating or identified a date when she could resume litigation, as required by the court's earlier order.[8]

[8] Daniels misunderstood the court's remarks and apparently believed the court was telling her it had not received some of her submissions, when in fact the court stated that the submissions were insufficient. This led the court to correct the record: "Ms. Daniels, you're missing what I'm saying . . . . I have received what you've been filing, but what you filed does not justify the Court entering an order that says that you're relieved from obligations of participating in this case." Dkt. 123 at 30:7-13 [FTC App. 1711].

See id. at 10:7-12:20 [FTC App. 1691-93]. Nonetheless, the court granted Daniels an extension until January 22, 2016, to respond to the FTC's summary judgment motion. *Id.* at 25:4-20 [FTC App. 1706].

By order dated December 18, 2015, the court formalized the extension, thus granting Daniels's request for relief in part, but otherwise denying her four concurrent motions. Dkt. 89 [FTC App. 1570-84]. In so doing, the court addressed Daniels's primary support for her medical claims: (1) a letter from Dr. Ajit Nemi stating that Daniels suffered from iritis that "may cause difficulty reading or typing for an extended period of time," *see* Dkt. 89 at 6 [FTC App. 1575], and (2) a letter from Dr. Mary Cox stating that Daniels has chronic shortness of breath and becomes winded after long monologues. *Id.* at 8 [FTC App. 1577]. The court found that neither of these letters established that Daniels was unable to participate in the litigation and that neither constituted "independent medical evidence that her condition prevents her from responding to the FTC's motions or this Court's Orders." *Id.* at 6, 8, 10 [FTC App. 1575, 1577, 1579].

Daniels again chose not to respond to the FTC's summary judgment motion. Instead, on January 14, 2016, she filed a motion for the court to correct its earlier ruling on the four concurrent motions based on letters from physicians that Daniels mistakenly believed the court did not have. Dkt. 92 [FTC App. 1591-98]. This motion to correct, however, attached the same letters from Drs. Nemi and Cox the

court had previously reviewed and rejected as insufficient. *Compare* Dkt. 92 at 3-4 [FTC App. 1593-94] *with* Dkt. 89 at 6, 8 [FTC App. 1575, 1577].[9]

Shortly after that, on January 25, 2016, Daniels filed yet another motion, this time asking the court to stay the proceedings and to recuse itself. In addition to yet another copy of the letter from Dr. Nemi, Daniels attached two additional letters from medical professionals Dr. C. Dirk Williams and Dr. R. Ahmad. These letters stated that, due to depression and reported short-term memory difficulties, Daniels was unable to appear in court. Dkt. 100 at 4-5 [FTC App. 1602-03]. Neither letter provided additional details nor stated the date that Daniels would be able to resume litigation, as the court had required.

On February 12, 2016, the court denied the motion. Noting that Daniels had previously filed a motion for recusal, the court again ruled that Daniels had not established that recusal was warranted under 28 U.S.C. § 144. Dkt. 104 at 2 [FTC App. 1609]. The court did not address the additional letters from Drs. Williams and Ahmad.

[9] During the December 16, 2015 hearing, Daniels expressed concern that the court had not received a letter from a "Dr. Linhart" that she claimed supported her position. *See* Dkt. 123 at 13:21-14:20; Dkt. 89 at 6 n.1 [FTC App. 1694-95; 1575]. In her later motion to correct, Dkt. 92 at 1 [FTC App. 1591], Daniels stated that she was attaching that letter, but there is no such letter provided. In a subsequent hearing, Daniels revealed that in fact she was not being treated by Dr. Linhart. Dkt. 124 at 28:17-18 [FTC App. 1768].

Daniels then requested another hearing, which the court granted on February 22, 2016. She again argued that her medical conditions should excuse her from participating and also implied that she had evidence to rebut the FTC's case. *See* Dkt. 124 at 6:3-7:24, 20:1-25 [FTC App. 1746-47, 1760]. In the discussions with Daniels, the court addressed the letters from Dr. Williams and Dr. Ahmad, and found that neither provided the information the court requested to support a stay (a finding it formalized in a subsequent order). Dkt. 124 at 32:2-18; Dkt. 106 at 2-3 [FTC App. 1772; 1612-13]. The court nonetheless gave Daniels an additional two weeks to respond to the FTC's motion for summary judgment. Dkt. 124 at 32:22-33:11; Dkt. 106 at 4 [FTC App. 1772-73; 1614]. Daniels again chose not to respond.

4. Grant Of Summary Judgment

On May 19, 2016, the court granted summary judgment to the FTC. *See* Dkt. 112 [FTC App. 1625-76] [hereinafter "Summary Judgment Order"].

The court first reviewed the procedural history of the case and resolved a number of pending motions. It began by noting that Daniels had elected to proceed *pro se* despite the court's willingness to release funds from the asset freeze to hire counsel and its warnings about the "potential negative ramifications" of representing herself. *Id.* at 4 [FTC App. 1628].

The court then described Daniels's refusal to participate in or respond to discovery and her myriad filings invoking her medical conditions as an excuse. The court observed that it had required her to make specific showings before it would excuse her from responding, yet none of Daniels's multiple notices satisfied the conditions. *See, e.g.*, *id.* at 9-13 [FTC App. 1633-1637]. The court also observed that at the same time she pleaded medical disability as to discovery, Daniels continued to litigate actively on other matters. *Id.* at 12-13, 15 [FTC App. 1636-37, 1639].

The court next addressed Daniels's requests for a stay of the proceedings and to re-open discovery of the FTC's investigator (Dkt. 92). For the same reasons it discussed earlier, the court found no medical basis for a stay. And in light of the "numerous opportunities" it had provided for Daniels to serve discovery, it denied the discovery request as well. Summary Judgment Order at 19 [FTC App. 1643].

The court turned then to the FTC's motion for summary judgment. The court viewed the evidence in the light most favorable to Daniels, the non-moving party, and stated that it was drawing all inferences in her favor. *Id*. at 20 n.9 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1270 (11th Cir. 2013)) [FTC App. 1644]. But the court also accepted "as admitted those facts in the [FTC's] statement of material facts that have not been

specifically controverted," as Daniels had declined numerous opportunities to dispute these facts. Summary Judgment Order at 20 n.9 (citing LR 56.1B(2), NDGa.) [FTC App. 1644]. The admitted facts included:

1. Daniels incorporated and established The Primary Group.

2. Daniels held herself out as holding various officer positions with The Primary Group, including Chief Financial Officer and Secretary, and in applying for bank accounts, Manager, Vice President, and Treasurer. Further, she considered herself to be President.

3. Daniels controlled the finances of the organization and withdrew $6,500 monthly for her compensation.

4. Daniels was involved in The Primary Group's finances, had hiring and firing authority, and was kept apprised of problems with the business.

5. The revenues of The Primary Group since 2012 totaled $980,000, with no evidence of any refunds.

6. The Primary Group's debt collectors used scripts in making calls to consumers.

7. None of the scripts or the recordings of any calls included the callers identifying themselves as debt collectors.

8. Consumer declarations provided by the FTC as well as the scripts themselves showed multiple false and deceptive practices by debt collectors for

The Primary Group. These debt collectors falsely presented themselves as agents, inspectors, investigators, and process servers. They misrepresented that the consumers committed a crime or faced pending legal action and that the potential consequences of failing to pay a debt included civil litigation and criminal prosecution. They falsely threatened to have consumers' wages garnished or their property seized. They improperly contacted third parties, including family members, supervisors, and co-workers in an attempt to pressure consumers to pay off debts. Finally, they failed to provide required disclosures under the FDCPA, including a validation notice that enabled consumers to obtain more information about the debt.

9. These debt collectors were trained in and presented with scripts enabling them to rebut inquiries from consumers. These scripts, too, contained misrepresentations about pending legal proceedings.

10. The Primary Group never filed a lawsuit against any consumer or had a reasonable basis for claiming it would do so.

11. The Primary Group never provided consumers with written information describing procedures by which consumers could dispute purported debts. *See generally* Summary Judgment Order at 20-26 [FTC App. 1644-50].

That "overwhelming and uncontroverted evidence" established "as a matter of law" that Daniels, through The Primary Group, "made material false and

deceptive representations likely to mislead consumers about the nature of the debts allegedly owed to creditors and failed to provide consumers with disclosures required under the FDCPA" in violation of both the FTC Act and FDCPA. *Id.* at 30 [FTC App. 1654]. The FTC Act prohibits unfair or deceptive acts and practices. 15 U.S.C. § 45. The FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt" and deems such conduct to be a violation of the FTC Act. 15 U.S.C. §§ 1692e, 1692*l*(a).

The court permanently enjoined Daniels and The Primary Group from engaging in debt collection activities or making certain specified misrepresentations. Summary Judgment Order at 38-41 [FTC App. 1662-65]. It also ordered them to disgorge $980,000, the amount The Primary Group had collected from consumers. *Id.* at 32-33, 43 (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) and *FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013)) [FTC App. 1656-57, 1667].

Daniels now appeals the grant of summary judgment.

SUMMARY OF ARGUMENT

Before this Court, Gail Daniels raises a number of legal and procedural challenges to the district court's award of summary judgment. Before the district court, however, Daniels elected not to rebut the FTC's statement of material facts.

The court below thus correctly deemed all of these facts admitted. They establish conclusively and as a matter of law that the court properly held Daniels individually liable for the false and misleading debt collection practices of The Primary Group, and further, properly awarded equitable monetary relief in the amount of revenue that Daniels herself admitted receiving.

Daniels's failure to respond to the FTC's statement of facts is not excused by her purported health ailments. The district court established two conditions for Daniels to satisfy before it would stay her response to the FTC's motion for summary judgment, but she failed to satisfy those conditions. Even so, the court repeatedly granted her additional time to respond to the FTC's dispositive motion. Moreover, if Daniels truly was unable to litigate the case properly (which is doubtful in light of the multiple motions she filed throughout the proceeding), she should have retained a lawyer, as the court repeatedly admonished her to do.

The district court properly held Daniels individually liable for the actions of The Primary Group, after it found undisputed facts establishing that Daniels founded and controlled The Primary Group, that Daniels controlled and benefitted from the company's finances and bank accounts, and that she had knowledge of the deceptive debt practices based on her day-to-day involvement in the scheme.

Daniels's challenge to the district court's issuance of the TRO is not justiciable. Daniels has already appealed from that order, and the appeals were

dismissed with prejudice. And in any event, the TRO expired long ago, and there is nothing left for this Court to consider.

STANDARD OF REVIEW

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

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

The Court reviews a district court's resolution of a motion to stay for abuse of discretion, a "highly deferential" standard. *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir. 1982); *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 627 (6th Cir. 2014).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR THE FTC.

The record of this case leaves no doubt that there was "no genuine dispute as to any material fact" and that the FTC was "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Indeed, by failing to respond to the FTC's statement

of undisputed facts, Daniels is deemed under the Local Rules to have admitted them. Those facts amply support the court's entry of judgment against Daniels.

A. By Failing To Respond To The FTC's Statement of Facts, Daniels Admitted Them, And Her Failure Is Not Excused By Her Health.

Despite multiple chances to respond to the FTC's statement of uncontested facts, Daniels did not do so. The district court thus correctly found that the facts set forth by the FTC were undisputed. A party opposing summary judgment may demonstrate the existence of a factual dispute by "citing to particular parts of materials in the record," such as depositions, documents, affidavits and interrogatory answers. Fed. R. Civ. P. 56(c)(1)(A). If a party "fails to properly address another party's assertion of fact as required by Rule 56(c)," the court may "consider the fact undisputed for the purposes of the motion." Fed. R. Civ. P. 56(e)(2). Rooted in the Federal Rule, Northern District of Georgia Local Rule 56.1 thus requires a party opposing summary judgment to respond point-by-point to the movant's statement of undisputed facts and directs the court to "deem each of the movant's facts as admitted" if the opposing party fails to respond to it. LR 56.1B(2)(a)(2), NDGa.; *see Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008).

Daniels did not comply with Local Rule 56.1, and she does not argue that the district court misapplied the rule. She simply elected not to file any response at

all. Because the FTC's factual assertions in its Rule 56.1 statement were amply supported by the materials it submitted, the district court properly found those facts undisputed and granted summary judgment to the FTC.

Daniels's failure to contest the FTC's statement of facts is not excused by her purported medical conditions. *See* Br. 4, 16-18, 21, 26. To begin with, the district court warned her at the outset of the hazards of representing herself rather than hiring an attorney; the court even offered to unfreeze assets sufficient to allow her to retain counsel. Dkt. 30 at 3-4; Dkt. 47 at 3:22-4:9, 6:5-9, 9:1-6; Dkt. 74 at 3 n.2 [FTC App. 0714-15; 0772-73, 0775, 0778; 1171]. She nevertheless declined the offer (although throughout the case, Daniels indicated that she consulted with various lawyers, *see* Dkt. 71 at 1; Dkt. 100 at 1; Dkt. 123 at 45:23-46:13; Dkt. 124 at 4:8-5:5 [FTC App. 1079; 1599; 1726-27; 1744-45]). Having chosen to reject the court's offer and to serve as her own lawyer despite the court's warnings, Daniels cannot be exempted from following rules applicable to all parties.

She has even less excuse given the court's multiple attempts to accommodate her. It gave her several opportunities to respond to the FTC's motion and several extensions of time totaling more than two months.[10] The court

[10] The FTC filed its motion on November 24, 2015, and after multiple extensions, the court eventually required Daniels to respond by March 7, 2016, 83 days later instead of the 21 days allowed by Local Rules 7.1 and 56.1. LR 7.1B, 56.1A, NDGa.

also offered to stay her response to the summary judgment motion to accommodate her medical conditions so long as she fulfilled two conditions: first, that she document the conditions with a doctor's letter; and second, that the letter provide an expected date by which she would be able to respond. Dkt. 64 at 2 [FTC App. 1036]. Daniels never satisfied both conditions.

Daniels's request to stay the summary judgment phase of the case was really a request for an open-ended stay of the entire proceeding. The district court had no obligation to grant such relief and it properly exercised its discretion to move the case forward. The decision was all the more reasonable in light of Daniels's voluntary choice not to hire counsel. Deciding whether to stay a case involves "the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55; *see FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 626-27 (6th Cir. 2014). The court properly exercised its judgment here. In similar circumstances, courts have found that medical conditions justify equitable tolling of deadlines only when they prevent "rational thought or deliberate decision making" or render the party "unable to function [in] society." *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005) (internal citation and quotation marks omitted).

Further, despite her purported inability to respond to the Commission's motion for summary judgement, Daniels was a frequent and active litigator

throughout the case, filing an answer and counterclaim (Dkt. 39), at least six motions in the case seeking recusal, stay, extensions, lifting of the asset freeze and TRO, and sanctions (Dkts. 16; 17; 23; 25; 81; 82). Daniels filed at least seven separate pleadings describing her medical conditions (Dkts. 65; 69; 70; 83; 84; 92; 100). She also filed three appeals in two different appellate courts. *See* Statement of the Case, C.2. *supra*. And she participated in three hearings, including the preliminary injunction hearing, during which she argued the case, introduced evidence, cross-examined a witness, and submitted to cross-examination herself. *See generally* Dkt. 47 [FTC App. 0770-0982]. Daniels could have devoted that energy to responding to the FTC's motion for summary judgment. As the district court noted, "when Daniels has chosen to do so, she has been able throughout the past eight months to file her own motions in both this Court and in the Eleventh Circuit Court of Appeals." Dkt. 89 at 10 n.4 [FTC App. 1579]; *see also* Summary Judgment Order at 8 n.6 [FTC App. 1632-33].

B. The Undisputed Facts Show That Daniels Is Individually Liable For The Primary Group's Violations.

Daniels does not contest the district court's conclusion that The Primary Group violated the FTC Act and the FDCPA. She claims only that the district court improperly held her liable for her company's violations. Br. 7, 23-25. The district court's decision was correct.

An individual is liable for corporate violations of the FTC Act if she "participated directly in the deceptive practices or acts *or* had authority to control them" and had knowledge of the practices. *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014) (citations, internal quotation marks, and brackets omitted; emphasis added); *see also Gem Merch.*, 87 F.3d at 470; *Amy Travel*, 875 F.2d at 573-74. Knowledge in this context means "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Amy Travel*, 875 F.2d at 574 (quoting *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985)). A person's "degree of participation in business affairs is probative of knowledge." *Amy Travel*, 875 F.2d at 574; *see also FTC v. Sharp*, 782 F. Supp. 1445, 1450 (D. Nev. 1991).

The undisputed facts show that Daniels met the test for individual monetary liability. To start, she controlled The Primary Group and its activities. The company would not have existed but for Daniels, who established it and authorized all the necessary corporate filings and applications. In applying for corporate bank accounts, Daniels represented herself as holding multiple corporate offices, including Manager, Vice President, and Treasurer; and she considered herself to be President as well. Summary Judgment Order at 20-21 (Findings of Fact Nos. 1-4) [FTC App. 1644-45]. Holding herself out as a corporate officer was sufficient in

itself to constitute control for purposes of liability. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) ("assumption of the role of president" and "authority to sign documents on behalf of the corporation" demonstrated control); *see also FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005) (officer and director status established authority and control); *Gem Merch.*, 87 F.3d at 467-68, 470 (corporate officer with day-to-day control and awareness of practices is individually liable).

Furthermore, Daniels not only opened the corporate bank accounts, she controlled them and used them to pay her own salary. These activities also demonstrate Daniels's control. Moreover, evidence of her control over The Primary Group did not stop at corporate titles and financial authority. Daniels was "directly involved in the financial aspects of the business," "was kept apprised of problems with the business," "monitor[ed] the actions of her employees," and held "the power to hire and fire them." Summary Judgment Order at 21 (Finding of Fact No. 6) [FTC App. 1645]. Her day-to-day control of the business extended to workplace policies on cell phone usage, installation of security cameras, and fielding calls from the Better Business Bureau. PI Hg. Tr. 144:8-148:3, 148:4-6, 150:1-5 (Dkt. 47 at 144-48, 150) [FTC App. 0913-17, 0919]. "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*, 875 F.2d at 573.

Daniels's level of involvement in the business operations likewise demonstrates at least her "awareness of a high probability of fraud along with an intentional avoidance of the truth." *Amy Travel*, 875 F.2d at 574 (quoting *Kitco*, 612 F. Supp. at 1292); *Sharp*, 782 F. Supp. at 1450 ("deep[]" involvement as corporate officer over a period of years provided "strong evidence" of awareness). She started the company and controlled the bank accounts through which nearly one million dollars flowed, and she withdrew $6,500 each month for herself. As the Seventh Circuit held in *Amy Travel*, such deep involvement in financial affairs establishes liability because "one may not enjoy the benefits of fraudulent activity and then insulate one's self from liability by contending that one did not participate directly in the fraudulent practices." 875 F.2d at 574 (citation omitted); *see also World Media Brokers*, 415 F.3d at 765-66; *Gem Merch.*, 87 F.3d at 467-68, 470.

Further, Daniels surely knew the activities that generated such large sums. She fielded calls from the Better Business Bureau, which would have concerned consumer complaints about the nature of her business. And she kept tight control over office practices—to the point of surveilling her employees—and thus could hardly have avoided knowing what went on there. This "degree of participation in business affairs" is highly probative of her knowledge. *See Amy Travel* at 574;

Sharp, 782 F. Supp. at 1450. Indeed, Daniels was in the office when the FTC personnel searched the operation, and she lied to the agents about her identity and role. Such consciousness of guilt demonstrates, at the least, "an awareness of a high probability of fraud along with an intentional avoidance of the truth." *See Amy Travel*, 875 F.2d at 574; *see also FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010) (finding that awareness of "myriad red flags" supports finding of liability).

Both of Daniels's responses to the court's finding of individual liability are meritless. First, she claims that the FTC's attorney misrepresented the standard for individual monetary liability before the court, falsely claiming that the FTC need show only control and not knowledge. Br. 7, 23-25 (citing Daniels's App. at 33). Even if arguments made by FTC counsel could somehow justify reversal of the court's well-considered decision, Daniels has her facts wrong. The transcript confirms that the FTC attorney correctly argued that the FTC needed to show "constructive knowledge." On that standard, she advised the court, "[e]ven if the defendants could somehow show they didn't know about the unlawful practices which permeated their business model, . . . they should have known what was

going on in the call center." Daniels App. at 33; *see also* PI Hg. Tr. 33:20-25 (Dkt. 47 at 33) [FTC App. 0802].[11]

Second, Daniels claims that testimony from her employee Cecil Presley at the preliminary injunction hearing rebuts liability. Br. 2, 5, 10. In response to her questioning, Presley stated that Daniels did not handle payroll "[t]o [his] knowledge" (PI Hg. Tr. 104:17-18), that Daniels was not in the office on a daily basis and came by rarely (PI Hg. Tr. 66:20-22; 100:19-25), and that Daniels did not write one of the scripts (PI Hg. Tr. 95:3-4). *See* Dkt. 47 at 66, 95, 100, 104 [FTC App. 0835, 0864, 0869, 0873]. Presley also testified that he had authority to fire employees. PI Hg. Tr. 67:5-23 (Dkt. 47 at 67) [FTC App. 0836]. Finally, Daniels argues that Presley testified she did not know or authorize the use of text messages to contact consumers. Br. 5; *see also* PI Hg. Tr. at 95:23-97:14 (Dkt. 47 at 95-97) [FTC App. 0864-66].

Even if this testimony were sufficient to rebut Daniels's actual control and thus raise a factual question, Daniels did not raise it in opposition to the FTC's motion for summary judgment. The district court thus properly did not consider it (and this Court should not consider it now) by virtue of Fed. R. Civ. P. 56 and Local Rule 56.1B(2). But the testimony does not raise a material dispute in any

[11] Daniels mistakenly relies on *FTC v. Ross*, 743 F.3d 886, 892 (4th Cir. 2014). Br. 24-25. *Ross* applied the same control standard as *Amy Travel*; this Court likewise applied that standard in *Gem Merchandising* and *IAB Marketing*.

event. Facts conclusively establishing Daniels's control, participation, and knowledge are undisputed and came from Daniels's own sworn testimony during the preliminary injunction hearing and her deposition. Daniels admitted that she created The Primary Group, that she considered herself President, that she had hiring and firing authority, that she was kept apprised of day-to-day issues, that she made changes to the business, and that she was put on notice of concerns from the Better Business Bureau. As described above, those facts show her control of the business and knowledge of its operations. The Presley testimony does not dispute them.

C. The District Court Properly Imposed Equitable Monetary Relief.

Daniels argues throughout her brief that the district court improperly imposed equitable monetary relief because none of the FTC's consumer witnesses testified that they personally paid any money to The Primary Group. *See* Br. 4-5, 11, 14-15, 18-19, 20-21, 26-27. The claim is a red herring; Daniels's own testimony shows that The Primary Group earned $980,000 in revenue. The district court needed no additional evidence.

A district court may award equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), if its calculation of harm to consumers "reasonably approximated" the defendant's unjust gains, after which the burden shifts to the defendant to show this figure is inaccurate. *FTC v. Bronson Partners,*

LLC, 654 F.3d 359, 368 (2d Cir. 2011); *see also Wash. Data Res.*, 704 F.3d at 1326 (citing *Gem Merch.*, 87 F.3d at 469). As this Court has held, "the amount of net revenue (gross receipts minus refunds), rather than the amount of profit (net revenue minus expenses), is the correct measure of unjust gains under section 13(b)." *Wash. Data Res.*, 704 F.3d at 1327 (citing *Bronson Partners*, 654 F.3d at 375). The Court's reasoning was that an alternative calculation providing for disgorgement of a defendant's profits would impermissibly allow a wrongdoer to deduct the costs of the illegal conduct. *Wash. Data Res.*, 704 F.3d at 1327.

The district court properly used The Primary Group's net revenue as an approximation of the harm it caused to consumers. Summary Judgment Order at 32-33 [FTC App. 1656-57]. Daniels testified that The Primary Group received $980,000 in revenue from consumers. Daniels Dep. 72:24-73:4 (Dkt. 78-5 at 26-27) [FTC App. 1311-12]. She put forth no evidence of consumer refunds. *Id.* at 71:15-22 (Dkt. 78-5 at 25) [FTC App. 1310]. On that record, the court properly ordered the $980,000 in equitable monetary relief.

Daniels is wrong that the FTC must prove actual reliance by individual consumers to obtain equitable monetary relief. This Court and others have rejected that theory. *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) (citing *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993)). For the same reason,

the FTC was not required to produce a list or spreadsheet of individually affected debtors, as Daniels incorrectly asserts. Br. 15.

Daniels also appears to argue that monetary relief was inappropriate because the FTC lacked evidence of consumer harm. Br. 4, 9-11, 26-27. It did not. Facts in the record undisputed by Daniels showed the pervasive unlawful behavior in which Daniels's company engaged. Consumers were harassed, threatened, and misled. So were their friends, families, and employers. And Daniels's company received $980,000 as the result of that illegal conduct. Daniels's claim to the contrary relies on the FTC's representations at the preliminary injunction hearing, before the agency had gathered its evidence and where the question was whether the agency could show a "likelihood" of success on the merits. PI Hg. Tr. 3:2-4 (Dkt. 47 at 3) [FTC App. 0772]. In that context, discussions of what the FTC's evidence was "likely" to show were proper. The FTC subsequently amassed evidence amply showing harm to consumers.

II. DANIELS MAY NOT CHALLENGE THE TEMPORARY RESTRAINING ORDER.

Daniels argues repeatedly that the district court erred in granting, dismissing, and then reinstating the TRO. *See* Br. 3-4, 11-13, 20, 25-26. But she may not challenge the TRO for two reasons.

First, it is long established "that as a general rule a temporary restraining order is not appealable." *Fernandez-Roque*, 671 F.2d at 429. Moreover, at this

point, the TRO has long since expired, replaced at first by a timely preliminary injunction and then by the final order now before the Court. There is nothing left of the TRO for the Court to review even if it were appealable. And Daniels has identified no harm caused to her by the district court's mistake in the expiration date of the initial TRO or any redress she would receive from a determination that the district court wrongly issued the TRO.

Second, even if the TRO were appealable, any such appeal would be precluded because Daniels has already challenged the preliminary injunction order that succeeded the TRO. She first filed a mandamus petition and then filed a notice of appeal of the preliminary injunction, first to the Federal Circuit and then, upon transfer, to this one. *See* Eleventh Circuit Case Nos. 15-12395; 15-13947 [FTC App. 1793-94; 1795-97]. Daniels did not pursue either of these appeals, and they were dismissed for failure to prosecute. The dismissal is with prejudice and bars Daniels from relitigating any matters regarding the preliminary injunction. *Morro v. City of Birmingham*, 926 F. Supp. 1033, 1036 (N.D. Ala. 1996); *see also Sibley v. Levy*, 203 Fed. App'x 279, 281 (11th Cir. 2006).

In any event, the district court's minor error in setting the TRO's expiration date was harmless. The court quickly corrected the mistake by adjusting and extending the TRO, fully in compliance with Fed. R. Civ. P. 65. *See, e.g., Garcia v. Smith*, 674 F.2d 838, 841 (11th Cir. 1982). The extension was well within the

court's discretion: it determined that Daniels was hiding assets and that the public would be harmed without immediate action. Dkt. 24 at 6-7 [FTC App. 0470-71].

Nor was Daniels prejudiced by the court's actions. Even with the dissolution and reinstatement of the TRO, Daniels was subject to the TRO for a period no longer than the 28 days allowed by Rule 65(b)(2). In addition, Daniels knew of the entry of the initial TRO and was able to file no fewer than *five* motions and pleadings while the TRO was pending, including motions challenging the asset freeze and a motion to dissolve the TRO. *See* Dkts. 16; 17; 23; 25; 29 [FTC App. 0344-75; 0376-94; 0446-64; 0475-91; 0694-0711]. Moreover, she appeared at the hearing, presented testimony, and cross-examined the FTC's witness.

III. DANIELS'S REMAINING CLAIMS LACK MERIT.

Daniels makes a hodgepodge of scattershot claims throughout her brief, including: that she was improperly selected for enforcement even though her company was the subject of fewer consumer complaints than other debt collectors; that the FTC had predetermined the outcome of its investigation of her; that the FTC investigated unfairly and cherrypicked helpful evidence while avoiding mitigating evidence; and that FTC staff did not dismiss her as a defendant for fear of supervisory reprisal. Br. 1-2, 3-9. The claims are baseless.

First, Daniels has never presented any evidence that would support her claims of abuse of prosecutorial discretion. The FTC and its staff are entitled to

"the longstanding presumption of regularity accorded to prosecutorial decisionmaking." *Hartman* v. *Moore*, 547 U.S. 250, 263 (2006). The Court should not "lightly discard" the "presumption that a prosecutor has legitimate grounds for the action he takes." *Id.*

Nothing in the record of this case remotely suggests any impropriety. For instance, it is simply not true that Daniels and her company were not subject to consumer complaints. The evidence showed 137 complaints, many of which echo the conduct uncovered by the FTC. *See* PX 01 at 19-20, ¶¶ 63-69 (Dkt. 5-3 at 23-24) [FTC App. 0098-99]. Even if other companies received more complaints (an assertion not supported by the record), the FTC has discretion to choose its enforcement targets. *See, e.g.*, *Moog v. FTC,* 355 U.S. 411, 413 (1958).

The claim of improperly "cherrypicked" evidence is likewise baseless. In civil litigation, each side puts forth its best evidence to support its claims and defenses. That is why the Rules of Civil Procedure allow discovery. Daniels was free to develop and raise before the district court any evidence supporting her position, which she chose not to do. Even now, she identifies no significant exculpatory evidence.

Daniels claims that the scripts found in her business premises belonged to other businesses, not hers. Br. 20. But many of the scripts instructed callers to identify themselves as "agents" for "Primary Solutions" or otherwise refer to

"Primary Solutions," the trade name that Daniels herself selected for her business. *See* PX 01 at 4 ¶ 15, Att. A at 26 (Dkts. 5-3 at 8; 5-4 at 5) [FTC App. 0083; 0105]; PX 18, Att. C at 30, 37, Att. M at 78-87, Att. T at 137 (Dkts. 28-2 at 31, 38, 79-88; 28-3 at 38) [FTC App. 0541, 0548, 0589-98; 0648]. Daniels provides no explanation for that incriminating fact.[12]

Daniels's other attacks—that the FTC inserted her name into boilerplate complaint without basis and then chose not to dismiss her for fear of supervisory retribution—have no factual support whatsoever. The claims are rebutted in any event by the substantial evidence offered by the FTC of Daniels's deep involvement in a patently unlawful operation. Her "mere assertions to the contrary are not enough to overcome summary judgment." *SEC v. Imperiali, Inc.*, 594 F. App'x 957, 962 (11th Cir. 2014).

[12] Similarly, several of the scripts also contain references to "PSA Investigations," another variation of Daniels's chosen trade name. *See* PX 18, Att. U at 152, Att. V at 155, Att. X at 161 (Dkt. 28-5 at 2, 5, 11) [FTC App. 0663, 0666, 0672].

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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March 15, 2017

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Dated: 3/15/17

CERTIFICATE OF SERVICE

I certify that on March 15, 2017, I caused a copy of the foregoing brief to be served using the CM/ECF electronic case filing system and by FedEx overnight delivery to appellant Gail Daniels at the following address:

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