16-3811, 16-3805

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

FEDERAL CHECK PROCESSING, INC., *et al.*,
Defendants,

and

MARK BRIANDI, and WILLIAM MOSES,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of New York, No. 1:14-cv-122-WMS

FINAL FORM BRIEF OF THE FEDERAL TRADE COMMISSION

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dispute that their employees had used unlawful collection practices, but argued that they were unaware of this wrongdoing and thus could not be held individually liable. They failed, however, to back up their blanket denials with evidence. The district court granted summary judgment for the FTC.

Briandi and Moses filed separate appeals. Moses did not submit a brief. Briandi's brief raises the following issues:

1. Whether the district court properly held Briandi individually liable for the consumer injury caused by his companies' violations.

2. Whether the district court properly set the measure of equitable monetary relief equal to Briandi's companies' total proceeds from the fraudulent scheme.

STATEMENT OF THE CASE

A. Defendants' Unlawful Debt Collection Practices.

Mark Briandi started a debt collection business in 2009 under the corporate name Federal Recoveries, LLC. SOF ¶¶2, 20 (Dkt. 127-2 at 2, 6) [A. 138, 142].[1] He and Moses subsequently created twelve more corporations, all of which existed to further the operation's purpose of collecting consumer debts (principally defaulted payday loans), which they purchased from third-party debt brokers for

[1] "SOF" refers to the FTC's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried. "Dkt." refers to entries on the district court docket. "A." refers to the joint appendix.

pennies on the dollar. SOF ¶¶2, 8, 14 (Dkt. 127-2 at 2-5) [A. 138-41]. From the start, defendants 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. Their

The FDCPA expressly prohibits debt collectors from falsely representing or implying "that the consumer committed any crime" or "threat[ening] to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5), (7).[2] Defendants' collectors nevertheless accused consumers of criminal violations and threatened that legal action was pending or imminent, even though these threats lacked any basis. SOF ¶¶89-97 (Dkt. 127-2 at 18-25) [A. 154-61]. One script (authored by Moses) directed the callers to tell consumers that they were accused of "intensionally" [*sic*] writing bad checks, and "[t]he party to whom your check bounced is alleging . . . you should be processed." The script instructed the caller to extract payment from the consumer by offering to "accommodate a e ¶SJ0 Tc

that failure to respond to the “pending allegations”

The FTC's evidence confirmed that Briandi's collectors followed these scripts when contacting consumers for payment. Transcripts of recorded calls documented representations that consumers had committed criminal or civil fraud in connection with their debts. PSJX 38 at 799-810 ¶¶5-36 (Dkt. 132-7 at 2-13) [A. 610-21]; *e.g.*, *id*. at 816-17 (Dkt. 132-7 at 19-20) [A. 623-24]; *id*. at 928-32 (Dkt. 132-7 at 131-35) [A. 629-33]; *id*. at 1061-63 (Dkt. 132-7 at 264-66) [A. 640-42]; *id*. at 1076 (Dkt. 132-7 at 279) [A. 643]. Further, multiple consumer declarants reported being threatened with criminal or civil penalties, including arrest, felony charges, or garnishment of wages. PSJX 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (Dkt. 129 at 5-24. 129-1, 129-2, 129-3, 129-4, 129-5, 129-6, 129-7, 129-8, 129-9) [A. 725-97]. Hundreds of consumers complained to the FTC and state agencies about similar threats. PSJX 11 at 80-83 ¶¶64-70 (Dkt. 129-10 at 18-21) [A. 815-18]; *id*. at 307-08 ¶¶14-15 (Dkt. 129-14 at 48-49) [A. 869-70]; PSJX 39 at 1087 ¶31 (Dkt. 132-8 at 9) [A. 652].

Briandi's collection efforts did not stop at the consumers themselves. His collectors also tried to increase the pressure by contacting third parties close to consumers, including their relatives and employers. SOF ¶¶107-115 (Dkt. 127-2 at 26-28) [A. 162-64]. The FDCPA prohibits such practices with only limited exceptions inapplicable here. *See* 15 U.S.C. § 1692c(b); *see also Padilla v. Payco Gen. Am. Credits, Inc.*, 161 F. Supp. 2d 264, 274 (S.D.N.Y. 2001). To tighten the

screws further, one script called for the collector to threaten to "supena [*sic*] the records" of the consumer's employer. PSJX 16 at 504 (Dkt. 130-5 at 51) [A. 895]. Following another script, the collector would tell third parties that there was a "Complaint filed under name and SSN," and the caller needed "to speak to [the debtor] before the complaint is filed." PSJX 16 at 440 (Dkt. No. 130-4 at 42) [A. 891]. Several consumers submitted declarations to the FTC confirming that Briandi's collectors in fact contacted their relatives and employers, often repeatedly, claiming that the consumer had committed "fraud" and was facing legal action. PSJX 4 ¶¶7-8 (Dkt. 129-3 at 3-4) [A. 757-58]; PSJX 5 ¶¶8-10 (Dkt. 129-4 at 3) [A. 761]; PSJX 6 ¶¶12, 15 (Dkt. 129-5 at 4) [A. 766]; PSJX 9 ¶¶11-12, 14-15 (Dkt. 129-8 at 5-6) [A. 787-88]; PSJX 10 ¶7 (Dkt. 129-9 at 3) [A. 795].

All of these threats were empty. Defendants never filed a single lawsuit against a consumer or sought to garnish any consumer's wages, and they lacked any basis for claiming that the original creditor would do so. Nor was any consumer arrested or prosecuted by criminal authorities, as Briandi's callers had threatened. SOF ¶¶91-93, 95, 97 (Dkt. 127-2 at 24-25) [A. 160-61]; PSJX 43 at 1495, Tr.44:2-8 (Dkt. 132-13 at 12) [A. 559]; *id*. at 1505, Tr. 82:7-20 (Dkt. 132-13 at 22) [A. 560].

In addition, even though Section 1692e(2) of the FDCPA prohibits falsely representing "the character, amount, or legal status of any debt," Briandi's

this requirement, the collecting companies failed to provide documentation even when a consumer requested it. SOF ¶¶ 118-121 (Dkt. 127-2 at 28-29) [A. 164-65].

Rather than complying with the statute, Briandi's collectors insisted that consumers first agree to pay before the company would provide documentation of the debt. SOF ¶122 (Dkt. 127-2 at 29-30) [A. 165-66]. For example, when one consumer asked for "a statement in the mail," the collector protested that he did not have time for "going back and forth in the mail," and "it's either . . . get it resolved or process it." PSJX 38 at 825-26 (Dkt. 132-7 at 28-29) [A. 625-26]. When the consumer persisted, asking for email confirmation of the payment demands, the collector ended the call, warning, "We have your place of employment located. Good luck in court." *Id*. at 828 (Dkt. 132-7 at 31) [A. 628]. When another consumer stated that she wanted "to investigate before I do anything," the collector said she could provide "an information letter" but warned that "[t]he balance is due today," and "[i]t will state right on the letter we have to have a confirmation today of your agreement." PSJX 38 at 942-43, 945-46 (Dkt. 132-7 at 145-46, 148-49) [A. 635-36, 638-39]. Defendants' caller told another consumer, "it is not Nationwide Check Processing's policy to send out letters"—adding that if the consumer did not pay by the day's end, "subpoenas would be processed" and the consumer "would be served with legal papers." PSJX 2 ¶¶4-5 (Dkt. 129-1 at 2-3) [A. 746-47]. When the collection companies did send letters to consumers, they

neglected to include information—required by the FDCPA—about how to dispute the purported debt. *See*, *e.g.*, PSJX 41 at 1417-18 (Dkt. 132-11 at 104-05) [A. 549-50].

B. The Roles Of Briandi And Moses.

Documents and information obtained from defendants, confirmed by sworn deposition testimony, showed that Briandi and Moses were the driving force behind the entire business. They started the business in 2009 and were the co-

[A. 357, 383-84]. Briandi was responsible for signing the checks and managing the corporate defendants' banking. Briandi Dep. at 176

C. The Continued Violations After Briandi And Moses Agreed With The State Of New York To Stop Violating The FDCPA.

In 2012, Briandi and Moses learned that New York State's Attorney General, spurred by voluminous consumer complaints, was investigating their operation. PSJX 35 at 781 (Dkt. 132-

collection companies' compliance. PSJX 41 at 1446-49 (Dkt. 132-11 at 133-36) [A. 554-57].

Despite their agreement with the State, Briandi and Moses did not stop their companies' unlawful collection practices. Instead, to evade scrutiny, they formed new corporations and began collecting debts under new names—without disclosing these entities to the Attorney General.[5] Although their collection business was based exclusively in the Buffalo area, Briandi and Moses established mailing addresses for the new entities in Denver, Colorado, and Erie, Pennsylvania. Their companies used these out-of-state addresses in their communications with consumers. To further evade local scrutiny, Briandi and Moses began using phone lines with Denver and Erie area codes to place collection calls. SOF ¶¶65-77 (Dkt. 127-2 at 13-14) [A. 149-50].

D. The FTC's Enforcement Lawsuit.

In February 2014, the FTC sued Briandi, Moses, and their companies for violations of the FTC Act and the FDCPA.[6] Dkt. 1. The district court entered a temporary restraining order granting the FTC access to defendants' business

[5] Briandi refused to answer on Fifth Amendment grounds when asked if they informed the Attorney General about the formation of new debt collection companies. Briandi Dep. at 191-93 (Dkt. 150-1 at 195-97) [A. 386-88]. Moses testified that he did not believe they informed the Attorney General. PSJX 43 at 1493, Tr. 35-36 (Dkt. 132-13 at 10) [A. 558].

[6] The complaint also named Empowered Racing as a relief defendant.

premises. Dkt. 11. When FTC staff entered the premises, it found deceptive scripts at 15 of 26 call center work stations, consumer complaints in both Briandi's and Moses' offices, and a list of criminal and civil penalties for bad checks (useful for threatening consumers) at Briandi's desk on the collection floor. PSJX 39 at 1083-84 & 1087 ¶¶15, 18, 31 (Dkt. 132-8 at 5-6, 9) [A. 648-49, 652]. FTC staff also obtained recordings of collections calls. PSJX 38 at 799-809 ¶¶5-35 (Dkt. 132-7 at 2-12) [A. 610-20]. The FTC's evidence ca

invoked the privilege in response to questions concerning his involvement in training staff, ensuring that consumers received statutorily-required validation letters, disciplining employees for violating the FDCPA, and his conduct with respect to compliance measures required by the AOD. Briandi Dep. at 191-93, 199-205 (Dkt. 150-1 at 195-97, 203-09) [A. 386-88, 394-400]. Moses invoked the privilege with respect to whether he obfuscated the identity and location of his companies following the AOD. PX41 at 1368, 1371 (Dkt. 132-11 at 53, 56) [A. 546-47]. The defendants did not seek discovery from the FTC or third parties.

E. The FTC's Motion For Summary Judgment

After the conclusion of discovery, the FTC filed a motion for summary judgment supported by over 1,500 pages of evidence, including collection scripts found in defendants' call center, transcribed recordings of their collection calls, sworn declarations by consumers, consumer complaints submitted to the FTC and other agencies, and deposition testimony by Briandi, Moses (individually and as a representative of the corporate defendants), and an employee of the business. Dkt. 127-132.

The corporate defendants did not file an opposition to the FTC's motion or respond to the FTC's statement of undisputed facts. *See* R&R 2 [A. 2]. Briandii(t)3r78..006 T

of 165) numbered paragraphs. Dkt. 150. He accompanied his response with a four-paragraph affidavit stating that he "agree[d] with" his attorney's assertions in that filing. Dkt. 150-1 at 2 [A. 193]. Briandi also submitted, for the first time, a response to the FTC's Requests for Admission (served on him seven months earlier). *Id*. at 244-48 [A. 435-39]. Moses cited no evidence in his response to the FTC's statement of facts. Dkt. 145.

F. The District Court's Decision.

The court designated Magistrate Judge Michael J. Roemer to hear and report on dispositive motions. Dkt. 159. On April 13, 2016, Judge Roemer recommended that the court grant the FTC's motion for summary judgment. Dkt. 168 [A. 1-36]. He found that nearly all items in the FTC's statement of facts regarding the corporate defendants' unlawful practices were undisputed. R&R 2 [A. 2]. These undisputed facts established that the corporate defendants operated as a common enterprise owned and directed by Briandi and Moses. *Id*. at 16-18 [A. 16-18].

Judge Roemer found further that the undisputed facts showed that the corporate defendants violated the FDCPA's prohibition of false or misleading representations by: (1) falsely representing or implying government affiliation; (2) deceptively threatening criminal and other legal actions; (3) inflating the amount of debts; and (4) failing to disclose that the communication was from a debt collector. The Judge found that the corporations also violated the FDCPA by

improperly communicating with third parties and by failing to provide consumers with validation of the debt. *Id*. at 18-23 [A. 18-23]. Those undisputed facts also proved that the corporate defendants violated the FTC Act because they made material misrepresentations likely to mislead reasonable consumers. Indeed, the Judge noted, the FTC had identified consumers who were duped by the misrepresentations into paying the corporate defendants. *Id*. at 23-24 [A. 23-24]. Thus, Judge Roemer recommended that summary judgment be granted against the corporate defendants on each count of the complaint. *Id*. at 24 [A. 24].

Judge Roemer also found that undisputed facts established that both Briandi and Moses were individually liable for the corporate violations. With respect to Moses, he found that Moses had the authority to control the corporate defendants and directly participated in their wrongdoing by handling collection calls, approving scripts used by collectors to call consumers, and authoring a deceptive script. The undisputed facts also showed that Moses had knowledge of the corporate defendants' misrepresentations, "aris[ing] from his participation in the corporate defendants' operation, which was permeated with fraud," and by virtue of the AOD. In addition, the Judge found, Moses' failure to respond to the FTC's Requests for Admission operated as an admission that he knew of the corporate defendants' wrongdoing. *Id*. at 24-26 [A. 24-26].

With respect to Briandi, Judge Roemer found that the undisputed facts established that he also was individually liable because he had the authority to control the corporate defendants and had knowledge of their misrepresentations. Although Briandi disputed having actual knowledge of the corporate defendants' misrepresentations, the Judge found that the uncontroverted facts established that in light of the AOD, Briandi was aware of a high probability of fraud within the corporate defendants' operation, but intentionally avoided learning of continued violations. The Judge also found that, by failing to respond timely to the FTC's Requests for Admission, Briandi admitted his knowledge of the corporate defendants' wrongdoing. But even in the absence of this admission, the Judge noted, he would still recommend summary judgment against Briandi. *Id*. at 26-29 [A. 26-29].

Judge Roemer recommended both that defendants be permanently enjoined from engaging in debt collection activities and that the district court award equitable monetary relief to remedy consumer injury. *Id*. at 31, 34 [A. 31, 34]. With regard to consumer injury, the Judge noted that the FTC was "not required to prove each individual consumer's reliance," but was "entitled to a presumption of reliance," if (1) the defendants made material misrepresentations of the kind relied on by reasonable persons; (2) the misrepresentations were "widely disseminated"; and (3) consumers actually paid the defendants. *Id*. at 32 [A. 32] (citing *FTC v.*

individual liability can be satisfied by an "awareness of a high probability of fraud along with an intentional avoidance of the truth." *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989). Here, Briandi does not—and cannot—dispute

so long as the declarant is competent to testify, and the declaration's content is based on his or her personal knowledge and would be admissible at trial. The proffered declarations met those conditions, and they therefore were plainly appropriate to consider on a motion for summary judgment. Further, as numerous courts have recognized, the proffered consumer complaints are admissible under Federal Rule of Evidence 807, the "residual" hearsay exception.

Briandi is flatly wrong m o, æa(t6(d8.3(4(stTc 0.n)ic)h)8.3(e0 o)8.3(uTc 0.00t-2.291 TD

pleadings, the discovery and disclosure materials on file, and any affidavits show 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Brown v. Eli Lilly & Co*., 654 F.3d 347, 358 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). Where the moving party demonstrates the absence of a genuine issue of material fact, the burden is on the opposing party to come forward with specific evidence demonstrating the existence of a trial worthy issue. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 256-57 (1986). "Where no rational finder of fact could find in favor of the nonmoving party because the evidence to support its case is so slight, summary judgment must be granted." *Brown*, 654 F.3d at 358 (internal quotation marks omitted). The Court "may affirm on any basis that finds support in the record," whether or not the district court relied upon that ground. *Tolbert v. Smith*, 790 F.3d 427, 434 (2d Cir. 2015).

A district court's denial of a request for additional discovery to respond to a summary judgment motion is reviewed for abuse of discretion. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994). And, "[b]ecause the district court has wide discretion in determining which evidence is admissible," the

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD BRIANDI PERSONALLY LIABLE FOR HIS COMPANIES' UNLAWFUL PRACTICES.

Briandi does not contest the district court's conclusion that the corporate defendants violated the FTC Act and the FDCPA. He claims only that the district court improperly held him personally liable for the corporate violations.

An individual is liable for corporate violations of the FTC Act, if he (1) "participated directly in the deceptive practices or acts *or* had authority to control them" and (2) "had some knowledge of the practices." *Amy Travel*, 875 F.2d at 573; *see FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014); *cf. FTC v. LeadClick Media, LLC*, 838 F.3d 158, 170 (2d Cir. 2016) (applying *Amy Travel*). 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)); *accord FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204, 1207 (10th Cir. 2005); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997).

The district court concluded that, as a matter of law, Briandi is individually liable for the wrongdoing of his companies because the undisputed facts showed

that he had authority to control them and knowledge of their misrepresentations

as the magistrate judge correctly held, Briandi's failure to timely respond resulted in admission of those matters. R&R 28 n. 10 [A. 28]. Summary judgment may properly be granted on issues deemed admitted under Rule 36 due to untimely responses. *SEC v. Dynasty Fund, Ltd*., 121 F. App'x 410, 411-12 (2d Cir. 2005). These admissions alone suffice to hold Briandi individually liable for the corporate violations.[8]

The Court need not rely on only these admissions, however, because other abundant and uncontroverted evidence also shows that Briandi meets the test for individual liability. To start, he had authority to control the corporate defendants and their activities. He created the business, incorporated the first corporate entity, and had signatory authority over each corporate defendant's bank accounts. *See supra* 10-11. Exercising that authority to control the corporate bank accounts, Briandi used them to pay himself more than $1.2 million. *Id*. at 10. Briandi also served (along with Moses) as a Director and General Manager of each of the corporate defendants (with the possible exception of one entity).[9] PSJX 34 at 769 (Dkt. 132-3 at 4) [A. 564]; PSJX 35 at 773-79 (Dkt. 132-4 at 2-8) [A. 569-75]. As

[8] Moses also failed to respond to the FTC's Requests for Admission and thus made similar admissions. R&R 26 [A. 26]; PSJX 19 ¶¶1-13, 44-51 (Dkt. 130-8 at 7-9, 11-12) [A. 516-18, 520-21].

[9] Briandi could not recall his interest in Flowing Streams, the entity that purchased debt portfolios. Moses, however, testified that he and Briandi served as general managers of that entity. PSJX 37 at 796 (Dkt. No. 132-6 at 7) [A. 587].

> This company is harassing me and threatening to serve me with a summons. They have also sent information to my payroll department. I asked Mr. Briandi not to contact my payroll department and he stated that he has jurisdiction to do so. I have asked them not to call my job and they continue to do so. I have asked them to send me a debt verification letter and they have yet to do so.

Id. at 273 (Dkt. 129-14 at 14) [A. 862]. And yet another one reported:

> Mr. Briandi . . . calls my work phone stating . . . that he is going to take action against me. Plus he also has called my parents home phone . . . . They have nothing to do with this issue.

Id. at 269 (Dkt. 129-14 at 10) [A. 858]. Even after he stopped placing collection calls himself, Briandi handled calls that collectors "passed" to him. Briandi Dep. at 72 (Dkt. 150-1 at 76) [A. 267]. Thus, Briandi knew, from personal experience, the type of collection tactics his business employed.

Moreover, Briandi also knew—from the New York Attorney General's 2012 investigation and the 2013 Assurance of Discontinuance, *which he signed*—that scores of consumers had complained about his companies' deceptive and abusive collection practices, and these violations were "repeated[] and persistent[]." *See supra* 12. Briandi does not disclaim that knowledge, nor could he in light of his signature on the agreement.

In response to that overwhelming uncontroverted evidence, Briandi argues that, after the New York proceeding in 2013, he left the task of ensuring compliance to others and no longer involved himself in the collection side of the business. He claims, apparently without irony, that he spent much of each day

praying, while his employees were pervasively violating the law in an operation that was "permeated with fraud." R&R 34 [A. 34]. He thus says he was unaware of his companies' violations. Br. 25-30.

The claim fails. Even if Briandi lacked actual knowledge of violations—which is doubtful, since he personally violated the FDCPA numerous times and his office contained numerous consumer complaints about his companies, *see supra* 14, 26-27—actual knowledge is not required for individual liability. To the contrary, the knowledge prong can be satisfied by an "

United States, 980 F.2d 148, 153 (2d Cir. 1992) ("blanket denial" insufficient). And his "self-serving affidavit without citations to the record" likewise was "insufficient to create a material issue of fact." *Jain v. McGraw-Hill Cos.*, 506 F. App'x 47, 49 (2d Cir. 2012).

B. The District Court Properly Rejected Briandi's Argument That Discovery Was Not Complete.

Briandi waived his argument (Br. 21-22) that the district court wrongly deprived him of discovery needed to oppose summary judgment. Rule 56 of the Federal Rules of Civil Procedure requires a party opposing summary judgment on the ground of incomplete discovery to explain by affidavit why further discovery is required. It states:

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant

misrepresentations were widely disseminated.

and has therefore waived this argument.[11] *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) ("[i]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal") (internal quotation marks omitted). But it also fails on the merits.

1. The Sworn Consumer Declarations.

Briandi fails to apprehend the role—and routine use—of declarations in the summary judgment process. Rule 56(c) expressly contemplates the use of declarations to support (or oppose) a summary judgment motion. It provides, in part:

> (1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including . . . affidavits or declarations . . . .
>
> * * *
>
> (4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Fed. R. Civ. P. 56(c). As the text of the rule makes plain, the use of declarations is an integral part of the process of presenting the trial court with the record material that supports (or defeats) a summary judgment motion—on equal footing with

[11] *See* R&R 5 n.6 [A. 5] ("[t]he defendants do not argue that the FTC's evidence (*e.g.*, telephone calls, scripts, consumer complaints) is inadmissible").

other forms of evidence, such as "depositions, documents, . . . admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). So long as the party proffering the declaration can show that the facts set out therein would be admissible at trial, and that the declarant meets the personal knowledge and competency-to-testify prongs of Rule 56(c)(4), then the district court can—indeed, must—consider the proffered declaration in deciding whether summary judgment is appropriate.

Here, the FTC's proffered consumer declarations met the Rule 56(c)(4) requisites because the declarants stated that they are over 18 years of age, "have personal knowledge of the facts" asserted, and "would testify" to those facts if called. PSJX 1 (Dkt. 129 at 6-8) [A. 726-28]; PSJX 2 (Dkt. 129-1) [A. 746-49]; PSJX 3 (Dkt. 129-2) [A. 751-54]; PSJX 4 (Dkt. 129-3) [A. 756-58]; PSJX 5 (129-4) [A. 760-62]; PSJX 6 at 34-38 (Dkt. 129-5) [A. 764-68]; PSJX 7 (Dkt. 129-6) [A. 774-77]; PSJX 8 at 7-34 Tc 0.00[(oe2(51224)Tj ( )Tj -0.00005( )-8.9() Tw 0.248 0 Td [(P

it was appropriate for the court to consider these declarations in support of the FTC's motion.

Briandi's reliance on *FTC v. Washington Data Resources*,[13] a case concerning the admissibility of declarations *in lieu of* trial testimony, is misplaced. Here, the FTC proffered consumer declarations

thousands of consumers, that goal would be disserved by insisting that numerous consumers take the witness stand and testify in open court—to exactly what their unchallenged declarations already said.

2. The Consumer Complaints.

It was also well within the district court's discretion to assess whether defendants' misrepresentations were widely disseminated based on complaints submitted by consumers to the FTC and state law enforcement agencies. As explained in affidavits by FTC staff, the FTC located over 500 consumer complaints about defendants' debt collection activities in its "Consumer Sentinel" database. PSJX 11 at 80-83 ¶¶64-70 (Dkt. 129-10 at 18-21) [A. 815-18]; *id*. at 235-59 (Dkt. 129-13 at 21-45) [A. 824-48]; id. at 260-78 (Dkt. 129-14 at 1-19) [A. 849-66]. And the FTC found numerous consumer complaints submitted to state agencies (and forwarded to defendants for response) on defendants' premises, in both Briandi's and Moses's offices and their desks on the collection floor. PSJX 39 at 1087 ¶31 (Dkt. 132-8 at 9) [A. 652]; *id*. at 1127- 40 (Dkt. 132-8 at 49-62) [A. 657-70]; *id*. at 1141-53 (Dkt. 132-9 at 1-13) [A. 671-83]. Defendants did not challenge this evidence, so the magistrate did not address its admissibility at length, but he observed that courts have found consumer complaints admissible under Fed. R. Evid. 807, the "residual exception" to the hearsay rule. R&R 5 n.6 [A. 5].

faulty perception, memory or meaning, the dangers against which the hearsay rule seeks to guard." *Figgie*, 994 F.2d at 608 (internal quotation marks omitted).

The other factors also warrant admission of this eviden3.7(s ad9T5(n)8.3(t a)3.5(dm)21.4

the scripts alone were not enough, audio recordings confirmed that collectors followed the scripts when contacting consumers for payments. *See supra* 6. The consumer declarations and consumer complaints provided further corroboration that this enterprise was steeped in deception. Indeed, out of the 25 collectors employed by Briandi and his companies at the time the FTC brought this case, the FTC's evidence captured 21 of them (including the three managers who supervised all collections) falsely representing that they were law enforcement personnel or "processors" handling complaints against the consumer. *See supra* 14. And it is

III.

Respectfully submitted,

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September 15, 2017

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 10,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Michele Arington
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