IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

OFFICE OF THE ATTORNEY GENERAL,
STATE OF FLORIDA, DEPARTMENT
OF LEGAL AFFAIRS

Plaintiff,

vs.

Case No.: 22-CA-9958
Division: L

MV REALTY PBC, LLC, a Florida limited
liability company;
AMANDA J. ZACHMAN,
f/k/a AMANDA ZUCKERMAN, an individual;
ANTONY MITCHELL, an individual;
And DAVID MANCHESTER, an individual,

Defendants.
_____/

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on August 27, 2024 at 10:30 a.m. (the "Hearing") on the Motion for Summary Judgment (Dkt. No. 448) ("Plaintiff's Motion") filed by the OFFICE OF THE ATTORNEY GENERAL, STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS (the "Plaintiff") and the Motion for Partial Summary Judgment (Dkt. No. 435) (the "MV Realty Motion") filed by Defendant MV REALTY PBC, LLC ("MV Realty") as to Count I. MV Realty also cross-moved for summary judgment as to Count II within its response (Dkt. No. 483). The three individual defendants named in the Complaint - Anthony Mitchell, David Manchester, and Amanda Zachman (the "Individual Defendants") - each filed separate summary judgment motions (Dkt. Nos. 436, 437, and 438). The Court reviewed the Motions, the responses and replies, the summary judgment record, applicable law, and heard argument from the Parties at the Hearing and provides as follows:

1. **Summary Judgment Standard.** The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510. Under the standard now utilized by Florida courts, "summary judgment is warranted if a jury, viewing all facts and any reasonable inferences therefrom in the light most favorable to plaintiffs, could not reasonably return a verdict in plaintiffs' favor." *Hale v. Tallapoosa Cnty*., 50 F.3d 1579, 1581 (11th Cir. 1995) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)). Cross-motions for summary judgment are not a concession that no genuine issues of material fact exist. *See Couch Construction Co. v. Florida Dep't of Transp*., 537 So.2d 631 (Fla. 1st DCA 1988).

2. **Overview.** Plaintiff's three count Complaint for Injunctive and Other Statutory Relief (Dkt. No. 2) (the "Complaint") alleges MV Realty and the Individual Defendants violated,

and continue to violate, the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Florida Statutes §§ 501.201 *et seq*. through a putative "Homeowner Benefit Program" (hereinafter "Homeowner Benefit Program") and its attendant "Homeowner Benefit Agreement" (hereinafter "HBA").2 Counts I and III allege FDUTPA violations against MV Realty and the Individual Defendants. Count II separately alleges that MV Realty violated the Telemarketing Sales Rule, 16 CFR §§ 310.3-310.4, which constitutes a *per se* violation of FDUTPA.[1] The Complaint seeks injunctive relief and includes claims for consumer restitution, civil penalties, attorney's fees and costs, and other statutory and equitable relief against Defendants under various provisions of FDUTPA. (*see, e.g.*, Compl., ¶ 99, 117, 132). Defendants, in turn, contend that they are entitled to summary judgment.

3. **FDUTPA Overview.** FDUTPA declares as "unlawful" unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. *See* Fla. Stat. § 501.204.[2] FDUTPA provides a private cause of action to an aggrieved party and sets forth specific remedies depending on whether the action is brought by an individual or an enforcing authority. *See* Fla. Stat. §§ 501.207 (remedies of enforcing authority); 501.211 (other individual remedies). The Defendants dedicate a significant portion of their argument disputing whether particular consumers were harmed or suffered actual damages, which is not dispositive of whether Defendants' acts and practices violate Section 501.204 so as to warrant injunctive relief. *Id.*; *see also Off. of Att'y Gen. v. Bilotti*, 267 So. 3d 1, 3 (Fla. 4th DCA 2019) ("Only when an enforcing authority is seeking recovery of actual damages under subparagraph (1)(c), or a private individual is seeking recovery of consumers' actual damages—as opposed to injunctive relief—is that party required to plead and prove 'actual damages.'") (citations omitted). Here, as Plaintiff's counsel acknowledged at the Hearing, Plaintiff's Complaint is an action to enjoin pursuant to Fla. Stat. § 501.207(1)(b), and not an action for declaratory relief or actual damages pursuant to Fla. Stat. § 501.207(1)(a) or (c).

4. **The Homeowner Benefit Program, HBA, and Memoranda are Unconscionable as a Matter of Law.** A trial court can refuse to enforce a contract based on unconscionability. The question of unconscionability is a matter of law for the court. *Belcher v. Kier*, 558 So. 2d 1039, 1040 (Fla. 2d DCA 1990); *Garrett v. Janiewski*, 480 So. 2d 1324, 1327 (Fla. 4th DCA 1985). While the FDUTPA does not define the terms "unfair," "deceptive," and "unconscionable, the Florida Supreme Court notes that "[u]nconscionability is a common law doctrine that courts have used to

[1] A person violates FDUTPA by violating any provision set forth therein, or the rules adopted thereunder. *See* § 501.203(3). In addition, as of July 1, 2017, a violation of FDUTPA may be based upon violations of other laws, including, among other things, "[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." Thus, a complainant may bring a FDUTPA claim predicated upon another statute. *See*, *e.g.*, *Naples Motorcoach Resort Homeowners Ass'n, Inc. v. JG&M Properties, LLC*, 363 So. 3d 1184, 1187 (Fla. 6th DCA 2023). Further, a violation of 501.203(c)(3)—*i.e.*, a violation of a separate law that proscribes unfair, deceptive, or unconscionable acts—is considered a "per se" violation of FDUTPA. *See Webber v. Bactes Imaging Sols., Inc*., 295 So. 3d 841, 844 (Fla. 2d DCA 2020). As a result, if a violation of that separate statute is shown, a complainant may benefit from FDUTPA's remedies for such violation. In this way, the citizens of Florida are afforded a broader protection in furtherance of FDUTPA's stated purpose. *See Am. Online, Inc. v. Pasieka*, 870 So. 2d 170, 172 (Fla. 1st DCA 2004).

[2] Section 501.202 provides that the provisions of FDUTPA must be construed liberally to promote expressly stated policies, including the protection of the consuming public from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce. § 501.202, Fla. Stat. (2023).

prevent the enforcement of contractual provisions that are overreaches by one party to gain 'an unjust and undeserved advantage which it would be inequitable to permit him to enforce.'" *Basulto v. Hialeah Auto*., 141 So. 3d 1145, 1157 (Fla. 2014) (quoting *Steinhardt*, 422 So. 2d 884, 889 (Fla. 3d DCA 1982) (quoting *Peacock Hotel, Inc. v. Shipman*, 103 Fla. 633, 138 So. 44, 46 (1931)). The *Basulto* Court explained that "[u]nconscionability has generally been recognized to include an *absence of meaningful* choice on the part of one of the parties together with contract terms which are *unreasonably favorable to the other party*." *Basulto*, 141 So. 3d at 1157 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (emphasis added in *Basulto*)).

5. The absence of meaningful choice is referred to as procedural unconscionability, "which relates to the manner in which the contract was entered." *Basulto*, 141 So. 3d at 1157. Substantive unconscionability pertains to the reasonableness of the terms of the contract, and therefore, "focuses on the agreement itself." *Basulto*, 141 So. 3d at 1157-58. A party must establish both procedural unconscionability and substantive unconscionability. *Basulto*, 141 So. 3d at 1158; *Hobby Lobby Stores, Inc. v. Cole*, 287 So. 3d 1272, 1275 (Fla. 5th DCA 2020). Because unconscionability is not a "rigid construct" where the procedural aspects are separate from the substantive aspects, both must be present, but not necessarily to the same degree. *Basulto*, 141 So. 3d at 1158-1161. As a result, a Court must evaluate both procedural and substantive unconscionability interdependently, not as independent elements. *Basulto*, at 1161.

6. Florida courts employ a sliding scale which "disregards the regularity of the procedural process of the contract formation, that creates the terms in proportion to the greater harshness or unreasonableness of the substantive terms themselves." In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required for unenforceability and "vice versa." *Id.* at 1159 (citing *Romano ex rel. Romano v. Manor Care, Inc.* 861 So. 2d 59 (Fla. 4th DCA 2003)). Under the "sliding scale" approach, "a balancing approach is employed allowing one prong to outweigh another provided that there is at least a modicum of the weaker prong." *Id.* (quoting *VoiceStream Wireless Corp. v. U.S. Commnc'ns, Inc.*, 912 So. 2d 34, 39 (Fla. 4th DCA 2005)). Moreover, procedural unconscionability – whether a meaningful choice is present in a particular case – can only be determined by considering all of the circumstances surrounding a transaction as the Florida Supreme Court explained as follows:

> In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement with full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. *In such a case the usual rule that the terms of the agreement are not to be*

> *questioned should be abandoned and the court should consider whether the terms of the contract as so unfair that enforcement should be withheld.*

Id. at 1160 (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d at 449 (emphasis added).

7. As brief background, MV Realty is a Florida-based limited liability company operating through subsidiaries in thirty-two (32) states other than Florida. Amanda Zachman is the lead broker for MV Realty, Antony Mitchell is the Chief Executive Officer and David Manchester is the Chief Operating Officer. In October of 2018, MV Realty began marketing and implementing its Homeowner Benefit Program enticing homeowners with an upfront cash payment in return for an agreement to use MV Realty as their real estate agent should the homeowner sell their home in the future. MV Realty locked thousands of Florida homeowners into Homeowner Benefit Agreements ("HBAs"). Between 2018 and November 2022, Defendants executed approximately 9,303 HBAs with Florida consumers. (Plaintiff's Mot., Ex. 6.) Nationally, in the same period, Defendants and their subsidiaries originated 34,000 HBAs. (Plaintiff's Mot., Ex. 7, at ¶ 16.) The HBAs had a term of forty (40) years and provided that if a homeowner breached the HBA, MV Realty would be entitled to collect three percent (3%) of the market value of the property (the "Early Termination Fee"). The HBA also gave MV Realty the right to record in the public records a "Memorandum of Homeowner Benefit Agreement" (the "Memoranda") which MV Realty promptly recorded with county registrars in every instance without exception.[3] The HBA also included a provision whereby consumers conceded the HBA constituted a covenant running with the land binding successors in interest in title. Between 2018 and 2023, MV Realty harvested $18,434,805.12 in Early Termination Fees from consumers – which stood at approximately 41% of MV Realty's total revenue. The pace at which Defendants harvested Early Termination Fees steadily increased over time from 12% of its revenue in 2020 to 57% of total revenue by 2023. (Plaintiff's Mot., Ex. 8.)

8. Defendants pitched the Homeowner Benefit Program through several channels, including direct mail, internet advertising, door-to-door sales, and telemarketing. Defendants preyed on homeowners with carefully constructed marketing materials and communications of certain putative "key" or "important" terms of the HBA and their impact on homeowners' despite promoting starkly different descriptions of the HBA and associated Memoranda to obtain funding for this "brand new financial asset." [4]

9. Defendants hid, downplayed—or altogether omitted—the burdensome terms that made the HBA a virtually inescapable obligation to ultimately pay MV Realty at least 3% of the

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[3] The provision concerning the recordation of the HBA states:

> (a) Company reserves the right to record a memorandum of this Agreement, in form and substance similar to the Memorandum of MVR Homeowner Benefit agreement attached hereto as Exhibit B (the "Memorandum"), to provide constructive notice of Company's right hereunder. Upon Company's request from time to time, Property Owner shall provide Company with a written certificate confirming the existence of this Agreement and that this agreement remains in full force and effect.

See e.g. Plaintiff's Ex. 27, pg. 17 and Plaintiff's Ex. 29, pg. 3.

[4] Defendants financed their growth through a series of credit facilities with two private lenders, Goodwood and Monroe Capital, as well as convertible notes. (*Id.*, at ¶¶ 17-31.) Collectively, Defendants obtained approximately $67,468,000.00 in financing to fund their expanding portfolio of HBAs. (*Id.*, at ¶¶ 18, 21, 28 & 30.) Balanced against this debt, Defendants value their HBAs at approximately $120,000,000.00. (*Id.*, at ¶ 32.)

property's value knowing homeowners would be "held over a barrel" at closing.[5] Defendants' telemarketers obfuscated the material terms and impacts detrimental to consumers.[6] In mailers, online advertisements, and in telemarketing pitches, Defendants told consumers that in exchange for an immediate, up-front payment that would never need to be repaid, consumers were merely giving MV Realty an opportunity to act as their real estate broker if they ever decided to sell their homes. Contrary to what the typical sales pitch suggested, the HBA was far more than just a simple promise to use a certain realty company exclusively in exchange for a cash payment or "loan alternative." Rather, the HBA severely restricted and hampered how consumers could tap or utilize the equity in their property absent Defendants' express consent, and was designed to guarantee—one way or another—that MV Realty would harvest 3% of the property's value. There is no genuine issue of material fact that MV Realty did not sufficiently disclose several key terms that were undoubtedly material; *i.e.*, terms that a reasonably prudent person would want to consider before entering into a binding agreement.

10. Defendant's repeated contention that the homeowners read, and thereby obviously understood and agreed to the terms and potential consequences of the HBA and Memoranda is not persuasive. The HBA and Memoranda are contracts of adhesion which include numerous one-sided terms. The inability to negotiate the contract terms and the absence of a reasonable opportunity to understand material terms demonstrate the procedural unconscionability. Defendants offered the preprinted agreements on a take-it-or-leave-it basis which homeowners could not negotiate. Affording consumers insufficient time to review the written HBA and Memoranda prior to execution and failing to leave a copy with the consumer after execution further evidence procedural unconscionability. Like *Basulto*, the homeowners here had little bargaining power when executing HBAs and Memoranda with commercially unreasonable terms, and the Court concludes that consent, or even an objective manifestation of consent, to all the terms was not provided.

11. In addition, the HBA's terms are substantively unconscionable. The term of the agreement is forty (40) years, as opposed to a typical real estate broker agreement with a much shorter duration; (2) consumers have no choice but to arbitrate claims, while MV Realty maintains the right to sue in court and file a *lis pendens*; and (3) homeowners must agree that the contract constitutes a covenant that runs with the land expressly binding subsequent owners, with narrow and limited exceptions. Plaintiff correctly asserts that consumers could not sufficiently understand that agreeing to a "covenant that runs with the land" would bind the homeowner's heirs or others to whom the property was transferred for a forty (40) year period.

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[5] Absent from the sales pitch was a detailed explanation of the full impact of "Early Termination Events" that would also trigger an obligation on the part of the consumer to pay the 3% Early Termination Fee. These "events" include: (1) any sale or other transfer of the property that occurs that does not result in MV Realty being paid the commission, with some limited exceptions; (2) when the property owner terminates, or attempts to terminate, MV Realty's right to act as the exclusive listing agent for the property; and (3) where the property owner ceases to be the owner of the property as a result of foreclosure, forfeiture or other transfer of interests in the property, whether voluntary or involuntary.

[6] As the Department points out, the Federal Trade Commission and courts have long recognized that deception by omission may arise where ordinary consumer assumptions about a product or service are not corrected by an advertisement. Stated plainly, advertisements are deceptive if they lead consumers to expect a certain type of product or service when the reality is materially different. *See F.T.C. v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1274 (M.D. Fla. 2012), *aff'd sub nom. F.T.C. v. Washington Data Res.*, 704 F.3d 1323 (11th Cir. 2013).

12. Moreover, Defendants' immediate recording of the HBA Memorandum in the public records is unconscionable in both procedural and substantive aspects. Defendants represented to homeowners through both online and telemarketing pitches that the Memorandum is merely a notice to the public of the homeowner's obligations to MV Realty under the HBA. However, it is undisputed that title companies and lenders require that the recorded Memoranda be subordinated, satisfied, or terminated in order for an impacted homeowner to close on any financial transaction involving their home – often times a consumers most valuable asset. (Ex. 31, Deposition of Richard Barbara at pp. 69:3-70:25, 73:4–73:21 : Dkt. No. 280 at 237:8-24.) MV Realty's recordation in the public records materially impacts homeowners by complicating, delaying, or altogether precluding consumers from accessing their home equity or closing transactions. (*Id.* at pp. 69:3-70:25: Dkt. 280 at 237:8-24.)[7]

13. The issue is not whether the various recording offices categorize the Memoranda as a "Lien" or a "Memorandum" on the public record, it is the undisputed fact that the recorded Memoranda precludes homeowners from accessing their home equity or closing transactions absent MV Realty's consent. Homeowners are held over the proverbial "barrel," meaning MV Realty's Memoranda must be satisfied or otherwise terminated prior to closing any transaction involving the property. Based upon the practical realities surrounding typical real estate transactions, consumers are essentially stripped of the right to challenge the one-sided terms, and Defendants force recovery of the Early Termination Fee as a result. And even where MV Realty claims it "consented," the summary judgment record reflects that Defendants demand an impacted homeowner concede to "lift and replace" the Memorandum at the closing table – leaving another recorded Memorandum encumbering their home.

14. Here, considering all of the circumstances surrounding Defendants' acts and practices surrounding the Homeowner Benefit Program – the HBAs and Memoranda themselves deny consumers a meaningful choice and are unreasonably favorable to MV Realty. Accordingly, for the reasons discussed above, the Court finds based on a careful examination of the summary judgment record that the HBAs and associated Memoranda are both procedurally and substantively unconscionable and thereby unenforceable. Plaintiff is entitled to partial summary judgment as to liability and injunctive relief on Count I.

15. **Plaintiff is Also Entitled To Partial Summary Judgment Based Upon Violations of the Telemarketing Sales Rule.** Plaintiff also seeks summary judgment as to Count II of its Complaint, alleging that MV Realty's telemarketing campaign to contact consumers is a *per se* FDUTPA violation. The Telemarketing Sales Rule ("TSR"), 16 C.F.R. §§ 310.1-310.9[8] prohibits

[7] Although MV Realty contends and has stipulated that it will "lift and replace" the HBA Memorandum in subordination, this does not avoid the harm when lenders are unwilling to accept a subordination from Defendants, which effectively forces a homeowner to pay the Early Termination Fee in order to complete the transaction. Further, the evidence showed that, in some cases, Defendant either refused to facilitate a transaction through a "lift and replace," or that MV Realty was simply hard to reach for this purpose. (Ex. 32, Ex. 33, Ex. 11.)

[8] FDUTPA defines a "violation of this part" to include violations of the Act based on "[a]ny rules promulgated pursuant to the Federal Trade Commission Act" or "[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." § 501.203(3), Florida Statutes. The Telemarketing Sales Rule was promulgated in response to Congress's direction to the Federal Trade Commission ("FTC") to enact rules prohibiting abusive and deceptive telemarketing acts or practices. *See* 15 U.S.C. §§ 6101-61008. A violation of the TSR constitutes an unfair and deceptive act or practice in violation of § 5(a) of the [Federal Trade Commission] Act." *United States v. Dish Network, L.L.C.*, 75 F. Supp. 3d 942, 1004 (C.D. Ill. 2014); *FTC v. Life Mgmt. Servs. Of Orange Cnty., LLC*, 350 F. Supp. 3d 1246, 1264 (M.D. Fla. 2018), *aff'd*, No. 19-14248, 2022 WL 703939 (11th Cir. Mar. 9, 2022) ("misrepresentations and omissions

abusive and deceptive acts or practices by sellers or telemarketers. as to this separately-pleaded claim in its omnibus summary judgment motion. The crux of the Plaintiff's argument centers around the variety of prerecorded or artificially-voiced messages MV Realty left as voicemails, which numbered close to seven million between 2021 and 2022, including 896,435 to phone numbers with Florida area codes. In those voicemails, telemarketing sales representatives—often employed by outside companies—touted the money consumers could receive through the Homeowner Benefit Program and asserted that consumers would never have to pay MV Realty back. Further, the Department contends that MV Realty made calls without the necessary consent from the consumer, and continued to do so even after the consumer requested that the calls cease.

16. The summary judgment record evidence demonstrates that summary judgment is warranted based on the following: (1) the substance of what the telemarketers and voicemails conveyed misrepresented material aspects of the Homeowner Benefit Program;[9] (2) Defendants failed to transmit, or cause to be transmitted, MV Realty's telephone number and name to caller identification services used by call recipients; (3) MV Realty called consumers that previously stated that they do not wish to receive outbound telephone calls from MV Realty; (4) MV Realty called telephone numbers on the DNC Registry without obtaining an express agreement to be called; (5) MV Realty initiated outbound telephone calls that delivered prerecorded messages to consumers who did not consent to receive such calls, essentially ignoring their "do not contact" or "do not recall" requests; and (6) MV Realty failed to purchase access to the DNC Registry for area codes into which MV Realty placed outbound telephone calls.

17. Briefly, in or about May 2021, Defendants tasked Operations Manager Christine Sierotowicz with building a "transfer specialists" division to grow the business by engaging in outbound calls to convince consumers to sign the HBA. The calls, made by both transfer specialists and real estate agents, were intended in part to induce customers to execute a listing agreement in the future via the Homeowner Benefit Program. To make calls, Defendants used a dialing platform called "Phoneburner," which allowed Defendants to deliver prerecorded messages to consumers' voicemail. Phoneburner records indicate that in 2021 and part of 2022, Defendants delivered at least 6,834,554 prerecorded messages in violation of the TSR's prohibitions against placing calls to consumers, absent the required consents and disclosures prescribed in 16 C.F.R. § 310.4(b)(1)(v).[10] Further, the evidence showed that Defendants violated the TSR's boundaries concerning consumers' requests not to be called. The TSR gives consumers the right to stop unwanted telephone calls. After invoking that right, any further calls violate the TSR. In this case, the uncontroverted evidence showed that calls were made following the consumers' invocation of the right to be placed in a "do not call" category. (Ex. 9, Rossie Aff.) For all of these reasons, partial summary judgment on Count II in favor of Plaintiff and against Defendants as to liability and injunctive relief is appropriate.

18. **The Individual Defendants are Liable.** The Individual Defendants argue that even if the Homeowner Benefit Program, HBA, and Memoranda violate § 501.204 of FDUTPA, they

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that violate the TSR constitute unfair or deceptive acts or practices in violation of . . . the FDUTPA").

[9] See Ex. 39, Transfer Specialist Call Script Training Slides, pp. 1-2; Ex. 35, Declaration of Dominique Butler, at ¶ 5.

[10] Defendants' transfer specialists called leads from a variety of sources, but the overwhelming majority of numbers were purchased from third parties—in the range of 99%.

cannot be held liable as a matter of law because they did not have the requisite involvement, responsibility, or knowledge. The Court disagrees for the reasons outlined below. Individuals that have a hand in FDUTPA-violative acts or practices under § 501.204 and those that have the authority to control such practices are subject to liability under FDUTPA once corporate liability is established. *Off. of Atty. Gen., Dep't of Legal Affs. v. Wyndham Int'l, Inc*., 869 So. 2d 592, 598 (Fla. 1st DCA 2004); *see also FTC v. Publishing Clearing House, Inc*., 104 F.3d 1168, 1170 (9th Cir.1997) (citing *FTC v. American Standard Credit Sys., Inc*., 874 F.Supp. 1080, 1087 (C.D.Cal.1994) (individual defendants may be held liable for injunctive relief for the corporate defendants' violations of the FTC Act if the FTC demonstrates that the individual defendants participated directly in the wrongful acts or practices or had authority to control the corporations).[11] If an individual had direct participation in the wrongful acts or practices, or knew or should have known of such practices and failed to control them, a finding of liability is warranted. *Id*.; *KC Leisure, Inc. v. Haber*, 972 So.2d 1069, 1074 (Fla. 5th DCA 2008) (individual liability requires a showing of active participation, some measure of control, or knowledge and awareness). Authority to control the company can be shown by the individual's active involvement in the business affairs, the making of corporate policy, or the assumption of duties of a corporate officer. *See FTC v. Life Mgmt. Servs. Of Orange Cnty., LLC*, 350 F. Supp. 3d 1246, 1264 (M.D. Fla. 2018), *aff'd*, No. 19-14248, 2022 WL 703939 (11th Cir. Mar. 9, 2022).[12]

19. Based on the summary judgment record, it is undisputed that each of the named Individual Defendants directly participated in the wrongful acts or practices and each is liable under FDUTPA. Each was directly involved in the planning, engineering, implementation, execution and other key aspects of the Homeowner Benefit Program, HBA and Memoranda which the Court has separately found to be violative of FDUTPA as a matter of law. Further, all three Individual Defendants had the ability to control the respective conduct and practices that violate the Act within their spheres of responsibility. The Court addresses the evidence as to each Individual Defendant in turn below.

a. ***Anthony Mitchell.*** Mitchell is the Chief Executive Officer ("CEO") of MV Realty and has acted in that capacity since 2018. (Ex. 78, Mitchell Depo.) As CEO, Mitchell was responsible for capital governance, diligence work, and general oversight, among other things. *Id*. Mitchell had full control of all of the company's affairs and practices. Mitchell played a key role in the conceptualization of the Homeowner Benefit Program and led efforts to secure capital for the business model. Mitchell pitched investors that homeowners would be subject to liens, which would essentially ensure the protection of the investments for those participating in Homeowners Benefit Program's financing. With financing secured, Mitchell played a prominent role in the plan's implementation. In this regard, Mitchell knew what information and features of the Homeowner Benefit Program were being conveyed to consumers, and which were not. In light of his involvement and conversations with investors, the evidence is clear that Mitchell knew that MV Realty presented a very different

[11] In construing section 501.204(1), "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2001." § 501.204(2), Fla. Stat. (2022).

[12] Piercing the corporate veil is not necessary to hold an individual officer liable under FDUTPA. *See North American Clearing, Inc. v. Brokerage Computer Systems, Inc*., 666 F.Supp.2d 1299, 1311 (M.D. Fla. 2009) (quoting *KC Leisure, Inc. v. Haber*, 972 So.2d at 1074).

picture to consumers. Mitchell argues that he should not be held individually liable because he did not "invent" the Homeowner Benefit Program; rather, it began from a patented program that MV Realty licensed. (Mitchell Mot., p. 8).[13] This argument is without merit. Individual liability under FDUTPA is not limited to those who conceive of an unlawful act or practice. Moreover, the fact that Defendants crafted their Homeowners Benefit Program from a previously patented agreement does not insulate the Individual Defendants from these FDUTPA violations. In reality, Mitchell oversaw MV Realty's more aggressive modifications of the original concept. For these reasons, Mitchell is subject to individual FDUTPA liability.

b. ***David Manchester.*** Manchester is MV Realty's Chief Operating Officer ("COO"). He joined MV Realty in January 2018 to assist the company with sales execution. (Ex. 78, Mitchell Depo.) As COO, Manchester oversaw and assisted with various aspects of the company's business, including real estate matters, general corporate matters, and HBA information. *Id.* Relevant here, Manchester essentially controlled MV Realty's operations, which included the marketing of the Homeowner Benefit Program to consumers. Manchester joined MV Realty close to the time it began offering the Homeowner Benefit Program to consumers and was instrumental in shaping the company's precise sales and marketing procedures. Manchester: (1) built-out of the transfer specialist program and crafted its organizational structure; (2) prepared training materials for the transfer specialists; (3) hired and trained real estate agents to engage with consumers; and (4) purchased sales leads utilized to make millions of prerecorded calls to consumers within and outside Florida. Manchester had deep knowledge of and participation in the key aspects of the marketing and implementation of the Homeowner Benefit Program, and further had the authority to control the how and what information was communicated to consumers in connection with their solicitation to enter into the HBA. The evidence therefore supports a finding of liability with respect to Manchester.

c. ***Amanda Zachman.*** In 2014, Defendant Zachman founded MV Realty. Zachman is the lead real estate broker for MV Realty in several states, including Florida. *Id.* She is a third-generation realtor licensed since 2009 and understands real estate. One of Zachman's principal duties involved overseeing MV Realty's real estate brokers and guiding MV Realty's relationships with consumers. Zachman executed virtually every HBA into which MV Realty entered.[14] Zachman was also tasked with designing the terms of the HBA, and coordinating brokerage services to ensure that MV Realty could comply when a homeowner would request such services. Further, Zachman personally responded to consumer complaints surrounding the HBA and Memoranda and managed brokerage services when necessary. In sum, Zachman's participation in designing and implementing the HBA, and her knowledge of the

[13] As Defendants point out, the idea of a "right to list" or "forward listing" agreement did not originate with MV Realty, as there multiple published federal patents concerning such agreements pre-dating the HBP. When MV Realty launched the Program, it licensed the business method and the form of an initial "OptListing Agreement" from an owner of one such patent. MV Realty eventually terminated its patent license and developed its own program and HBA.

[14] At times, Zachman used a "designator signor" that signed her name using an electronic signature for Zachman. In any event, there was no evidence that any HBA was signed without Zachman's knowledge or permission.

issues raised by complaining consumers, establishes Zachman's liability for MV Realty's FDUTPA violations.

While the Individual Defendants dedicate the bulk of their Motions arguing that MV Realty's practices did not violate FDUTPA, once liability is established, as it has been here, the focus shifts to the nature and extent of the individuals' participation in the FDUTPA. Here, the evidence—including that submitted by the Individual Defendants in connection with their own summary-judgment motions—demonstrates that each of the three Individual Defendants had the requisite involvement in the unconscionable acts and practices, so as to warrant summary judgment as to their liability.

20. **Summary.** Pursuant to Rule 1.510(a), Plaintiff is entitled to partial summary judgment as a matter of law that MV Realty's actions and practices surrounding the Homeowner Benefit Program—and the HBAs and Memoranda themselves—as set forth in Counts I and II of Plaintiff's Complaint with respect to liability and injunctive relief, constitute unlawful practices in violation of § 501.204 of FDUPTA. (*See* Compl., ¶¶ 97 & 116). Further, the record evidence establishes that Plaintiff is entitled to judgment as a matter of law as to Count III, with respect to the issue of liability and injunctive relief, against the Individual Defendants Anthony Mitchell, David Manchester, and Amanda Zachman for violations of FDUPTA. (*See* Compl., ¶¶ 131). Plaintiff is therefore entitled to injunctive relief as set forth in § 501.207. Finally, to the extent Plaintiff seeks summary judgment as to entitlement to any equitable monetary relief sought in its Complaint (*see, e.g.*, Compl., ¶ 99, 117, 132), including but not limited to consumer restitution and civil penalties, the Court finds that summary judgment is inappropriate at this juncture. *See Outreach Housing, LLC v. Office of the Attorney General*, 221 So.3d 691 (Fla. 4th DCA 2017).

Accordingly, it is hereby **ORDERED** that:

1. Plaintiff's Motion for Summary Judgment (Dkt. No. 448) is GRANTED, in part, as to liability and injunctive relief with respect to Counts I and II of the Complaint. To the extent Plaintiff also seeks summary judgment on its claim for civil penalties pursuant to Florida Statute § 501.2075 as reflected in paragraphs 99 and 117 of the Complaint, Plaintiff's Motion is DENIED, without prejudice, pending further proceedings.

2. Plaintiff's Motion for Summary Judgment (Dkt. No. 448) is GRANTED, in part, as to individual liability and injunctive relief as to the Individual Defendants, Anthony Mitchell, David Manchester, and Amanda Zachman as set forth in Count III of the Complaint. To the extent Plaintiff also seeks summary judgment on its claim for civil penalties pursuant to Florida Statute § 501.2075 as reflected in paragraph 132 of the Complaint as to the Individual Defendants, Plaintiff's Motion is DENIED, without prejudice, pending further proceedings.

3. Defendant MV Realty's Motion for Partial Summary Judgment (Dkt. No. 435) and Cross-Motion for Summary Judgment as to Count II (Dkt. No. 483) are **DENIED.**

4. Defendants' Renewed Motion for Partial Summary Judgment on the Retroactive Application of Fla. Stat. § 475.279 (Dkt. No. 129) is **DENIED** as moot.

5. Defendant Anthony Mitchell's Motion for Summary Judgment, filed July 10, 2024 (Dkt. No. 436), is **DENIED**.

6. Defendant David Manchester's Motion for Summary Judgment, filed July 10, 2024 (Dkt. No. 437), is **DENIED**.

7. Defendant Amanda Zachman's Motion for Summary Judgment, filed July 10, 2024 (Dkt. No. 438), is **DENIED**.

8. All scheduled hearings on pending motions *in limine* are hereby CANCELED and the jury trial currently set to begin on October 11, 2024 is hereby removed from the upcoming trial calendar pending further adjudication of the remaining issues. The Pre-Trial Conference set for October 1, 2024 shall be converted to a Status Conference via Zoom for thirty (30) minutes (Plaintiff shall prepare and docket a Notice of Hearing) at which time the Court shall consider, among other things, the scope of the injunctive relief Plaintiff seeks and further proceedings with respect to all other relief sought in the Complaint.

DONE and **ORDERED** in Chambers, in Tampa, Hillsborough County, Florida this ____ day of September, 2024.

Electronically Conformed 9/24/2024
Darren D. Farfante

HONORABLE DARREN D. FARFANTE
Circuit Judge