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MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (OCTOBER 2, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

CHARLES T. MARSHALL,

Defendant-Appellant.

No. 17-56476

D.C. No. 8:16-cv-00999-BRO-AFM
U.S. District Court for Central California, Santa Ana

The judgment of this Court, entered July 16, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Quy Le
Deputy Clerk
Ninth Circuit Rule 27-7

MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 16, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

CHARLES T. MARSHALL,

Defendant-Appellant.

No. 17-56476

D.C. No. 8:16-cv-00999-BRO-AFM

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Submitted July 12, 2019**
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: M. SMITH and FRIEDLAND, Circuit Judges, and SIMON,*** District Judge.

Defendant-Appellant Charles Marshall appeals the district court's orders granting summary judgment as well as restitution and injunctive relief in favor of the Federal Trade Commission ("FTC") for violations of Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), and the Mortgage Assistance Relief Services ("MARS") Rule, 12 C.F.R. §§ 1015.1-1015.5. Marshall also appeals the district court's orders denying his attempt to amend his Answer and extend discovery and holding Marshall in contempt for using frozen funds in violation of a court order. Finally, Marshall argues that the district court's final order violated due process and Federal Rule of Civil Procedure 63.

We affirm.

1. We review de novo the district court's rulings on motions for summary judgment. *Longoria v. Pinal County*, 873 F.3d 699, 703-04 (9th Cir. 2017). We may affirm on any ground supported by the record, including grounds the district court did not reach. *Or. Short Line R.R. Co. v. Dep't of Revenue Or.*, 139 F.3d 1259, 1265 (9th Cir. 1998).

We agree with Marshall that, to the extent the district court disregarded the entirety of Marshall's declaration on the basis that it was self-serving, the district court erred. *See Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 498 (9th Cir. 2015). The declaration may have been self-serving, but it contained some

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*** The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

statements that were "based on personal knowledge, legally relevant, and internally consistent." *Id.* Nevertheless, even taking the statements in the declaration as true, any reasonable jury would conclude on this record that Marshall is personally liable for violations of the FTC Act and MARS Rule.

First, the FTC produced sufficient evidence to show that Brookstone Law Group and Brookstone Law P.C. ("Brookstone"), Advantis Law P.C. ("AL"), and Advantis Law Group P.C. ("ALG") "operate[d] together as a common enterprise." *FTC v. Grant Connect, LLC,* 763 F.3d 1094, 1105 (9th Cir. 2014). It is undisputed that the three entities shared corporate officers. The entities also shared resources, including a website, office spaces, staff members, and nearly identical sales scripts and advertising materials. These undisputed facts were sufficient to show that the three corporate entities functioned as a common enterprise, even if Marshall's statements that he did not know AL existed and that he did not know that ALG was part of the enterprise are taken as true. *See FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010).

Second, there were sufficient undisputed facts to hold Marshall individually liable for injunctive relief at summary judgment. As part of the common enterprise, ALG is "liable for the[se] deceptive acts and practices." *Grant Connect*, 763 F.3d at 1105. An injunction could issue against Marshall individually for ALG's corporate violations if Marshall "participated directly in the acts or practices or had authority to control them." *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (quoting *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp 1080, 1087 (C.D.

Cal 1994)). The FTC's evidence that Marshall was one of ALG's co-owners and state-registered corporate officers, that he directed Damian Kutzner and Jeremy Foti to start marketing the firm, and that Marshall signed documents on ALG's behalf is sufficient to show the necessary level of authority. *See id.* (holding that "assumption of the role of president of [the corporation] and her authority to sign documents on behalf of the corporation demonstrate . . . the requisite control over the corporation"). Marshall does not dispute the FTC's evidence that Brookstone and AL—with which ALG was in a common enterprise—both violated the FTC Act and MARS Rule by promising consumers that participation in mass joinder lawsuits would result in mortgage-related relief and procuring advance fees for representation in those suits. *See* 15 U.S.C. § 45(a)(1); 12 C.F.R. § 1015.5. Thus, we conclude that Marshall failed to create a genuine dispute as to whether he was personally liable for the common enterprise's FTC Act and MARS Rule violations, such that injunctive relief against him was proper.[1]

Third, the undisputed facts establish that Marshall was at least recklessly indifferent to Brookstone's and AL's misrepresentations, making him jointly and severally liable for restitution for the corporation's unjust gains in violation of the FTC Act. Marshall knew that Kutzner and Geoffrey Broderick had previ-

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[1] Marshall contends on appeal that he is entitled to the "attorney exemption" to the MARS Rule under 12 C.F.R. § 1015.7(b). Marshall has not disputed that it is his burden to show that he qualifies for the defense, and he has produced no evidence that the advance fees sent to Brookstone and AL were placed in client trust accounts, or that his actions were otherwise in compliance with the governing ethical rules. *See id.* § 1015.7(b)(1).

ously operated schemes accepting unearned advanced fees for loan modification work that was never performed. He also admitted to knowing that Brookstone was facing bar discipline related to its mass joinder practice and admitted to using ALG rather than Brookstone to file mass joinder lawsuits because he suspected "there was a problem" with Brookstone. Marshall's defenses that he did not personally sign the AL and ALG marketing materials and that Kutzner assured him a lawyer had legally approved the materials are unavailing—it was reckless to rely on Kutzner, a non-lawyer with a history of running fraudulent schemes, for such assurances. *See also FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) ("'[R]eliance on advice of counsel is not a valid defense on the question of knowledge' required for individual liability." (quoting *FTC v. Amy Travel Serv., Inc.,* 875 F.2d 564, 575 (7th Cir. 1989)) (internal brackets omitted)). Given these undisputed facts, there is no genuine dispute that Marshall is personally monetarily liable for the common enterprise's fraud and thus liable for restitution.[2]

2. We review a denial of a motion for leave to amend pleadings and a motion for leave to conduct further discovery for abuse of discretion. *See In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 736 (9th Cir. 2013); *Quinn v. Anvil Corp.*, 620 F.3d 1005, 1015 (9th Cir. 2010). Because Marshall filed his motion to amend after the scheduling order

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[2] Marshall has not contested that consumers suffered injury as a result of the misleading advertisements or the amount of monetary liability imposed, so we do not address those issues. *See Publ'g Clearing House*, 104 F.3d at 1171; *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603-05 (9th Cir. 2016).

deadline, his motion was subject to Federal Rule of Civil Procedure 16(b)(4), which states that "[a] schedule may be modified only for good cause and with the judge's consent." *Id.* "Rule 16(b)'s 'good-cause' standard primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

Marshall had four months from the filing of his Answer invoking the Fifth Amendment to amend under the district court's scheduling deadlines, but he still failed to file a timely motion seeking amendment. Marshall did not participate in any discovery prior to his motion for leave to amend, and he has provided no support for his contentions that the FTC interfered with his ability to obtain counsel. The district court did not abuse its discretion in concluding that he did not exercise due diligence.

For similar reasons, we reject Marshall's argument that the district court erred in denying his motion to extend discovery. *See* Fed. R. Civ. P. 16(b)(3)(A) (requiring that the scheduling order limit the time to complete discovery); *cf. Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1442-43 (9th Cir. 1986) (holding that a party "cannot complain [of a denial of a request for further discovery] if it fails to pursue discovery diligently before summary judgment").

3. We also review a district court's civil contempt order for abuse of discretion. *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999). The district court did not err in concluding that Marshall's withdrawal of $24,500 from his personal account violated the Temporary Restraining Order ("TRO"). The TRO made clear that Marshall's personal bank accounts were included in the asset freeze, and Marshall conceded

that he had actual notice of the prohibition. The district court therefore properly determined that there was clear and convincing evidence showing that Marshall's disobedience was beyond substantial compliance, and not based on a good faith and reasonable interpretation of the court's order. *See In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). Marshall's citation to *Luis v. United States*, 136 S. Ct. 1083 (2016), is inapposite because he had not been charged with a crime at the time he withdrew the funds, so it was not reasonable to think *Luis* applied here.[3]

4. Lastly, Marshall argues that Chief Judge Phillips violated Federal Rule of Civil Procedure 63 and created "due process concerns" when she entered final judgment without certifying her familiarity with the record, given that Judge O'Connell had presided over the summary judgment proceedings and issued the order granting summary judgment to the FTC. Rule 63 has no bearing at summary judgment, where the court's role is to assess what is uncontested in the record without making credibility determinations. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (explaining that at summary judgment, "the judge does not weigh conflicting evidence with respect to a disputed

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[3] Marshall previously filed an emergency petition for a writ of mandamus with our court, challenging the district court's contempt order and requesting a stay pending resolution of the petition. *See* Emergency Pet. for Writ of Mandamus & Mot. for Stay, *Marshall v. United States District Court*, No. 17-71781 (9th Cir. 2017), ECF No. 1. We denied the motion for a stay, as well as the petition for mandamus. Ct. Order, *Marshall v. United States Dist. Ct.*, No. 17-71781 (9th Cir. 2017), ECF Nos. 9, 10.

material fact . . . [n]or does the judge make credibility determinations"). And Marshall has not explained what "process" he was deprived of when we review de novo the summary judgment order.

AFFIRMED.

FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF AS TO DEFENDANTS JEREMY FOTI AND CHARLES MARSHALL (SEPTEMBER 21, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DAMIAN KUTZNER, ET AL.,

Defendants.

No. SACV16-00999-BRO (AFMx)

Before: Virginia A. PHILLIPS, Chief Judge.
Honorable Beverly R. O'CONNELL,
United States District Court Judge

Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), filed its Complaint for Permanent Injunction and Other Equitable Relief ("Complaint"), pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and the 2009 Omnibus Appropriations Act, Public Law 111-8, Section 626, 123 Stat. 524, 678 (Mar. 11, 2009) ("Omnibus Act"), as clarified by the Credit Card Accountability Responsibility and Disclosure Act of

2009, Public Law 111-24, Section 511, 123 Stat. 1734, 1763-64 (Mar. 22, 2009) ("Credit Card Act"), and amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, Section 1097, 124 Stat. 1376, 2102-03 (July 21, 2010) ("Dodd-Frank Act"), 12 U.S.C. § 5538. On September 5, 2017, the Court issued its Order re Plaintiff's Motion for Summary Judgment Against Defendants Jeremy Foti and Charles Marshall, and Defendant Jeremy Foti's Motion for Summary Judgment or, in the Alternative, Summary Adjudication. DE 353. There, the Court granted the FTC's motion for summary judgment against defendants Jeremy Foti and Charles Marshall and denied Jeremy Foti's motion for summary judgment. On September 19, 2017, the Court ordered the FTC to "to lodge a Proposed Judgment consistent with the order issued in this matter no later than September 22, 2017." DE 358. On September 20, 2017, the FTC submitted the Proposed Judgment. Therefore, the Court issues this order as a Final Judgment pursuant to Federal Rules of Civil Procedure 54(a) and 58(a).

Summary of Findings and Judgment

1. This Court has jurisdiction over this matter.

2. The Complaint charges that Defendants participated in deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and otherwise violated the Mortgage Assistance Relief Services Rule ("MARS Rule"), 16 C.F.R. Part 322, recodified as Mortgage Assistance Relief Services, 12 C.F.R. Part 1015 ("Regulation O").

3. The undisputed facts establish that Brookstone Law P.C., a California corporation, Brookstone Law

P.C., a Nevada corporation (collectively Brookstone); Advantis Law P.C. and Advantis Law Group P.C. (collectively "Advantis" and, with Brookstone, the "Corporate Defendants") formed a common enterprise. "[E]ntities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests of the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010). Here, the undisputed facts are that Brookstone and Advantis shared staff and office space at multiple locations. They had significant overlap in owners and direct overlap in control persons, including Foti. They also assisted one another in furthering the scheme, with Advantis coming on board when Vito Torchia was being disbarred, using virtually the same misrepresentations in mailers, scripts, and websites. *Network Servs. Depot, Inc.*, 617 F.3d at 1143 ("The undisputed evidence is that [defendant's] companies pooled resources, staff and funds; they were all owned and managed by [defendant] and his wife; and they all participated to some extent in a common venture to sell internet kiosks."). "Thus, all of the companies were beneficiaries of and participants in a shared business scheme. . . . " *Network Servs. Depot, Inc.*, 617 F.3d at 1143.

4. The Corporate Defendants deceptively marketed and sold to struggling homeowners litigation against their lenders, falsely telling consumers: they were likely to prevail; they were likely to receive large monetary payments; the Corporate Defendants were likely to void consumers' mortgages or receive their property free and clear; the Corporate Defendants had a team

of legal professionals capable of litigating the cases as promised; and, for some consumers, that they would be added to a lawsuit.

5. The Corporate Defendants were marketing and selling mortgage assistance relief services ("MARS") as defined in 12 C.F.R. § 1015.2.

6. The Corporate Defendants took advance fees for the MARS in violation of 12 C.F.R. § 1015.5.

7. The Corporate Defendants did not make the disclosures to consumers required by 12 C.F.R. § 1015.4.

8. The Corporate Defendants made misrepresentations regarding material aspects of their services in violation of 12 C.F.R. § 1015.3.

9. The Corporate Defendants do not meet the attorney exemption in 12 C.F.R. § 1015.7.

10. Jeremy Foti had authority to control and participated in the Corporate Defendants' acts, and was doing so by at least January 1, 2011.

11. Charles Marshall had authority to control and participated in the Corporate Defendants' acts, and was doing so by at least February 27, 2015.

12. Because the undisputed facts establish that Jeremy Foti and Charles Marshall had extensive involvement in the fraudulent scheme, Jeremy Foti and Charles Marshall had at least "actual knowledge of material misrepresentations, . . . reckless[ ] indifferen[ce] to the truth or falsity of a misrepresentation, or . . . awareness of a high probability of fraud along with an intentional avoidance of the truth." *FTC v. Affordable Media*, 179 F.3d 1228, 1235 (9th Cir. 1999).

13. A permanent injunction is required because, in light of Jeremy Foti's and Charles Marshall's conduct in operating the Corporate Defendants, and their prior conduct, there is a "cognizable danger of recurring violation." *FTC v. Gill*, 71 F. Supp. 2d 1030, 1047 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir.) (citing *United States v. W.T. Grant*, 345 U.S. 629, 633 (1953)). "As demonstrated by the frequency of the misrepresentations . . . , defendants have exhibited a pattern of misrepresentations which convinces this Court that violations of the [MARS Rule] and of the FTC Act were systematic." *See Gill*, 71 F. Supp. 2d at 1047. "As to the possibility of recurrence," defendant Marshall continues to be able to practice law, such that it is possible that he could engage in similar conduct in the future. As to Foti, his involvement in the Corporate Defendants' scheme was so extensive, and the Corporate Defendants made so many misrepresentations to consumers, that in considering the undisputed facts, there is a likelihood that he will engage in similar conduct in the future.

14. The Corporate Defendants' net revenues from January 1, 2011 to June 2, 2016 were $18,146,866.34.

15. The Corporate Defendants' net revenues from February 27, 2015 to June 2, 2016 were $1,784,022.61.

Definitions

For the purposes of this Final Judgment, the following definitions apply:

A. "Assisting others" includes:

1. performing customer service functions, including receiving or responding to consumer complaints;

2. formulating or providing, or arranging for the formulation or provision of, any advertising or marketing material, including any telephone sales script, direct mail solicitation, or the design, text, or use of images of any Internet website, email, or other electronic communication;

3. formulating or providing, or arranging for the formulation or provision of, any marketing support material or service, including web or Internet Protocol addresses or domain name registration for any Internet websites, affiliate marketing services, or media placement services;

4. providing names of, or assisting in the generation of, potential customers;

5. performing marketing, billing, or payment services of any kind; or

6. acting or serving as an owner, officer, director, manager, or principal of any entity.

B. "Corporate Defendants" means Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C., and their successors and assigns.

C. "Defendants" means all of the Individual Defendants and the Corporate Defendants, individually, collectively, or in any combination.

D. "Financial product or service" means any product, service, plan, or program represented, expressly or by implication, to:

1. provide any consumer, arrange for any consumer to receive, or assist any consumer in receiving, a loan or other extension of credit;

2. provide any consumer, arrange for any consumer to receive, or assist any consumer in receiving, credit, debit, or stored value cards;

3. improve, repair, or arrange to improve or repair, any consumer's credit record, credit history, or credit rating; or

4. provide advice or assistance to improve any consumer's credit record, credit history, or credit rating.

E. "Individual Defendants" means Damian Kutzner, Jeremy Foti, Vito Torchia Jr., Jonathan Tarkowski, R. Geoffrey Broderick, and Charles T. Marshall.

F. "Person" includes a natural person, organization, or other legal entity, including a corporation, partnership, proprietorship, association, cooperative, or any other group or combination acting as an entity.

G. "Secured or unsecured debt relief product or service" means:

1. With respect to any mortgage, loan, debt, or obligation between a person and one or more secured or unsecured creditors or debt collectors, any product, service, plan, or program represented, expressly or by implication, to:

   a. stop, prevent, or postpone any mortgage or deed of foreclosure sale for a person's dwelling, any other sale of collateral,

any repossession of a person's dwelling or other collateral, or otherwise save a person's dwelling or other collateral from foreclosure or repossession;

b. negotiate, obtain, or arrange a modification, or renegotiate, settle, or in any way alter any terms of the mortgage, loan, debt, or obligation, including a reduction in the amount of interest, principal balance, monthly payments, or fees owed by a person to a secured or unsecured creditor or debt collector;

c. obtain any forbearance or modification in the timing of payments from any secured or unsecured holder or servicer of any mortgage, loan, debt, or obligation;

d. negotiate, obtain, or arrange any extension of the period of time within which a person may (i) cure his or her default on the mortgage, loan, debt, or obligation, (ii) reinstate his or her mortgage, loan, debt, or obligation, (iii) redeem a dwelling or other collateral, or (iv) exercise any right to reinstate the mortgage, loan, debt, or obligation or redeem a dwelling or other collateral; obtain any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling or other collateral; or

f. negotiate, obtain, or arrange (i) a short sale of a dwelling or other collateral, (ii) a deed-in-lieu of foreclosure, or (iii) any

other disposition of a mortgage, loan, debt, or obligation other than a sale to a third party that is not the secured or unsecured loan holder.

The foregoing shall include any manner of claimed assistance, including auditing or examining a person's application for the mortgage, loan, debt, or obligation.

2. With respect to any loan, debt, or obligation between a person and one or more unsecured creditors or debt collectors, any product, service, plan, or program represented, expressly or by implication, to:

   a. repay one or more unsecured loans, debts, or obligations; or

   b. combine unsecured loans, debts, or obligations into one or more new loans, debts, or obligations.

I. Ban On Secured or Unsecured Debt Relief Products and Services

IT IS ORDERED that Jeremy Foti and Charles Marshall are permanently restrained and enjoined from advertising, marketing, promoting, offering for sale, or selling, or assisting others in the advertising, marketing, promoting, offering for sale, or selling, of any secured or unsecured debt relief product or service.

II. Prohibition Against Misrepresentations Relating to Financial Products and Services

IT IS FURTHER ORDERED that Jeremy Foti and Charles Marshall, their officers, agents, employees, and attorneys, and all other persons in active concert

or participation with any of them, who receive actual notice of this Final Judgment, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, offering for sale, or selling of any financial product or service, are permanently restrained and enjoined from misrepresenting, or assisting others in misrepresenting, expressly or by implication:

A. the terms or rates that are available for any loan or other extension of credit, including:

1. closing costs or other fees;
2. the payment schedule, monthly payment amount(s), any balloon payment, or other payment terms;
3. the interest rate(s), annual percentage rate(s), or finance charge(s), and whether they are fixed or adjustable;
4. the loan amount, credit amount, draw amount, or outstanding balance; the loan term, draw period, or maturity; or any other term of credit;
5. the amount of cash to be disbursed to the borrower out of the proceeds, or the amount of cash to be disbursed on behalf of the borrower to any third parties;
6. whether any specified minimum payment amount covers both interest and principal, and whether the credit has or can result in negative amortization; or
7. that the credit does not have a prepayment penalty or whether subsequent refinancing

may trigger a prepayment penalty and/or other fees;

B. the ability to improve or otherwise affect a consumer's credit record, credit history, credit rating, or ability to obtain credit, including that a consumer's credit record, credit history, credit rating, or ability to obtain credit can be improved by permanently removing current, accurate negative information from the consumer's credit record or history;

C. that a consumer will receive legal representation; or

D. any other fact material to consumers concerning any good or service, such as: the total costs; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics.

III. Prohibition Against Misrepresentations Relating to Any Product or Service

IT IS FURTHER ORDERED that Jeremy Foti and Charles Marshall, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Final Judgment, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, offering for sale, or selling of any product, service, plan, or program, are permanently restrained and enjoined from misrepresenting, or assisting others in misrepresenting, expressly or by implication:

A. the likelihood of obtaining any relief for consumers;

B. that consumers will be added to a lawsuit;

C. any material aspect of the nature or terms of any refund, cancellation, exchange, or repurchase policy, including the likelihood of a consumer obtaining a full or partial refund, or the circumstances in which a full or partial refund will be granted to the consumer;

D. that any person is affiliated with, endorsed or approved by, or otherwise connected to any other person; government entity; public, non-profit, or other non-commercial program; or any other program;

E. the nature, expertise, position, or job title of any person who provides any product, service, plan, or program;

F. the person who will provide any product, service, plan, or program to any consumer;

G. that any person providing a testimonial has purchased, received, or used the product, service, plan, or program;

H. that the experience represented in a testimonial of the product, service, plan, or program represents the person's actual experience resulting from the use of the product, service, plan, or program under the circumstances depicted in the advertisement; or

I. any other fact material to consumers concerning any good or service, such as: the total costs; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics.

IV. Monetary Judgment

IT IS FURTHER ORDERED that judgment in the amount of Eighteen Million One Hundred Forty-

Six Thousand Eight Hundred Sixty-Six Dollars and Thirty Four Cents ($18,146,866.34), is entered, in favor of the Commission against Jeremy Foti, jointly and severally, as equitable monetary relief. Jeremy Foti is ordered to pay the FTC this amount immediately upon the entry of this Final Judgment.

IT IS FURTHER ORDERED that judgment in the amount of One Million Seven Hundred Eighty-Four Thousand Twenty-Two Dollars and Sixty-One Cents ($1,784,022.61), is entered in favor of the Commission against Charles Marshall, jointly and severally, as equitable monetary relief. Charles Marshall is ordered to pay the FTC this amount immediately upon the entry of this Final Judgment.

V. Additional Monetary Provisions

IT IS FURTHER ORDERED that:

A. Jeremy Foti and Charles Marshall relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Final Judgment and may not seek the return of any assets.

B. All money paid to the Commission pursuant to this Final Judgment may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to

be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Defendants have no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection.

C. The asset freezes in force against Jeremy Foti and Charles Marshall are modified to permit the payment of the Monetary Judgments, above identified. Upon satisfaction of their Monetary Judgments, the asset freezes shall be dissolved.

VI. Receivership Termination

IT IS FURTHER ORDERED that the Receiver must complete all duties related to the individual receivership estate created pursuant to DE 153 within 180 days after entry of this Final Judgment, but any party or the Receiver may request that the Court extend the Receiver's term for good cause.

VII. Customer Information

IT IS FURTHER ORDERED that Jeremy Foti and Charles Marshall, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Final Judgment, are permanently restrained and enjoined from directly or indirectly:

A. failing to provide sufficient customer information to enable the Commission to efficiently administer consumer redress. If a representative of the Commission requests in writing any information related to redress, Jeremy Foti and Charles Marshall

must provide it, in the form prescribed by the Commission, within 14 days;

B. disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that any Defendant obtained prior to entry of this Final Judgment in connection with any product or service related to consumers' mortgages; and

C. failing to destroy such customer information in all forms in their possession, custody, or control within 30 days after entry of this Final Judgment.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

VIII. Final Judgment Acknowledgments

IT IS FURTHER ORDERED that Jeremy Foti and Charles Marshall submit acknowledgments of the Final Judgment. They each shall:

A. Within 7 days of entry of this Final Judgment, submit to the Commission an acknowledgment of receipt of this Final Judgment sworn under penalty of perjury.

B. For 5 years after entry of this Final Judgment, for any business that either of them, individually or collectively with any other Defendant, is the majority owner or controls directly or indirectly, must deliver a copy of this Final Judgment to: (1) all principals,

officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Final Judgment; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 7 days of entry of this Final Judgment for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Jeremy Foti or Charles Marshall delivered a copy of this Final Judgment, he must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Final Judgment.

IX. Compliance Reporting

IT IS FURTHER ORDERED that Jeremy Foti and Charles Marshall make timely submissions to the Commission.

A. They each shall, one year after entry of this Final Judgment, submit a compliance report, sworn under penalty of perjury:

1. (a) identifying the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with him; (b) identifying all of his businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describing the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement

of any other Defendant (which he must describe if he knows or should know due to their own involvement); (d) describing in detail whether and how he is in compliance with each Section of this Final Judgment; (e) providing a copy of each Final Judgment Acknowledgment obtained pursuant to this Final Judgment, unless previously submitted to the Commission; and

2. (a) identifying all telephone numbers and all physical, postal, email and Internet addresses, including all residences; (b) identifying all business activities, including any business for which he performs services whether as an employee or otherwise and any entity in which he has any ownership interest; and (c) describing in detail his involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 15 years after entry of this Final Judgment, Jeremy Foti and Charles Marshall each must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. (a) any designated point of contact; or (b) the structure of any entity that he has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Final Judgment, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Final Judgment; and

2. (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business activity, including any business for which he performs services whether as an employee or otherwise and any entity in which he has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Jeremy Foti and Charles Marshall must each submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against him within 14 days of its filing.

D. Any submission to the Commission required by this Final Judgment to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Final Judgment must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. Damian Kutzner, X030002.

X. Recordkeeping

IT IS FURTHER ORDERED that Jeremy Foti and Charles Marshall each must create certain records for 15 years after entry of the Final Judgment, and retain each such record for 5 years. Specifically, for any business that either, individually or collectively with any other Defendant, is a majority owner or controls directly or indirectly, he must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. all records necessary to demonstrate full compliance with each provision of this Final Judgment, including all submissions to the Commission; and

E. a copy of each unique advertisement or other marketing material.

XI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Jeremy Foti's and Charles Marshall's compliance with this Final Judgment:

A. Within 14 days of receipt of a written request from a representative of the Commission, Jeremy Foti and Charles Marshall each must: submit additional

compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

B. For matters concerning this Final Judgment, the Commission is authorized to communicate directly with Jeremy Foti and Charles Marshall. Jeremy Foti and Charles Marshall each must permit representatives of the Commission to interview any employee or other person affiliated with him who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities to Jeremy Foti or Charles Marshall or any individual or entity affiliated with either or both of them, without the necessity of identification or prior notice. Nothing in this Final Judgment limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning either Jeremy Foti or Charles Marshall, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1).

XII. Retention of Jurisdiction

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Final Judgment.

IT IS SO ORDERED.

By: /s/ Virginia A. Phillips
Honorable Beverly R. O'Connell
United States District Court Judge

Dated: September 21, 2017

ORDER RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS JEREMY FOTI AND CHARLES MARSHALL, AND DEFENDANT JEREMY FOTI'S MOTION FOR SUMMARY OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION [284, 287] (SEPTEMBER 5, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

v.

DAMIAN KUTZNER, ET AL.

No. SA CV 16-00999-BRO (AFMx)

Before: The Hon. Beverly REID O'CONNELL, United States District Judge.

I. Introduction

Pending before the Court are Plaintiff Federal Trade Commission's ("Plaintiff" or "FTC") Motion for Summary Judgment against Defendants Jeremy Foti ("Foti") and Charles Marshall ("Marshall") (Dkt. No. 284 (hereinafter, "FTC Mot.")), and Defendant Foti's Motion for Summary Judgment or, in the alternative, Motion for Summary Adjudication (Dkt. No. 287 (hereinafter, "Foti Mot.")). After considering the papers filed in support of and in opposition to the instant Motions, as well as the oral argument of counsel, the Court

GRANTS Plaintiff's Motion for Summary Judgment and DENIES Defendant Foti's Motion for Summary Judgment.

II. Background

A. The Parties and Plaintiff's Allegations[1]

The FTC brings the instant action against several corporate entities, Brookstone Law P.C. (California), doing business as Brookstone Law Group, Brookstone Law P.C. (Nevada), Advantis Law P.C. and Advantis Law Group P.C.[2] (*See* Dkt. No. 61 (hereinafter, "FAC") ¶¶ 6-7.) These companies are law firms that offer mortgage relief services to consumers. (FAC ¶ 7.) In addition, Plaintiff brings this action against several individual Defendants: Damian Kutzner, Vito Torchia, Jr., Jonathan Tarkowski, R. Geoffrey Broderick, Marshall, and Foti (collectively, the "Individual Defendants"). (*See* Dkt. Nos. 1, 61.) Plaintiff has reached resolutions with several of the Individual

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[1] The Court's description of the background of this case does not constitute this Court's findings of undisputed facts for these Motions.

[2] Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C. are collectively referred to as the "Corporate Defendants." Brookstone Law P.C. (California) and Brookstone Law P.C. (Nevada) are collectively referred to as "Brookstone." Advantis Law P.C. ("Advantis Law") and Advantis Law Group P.C. ("Advantis Law Group") are collectively referred to as "Advantis." According to Plaintiff, Brookstone and Advantis "are under common control, with common employees and a common address while marketing the same product." (FAC ¶ 14.) Plaintiff also avers that "Defendants have used the names Brookstone and Advantis interchangeably." (FAC ¶ 14.)

Defendants, and they have been dismissed from the action. (*See* Dkt. Nos. 170, 177, 193.) Plaintiff has not reached a resolution with Defendants Foti or Marshall.

Plaintiff alleges that Defendant Foti "is an owner and controlling person of Brookstone and a principal or controlling person of Advantis." (FAC ¶ 9.) According to Plaintiff, Foti was one of the co-founders of Brookstone in 2011." (FAC ¶ 9.) "Although not an attorney, Foti controls the marketing and sales at both Brookstone and Advantis." (FAC ¶ 9.) Plaintiff claims that "[a]t all times material . . . , acting alone or in concert with others, [Foti] formulated, directed, controlled, had the authority to control, or participated in the acts and practices set forth" in the FTC's FAC. (FAC ¶ 9.)

Plaintiff alleges that Defendant Marshall "is a director, Chief Executive Officer, and Secretary of Advantis." (FAC ¶ 13.) "Marshall has also appeared as counsel in Brookstone's *Wright v. Bank of America* mass joinder case." (FAC ¶ 13.) "In 2015, Marshall was disciplined by the California Bar for violations related to mortgage assistance relief services, receiving a 90-day suspension from the practice of law in November 2015 for his ethical violations." (FAC ¶ 13.) Plaintiff claims that "[a]t all times material . . . , acting alone or in concert with others, [Marshall] formulated, directed, controlled, had the authority to control, or participated in the acts and practices set forth" in the FTC's FAC. (FAC ¶ 13.)

The instant action arises from the Individual Defendants' alleged scheme to defraud "consumers out of thousands of dollars in upfront and recurring monthly fees" in violation of the FTC Act and the Mortgage

Assistance Relief Services ("MARS") Rule, 12 C.F.R. 1015. (Dkt. No. 142 at 4.) Specifically, Plaintiff claims that the Individual Defendants, operating through the Corporate Defendants, "convince consumers that if added to a 'mass joinder' case against their lender, they can expect a significant recovery, typically at least $75,000." (*Id.*) Plaintiff also claims that, despite their representations to the contrary, the Individual Defendants "have never won a mass joinder case, do not have the experience or resources to litigate them, and never sue on behalf of many paying consumers." (*Id.*)

The purported scheme began with Defendant Kutzner's ULG, a law firm offering advance fee loan modifications. (*Id.* at 5.) However, after the FBI and the United States Postal Inspectors raided ULG due to claims that its two primary attorneys committed mortgage modification fraud, and with ULG "unraveling," Defendant Kutzner, along with Defendants Torchia and Foti, set out to market mass joinder litigation through Brookstone. (*Id.*)

To market the mass joinder litigation, the Individual Defendants allegedly sent a substantial amount of form mailers to the public, which included the following statements: "you may be a potential plaintiff against your lender[;]" "our team of experienced lawyers offers you a superior alternative for recovery[;]" and "[i]t may be necessary to litigate your claims against your lender to get the help you need and our lawyers know how to do so." (*Id.*) The mailers also included statements that consumers had "a very strong case" and that prevailing in the litigation was "basically a done deal." (*Id.*)

In order to participate in the mass joinder litigation, the Individual Defendants would require consumers to pay upfront fees, including a large initial fee and subsequent monthly fees. (*Id.*) According to Plaintiff, the Individual Defendants failed to keep these fees in client trust accounts. (*Id.*) Plaintiff also claims that the mailers and fee agreements failed to include disclosures required by law. (*Id.*) Plaintiff avers that the Individual Defendants failed to provide the promised services, as many consumers were never added to a mass joinder case and the attorneys working for Brookstone and Advantis did not have sufficient experience to competently litigate the mass joinders. (*Id.*)

B. Procedural History

On May 31, 2016, Plaintiff filed its Original Complaint under seal. (Dkt. No. 1.) Plaintiff alleged two causes of action in its Original Complaint: (1) a violation of the FTC Act, 15 U.S.C. § 45(a); and, (2) a violation of the MARS Rule, 16 C.F.R. Part 322, recodified as 12 C.F.R. Part 1015 against Defendant Marshall and others, but not Defendant Foti. (Dkt. No. 1.) On July 5, 2016, Plaintiff filed a First Amended Complaint, adding Foti as a defendant, and alleging the same causes of action as its Original Complaint. (*See* FAC.)

On July 10, 2017, Plaintiff filed its Motion for Summary Judgment against Defendants Foti and Marshall. (FTC Mot.) Also on July 10, 2017, Defendant Foti filed his Motion for Summary Judgment or, in the alternative, Summary Adjudication. (Foti Mot.) On August 7, 2017, Defendant Foti (Dkt. No. 304 (hereinafter, "Foti Opp'n")) and Defendant Marshall

(Dkt. No. 313 (hereinafter, "Marshall Opp'n")) opposed the FTC's Motion. Also on August 7, 2017, Plaintiff opposed Foti's Motion. (Dkt. No. 303 (hereinafter, "FTC Opp'n").) On August 14, 2017, Plaintiff filed its reply in support of its Motion (Dkt. No. 315 (hereinafter, "FTC Reply")), and Foti filed his reply in support of his Motion (Dkt. No. 319 ("hereinafter, "Foti Reply")).

On August 20, 2017, Defendant Marshall filed a Notice of Errata, attaching a corrected version of his response to Plaintiff's Separate Statement of Undisputed Facts. (Dkt. No. 338.) On August 21, 2017, the Court ordered Plaintiff to file any response to Defendant Marshall's corrected Statement Disputing Plaintiff's Undisputed Facts and Conclusions of Law in Support of Summary Judgment by August 24, 2017. (Dkt. No. 339.) Plaintiff complied with the Court's order and filed its Undisputed Statement of facts and Conclusions of Law on Reply in Support of its Summary Judgment Motion on August 24, 2017. (Dkt. No. 341 (hereinafter, "FTC Mot. USF").)

The Court held a hearing on these Motions on August 28, 2017.

III. Evidentiary Objections

"In motions for summary judgment with numerous objections, it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." *Doe v. Starbucks, Inc.*, No. 08-0582, 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009). "This is especially true when many of the objections are boilerplate recitations of evidentiary principles or blanket objections without analysis applied to specific items of evidence." *Id.*; *see*

also Stonefire Grill, Inc. v. FGF Brands, Inc., 987 F. Supp. 2d 1023, 1033 (C.D. Cal. 2013) (explaining that "the Court will not scrutinize each objection and give a full analysis of identical objections raised as to each fact"). Per this Court's Standing Order, the parties are not to "submit blanket or boilerplate objections to the opponent's statements of undisputed fact." (Standing Order Regarding Newly Assigned Cases Rule 8(c)(iii).) "The boilerplate objections will be overruled and disregarded." (Standing Order Regarding Newly Assigned Cases Rule 8(c)(iii).)

Defendant Foti makes a variety of boilerplate objections to Plaintiff's evidence included in support of Plaintiff's Motion for Summary Judgment as well as Plaintiff's evidence included in opposition to Defendant Foti's Motion for Summary Judgment. (*See* Foti Reply at 1; FTC Mot. USF.) Defendant Marshall has joined in Foti's objections.[3] The Court will not consider Defendants' blanket or boilerplate objections. *See Starbucks, Inc.*, 2009 WL 5183773, at *1; (Standing Order Regarding Newly Assigned Cases Rule 8(c)(iii)). Defendant Foti makes a few specific objections that the Court discusses below. First, Foti argues that the emails, scripts, and mailers that the Receiver collected from the Corporate Defendants' offices are inadmissible because they have not been authenticated, they lack foundation, and/or they are not relevant. (Foti Reply at 1; Dkt. No. 304-2.) Second, Foti argues that the FTC relies on a flawed expert report in support of its

[3] In his opposition, Defendant Marshall states that he "joins in Defendant Foti's evidentiary objections to the Plaintiff's evidence in support of its motion for summary judgment." (Marshall Opp'n at 2 n.2.)

Motion for Summary Judgment. (Foti Reply at 1; Dkt. No. 304-3.)

A. Defendant's Evidentiary Objections Regarding the Admissibility of the Emails, Scripts, and Mailers Collected by the Receiver from the Corporate Defendants

The Court OVERRULES Defendant's objections that the emails, scripts, and mailers the Receiver obtained from the Corporate Defendants have not been authenticated. The Receiver found the documents in question on the Defendants' premises, copied them, and produced them to the FTC. (*See* Dkt. Nos. 57 at 22 (detailing that the Receiver was made the custodian of all the Receivership's documents and assets), 284-8 at 1-2 ¶¶ 2-4.) These documents are, therefore, authentic, as business records certified by the Receiver. *MGM Studios Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 972 (C.D. Cal. 2006) (emails of individual employees authenticated through production by corporate defendant); *Burgess v. Premier*, 727 F.2d 826, 835-36 (9th Cir. 1984) (documents found on the defendants' premises were authentic). Further, many of the emails are also authenticated by having been found on one of Foti's computers. (*See* Dkt. No. 284-8 at 1-2 ¶¶ 2-4.) As shown in *Burgess*, to overcome this prima facie showing of authenticity, Foti would need to prove there was a "motive . . . to store false documents" at the Corporate Defendants' offices. *See Burgess*, 727 F.2d 826 at 835; *see also* E*.W. French & Sons, Inc. v. Gen. Portland, Inc.*, 885 F.2d 1392, 1298 (9th Cir. 1988) (explaining that the FTC need only establish a prima facie case of authenticity). Foti has not done so, and thus, the Court overrules Defendant's objections with respect to the objection that the emails,

scripts, and mailers obtained from the Corporate Defendants have not been authenticated.

The Court also finds that Defendant Foti's objection as to the relevance of the emails, mailers, and scripts that the Receiver obtained from the Corporate Defendants is also OVERRULED. Foti argues that these documents are irrelevant. (*See* Dkt. No. 3042 at 5.) However, these documents are relevant in that they tend to prove or disprove that the Corporate Defendants and the Individual Defendants engaged in the illegal conduct in question, and these facts are thus of consequence in determining the action. *See* Fed. R. Evid. 401. Defendant Foti's arguments on this point are therefore rejected.

B. Defendant's Evidentiary Objections Regarding the FTC's Expert Report Prepared by Dr. Isaacson

The Court OVERRULES Defendant's objection that Dr. Isaacson's report is inadmissible. Dr. Isaacson conducted a survey measuring the experience of consumers who retained the Corporate Defendants for their services. (*See* Dkt. No. 284-6.) Contrary to Defendant Foti's arguments, Dr. Isaacson's report does not violate Federal Rule of Evidence 702. As Dr. Isaacson testifies in his supporting declarations, his procedure for conducting the consumer survey is in accordance with generally accepted procedures, he appropriately blinded the study to hide the purpose of the study from the respondents while giving the respondents comfort in the legitimacy of the survey, determined that the response rate was more than sufficient, and determined there were no inherent biases. (*See* Dkt. Nos. 284-6, 315-5.) After considering

the declarations of Dr. Isaacson, it appears that the survey he conducted does not suffer from the alleged defects discussed in *In re Autozone, Inc.*, No. 3:10-md-02159-CRB, 2016 U.S. Dist. LEXIS 105746 (N.D. Cal. Aug. 10, 2016). Here, Dr. Isaacson's survey did not disclose the nature or purpose of the survey and has a much higher response rate than that in *Autozone*, greater than 20%. (*See* Dkt. No. 315-3 ¶ 4); *In re Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746 at *56 ("Plaintiffs' survey had a woefully low response rate [—] . . . a response rate of 3.43%. . . . "). Further, the Court finds that the FTC has put forward competent expert testimony on the nature and sufficiency of the survey, but neither Marshall nor Foti have countered with any contrary expert testimony, either in the form of their own survey or expert critique of Dr. Isaacson's survey. Therefore, the Court has uncontroverted testimony supporting the legitimacy of the survey, and there is no reason to doubt its reliability. *See FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (criticizing survey was not sufficient to defeat summary judgment).

IV. Legal Standard

Summary judgment is appropriate when, after adequate discovery, the evidence demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A disputed fact is material where its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Id.* The moving party bears the initial burden of estab-

lishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The moving party may satisfy that burden by showing "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325.

Once the moving party has met its burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the non-moving party must go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 587. Only genuine disputes over facts that might affect the outcome of the lawsuit will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (holding that the non-moving party must present specific evidence from which a reasonable jury could return a verdict in its favor). A genuine issue of material fact must be more than a scintilla of evidence, or evidence that is merely colorable or not significantly probative. *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000).

A court may consider the pleadings, discovery, and disclosure materials, as well as any affidavits on file. Fed. R. Civ. P. 56(c)(2). Where the moving party's version of events differs from the non-moving party's version, a court must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Although a court may rely on materials in the record that neither party cited, it need only consider cited materials. Fed. R. Civ. P. 56(c)(3). Therefore, a court may properly rely on the non-moving party to

identify specifically the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

Finally, the evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise a genuine issue of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson*, 477 U.S. at 253.

V. Discussion

The FTC argues that the undisputed facts establish that Defendants Foti and Marshall, through the acts of the Corporate Defendants, (1) violated the FTC Act by making material misrepresentations about the services that they provided to the consumers; and, (2) violated the MARS Rule by (a) failing to make the proper disclosures while communicating with consumers, (b) collecting improper fees before obtaining the promised result, and (c) misrepresenting material aspects of the services. (*See generally* FTC Mot.) Defendant Foti argues that "there is an absence of evidence to support the FTC's case," and that summary judgment should be entered in Defendant Foti's favor as a result. (*See* Foti Mot. at 2.) In determining these instant Motions for Summary Judgment, the Court considers all appropriate evidentiary material identified and submitted in support of and in opposition to both Motions; here, the two Motions address the same claims

and the same underlying facts. *See Fair Housing Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132 (9th Cir. 2001); (Foti Mot.; FTC Mot.).

A. The Conduct of the Corporate Defendants

1. The Corporate Defendants Formed a Common Enterprise

At the outset, the Court finds that the undisputed facts establish that the Corporate Defendants formed a common enterprise. "[E]ntities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests of the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010). Here, the undisputed facts are that Brookstone and Advantis shared staff and office space at multiple locations. (*See, e.g.*, FTC Mot. USF ¶¶ 64-67, 75-76, 78.) They had significant overlap in owners and direct overlap in control persons, including Foti. (*See, e.g.*, FTC Mot. USF ¶¶ 56, 231, 305, 308.) They also assisted one another in furthering the scheme, with Advantis coming on board when Torchia was being disbarred, using virtually the same misrepresentations in mailers, scripts, and websites. (*See* FTC Mot. USF ¶¶ 46-62, 84-89); *Network Servs. Depot, Inc.*, 617 F.3d at 1143 ("The undisputed evidence is that [defendant's] companies pooled resources, staff and funds; they were all owned and managed by [defendant] and his wife; and they all participated to some extent in a common venture to sell internet kiosks."). "Thus, all of the companies were beneficiaries of and participants in a

shared business scheme. . . . " *Network Servs. Depot, Inc.*, 617 F.3d at 1143.

2. The Corporate Defendants Violated the FTC Act

"Section 5 of the FTC Act prohibits deceptive acts or practices in or affecting commerce and imposes injunctive and equitable liability upon the perpetrators of such acts." *Network Servs. Depot, Inc.*, 617 F.3d at 1138 (citing 15 U.S.C. § 45(a)). "An act or practice is deceptive if first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." *Stefanchik*, 559 F.3d at 928 (internal quotation marks omitted). "Express product claims are presumed to be material." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994). "Deception may be found based on the 'net impression' created by a representation." *Id.*

The undisputed facts show that the Corporate Defendants made numerous deceptive statements to consumers. Brookstone's representatives said or suggested that hiring Brookstone would definitely or probably achieve at least one of the following five outcomes: consumers would (1) win a lawsuit against the company that holds their mortgage; (2) have the terms of the mortgage changed; (3) receive money; (4) have their mortgage voided; and/or (5) get their property free and clear of their mortgage. (FTC Mot. USF ¶ 176.) Brookstone's representatives told consumers that that they would definitely or probably win their lawsuit. (FTC Mot. USF ¶ 176.) In addition, consumers received advertising in the mail from the Corporate Defendants that stated: "you may be a potential plaintiff against

your lender;" mass joinder is a way to "void your note(s), and/or award you relief and monetary damages;" "our team of experienced lawyers offers you a superior alternative for recovery;" and, "[i]t may be necessary to litigate your claims against your lender to get the help you need and our lawyers know how to do so." (FTC Mot. USF ¶¶ 99-102.) Some versions of the mailers told consumers they could expect to receive $75,000 in damages. (FTC Mot. USF ¶¶ 103-04.) One mailer stated that each customer "shall receive a judicial determination that the mortgage lien alleged to exist against their particular property is null and void *ab initio*." (FTC Mot. USF ¶ 104.) Some mailers referenced the Department of Justice's multi-billion dollar settlements with the banks, suggesting that Brookstone's cases were somehow connected. (FTC Mot. USF ¶¶ 107-09.) Another mailer stated that consumers might be entitled to relief as a result of multibillion-dollar settlements with banks, with no mention that Advantis was not a party to those settlements. (FTC Mot. USF ¶ 111.) One mailer reads: "[i]f you are behind on your payments act now to preserve your legal rights because the law is on your side," representing to consumers that they had viable claims against their lenders. (FTC Mot. USF ¶ 79.)

When the consumers called the Corporate Defendants, the sales agents would tell consumers about the Corporate Defendants' mass joinder cases as proof of their validity, telling them that "[Brookstone/ Advantis] is a Pioneer in Mass Tort litigation and all of our landmark cases are still going through the court system. We have had some phenomenal results in our individual cases and have been able to save hundreds of homes and have achieved many confiden-

tial settlements." (FTC Mot. USF ¶¶ 93, 124.) The "Objection Techniques" script instructed the sales people, when a potential customer indicated they did not want to spend any more money on their property to say: "Sir, I know exactly how you feel and the bottom line is, if we can't custom tailor a program that benefits you and your family[,] we won't get to write and you won't sign it correct?" (FTC Mot. USF ¶ 131.) Another supplemental script directed sales people to address questions about whether the mass joinder is better than or different from a loan modification by stating:

> Over the past few years we have taken the steps to build solid relationships with the major banking institutions to provide our clients with the relief they seek. By having the backing of a REPUTABLE law [f]irm that has formed a strong relationship with lenders as we have, you can rest assured that we will be able to get you and your family a permanent solution.

(FTC Mot. USF ¶ 132 (emphasis in original).)

Some consumers attended in-person sales meetings with the Corporate Defendants' "Banking Specialists," who were actually sales persons or "closers." (FTC Mot. USF ¶¶ 94-98.) At these meetings, the "Banking Specialists" would show consumers a "Legal Analysis" that stated consumers had multiple valid causes of actions against their lenders with no discussion of any defenses the lenders may have or the relative weakness of the various claims. (FTC Mot. USF ¶¶ 141-44, 167.)

The consumers declare they were solicited with mailers, claiming, among other things, that the mass joinder litigation would seek to "void your note[s]," and that "our team of experienced lawyers offers you a superior alternative to recovery." (FTC Mot. USF ¶¶ 100-01.) At in person meetings, sales people made various statements regarding consumers' likelihood of success and monetary relief, including: that they had "a very strong case[;]" prevailing in the litigation was "basically a done deal[;]" 'it was not a question of whether [the consumers] would win [the] cases, but how much money [the consumers] would get[;]" "the minimum amount [the consumer] would get would be $75,000[;]" the consumer was "entitled to a refund as a result of litigation between the Department of Justice and Bank of America[;]" and "Brookstone would succeed eventually." (FTC Mot. USF ¶¶ 136-39, 147-66.) None of these representations were accurate. The Corporate Defendants did not seek to void notes, did not have the promised experience or capabilities, and have never prevailed[4] in a mass joinder, thus failing to obtain the represented relief. (FTC Mot. USF ¶¶ 186-204.) "Some consumers who paid to be mass joinder clients were never [even] added to a mass joinder case." (FTC Mot. USF ¶ 199.)

In opposition to the FTC's Motion, Defendants Foti and Marshall argue that the Corporate Defendants' marketing was not deceptive, focusing on aspects of

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[4] Foti admits that Torchia declared: "Neither Brookstone nor Advantis has ever won a mass joinder case. Because there is always risk in litigation, I knew there was a possibility that we could in fact lose all of the lawsuits and that payment to Brookstone and Advantis would increase those consumers' losses." (FTC Mot. USF ¶ 186.)

the marketing that were true. (Foti Opp'n at 6; Marshall Opp'n at 5.) However, even if some of the statements that the Corporate Defendants made as part of their marketing were true, it does not change that the Corporate Defendants made misrepresentations. *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) ("[B]ecause each representation must stand on its own merit, even if other representations contain accurate, non-deceptive information, that argument fails.").

Defendant Foti argues that because the retainer agreement had a disclaimer in it, it nullifies any misrepresentations made in the marketing. (Foti Mot. at 14; Foti Opp'n at 8-9.) But this argument fails as a matter of law. *See Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) ("The Federal Trade Act is violated if [the advertising] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract."). Further, Foti admits a sales person told a consumer that the disclaimer "was just legal words in the retainer and they had to use them in the agreement, but there was no risk of losing." (FTC Mot. USF ¶ 150.)[5]

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[5] Defendant Foti also argues that when considering the net impression of the Corporate Defendants' promises about the potential outcome of the litigation, the statements are not misleading because "the concept of 'filing a lawsuit' is uniquely easy for consumers to understand." (Foti Opp'n at 7.) According to Foti "[u]nlike other services, where consumers might be misled by promises of successful results, consumers are well-exposed to, and can easily understand, the basic elements that are present in all lawsuits. . . . " (Foti Opp'n at 7-8.) The Court rejects Defendant Foti's argument that "the concept of 'filing a lawsuit' is uniquely easy for consumers to understand."

Thus, the undisputed facts establish that the Corporate Defendants violated the FTC Act as a matter of law because the Corporate Defendants made numerous false and/or misleading material statements to consumers, and Defendants raise no facts creating a genuine dispute. *See Stefanchik*, 559 F.3d at 928.

3. The Corporate Defendants Violated the MARS Rule

In 2009, Congress directed the FTC to prescribe rules prohibiting unfair or deceptive acts or practices with respect to mortgage loans. Omnibus Act, § 626, 123 Stat. at 678, as clarified by Credit Card Act, § 511, 123 Stat. at 1763-64. Pursuant to that direction, the FTC promulgated the MARS Rule, 16 C.F.R. Part 322. The Dodd-Frank Act, § 1097, 124 Stat. at 2102-03, 12 U.S.C. § 5538, transferred rulemaking authority over the MARS Rule to the Consumer Financial Protection Bureau, and the MARS Rule was recodified as 12 C.F.R. Part 1015, effective December 30, 2011. The FTC retains authority to enforce the MARS Rule pursuant to the Dodd-Frank Act § 1097, 12 U.S.C. § 5538.

The MARS Rule defines the term "mortgage assistance relief service provider" as "any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service" other than the dwelling loan holder, the servicer of a dwelling loan, or any agent or contractor of such individual or entity. 12 C.F.R. § 1015.2. Attorneys are covered by the MARS Rule. *See FTC v. A to Z Mktg., Inc.*, No. 13-00919-DOC (RNBx), 2014 WL 12479617, at *4 (C.D. Cal. Sept. 17, 2014) (explaining that attorneys are only exempt from the MARS Rule in "[u]nder certain

conditions"). The Corporate Defendants were MARS providers because they offered to provide mortgage assistance relief services. *See id.*; (FTC Mot. USF ¶¶ 100, 104-07). In fact, Foti admits that the Corporate Defendants were MARS providers and that the mass joinder services were MARS. (*See* FTC Mot. USF ¶ 25.)

Plaintiff alleges that the Corporate Defendants violated the MARS Rule because they: (1) failed to make legally required disclosures (FAC ¶¶ 83); (2) asked for, or received, payment before consumers had executed a written agreement with their loan holder or servicer that incorporates the offer obtained by Defendants in violation of the MARS Rule (FAC ¶ 81); and, (3) misrepresented material aspects of their services (FAC ¶ 82).

a. The Corporate Defendants Failed to Make Legally Required Disclosures

Under 12 C.F.R. section 1015.4, certain written disclosures must be made to consumers if a company is providing MARS. These disclosures include statements that a consumer does not have to accept the relief, if any, obtained by the MARS provider and does not have to make any payments until the consumer has received the promised relief. 12 C.F.R. § 1015.4. The Corporate Defendants did not include the requisite disclosures in the mailers or the retainer agreements, and therefore violated 12 C.F.R. section 1015.4. (*See* FTC Mot. USF ¶ 185.)

b. The Corporate Defendants Took Advance Fees in Violation of the MARS Rule

Under 12 C.F.R. section 1015.5, "[i]t is a violation . . . for any mortgage assistance relief service provider

to: [ ]Request or receive payment of any fee or other consideration until the consumer has executed a written agreement between the consumer and the consumer's dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer." Essentially, the Corporate Defendants could only take a fee upon providing the promised result. *See* 12 C.F.R. § 1015.5.

The Corporate Defendants charged consumers a variety of advance fees. "Consumers paid an initial fee for the mass joinder [cases], always exceeding $1,000." (FTC Mot. USF ¶ 169.) The consumers paid "Legal Analysis" fees "in amounts ranging from $895-$1500." (FTC Mot. USF ¶ 168.) Consumers also "paid monthly fees, in many instances $250 per month." (FTC Mot. USF ¶ 170.) All of the fees that the Corporate Defendants collected were advance fees in violation of the MARS Rule because the Corporate Defendants did not win any of their mass joinder cases or obtain the promised relief for the consumers. (FTC Mot. USF ¶ 186-96.)

c. The Corporate Defendants Made Misrepresentations Regarding Material Aspects of Their Services

As explained above, the undisputed facts demonstrate that the Corporate Defendants made misrepresentations regarding material aspects of their services. *See supra* section V.A.2. This conduct is not only considered a violation of the FTC Act, but is also considered a violation of the MARS Rule. *See, e.g.*, 12 C.F.R. § 1015.3 ("It is a violation of this rule for any mortgage assistance relief service provider to engage

in the following conduct: . . . [m]isrepresenting, expressly or by implication, any material aspect of any mortgage assistance relief service, including but not limited to: (1) [t]he likelihood of negotiating, obtaining, or arranging any represented service or result . . . [;] (6) [t]he terms or conditions of any refund, cancellation, exchange, or repurchase policy for a mortgage assistance relief service, including but not limited to the likelihood of obtaining a full or partial refund, or the circumstances in which a full refund will be granted . . . [;] (8) [t]hat the consumer will receive legal representation. . . . ").

d. The Attorney Exemption Does Not Apply to the Corporate Defendants

Defendant Foti, who is not an attorney himself, argues in his Motion for Summary Judgment that the Corporate Defendants cannot be held liable for any violations of the MARS Rule because the attorney exemption applies. (Foti Mot. at 9.) In response, Plaintiff argues that the attorney exemption is an affirmative defense, and that because (1) Foti did not plead this defense in his answer, and (2) Foti did not identify the attorney exemption in response to Plaintiff's interrogatories requiring Foti to identify all defenses on which he might rely, Foti should not be permitted to assert this defense because the FTC did not have the opportunity to seek discovery from Foti and third parties to rebut it. (FTC Opp'n at 7.)

"While the general rule is that a defendant should assert affirmative defenses in its first responsive pleading, Fed. R. Civ. P. 8(c), the Ninth Circuit has 'liberalized' the requirement that a defendant must raise affirmative defenses in their initial responsive

pleading." *Helton v. Factor 5, Inc.*, 26 F. Supp. 3d 913, 921 (N.D. Cal. 2014) (citing *Magana v. Commonwealth of the N. Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997)). "In the Ninth Circuit, a defendant 'may raise an affirmative defense for the first time in a motion for summary judgment only if the delay does not prejudice the plaintiff.'" *Id.*

"Here, [Foti] attempt[s] to assert an . . . exemption defense for the first time approximately" over a year after the FTC filed its Amended Complaint against Foti, and approximately one month before the discovery cut-off deadline as stated in the January 10, 2017 Amended Scheduling Order. (*See* Dkt. Nos. 61, 169; Foti Mot.) The Court need not determine whether Foti's "unexplained, inordinate delay in raising this defense is prejudicial" to Plaintiff, as Foti raised this defense only a month before the close of discovery because the Court finds that the defense does not apply to the Corporate Defendants' actions here. *See Ulin v. Lovell's Antique Gallery*, No.C-09-03160 EDL, 2010 WL 3768012, at *13 (N.D. Cal. 2010) (prohibiting defendants from raising exemption defense for the first time at the summary judgment stage).

Because the attorney exemption is an affirmative defense, Defendant Foti has the burden of proof. *See FTC v. Lakhany*, No. SACV 12-00337-CJC (JPRx), Dkt. No. 136 at 5-6 (attorney exemption is a defense for which defendants have the burden of proof); *Barnes v. AT & T Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1173-74 (N.D. Cal. 2010) ("[A]n affirmative defense . . . is a defense on which the defendant has the burden of proof.") (citing *Kanne v. Conn. Gen. Life Is. Co.*, 867 F.2d 482, 492 n.4 (9th Cir. 1988)). To employ the attorney exemption, Defend-

ant Foti must establish that the Corporate Defendants were ethically discharging their legal duties. *See* 75 F.R. 75128, 715131-32. Here, Foti fails to put forth facts establishing this defense, and thus the exemption does not apply to the Corporate Defendants' conduct. (*See* FTC SGD ¶ 116.)[6]

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[6] Defendants Marshall and Foti do not put forth evidence that the Corporate Defendants were complying with legal ethical duties sufficient to satisfy that the attorney exemption applies. The evidence provided by the FTC suggests that the Corporate Defendants did not comply with their ethical duties, and that they were informed of their unethical practices. For example:

> Brookstone received ethics advice that its "non-refundable" flat fees were not true retainer fees: "The retainer agreements should be amended to remove the language that the retainer fees are non-refundable unless the payment is used to insure availability and not to any extent to compensate Brookstone for providing legal services. Given that Brookstone's attorneys do not currently keep track of the time spent on each client, it would be difficult for Brookstone to track the time spent in case a client terminates Brookstone's representation before the matter is resolved or adjudicated. We recommend that Brookstone's lawyers begin keeping track of their time to provide a basis to show that fees have been earned.

(FTC Mot. USF ¶ 172.) Brookstone also received ethics advice noting that Brookstone did not perform conflicts checks when retaining clients and stating that this was problematic. (FTC Mot. USF ¶ 173.) In response to one piece of ethics advice, Foti wrote: "I think we need to keep in mind he is an ethic's attorney so he is going to always say you shouldn't do this you shouldn't do that." (FTC Mot. USF ¶ 255.) Additionally, Brookstone obtained ethics advice that paying sales people a bonus based on the number of clients retained likely violated Brookstone's ethical duties. (FTC Mot. USF ¶ 240.)

B. The Undisputed Facts Demonstrate that Foti and Marshall Must Be Held Liable for the Corporate Defendants' Conduct

Injunctive relief against Defendants Foti and Marshall is appropriate if the FTC establishes a corporation's violations and establishes that Defendants "participated directly in the acts or practices *or* had the authority to control them." *FTC v. Publ'g Clearinghouse Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). Once injunctive liability is proven, Defendants Foti and Marshall will be held monetarily liable if the FTC establishes that that they had the requisite "knowledge." *Id.* at 1171.

1. Foti and Marshall Are Each Liable for Injunctive Relief

Because the Court has concluded that the undisputed facts demonstrate that the Corporate Defendants violated the FTC Act and the MARS Rule as a matter of law, the only remaining issue as to whether Defendants Foti and Marshall are liable for injunctive relief is whether they "participated directly in the acts or practices *or* had authority to control them." *See Publ'g Clearinghouse Inc.*, 104 F.3d at 1171. The FTC need not prove both participation and control, either will suffice. *Id.*

The undisputed facts show that both Defendants Foti and Marshall participated directly in the acts or practices. Defendant Foti began working with Brookstone in late 2010. (FTC Mot. USF ¶ 215.) In November 2010, Kutzner sent Foti a Brookstone telemarketing script, and Foti responded by telling Kutzner to send him all other scripts because he was getting the marketing and sales operation up and running, and

he was going to "work on a little bit shorter process [that] will still have the same effect with the client." (FTC Mot. USF ¶ 216.) Also in November 2010, Foti emailed Kutzner, explaining that he is bringing in numerous employees, several of whom are sales people. (FTC Mot. USF ¶ 217.) Foti told Kutzner, "It is go time let's hit it full throttle." (FTC Mot. USF ¶ 217.) One of the Corporate Defendants' phone directories identified Foti as "management." (FTC Mot. USF ¶ 220.) Another Corporate Defendant phone directory identified Foti as "VP of Marketing." (FTC Mot. USF ¶ 221.)

Individual Defendants Foti, Kutzner, and Torchia all signed their initials to a document titled "Deal Mem." (FTC Mot. USF ¶ 227.) In this Deal Memo, there was a provision related to the day-to-day management of Brookstone, which stated: "[T]here will be a majority rule in the voting decision amongst the shareholders of the firm and non-attorneys (Employees) Jeremy Foti and Damian Kutzner." (FTC Mot. USF ¶ 228.) Foti himself has declared that his role with the Corporate Defendants included: (1) "management services related to referral services, hiring/recruiting, vendor relations, IT relations, and data sources[;]" (2) "[o]btain[ing] estimates and costs for expenses associated with day to day operations[;]" (3) "[o]btain[ing] or arrang[ing] for the preparation of law firm supplied creative content, advertising, campaign management and other related services[;]" and, (4) "[a]udit[ing] all invoices and expenses provided by third-parties to ensure accuracy, including but not limited to payroll bonuses and employee compensation." (FTC Mot. USF ¶ 231.) At times, Foti would send emails to the Corporate Defendants' sales personnel regarding the sales process

and guidelines. (FTC Mot. USF ¶ 241.) The undisputed facts support that Foti was directly involved with overseeing the sales persons working for the Corporate Defendants, setting up training meetings and participating in meetings to determine the sales process. (*See, e.g.*, FTC Mot. USF ¶¶ 242-47.) Further, Torchia, a purported owner of Brookstone, declared: "Although Jeremy Foti was technically a 'consultant' for Brookstone, he was, along with Damian Kutzner, responsible for all non-legal aspects of Brookstone's operations." (FTC Mot. USF ¶ 248.) Former Brookstone and Advantis attorney Jonathan Tarkowski declared: "Damian Kutzner and Jeremy Foti, another non-attorney, were responsible for Brookstone/Advantis financial matters. Damian Kutzner and Jeremy Foti supervised the individuals primarily responsible for customer contact—the 'Civil Litigation Representatives' (CLRs) and 'Banking Specialists.'" (FTC Mot. USF ¶ 249.) Foti attempts to create a disputed fact as to his control over Brookstone and Advantis matters on the basis that others also had control, but participation or control by others does not preclude Foti's participation or control. Foti can also simultaneously have control over the Corporate Defendants' operations and, in fact, Foti directly participated in the Corporate Defendants' conduct. (*See, e.g.*, FTC Mot. USF ¶¶ 248-50.)

As to Defendant Marshall, he joined the scheme as part of Advantis, seeking to transfer clients from Brookstone to Advantis. (FTC Mot. USF ¶ 303.) Marshall sent letters to Brookstone clients informing them that their cases were being transferred to Marshall/Advantis. (FTC Mot. USF ¶ 304.) On numerous occasions, Marshall requested that Kutzner

and Foti begin fully marketing Advantis' mass joinder services urging them to "fully open marketing," engage marketing "full-on," and "open up the marketing." (FTC Mot. USF ¶ 305.) Marshall scheduled a meeting with the Brookstone/Advantis sales people to go over the entire business, including sales scripts. (FTC Mot. USF ¶ 309.) And Marshall appeared in the *Wright v. Bank of America* litigation on behalf of all plaintiffs. (FTC Mot. USF ¶¶ 310-11.) Marshall told Foti and Kutzner that the *Wright* matter and his participation in it and any settlement was dependent on him "presenting well for Advantis." (FTC Mot. USF ¶ 314.) Marshall worked to ensure the *Wright* case "stay[ed] on track" due to its importance and told Foti he had "done all the right things to keep that baby alive." (FTC Mot. USF ¶ 315.)

After Marshall's bar suspension concluded in 2016, Marshall deepened his involvement in Brookstone matters, telling Tarkowski that, pursuant to instructions from Foti and Kutzner, he would need "access to all the pleadings for recent Brookstone joinder cases that [Tarkowski] filed. [Marshall] need[ed] to review and assess status of hearings, pleadings, next steps, etc." (FTC Mot. USF ¶ 317.)[7]

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[7] Marshall attempts to establish that the facts as to his involvement with the Corporate Defendants' scheme are in dispute based on his declaration, but "[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *See Publ'g Clearing House, Inc.*, 104 F.3d at 1171; *see also Dizon v. Asiana Airlines, Inc.*, No. 16-01376-BRO (MRWx), 2017 WL 1498187, at *3 (March 6, 2017). The Court therefore concludes that Defendant Marshall has not established any disputed facts with respect to this issue.

Courts are authorized "to permanently enjoin defendants from violating the FTC Act if there is some cognizable danger of recurring violation." *FTC v. Gill*, 71 F. Supp. 2d 1030, 1047. "As demonstrated by the frequency of the misrepresentations . . . , defendants have exhibited a pattern of misrepresentations which convinces this Court that violations of the [MARS Rule] and of the FTC Act were systematic." *See Gill*, 71 F. Supp. 2d at 1047. "As to the possibility of recurrence," defendant Marshall continues to be able to practice law, such that it is possible that he could engage in similar conduct in the future. *See id.* at 1047-48; (FTC Mot. USF ¶ 317 (showing that Marshall's "bar suspension concluded in 2016")). As to Foti, his involvement in the Corporate Defendants' scheme was so extensive, and the Corporate Defendants made so many misrepresentations to consumers, that in considering the undisputed facts, there is a likelihood that Marshall will engage in similar conduct in the future. Thus, there is a likelihood of recurring violations, such that a permanent injunction against Defendants Foti and Marshall is warranted. *See id.* at 1047-48.

2. Foti and Marshall Are Monetarily Liable Because Each Held the Requisite Knowledge

"The FTC may establish knowledge by showing that the individual defendant had actual knowledge of material misrepresentations, [was] recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Network Servs. Depot, Inc.*, 617 F.3d at 1138-39 (internal quotation marks omitted). "The FTC is not required to

show that the defendant actually intended to defraud consumers." *Id.* at 1139. "The extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability." *FTC v. Affordable Media*, 179 F.3d 1228, 1235 (9th Cir. 1999).

The undisputed facts establish that Defendants Marshall and Foti had the requisite knowledge because of their extensive involvement in the fraudulent scheme. *See id.* Foti was involved in the drafting of at least some of the language for the various mailers, arranging for the mailers to be sent to consumers, providing input on the content of scripts, distributing scripts to the sales people, monitoring sales to consumers to determine bonus figures, and receiving and responding to consumer complaints. (*See, e.g.*, FTC Mot. USF ¶¶ 216, 231, 260, 264-65, 269, 280, 286.)

Defendant Marshall appeared in the *Wright* case and, after his bar suspension ended in late February 2016, he provided legal assistance on other Brookstone matters. (FTC Mot. USF ¶¶ 310-11, 317.) Further, Marshall also guided the sales staff on how to interact with current and potential clients, and directed Kutzner and Foti to issue marketing for Advantis. (FTC Mot. USF ¶¶ 305, 309.) Marshall was aware that Torchia and Brookstone were facing bar discipline related to the mass joinder practice. (FTC Mot. USF ¶ 321.) Notwithstanding Marshall's knowledge of Torchia's California State Bar disciplinary issues related to Brookstone's mass joinder cases, Marshall did no systematic analysis of the Brookstone mass joinder cases, undertook no investigation and did not research the bar complaints against Torchia at "any kind of level of detail." (FTC Mot. USF ¶ 322.) Marshall was

also aware of Kuztner's history, including that ULG had been shut down by criminal law enforcement. (FTC Mot. USF ¶ 323.)

Defendant Foti argues that he believed the Corporate Defendants' representations to be true, that he had not done due diligence, and that he acted on the advice of counsel. (Foti Opp'n at 28-29.) However, Defendant Foti's arguments should be rejected, because none of Foti's arguments serve as a defense to the knowledge standard. *See Publ'g Clearing House*, 104 F.3d at 1171 (intent to defraud not required); *Affordable Media*, 179 F.3d at 1235 (defendants' claim to have done due diligence regarding truth of claims does not defeat "knowledge"); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) ("[R]eliance on advice of counsel [is] not a valid defense on the question of knowledge. . . . ").

Thus, the undisputed facts establish that both Defendants Foti and Marshall are monetarily liable because each held the requisite knowledge. *See Affordable Media*, 179 F.3d at 1235 ("The extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability.").

3. Foti and Marshall Are Liable for the Full Amount Paid by Consumers

"[T]he Ninth Circuit has held that the power to grant any ancillary relief necessary to accomplish complete justice necessarily includes the power to order restitution." *Gill*, 71 F. Supp. 2d at 1048. The FTC does not need to show reliance by each consumer: "Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions

of large consumer redress actions and frustrate the statutory goals of [Section 13(b)]." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).[8]

The proper amount for restitution is the amount that the "defendant has unjustly received." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016). To calculate the restitution awards, courts employ a two-step burden-shifting framework. *Id.* at 603. "Under the first step, the FTC bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains, since the purpose of such an award is 'to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction.'" *Id.* "Unjust gains in a case like this one are measured by the defendant's net revenues (typically the amount consumers paid for the product or service minus refunds and chargebacks), not by the defendant's net profits." *Id.*

"If the FTC makes the required threshold showing, the burden then shifts to the defendant to show that the FTC's figures overstate the amount of the defendant's unjust gains." *Id.* at 604. "Any risk of uncertainty at this second step 'fall[s] on the wrongdoer whose illegal conduct created the uncertainty.'" *Id.*

Here, "[t]he FTC carried its initial burden at step one." *See id.* The FTC presented undisputed evidence

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[8] Additionally, summary judgment is appropriate even if Defendants Foti and Marshall presented some satisfied consumers because "the existence of some satisfied customers does not constitute a defense under the FTCA." *See Stefanchik*, 559 F.3d at 929 n.12 (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989)).

that that the Corporate Defendants received $18,146,866.34 in net revenues, taking into account refunds, chargebacks, and transfers among the Corporate Defendants' bank accounts. *See id.*; (FTC Mot. USF ¶ 213). The FTC having proved that all of the $18,146,866.34 represented presumptively unjust gains, the burden shifted to Defendants Foti and Marshall to show that the FTC's figure overstated the Corporate Defendants' restitution obligations. *See Commerce Planet, Inc.*, 815 F.3d at 604. The Court does not find that Foti or Marshall have met their burden discounting the FTC's calculation. (*See* FTC Mot. USF ¶ 213.) Defendant Foti attempted to meet his burden by attaching an excel sheet containing various data. (*See* Dkt. No. 287-4 ¶ 2(mm).) However, Defendant Foti did not proffer any information explaining what the excel sheet contains or that the document accounts for all of the Corporate Defendants' revenue. (*See* Dkt. No. 287-4 ¶ 2 (mm).) The evidence that Defendant Foti puts forth "sheds no light on what portion of the . . . net revenues represents unjust gains." *See Commerce Planet, Inc.*, 815 F.3d at 604. Thus, Defendants Marshall and Foti are liable for the full amount paid by consumers.[9]

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[9] During the hearing, Foti explained that the excel document contains information demonstrating that the amount clients paid to Brookstone totaled approximately $11 million. However, Defendant Foti has not proffered evidence supporting that this calculation includes all of the Corporate Defendants' revenue. Thus, the Court adopts the FTC's calculation as it is supported by the undisputed evidence.

VI. Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment against Defendants Jeremy Foti and Charles Marshall is GRANTED.

Defendant Jeremy Foti's Motion for Summary Judgment or, in the alternative, Motion for Summary Adjudication is DENIED.

IT IS SO ORDERED.

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Initials of Preparer

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (SEPTEMBER 24, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

CHARLES T. MARSHALL,

Defendant-Appellant.

No. 17-56476

D.C. No. 8:16-cv-00999-BRO-AFM
Central District of California, Santa Ana

Before: M. SMITH and FRIEDLAND, Circuit Judges, and SIMON,* District Judge.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Smith and Judge Friedland have voted to deny the petition for rehearing *en banc*, and Judge Simon so recommends. The full court has been advised of the petition for rehear-

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* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

ing *en banc*, and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petitions for rehearing and rehearing *en banc* are DENIED.

ANSWERING BRIEF OF THE FEDERAL TRADE COMMISSION (NOVEMBER 14, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

CHARLES T. MARSHALL,

Defendant-Appellant.

No. 17-56476

On Appeal from the United States District Court
for the Central District of California
No. 8:16-cv-00999-BRO-AFM
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INTRODUCTION

Charles Marshall and other persons and companies he worked with in a common enterprise ran a deceptive scheme that falsely promised struggling homeowners relief from their mortgage obligations and monetary damages, in exchange for unlawful up-front fees.

Marshall did not start the scheme, but he and his law firm, Advantis Law Group PC, played a major role in it starting in February 2015, working with the original company, Brookstone, and other principals to further the scheme under a joint Brookstone/Advantis umbrella, while also transitioning clients and operations to Advantis. All the while, he knew that several of Brookstone's principals had already faced charges of fraud and other unethical conduct based on similar activities, but decided to move forward anyway. Under his watch, consumers lost $1.8 million.

The district court found that undisputed evidence proved that Marshall's law firm and its predecessors and associated companies violated the FTC Act and the Mortgage Assistance Relief Services Rule (the MARS Rule). It held Marshall personally liable for the unlawful acts, enjoined him from further participation in the mortgage relief business, and entered an equitable monetary judgment against him.

QUESTIONS PRESENTED

1. Whether an unsupported declaration submitted by Marshall showed a dispute of material fact on the questions whether Marshall's law firm violated the FTC Act and the MARS Rule and whether Marshall is personally liable for the firm's actions;

2. Whether the district court should have excused the unlawful conduct under the attorney exception to the MARS Rule;

3. Whether the district court entered Final Judgment in violation of Fed. R. Civ. P. 63;

4. Whether the district court properly declined to allow Marshall to amend his answer or extend discovery; and

5. Whether the district court properly held Marshall in contempt for using frozen funds to pay attorney's fees.

JURISDICTION

The FTC agrees with appellant's jurisdiction statement, except that the Final Judgment on appeal was entered on September 21, 2017, not September 8, 2017. DE.360 [ER_8-24].[1]

STATEMENT OF THE CASE

A. The Brookstone/Advantis Scheme

Starting in 2011, two related companies going by the name of "Brookstone Law Group" (one based in

[1] "DE.xxx" refers to the district court's Docket Entry number. "ER" refers to Appellant's Excerpts of Record. "SER" refers to the FTC's Supplemental Excerpts of Record, filed concurrently with this brief.

California and one in Nevada), and founded by Jeremy Foti, Damian Kutzner, and Vito Torchia, engaged in a scheme to lure consumers into paying for bogus mortgage relief services. Their pitch was that if a homeowner paid substantial up-front fees to become a member of a "mass joinder" lawsuit (in which numerous people are joined together as plaintiffs, but are not certified as a class), they were highly likely to gain more favorable mortgage terms and substantial money damages. Beginning in 2015, Marshall became associated with the scheme by assisting the Brookstone entities and opening a new law firm, Advantis Law Group PC, to further the scheme.

Mortgage relief services have been rife with fraud for years. Advertising for such services is therefore strictly regulated by the Mortgage Assistance Relief Services (MARS) Rule, 16 C.F.R. Part 322, recodified as 12 C.F.R. Part 1015 (Regulation O).[2] As pertinent here, the MARS Rule prohibits misrepresentations in the sale of MARS services, 12 C.F.R. § 1015.3(b), requires certain disclosures, *id.* § 1015.4, and forbids the collection of fees until after the promised result has been delivered, *id.* § 1015.5. The FTC Act separately prohibits "deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).

The Brookstone/Advantis scheme violated all of those prohibitions. The firms attracted customers

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[2] The Dodd-Frank Act, Pub. Law 111-203, 124 Stat. 1376, 2102-03 (July 21, 2010), transferred rulemaking authority in this area from the FTC to the newly formed Consumer Financial Protection Bureau (CFPB). The CFPB then re-codified the FTC's MARS Rule as its own "Regulation O." The FTC has concurrent authority with the CFPB to enforce the MARS Rule, 12 U.S.C. § 5538(a)(3).

through mass mailers promising that participation in mass joinder lawsuits against lenders was very likely to improve their mortgage terms by voiding their notes or saving their homes from foreclosure, and that class members would receive substantial monetary awards (typically $75,000). DE.341 ¶¶ 79, 92, 99, 100, 103 [ER_2264-66, 2286-88, 2295-99, 2304-06].[3] They touted huge multi-billion settlements by major banks (some brought by the Department of Justice), stating that defendants' clients could be entitled to those funds. DE.341 ¶¶ 107-09 [ER_2320-26]. These promises were untrue. The lawsuits could not seek to void the consumers' mortgage notes because, if they had done so, they would have been dismissed for misjoinder under the Federal Rules of Civil Procedure. *See* DE.341 ¶ 197 [ER_2451].

Defendants touted themselves as a "national" law firm with experience litigating or settling "mass joinder" suits. DE.341¶¶ 101-02 102 [ER_2291-2304]. In fact, none of the lawyers (including Marshall) had experience litigating mass joinder cases. DE.341 ¶¶ 200, 202-03 [ER_2453-56]. Nor had they ever won a judgment in a mass joinder suit; indeed, all but one of their attempts have been dismissed and none resulted in a judgment. DE.341 ¶¶ 186-96, 198 [ER_2441-52]. The single remaining case, *Wright v. Bank of America*,

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[3] DE.341 is the FTC's amended Undisputed Statement of Facts and Conclusions of Law on Reply, which the district court relied upon in making its summary judgment decision. It consists of the FTC's Undisputed Statement of Facts (with supporting evidence), defendants' responses (with supporting evidence), and the FTC's reply. Citations to DE.341 in this brief include the FTC's supporting evidence reflected in that document.

has not advanced beyond the filing of the complaint. DE.341 ¶ 42 [ER_2229].[4]

When consumers called in response to the mailers, sales agents repeated many of the same deceptive claims, including the firms' experience suing major banks in which they obtained "some phenomenal results" that "sav[ed] hundreds of homes," and claiming as their own victories successful litigation by the government against major banks. DE.341 ¶¶ 118-20, 123-28 [ER_2340-46, 2349-63]. And they trumpeted their efforts in the "prominent" *Wright v. Bank of America* mass joinder case. DE.341 ¶¶ 129-30 [ER_2363-66]. Many of these claims were repeated on the Brookstone and Advantis websites. For the reasons stated above, those claims were all false.

Consumers still on the hook met with a "Banking Specialist" (a non-attorney sales representative), who showed them a "Legal Analysis," which had not been reviewed by a lawyer. It represented that consumers had many valid claims against their lenders, but failed to discuss the relative weakness of such claims. DE.341 ¶¶ 94, 133, 141-44, 159, 167 [ER_2289-90, 2372-74, 2389-95, 2408-09, 2416-18]. The Banking Specialists repeated the same lies as before: that consumers had "a very strong case, it was basically a done deal," they faced "no risk of losing," and were "guaranteed

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[4] At this point, a demurrer is pending and many of the plaintiffs have stipulated to dismiss their claims with prejudice in exchange for Bank of America's agreeing not to seek costs. DE.341 ¶¶ 188-90 [ER_2443-45].

$75,000." DE.341 ¶¶ 149, 152-66 [ER_2399-2400, 2402-2415].[5]

In addition to the misrepresentations, Brookstone/ Advantis violated the MARS Rule by collecting upfront fees, including $895 for the "Legal Analysis," an initial litigation retainer fee of up to $3,000, and monthly retainer payments. DE.341¶¶ 168-70 [ER_2418-25]. Some consumers who paid the fees were never even added to a mass joinder case. DE.341 ¶ 199 [ER_2452-53]. The defendants, as Marshall admitted, also did not deposit these fees into client trust accounts. DE.341 ¶ 171 [ER_2426].

Nor did Brookstone/Advantis provide the written disclosures required by the MARS Rule. DE.341 ¶ 185 [ER_2438-41]. These include statements that the consumer does not have to make any payments until they have received the promised relief. *See* 12 C.F.R. § 1015.4.

B. Marshall Takes a Leading Role in the Scheme

In 2015, Marshall joined the scheme. At the time, Marshall was aware of disciplinary bar proceedings and enforcement actions against Brookstone and its officers, all relating to its mass joinder practice. DE.341 ¶¶ 321-23, 328, 331 [ER_2604-06, 2608-09, 2611]; DE.313-1 ¶ 45 (Marshall admits he knew of

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[5] These deceptive statements are attested to by numerous consumer declarations reflected in the FTC's Undisputed Statement of Facts (which appear in the first column of DE.341), as well as a consumer survey establishing that consumers understood the representations as a promise of mortgage relief. DE.341 ¶¶ 175-84 [ER_2432-38].

Broderick's past) [ER_ 2150].[6] His emails document his understanding that those actions were creating "a lot of liability for me," but he forged ahead anyway because "[a]t the end of the day, . . . this is fundamentally a business decision. So I am moving forward in that light. The business prospect still looks quite good." DE.341 ¶ 332 [ER_2612-13] (citing DE.218-2 at Page ID 6053 [SER_69] (Ex. 37).[7]

Marshall, an attorney, participated in the scheme through a law firm called the Advantis Law Group PC (ALG), which he co-owned and operated. DE.341 ¶ 60 [ER_2245-46] (citing DE.284-8 at Page ID 7485, 7519-26 (Ex. 34) [ER_924-31]); DE.313-1 ¶ 9 [ER_2138] (Marshall does not dispute ownership of ALG); DE.341 ¶¶ 61, 62 [ER_2246-47]. Around the same time, the scheme established another entity called Advantis Law PC (AL). Despite the slight difference in the name, the two Advantis entities operated as one, with Marshall deeply involved in its operations (along

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[6] Marshall was no stranger to MARS-related abuses. In 2011, he stipulated to findings in state court that he violated his ethical obligations to five different sets of clients whom he represented on short sale and loan modification matters. DE.341 ¶ 351 [ER_2627-28]; DE.313-1 ¶ 53 (Marshall does not dispute this fact) [ER_2153]. Specifically, he took advance fees for work that he did not perform. *Id.* Similarly, in 2013 and again in 2015, Marshall stipulated that he took illegal advance fees for loan modification work. DE.341 ¶¶ 352-55 [ER_2628-29]. In both instances, he told his clients the fees were for "litigation" that he never in fact pursued. *Id.*

[7] Exhibits referenced in DE.218-2 are authenticated through the Declaration of Gregory Madden in Support of Plaintiff's Opposition to Motion to Dissolve or Otherwise Modify Preliminary Injunction as to Defendant Charles T. Marshall, DE.218-1 [SER_51-56].

with Foti and Kutzner). They shared office space. DE.341 ¶¶ 64-67 [ER_2248-51]; DE.313-1 at 5 [ER_2139] (Marshall does not respond to this asserted fact); DE.41-2 at Page ID 2511 [SER_206] ("Advantis Law, PC" indicated at same location as other entities in Santa Ana, CA). And as described below, "Advantis," "Advantis Law," and "Advantis Law Group" were used interchangeably in emails, correspondence, and marketing materials; Marshall was identified with all three names.

ALG used the "Advantis Law" website (www.advantislaw.com), DE.284-8 at Page ID 7485, 7538-39 (Ex. 60) [ER_889-90, 943-44], and did not have its own website. Marshall knew about the website, knew it included his name, image, and title as "Director," and knew it claimed credit for the *Wright* case. DE.284-14 at Page ID 8413, 8414 (RFAs nos. 8, 11) [ER_1997];[8] DE.218-2 at Page ID 6073 (Marshall Dep. at 243:11-14) [SER_89]. He ensured that his name was removed from the site when his law license was suspended during the winter of 2015-16. DE.284-8 at Page ID 7538-39 (Ex. 60) [ER_943-44],

Marshall was identified as the attorney for "Advantis Law, PC" in an advertising mailer sent out to prospective clients, which also listed "Advantis Law Group" in its header. DE.341 ¶ 110 [ER_2326-27] (citing DE.41-2 at Page ID 2511 [SER_206]. Marshall signed a payment processing agreement as "President"

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[8] Cites referring to "RFA," are the FTC's First Requests for Admission issued to Marshall pursuant to Fed. R. Civ. P. 36. DE.284-14 at Page ID 8410-8420 [ER_1993-2003]. Because Marshall did not respond to these Requests, he has admitted those facts. *See* Fed. R. Civ. P. 36(a)(3).

for "Advantis Law." DE.341 ¶ 319 [ER 2603] (citing DE.284-11 at Page ID 7836-40 [ER_ 1248-52]). He had an Advantis Law email address ("Charles@ AdvantisLaw.com"). DE.341 ¶ 306 [ER_2592-93] (citing DE.284-14 at Page ID 8413, 8417 (RFA no. 47.b) [ER_1996, 2000]).

In negotiating their business arrangement, Marshall and the Brookstone partners referred to their new business operation interchangeably as "Advantis" or "Advantis Law." DE.218-2 at Page ID 6055-57 [SER_71-73] (Ex. 30); DE.284-8 at Page ID 7485, 7517-18 [ER_890, 922-23] (Ex. 32). In his deposition testimony, Marshall referred to "Advantis," "Advantis Law," and "Advantis Law Group" interchangeably. DE.284-14 at Page ID 8125, 8285-86 (Marshal Dep. 76:6-77:2), *id.* at Page ID 8290 (Marshall Dep. 97:6-98:12, 100:2-100:5) [ER_1868-69, 1873]. Indeed, after the FTC filed its complaint in this very case naming both Advantis Law PC and Advantis Law Group PC as defendants, Marshall entered an appearance as attorney for both of them, in which capacity he signed the stipulated preliminary injunction on behalf of both. DE.341 ¶ 320 [ER_2603-04] (citing DE.50 at Page ID 2959 [SER_177]; DE.53 at Page ID 2967-70 [SER_138-41]; DE.53-1 at Page ID 2972-3005 [SER_143-76]).

Through Advantis, Marshall continued the scheme begun by Brookstone. He signed letters informing Brookstone clients that their cases were being transferred to "Advantis Law Group, PC," in which "Advantis Law" will be filing "your needed lawsuit." *See* DE.341 ¶ 304 [ER_2590] (citing DE.218-2 at Page ID 5996-6003 (Ex. 46) [SER_56-63]). His emails gave instructions on the "Brookstone to Advantis client hand-off," including "clients still positioned with Brookstone,

but subject to transfer to Advantis." DE.341 ¶ 303 [ER_2589-90] (citing DE.218-2 at Page ID 6004 (Ex. 44) [SER_64], *id.* at Page ID 5996-6003 (Ex. 46) [SER_56-63]; *id.* at Page ID 6005 (Ex. 48) [SER_65]). He received numerous emails about Advantis matters, including the transition from Brookstone, from employees using their advantislaw.com email addresses. DE.341 ¶ 307 [ER 2593-94] (citing DE.218-2 at Page ID 6053 (Ex. 37) [SER_69]; *id. at* Page ID 5996-6003 (Ex. 46) [SER_56-63]; *id.* at Page ID 6007-08 (Ex. 57) [SER_67]); DE.313-1 ¶ 24 [ER_2144] (Marshall does not dispute this fact).

At times, he also performed legal work on Brookstone mass joinder cases. DE.284-14 at Page ID 8413, 8418-19 (RFA nos. 56-62) [ER_1996, 2001-02]. For example, after his bar suspension ended in April 2016, he sought "access to all the pleadings for recent Brookstone joinder cases that [Brookstone] filed" in order to "assess status of hearings, pleadings, next steps, etc." DE.341 ¶ 317 [ER_2601-02] (citing DE.284-8 at Page ID 7485 ¶ 4. h., 7537 (Ex. 53) [ER_890, 942]).

Marshall represented all the plaintiffs in the *Wright* litigation as an attorney for Advantis Law Group PC. DE.341 ¶¶ 310-11 [ER_2596-97]. His emails stress that his representation in the *Wright* matter was critical to moving the case forward, that he worked hard "to ensure that the case stays on track," and emphasized the need that he "present[ ] well for Advantis (which I will do)." DE.341 ¶¶ 314-15 [ER_2598-2600] (citing DE.218-2 at Page ID 6006 (Ex. 55) [SER_66]; *id.* at Page ID 6607 (Ex. 57) [SER_67]. He also commented that an upcoming amendment to the *Wright* complaint "will serve as a template and baseline for our own Advantis joinders." DE.218-2 at Page ID 6007

(Ex. 57) [SER_67]; DE.284-8 at Page ID 7489 ¶ 5 [ER_894].

He also made sure Advantis marketing and client development moved forward. He provided to Foti and Kutzner "needed documents to submit for Advantis Launch," DE.284-11 at Page ID 7835 [ER_1247]; DE.284-8 at Page ID 7484 ¶ 4.mmm, 7487 [ER_889, 892], and discussed meeting a prospective client "who is a strong prospect for our first Advantis joinder." DE.218-2 at Page ID 6007 (Ex. 57) [SER_67]. He discussed scheduling a meeting "to cover all relevant areas to Advantis legal practice, from telephone scripts, to proceedings, to client management, including working on mass joinder complaints." DE.341 ¶ 309 [ER_2595-96] (citing DE.284-8 at Page ID 7485 ¶ 4.e, 7533-34 (Ex. 41) [ER_890, 938-39]; DE.313-1 ¶ 26 [ER_2144] (Marshall does not deny scheduling a meeting). He requested that Foti and Kutzner "fully open marketing," that the marketing "be full on," and "to open up the marketing" for Advantis mass joinder cases. DE.341 ¶ 305 [ER_2590-91] (citing DE.218-2 at Page ID 6078 (Ex. 54) [SER_94]; DE.218-2 at Page ID 6006 (Ex. 55) [SER_55]); DE.218-2 at Page ID 6094 (Ex. 56) [SER_110]; DE.313-1 ¶ 22 [ER_2143] (Marshall admits he sent emails about marketing), but relied on others to ensure the marketing was legally compliant. DE.341 ¶ 326 [ER_2607]. He provided instructions to staff to set legal fees "for Advantis clients" and for "ALG." DE.284-8 at Page ID 7485 ¶ 4.f, 7535 [ER_890, 940] (Ex. 43); DE.284-14 at Page ID 8413, 8416 [ER_1996, 1999] (RFA no. 32).

Marshall knew that Advantis misrepresented various aspects of its practice. He emailed Foti that Advantis was not a "group of attorneys," as the firm

was marketed, but that Marshall was the "only attorney moving forward." DE.218-2 at Page ID 6053 [SER_69] (Ex. 37); *see* DE.341 ¶ 333 [ER_2613]. Marshall knew that the advantislaw.com website misrepresented various facets of ALG's practice, including when it began, practice areas, locations, attorneys, paralegals, and legal assistants. DE.284-14 at page ID 8413, 8415-16 [ER_1997-99] (RFA nos.13-27); DE.218-2 at Page ID 6073 [SER_89] (Marshall Dep. at 241:1-244:11); *see* DE.341 ¶ 334 [ER_2614].

The undisputed facts showed that Brookstone and Advantis (both Advantis Law Group PC and Advantis Law PC) operated as a common enterprise. They had significant overlap in owners and direct overlap in control persons, and they shared offices, employees, and clients. They also assisted one another in furthering the scheme, with Marshall and Advantis working on the Wright case and other Brookstone mass joinder cases together, and both firms using virtually the same misrepresentations in mailers, sales scripts, and websites. DE.341 ¶¶ 21-24, 26-31; 64-67, 74-79, 80-91 [ER_2203-06, 2211-19, 2248-51, 2260-65, 2266-86]; DE.313-1 at 2-6 [ER_2136-2140] (Marshall's declaration failed to dispute any of the facts asserted in the cited DE.341 paragraphs); DE.284-14 at Page ID 8414-19 [ER_1997-2002] (RFA nos. 11-12, 28-31, 33-46, 56-68). During the period Marshall participated in the scheme (from February 27, 2015 until it was shut down on June 1, 2016), the enterprise collected $1,784,022.61 in net revenues, after deducting refunds

and credit card chargebacks and reconciling internal corporate transfers. DE.341 ¶ 214 [ER_ 2471-72].[9]

C. The FTC's Enforcement Lawsuit

1. The Complaint and Preliminary Relief

On May 31, 2016, the FTC charged Marshall, Advantis Law PC, Advantis Law Group PC, the California and Nevada Brookstone entities, and four other individuals with violating the FTC Act, 15 U.S.C. § 45(a), and the MARS Rule, 12 C.F.R. Part 1015. DE.1.[10] The FTC also moved for a temporary restraining order (TRO) to freeze the defendants' assets and appoint a temporary receiver, which the court granted the following day. DE.23 [ER_151-82]. The TRO appointed a temporary receiver and froze all of Marshall's assets as of June 1, 2016, as well as any after-acquired assets that were "derived, directly or indirectly, from the Defendants' activities" charged in the complaint. *Id.* at 12 § VI [ER_162].

On June 20, 2016, Marshall filed an appearance specifically on behalf of both Advantis entities by filing the "Notice of Appearance on behalf of his co-defendants ADVANTIS LAW P.C. and ADVANTIS LAW GROUP P.C." DE.50 at 1 [SER_177] (caps in original). He later stipulated to entry of a preliminary injunction (PI), incorporating the terms of the TRO, including the asset freeze, individually, and on behalf

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[9] Bank records for Brookstone and Advantis together show net revenues of $18,146,866.34 during the entire scheme. DE.341 ¶ 213 [ER_2471].

[10] On July 5, 2016, the FTC amended its complaint to add Jeremy Foti as a defendant. DE.61 [ER_190-212].

of both Advantis entities. DE.53 [SER_138-41]; DE.57 at 14-15 § VIII [ER_130-31]. The court issued the stipulated PI on June 24, 2017. DE.57 [ER_117-50].

2. Marshall's Answer and Subsequent Motions to Amend the Answer and to Extend Discovery

Marshall filed his answer on November 14, 2016, several months after it was due. Instead of admitting or denying the allegations, Marshall invoked a blanket Fifth Amendment right not to incriminate himself as to any allegation. DE.149 [ER_213-15]. The court's scheduling order set March 6, 2017, to amend pleadings. DE.169 at 12 [SER_137]. Marshall waited more than two months after the deadline, until May 15, 2017, to seek leave to file an amended answer, in which he abandoned his prior invocation of the Fifth Amendment, and to assert affirmative defenses. DE.238 [ER_378-420].

The court denied the motion because Marshall had not acted diligently and thus failed to establish good cause under Fed. R. Civ. P. 16(b)(4). DE.259 [ER_103]. Marshall failed to explain how the new information in his amended answer would have been self-incriminating and could not have been included in his original answer or before the amendment filing deadline. *Id.* at 9 [ER_111]. The court also found that amendment would result in "undue delay" and would prejudice the FTC. *Id.* at 11 [ER_113]. Undeterred, on July 31, 2017, Marshall sought again to file an almost-identical amended answer, DE.296 [ER_2075], without addressing any of the deficiencies the court had previously identified. The court denied this motion for lack of good cause. DE.343 at 5-6 [ER_68-69].

Likewise, notwithstanding Marshall's failure to engage in discovery, on July 24, 2017 (only three weeks before the cut-off date), he moved to extend discovery and to continue the trial date for at least five months. He explained the extension was necessary because he had withdrawn his Fifth Amendment claim, so he needed additional time to engage in discovery and prepare for trial. DE.292 [ER_2035-51]. The court denied Marshall's extension request because he had failed both to pursue his claims diligently and to comply with the court's orders and procedures, particularly his failure to provide Rule 26 initial disclosures or take discovery. DE.336 at 5-6 [ER_75-76].

3. Contempt Order

Marshall became aware of the TRO, including the asset freeze, on June 2, 2016, when he was contacted by the Receiver. DE.260 at 8 [ER_90]; DE.232-1 ¶¶ 4-7 [ER_325-26]. Four days later, however, he nevertheless paid $24,500 to his criminal defense lawyer. DE.260 at 9 [ER_91]; DE.221-1 ¶ 4 & Att.1 [ER_297, 299]. The FTC moved to hold Marshall in contempt because he had paid the money out of frozen funds despite being aware of the asset freeze. DE.220 [ER_275-99].

On June 12, 2017, the district court held Marshall in contempt and ordered him to purge the contempt by paying $24,500 to the Receiver and providing a financial disclosure statement to the FTC. DE.260 at 18-19 [ER_100-01]. The court concluded that Marshall "did not substantially comply with the asset freeze

provisions; rather, he directly contradicted the Court's order by dissipating funds." *Id.* at 12 [ER_94].[11]

4. Summary Judgment Order

The FTC and Foti cross-moved for summary judgment. DE.284 (FTC) [ER_580-628]; DE.287 (Foti). On September 5, 2017, the court, Judge Beverly Reid O'Connell, granted the FTC's motion and denied Foti's. DE.353 [ER_41-64]. The FTC also moved for a default judgment against the two Brookstone and the two Advantis corporate defendants, DE.295 [ER_2061-74], which the court granted. DE.347 [SER_22-36].

In its summary judgment ruling, the district court first held that undisputed facts showed that Brookstone and Advantis formed a "common enterprise." DE.353 at 9-10 [ER_49-50]. "[E]ntities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010) (quoted at DE.353 p.9 [ER_49]). Brookstone and the Advantis practices "shared staff and office space in multiple locations," "had significant overlap in owners and direct overlap in control persons," and "assisted one another in furthering the scheme, . . . using virtually the same mis-

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[11] Marshall did not comply with the court's order. Instead, on June 19, 2017, Marshall filed in this Court an emergency petition for writ of mandamus and a stay of the contempt order pending resolution of the petition. DE.268. This Court denied both the stay request and the petition. *Marshall v. U.S.D.C. Central Dist. Calif., Santa Ana*, No. 17-71781, Orders of June 30, 2017, and Sept. 12, 2017.

representations in mailers, scripts, and websites." DE.353 at 9-10 [ER_49-50].

The court next held that undisputed facts showed that the corporate defendants violated Section 5 of the FTC Act by making "numerous false and/or misleading material statements to consumers." *Id.* at 10-13 [ER_50-53]. Defendants misrepresented the benefits of consumers participating in their "mass joinder" litigation program, including having their mortgages voided or their terms improved or receiving large monetary damages. Defendants also deceived consumers about their lawyers' experience litigating, winning, or settling such cases. *Id.* at 10-11 [ER_50-51]. The undisputed facts showed, however, that "[n]one of these representations was accurate. The Corporate Defendants did not seek to void notes, did not have the promised experience or capabilities, and have never prevailed in a mass joinder [case], thus failing to obtain the represented relief. Some consumers . . . were never [even] added to a mass joinder case." *Id.* at 12 [ER_52].

The undisputed record also showed that the corporate defendants violated the MARS Rule. They failed to make required disclosures, collected forbidden advance fees, and misrepresented material aspects of their services. *Id.* at 13-15 [ER_53-55]. The court rejected the claim that the attorney exception to the MARS Rule applied because "Marshall and Foti do not put forth evidence that the Corporate Defendants were complying with legal ethical duties sufficient to satisfy that the attorney exemption applies." *Id.* at 16-17 & n.6 [ER_55-56].

The court then turned to Marshall's personal liability for the acts of the corporate defendants. Indi-

viduals can be held liable for corporate conduct if they have "participated directly in the acts or practices or had authority to control them." *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). The court concluded that undisputed facts proved Marshall's direct participation in the corporate defendants' unlawful conduct. *Id.* at 18-23 [ER_58-63]. The record showed that Marshall sought to transfer clients from Brookstone to Advantis, encouraged his co-defendants to market Advantis's mass joinder services, and met with Brookstone/Advantis sales personnel, including to review sales scripts. *Id.* at 19-20 [ER_59-60]. He appeared in the *Wright v. Bank of America* litigation on behalf of all the plaintiffs and worked extensively on that case because he needed to "present[ ] well for Advantis" due to its importance. *Id.* at 20 [ER_60].

The court rejected Marshall's claim that a declaration he submitted created a genuine dispute over material facts. The court found that "[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *Id.* at 20 n.7 [ER_60 n.7] (quoting *Publ'g Clearing House*, 104 F.3d at 1171).

The court determined that Marshall's extensive involvement in the scheme and his "likelihood of recurring violations" warranted permanent injunctive relief. *Id.* at 20-21 [ER_60-61]. It also found that Marshall "had the requisite knowledge" of the unlawful acts at issue to be liable for monetary relief in the amount of consumer loss. *Id.* at 21-22 [ER_61-62].

5. Final Judgment

After ruling on the motions for summary judgment, but before entering final judgment, Judge O'Connell unfortunately died. Based on the summary judgment order, Chief Judge Phillips entered the final judgment against Marshall and Foti, including injunctive and equitable monetary relief. DE.360 [ER_8-24]. The judgment permanently bans Marshall from work involving debt relief products and services, bars him from misrepresenting the likelihood of obtaining a refund for consumers, and imposes compliance reporting, recordkeeping, and monitoring requirements. *Id.* §§ I-III, IX-XI [ER_15-17, 20-24]. It also orders a monetary judgment against Marshall (jointly and severally with the other defendants) of $1,784,022.61, which reflects the amounts consumers lost during the time when Marshall participated in the scheme. *Id.* § IV [ER_17-18].

The case was then assigned to Judge David O. Carter for post-judgment matters. He rejected Foti's argument that Judge Phillips violated Fed. R. Civ. P. 63 by failing to certify her familiarity with the record before issuing the Final Judgment. DE.391 [SER_1-20]. He ruled instead that Rule 63 does not apply in summary judgment proceedings, where "the successor judge is not required to make credibility determinations." *Id.* at 11 [SER_11].

SUMMARY OF THE ARGUMENT

1. The principal question in this case is whether summary judgment can be defeated by Marshall's own unsupported declaration. The FTC presented substantial undisputed evidence showing that Marshall, the two Advantis firms, and the Brookstone firms

operated together as a common enterprise. Marshall offered in response only his own statement that he is an innocent party unfairly swept into the FTC's case because the name of his law firm, Advantis Law Group PC, is highly similar to that of the guilty firm, Advantis Law PC. In particular, he claims that, until his deposition, he had never heard of Advantis Law PC.

a. The district court properly rejected Marshall's declaration as a basis for denying summary judgment. Marshall's unsubstantiated denial that he was unaware of Advantis Law PC until his deposition runs headlong into the record, including his representation of that firm in this very litigation. Other evidence similarly show Marshall's involvement with both firm names. Thus, even if an unsubstantiated declaration could theoretically defeat summary judgment, it could not do so here because it was so "contradicted by the record . . . that no reasonable juror could believe it." *Scott v. Harris*, 550 U.S. 372, 380-81 (2007).

b. Undisputed facts in the record apart from Marshall's knowledge of Advantis Law PC prove his liability. He actively participated on behalf of Advantis Law Group PC in the principal case, *Wright v. Bank of America*, used to lure victims. He arranged the transfer of clients from Brookstone to Advantis. He pressed for greater marketing of Advantis Law Group PC and scheduled meetings to discuss marketing scripts with the sales team. He directly acknowledged that Brookstone's legal problems could expose

him to liability, yet he continued participating as a business decision.

2. The district court properly held that Marshall is not entitled to the attorney exception to the MARS Rule's ban on up-front fees. He waived the defense by failing to plead it below. If he may raise it, the exception requires that an attorney deposit advance fees in client trust accounts. Marshall admitted that he did not deposit the fees in such accounts. In addition, he failed to show that he complied with state ethics obligations, as the exception also requires.

3. Rule 63 did not require Chief Judge Phillips to certify her familiarity with the record before entering final judgment. That rule does not apply to summary judgment proceedings where witness credibility is not at issue.

Nor did an alleged lack of familiarity with the record cause any error in the injunctive relief directed in the district court's Final Order. The summary judgment order contemplated restrictions on Marshall's future conduct, given his central role in the deceptive scheme and the likelihood of his recidivism. The summary judgment order likewise determined both that Marshall had the requisite knowledge to be found monetarily liable and that liability should equal consumer loss. No familiarity with the record was needed to order that relief.

4. The district court properly exercised its discretion when it denied Marshall's motions to amend his answer and to extend the discovery period. An extension for "good cause" under Fed. R. Civ. P. 16(b)(4) requires a litigant to diligently pursue his claims. Marshall did not do so. He tried to amend his answer

more than two months late and he failed to explain why he could not have filed earlier. He also failed to provide initial disclosures or take any discovery, fatally undercutting his later request to extend discovery for months.

5. The district court properly found Marshall in contempt for using $24,500 in frozen funds to pay a criminal defense lawyer. The decision in *Luis v. United States*, 136 S. Ct. 1083 (2016), does not justify his conduct. When Marshall violated the district court's freeze order, he was under neither criminal indictment nor even investigation. And in any event, the Sixth Amendment does not apply to an asset freeze in a civil case.

STANDARD OF REVIEW

The Court reviews a district court's grant of summary judgment *de novo* to determine "whether, viewing the evidence in the light most favorable to the non-moving party, there are genuine issues of material fact and whether the lower court correctly applied the relevant substantive law." *Network Servs. Depot*, 617 F.3d at 1138. The judgment may be affirmed on any ground supported by the record. *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008). The non-moving party must set forth evidence that is "significantly probative as to any fact claimed to be disputed." *SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980) (cleaned up).

The Court reviews for abuse of discretion the district court's orders: 1) denying Marshall leave to amend his answer, *Owens Corning v. Nat'l Union Fire Ins. Co.,* 257 F.3d 484, 491 (6th Cir. 2001); 2) denying Marshall leave to extend discovery, *Quinn v. Anvil*

Corp., 620 F.3d 1005, 1015 (9th Cir. 2010); 3) holding Marshall in contempt, *FTC v. EDebitPay, LLC*, 695 F.3d 938, 943 (9th Cir. 2012); 4) denying Marshall's Rule 63 challenge, *Home Placement Service, Inc. v. Providence Journal Co.,* 739 F.2d 671, 677-78 (1st Cir. 1984); and 5) deciding to impose equitable monetary and injunctive relief, *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1101 (9th Cir. 2014).

ARGUMENT

I. The District Court Properly Entered Summary Judgment Against Marshall

Marshall was personally liable for the unlawful acts of the corporate defendants if he "participated directly in the acts or practices or had the authority to control them." *Publ'g Clearing House,* 104 F.3d at 1170; *see also FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016). Substantial undisputed evidence shows that Advantis (both Advantis Law PC and Advantis Law Group PC) and Brookstone operated as a seamless common enterprise with the same pitches, offices and staff, and that, beginning in early 2015, Marshall played an integral role by participating directly in the unlawful conduct.

Before this Court, Marshall does not contest the grant of summary judgment against the Brookstone companies or deny that Advantis Law PC was part of the unlawful scheme. The gist of Marshall's argument on appeal is that he was an innocent bystander unfairly swept into "one indistinguishable pot" with the Brookstone entities and personnel because the name of his law firm—Advantis Law Group PC—is similar to that of the guilty law firm—Advantis Law PC. Br. 5, 7, 11-

12, 23-24. As he tells it, the district court improperly declined to credit his declaration describing the distinction between the two sound-alike firms, which he claims raised a disputed issue of fact material to his personal liability.

The district court properly declined to consider Marshall's declaration, which directly contradicted evidence from this case on the distinction between the law firms and failed to address other key evidence showing Marshall's role in, and knowledge of, the common enterprise. In any event, the difference between the firms is not a material fact and Marshall's reliance on it is a red herring. Abundant undisputed evidence aside from the law firm nomenclature showed Marshall participated directly in the unlawful mortgage modification scheme.

A. The District Court Properly Declined to Consider Marshall's Declaration

Marshall's declaration states that he was unaware of the existence of Advantis Law PC until asked about that firm at his March 2017 deposition. DE.313-1 ¶ 5 [ER_2137]. The district court declined to consider the declaration on the ground that "[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." DE.353 at 20 n.7 [ER_60 n.7]. The court cited this Court's opinion in *Publ'g Clearing House*, 104 F.3d at 1171, for that determination. On that standard, which remains good law, the district court properly declined to rely on the declaration.

Just two years ago in *CFPB v. Gordon*, 819 F.3d 1179, 1193-94 (9th Cir. 2016), this Court held that a declaration that lacks "detailed facts and any sup-

porting evidence," does not defeat summary judgment where the moving party has provided substantial contrary evidence, as the FTC did here. *Gordon*, like this case, involved a defendant held personally liable for corporate acts in a deceptive loan modification scheme, and the Court affirmed the district court's grant of summary judgment in the face of a bald denial similar to Marshall's. *See id.*, 819 F.3d at 1192-94.

Here, the FTC presented a detailed statement of undisputed facts showing Marshall's culpability, each supported by substantial documentary evidence. Marshall, by contrast, makes the unsupported claim that "he knew nothing about . . . a separate corp entity called Advantis Law PC." DE.313-1 ¶ 5 [ER_2137]. Indeed, this was the first time he made such a claim after nearly a year of litigation. Marshall did not raise the issue in response to discovery requests by the FTC demanding evidence as to any defenses. This included a request that he identify any people or entities who had information suggesting that he or another defendant (like ALG) are not liable. DE.341 ¶¶ 335, 336 [ER_2614-17] (citing DE.284-14 at Page ID 8126-28 ¶¶ 4-6, 8423-26 (Att. 16) [ER_1709-11, 2006-09]; DE. 284-15 at Page ID 8432-33 (Att. 17) [ER_2022-23]. Several prior declarations submitted by Marshall likewise drew no distinction between the two Advantis firms. *E.g.*, DE.212-2 [ER_247-56]. He provided no evidence that Advantis Law PC engaged in marketing mass joinder cases or other activities apart from that of ALG.

The Supreme Court has recognized that where an assertion is "contradicted by the record, so that no reasonable juror could believe it, a court should not adopt that version of the facts" in ruling on summary

judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007). Marshall's belated claim that he was unaware of the existence of "Advantis Law PC" until his deposition is directly contradicted by the record. In particular, the FTC's complaint was filed in May 2016, shortly after which Marshall appeared as the attorney of record for *both Advantis Law Group PC and Advantis Law PC*. He then signed the stipulation for the preliminary injunction on behalf of Advantis Law PC (as well as Advantis Law Group PC) and represented both firms until final judgment was issued in September 2017. Indeed, in negotiations with FTC counsel over the stipulated PI in June 2016—nine months before the deposition—Marshall's emails to FTC counsel stated his intention to sign the stipulation "as to the two Advantis defendants." DE.301-1 [SER_37-50]. He was also identified as the attorney for "Advantis Law, PC" in an advertising solicitation. DE.41-2 at Page ID 2511 [SER_206]. No reasonable jury would believe him.

Accepting a declaration like Marshall's to defeat summary judgment would hand litigants a trump card in summary judgment proceedings. They could defeat summary decision and force an expensive and burdensome trial merely by creating some story, however farfetched, lacking in evidentiary support, or failing to address material facts in the record. The Court should not condone such a result.

Contrary to Marshall's suggestion, the Court did not adopt that approach in *Nigro v. Sears, Roebuck, & Co.*, 784 F.3d 495, 497 (9th Cir. 2015), when it held that a "district court may not disregard a piece of evidence at the summary judgment stage solely based on its self-serving nature." *See* Br. 30. *Nigro* explained

further that "a self-serving declaration that states only conclusions and not facts that would be admissible evidence" does not create genuine disputed facts. *Id.* at 497. That explanation was in keeping with long established precedent that "bald assertions or a mere scintilla of evidence" in a party's favor do not defeat summary judgment in the absence of supporting evidence. *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009).

Following the logic of *Nigro* and *Stefanchik*, unsupported assertions or denials in Marshall's declaration—which essentially amount to "I didn't know or do anything"—lack probative value and thus do not create genuine issues of fact where they fail to address directly contrary record evidence.

For example, his declaration does not deny that Marshall knew about the advantislaw.com website, that his name and image appeared on the website identifying him as a "Director," and that the website identified the *Wright* matter as an ALG case. DE.284-14 at Page ID 8413, 8414 [ER_1997] (RFAs nos. 8, 11); DE.218-2 at Page ID 6073 [SER_89] (Marshall Dep. at 243:11-14). And it does nothing to rebut that he knew about the misrepresentations about ALG on the firm's website, but took no corrective action. DE.284-14 at Page ID 8126 8414-16 [ER_1997-99] (RFA nos.13-27)]; DE.218-2 at Page ID 6073 [SER_89__] (Dep. at 241:1-244:11); *see* DE.341 ¶ 334 [ER_2614].

Neither does his declaration address or dispute record evidence establishing the common enterprise, such as his awareness that Brookstone and ALG shared sales people and other staff, DE.284-14 at Page ID 8416 [ER_8416] (RFA nos. 28-36), and shared office

addresses. DE.284-14 at Page ID 8416-17 [ER_1999-2000] (RFA nos. 37-45); DE.341 ¶¶ 21-24 [ER_2203-06].

His declaration also does not deny that he abdicated responsibility for Advantis marketing, confirming his previous testimony that— although he asked Foti and Kutzner to ramp up marketing for Advantis—he relied on others to ensure that the marketing was legally compliant. DE.313-1 ¶¶ 41-44 [ER_2149-50]; DE.218-2 at Page ID 6071, 6073 (Marshall Dep. at 215:23-216:24; 244:19-25), *id.* at Page ID 6074 (Marshall Dep. at 247:10-248:5), *id.* at Page ID 6077 (Marshall Dep. at 261:3-9) [SER_87-93]. He also does not deny that he worked on several Brookstone mass joinder cases after his bar suspension was lifted in February 2016, and asked to see recent pleadings in Brookstone cases so he could "assess status of hearings, pleadings, next steps, etc." DE.313-1 ¶ 34 [ER_2147]; DE.284-14 at Page ID 8413, 8418-19 [ER_1996, 2001-02] (RFA nos. 56-62); DE.284-8 at Page ID 7485 ¶ 4.h., 7537 [ER_890, 942] (Ex. 53).

Further, as discussed above, his new assertion that he was unaware of Advantis Law PC, is contradicted by his representation in this case of both Advantis entities. And other specific assertions he makes (*e.g.*, that ALG had only one foreclosure-related client and only one bank account that he controlled, *see* Br. 30) are simply irrelevant given the record evidence showing his participation in many aspects of the common enterprise.

Marshall makes two additional meritless arguments challenging the district court's rejection of his declaration. First, he asserts that the rejection amounted to an assessment of his credibility, which is improper in a summary judgment ruling. Br. 32. In

fact, as discussed above, the court properly rejected the declaration because it failed to address or deny material facts supporting his liability, and well as being unsupported and conclusory. DE.353 at 20 n.7 [ER_60 n.7].

Second, he claims that, by rejecting his declaration, the district court drew improper inferences from Marshall's earlier invocation of his Fifth Amendment right against self-incrimination. Br. 33. He again provides no support for this claim, and there is none. The FTC never argued that the court should draw negative inferences, and the court relied on no such inferences in its ruling or final judgment. *See* DE.284-1 [ER_583-678]; DE.315; DE.353 [ER_41-64]; DE.360 [ER_8-24].

B. Undisputed Facts Unrelated to Advantis Law PC Show Marshall's Individual Liability

Marshall's arguments over the declaration are a red herring in any event because undisputed facts unrelated to the distinction between the law firms establish his personal liability for the corporate acts.

Marshall does not contest that the Brookstone/Advantis scheme violated the FTC Act and the MARS Rule (and the undisputed evidence showed overwhelmingly that the operation was unlawful through-and-through).[12] It is unchallenged that before 2015, the

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[12] Marshall did not respond to the FTC's discovery requests for documents or information relating to whether the claims were truthful. He also did not respond to the FTC's Requests for Admissions regarding numerous false statements to consumers. As a result, Marshall has admitted the corporate defendants' liability. *See* Fed. R. Civ. P. 36(a)(3).

Brookstone fraud had been ongoing for several years and that one of its principal false selling points was the *Wright v. Bank of America* litigation. Marshall, through Advantis Law Group PC, became affiliated with Brookstone in February 2015. Undisputed facts showed that Marshall became deeply involved with the *Wright* case, entering his appearance for all of the plaintiffs, ensuring that the case "stay[ed] on track" due to its importance, and noting that he had "done all the right things to keep that baby alive." DE.353 at 20 [ER_60]; *see infra* at 13. Indeed, he admitted each of these facts in his declaration, DE.313-1 ¶¶ 28, 32 [ER_2145-46], further supporting his undisputed role in the scheme.

He also arranged for the transfer of clients from Brookstone to Advantis Law Group PC, giving instructions regarding the "Brookstone to Advantis client hand-off." His emails discuss Brookstone clients "subject to transfer to Advantis," and, as he confirmed in his declaration, he signed letters addressed to Brookstone clients informing them that their cases were being transferred to Marshall and Advantis. *See infra* at 12; DE.313-1 ¶ 21 [ER_2142].

The district court determined that undisputed evidence showed (and Marshall's declaration confirms) that Marshall asked Foti and Kutzner to begin "fully open marketing," to conduct that marketing "full on," and to "open up the marketing" to consumers for mass joinder litigation to be run by Marshall. DE.353 at 19 [ER_59]; DE.341 ¶ 305 [ER_2590-91]; DE.313-1 ¶ 22 [ER_2143]. Marshall also scheduled a meeting with Brookstone/Advantis sales people to review the entire business, including sales scripts, a fact again confirmed in Marshall's declaration. DE.353 at 20 [ER_60];

DE.313-1 ¶ 26 [ER_2144-45]. A marketing mailer, referring both to "Advantis Law Group" and "Advantis Law, PC," identified Marshall as the attorney.

Marshall's declaration disputes none of those instances of his direct participation in the scheme (and, as noted above, supports many of them). Even if there had been some meaningful distinction between "Advantis Law PC" and "Advantis Law Group PC," undisputed evidence shows that Marshall himself directly participated in the Brookstone/ Advantis operation and therefore properly bears liability for its conduct.

Indeed, Marshall—who himself had been disciplined multiple times for MARS-related violations (*see* n.6, *supra*)—knew of bar discipline and enforcement actions taken against Brookstone and its officers, all relating to its mass joinder practice. DE.341 ¶¶ 321, 323, 331 [ER 2604-06, 2611]; D.313-1 ¶¶ 39, 40 [ER_2148-49]. Marshall's emails indisputably indicate his view that his affiliation with Brookstone was creating "a lot of liability for me," but he pursued the alliance as "fundamentally a business decision." DE.341 at ¶ 332 [ER 2612-13].[13]

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[13] In light of the record, Marshall is wrong that the district court improperly applied against him the default judgment against the corporate defendants. Br. 36-38. The judgment rested on undisputed evidence in the summary judgment record, as fully explained by the district court, which did not even mention the default judgments in rendering its decision. DE.353 at 9-10 [ER_49-50].

C. Undisputed Facts Show That the Attorney Exception to the MARS Rule Does Not Immunize Marshall

Undisputed facts showed that Marshall's scheme collected up-front fees, which are unlawful under the MARS Rule. 12 C.F.R. § 1015.5. Marshall does not question that the services he offered were MARS services or that he collected advance fees. He nevertheless asserts (Br. 33-36) that he is entitled to the attorney exception to the advance-fee prohibition, 12 C.F.R. § 1015.7, and that the district court erred in not according him that protection. The claim is both waived and meritless.

First, Marshall waived the defense by not pleading it below or providing any discovery responses supporting the claim. The exemption is an affirmative defense, which under Fed. R. Civ. P. 8(c) Marshall was required to plead in his answer. He did not, *see* DE.149 [ER_213-15], nor did he identify the defense in response to the FTC's discovery requests, DE.341 ¶¶ 335-37 [ER_2614-18]. It is now too late to seek harbor in the attorney exception.

The argument fails in any event. Marshall bore the burden to prove the affirmative defense, *Kanne v. Conn. Gen. Life Ins. Co.,* 867 F.2d 489, 492 n.4 (9th Cir. 1988), and he failed to show either that he met the exception or that factual disputes prevented resolution of the matter. The uncontroverted facts show that Marshall and Advantis failed to meet at least two of the exemption's prerequisites. The attorney exemption applies only to lawyers who deposit advance fees in a client trust account, 12 C.F.R. § 1015.7(b), and who comply with their state bar ethics obligations,

12 C.F.R. § 1015.7(a).[14] Marshall provided no evidence he met either requirement.

First, undisputed evidence shows that the defendants failed to deposit up-front fees in client trust accounts as required under 12 C.F.R. § 1015.7(b). Indeed, Marshall admitted that fact, which alone is fatal to his claim. DE.341 ¶ 171 [ER_2426].

Second, as the district court correctly recognized, "Marshall and Foti do not put forth evidence that the Corporate Defendants were complying with legal ethical duties sufficient to satisfy that the attorney exemption applies." The FTC's evidence "suggests that the Corporate Defendants did not comply with their ethical duties, and that they were informed of their unethical practices." *See* DE.353 at 16-17 & n.6 [ER_56-57 & n.6]. Marshall bore the burden to prove his entitlement to the exception, and he did not meet it.

Marshall's only response is that the FTC failed to show that he did not comply with California state law "regarding the specific MARS services" challenged in the FTC's complaint. Br. 34. But as we have explained, it was his burden—not the FTC's—to show that he qualified for the attorney exemption, which he failed to do. In any event, it appears he did violate California law prohibiting advance fees for MARS services, one of the MARS services challenged by the FTC. Like the MARS Rule, Cal. Civ. Code § 2944.7(a)

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[14] *See* FTC's MARS Rule Statement of Basis and Purpose, 75 Fed. Reg. 75092, 75131-32 (Dec. 1, 2010) (explaining that § 1015.7(a)(3)'s requirement of "compl[ying] with state laws and regulations that cover the same type of conduct that the rule requires," essentially covers various attorney ethical and professional responsibility requirements).

expressly bars advance fees until promised "mortgage loan modification or other form of mortgage loan forbearance" services are performed. Thus, he undoubtedly failed to comply with applicable state law. *See In the Matter of Jorgensen*, 2016 WL 3181013, at *2-3 (Review Dep't, Cal. State Bar Ct. May 10, 2016) (finding lawyer violated § 2944.7 by taking advance fees before performing promised loan modification services even though retainer services stated services were limited to litigation).

II. Rule 63 Does Not Apply to This Case

Marshall argues that Chief Judge Phillips violated Fed. R. Civ. P. 63 when she entered Final Judgment. The claim is that because she had not issued the summary judgment order, she was required under the Rule to certify familiarity with the record, which she did not do. Br. 38-40. Rule 63 does not apply here.

By its plain language, the Rule applies only to "a judge conducting a hearing or trial." The proceedings below involved summary judgment. The Rule therefore does not apply on its face.

The point of Rule 63 is that hearings and trials require a court to assess the credibility of live witnesses. Thus, the Rule provides that "[i]n a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden." As the Advisory Committee that amended the Rule in 1991 observed, a court would "risk error to determine the credibility of a witness not seen or heard who is available to be recalled." Indeed, the Committee notes are replete with references to judges becoming unavailable "during

the trial." Such concerns do not apply to summary judgment proceedings, which do not turn on live testimony and involve only undisputed facts shown through documents.

In keeping with that understanding of the Rule, this Court has held that where a successor judge takes over following a bench trial, but before the original judge made findings of fact, "as an alternative to stepping into the shoes of the unavailable district judge . . . the successor judge may examine the trial transcript as if it were 'supporting affidavits' for summary judgment purposes and enter summary judgment if no credibility determinations are required." *Patelco Credit Union v. Sahni*, 262 F.3d 897, 906 (9th Cir. 2001) (emphasis added) (citing 12 Moore's Federal Practice § 63.05[3] (3d ed. 1999)). The Court noted that "[a] significant body of case law supports this proposition." *Id.* Thus, "Rule 63 is not violated when no material facts are in dispute and the successor judge rules as a matter of law." *Id.*

Indeed, this is even a stronger case for rejecting a Rule 63 challenge than *Patelco*. Here, Judge O'Connell granted summary judgment based on a factual record she determined was undisputed, which showed that Marshall was liable for permanent injunctive and monetary relief.[15] Chief Judge Phillips was not required to assess witness credibility nor even determine if there were disputed facts. Rather,

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[15] Marshall also suggests there are "cogent reasons or exceptional circumstances" that justify revisiting Judge O'Connell's summary judgment order given her "capacity" at the time. Br. 40 (citing *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000)). He provides no support for this offensive assertion.

she could enter the Final Judgment based on record facts already determined to be undisputed and Judge O'Connell's summary judgment order. Rule 63 required no further proceedings.

In denying the same argument when Foti made it below, the district court agreed that no Rule 63 certification was required where Judge O'Connell had already determined that undisputed facts showed the individual defendants were liable for permanent injunctive relief. DE.391 at 9-12 [SER_9_12]. And this Court likewise seemed unpersuaded by this argument when it denied Foti's Motion to Stay Pending Appeal, which claimed likelihood of success based in part on the same argument. *FTC v. Foti*, No. 17-56455 (9th Cir. Jan. 24, 2018).

Marshall also contends that the Final Judgment is invalid because it contains "extensive and draconian injunctive relief" against Marshall, which was "inconsistent" with the summary judgment order. Br. 39. He seems to suggest that Chief Judge Phillips's lack of familiarity with the record (as allegedly evidenced by the lack of a Rule 63 certification) led her to impose overbroad relief.

To the contrary, Judge O'Connell's summary judgment order clearly contemplated the injunctive provisions challenged by Marshall. The FTC explained in its motion for summary judgment the need for the very injunctive provisions later entered by Chief Judge Phillips (in particular, the ban against selling debt relief products or services) particularly given Marshall's "history of repeated attorney discipline for loan modification work" and the likelihood of future infractions. DE.284-1 at Page ID 7060 [ER_624];

DE.341 ¶¶ 351-55 [ER_2627-29].[16] Judge O'Connell concluded that undisputed evidence established that Marshall "participated directly" in the deceptive scheme by playing a central role to ensure that Advantis continued Brookstone's bogus mortgage modification scheme, including his participation in the *Wright* litigation. DE.353 at 19-20 [ER_59-60]. The court also observed that Marshall "could engage in similar conduct in the future" since he continues to practice law. Thus, "a permanent injunction" against him "is warranted." *Id.* at 20-21 [ER_60-61].

Marshall also challenges the district court's imposition of monetary liability based on the acts of all the corporate defendants even though he allegedly controlled only Advantis Law Group PC. Br. 7. For all the reasons explained above, this claim too lacks merit.

Once injunctive liability is proven, the defendant may be held monetarily liable if the FTC establishes he has the requisite knowledge through proof of "actual knowledge of material misrepresentations, . . . reckless[ ] indifferen[ce] to the truth or falsity of a misrepresentation, or . . . awareness of a high probability of fraud along with an intentional avoidance of the truth." *Grant Connect*, 763 F.3d at 1101-02. "The extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish

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[16] A permanent injunction is necessary to restrain his future conduct because there is a "cognizable danger of recurring violation." *FTC v. Gill*, 71 F. Supp. 2d 1030, 1047 (C.D. Cal. 1999) (citing *United States v. W.T. Grant*, 345 U.S. 629, 633 (1953)), *aff'd*, 265 F.3d 944 (9th Cir. 2001). Beyond that, where violations of law were "predicated upon systematic wrongdoing," as they were here, "a court should be more willing to enjoin future conduct." *Id.*

the requisite knowledge for personal restitutionary liability." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1235 (9th Cir. 1999).

Although Marshall claims ignorance of the activities of Advantis Law PC, he admits he took over the business from Brookstone, was well aware of the checkered histories of others involved in the Brookstone mass joinder scheme, and knew of the allegations of ethical misconduct against them. He nonetheless chose to do business with them, even as he acknowledged that he was taking on "liability" in doing so. DE.341 ¶¶ 321-32 [ER_2604-13]; DE.313-1 ¶¶ 42, 45 [ER_2149-50] (Marshall admitting he knew of Broderick's past and saw no documents showing that Advantis advertising materials were legally compliant). He took steps to avoid further knowledge of illegality of the sales process. Despite his direct involvement in the scheme, he neither reviewed the marketing materials nor performed any due diligence. The district court properly found that undisputed facts showed that Marshall was sufficiently aware of corporate wrongdoing due to his "extensive involvement in the fraudulent scheme," and had at least an "awareness of a high probability of fraud along with an intentional avoidance of the truth." DE.353 at 21-22 [ER_61-62].

Further, Marshall is liable for the full amount of consumer loss during the period in which he participated in the scheme. *Commerce Planet*, 815 F.3d at 600; *see generally FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994). Corporate records show that consumers lost $1,784,022.61 during the time Marshall was in control, after deducting refunds and chargebacks. The Final Judgment properly imposed this amount of equitable monetary relief against Marshall.

III. The District Court Reasonably Denied Marshall's Tardy Requests to Amend His Answer and to Extend Discovery

Marshall's answer to the complaint did not admit or deny anything and asserted no affirmative defenses, but invoked a blanket Fifth Amendment right against self-incrimination. DE.149 [ER_213-15]. He refused to engage in discovery on the same ground. He later decided to change strategy and sought leave to amend his answer to respond substantively to the FTC's allegations and assert affirmative defenses. He likewise sought additional time for discovery. The district court denied both requests, and Marshall now claims that the denials were abuses of discretion. Br. 40-53. They were not.

A motion for leave to amend a pleading is typically evaluated under the permissive standards of Fed. R. Civ. P. 15(a)(2). But if the motion is filed after the court has issued a scheduling order, the court first applies "the heightened good-cause standard of Fed. R. Civ. P. 16(b)(4) before considering whether the requirements of Rule 15(a)(2) were satisfied." *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). The "good cause standard" for modification, which also governs motions to extend the discovery period, "primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The party must show that, even with the exercise of due diligence, he was unable to meet the court's deadline. *Zivkovic v. S. Cal. Edison, Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *Johnson*, 975 F.2d at 609. "If the party seeking modification was not diligent," the motion should be denied. *Zivkovic*, 302 F.3d at 1087 (cleaned up).

Although "prejudice to the [opposing] party . . . might supply additional reasons to deny a motion," the focus of the inquiry is the moving party's diligence. *Johnson,* 975 F.2d at 609. Applying these standards, the court acted well within its discretion in denying Marshall's motions.

First, the court properly refused to allow Marshall to amend his answer.[17] He had nearly five months—until March 6, 2017—to seek amendment under the court's amended scheduling order. DE.169 at 12 [SER_137]. Yet, he waited for more than two additional months, until May 15, 2017. DE.238 [ER_378-420].

The court denied the motion because Marshall had not acted diligently and thus had not shown good cause under Rule 16. DE.259 [ER_103-16]. Marshall failed to explain how the new information in his amended answer would have incriminated him had he revealed it earlier. It therefore should have been included in his original answer or in an amendment made before the filing deadline. *Id.* at 9 [ER_111]. The court also expressed concern about the "risk of prejudice and undue delay." *Id.* at 11 [ER_113]. The FTC would be prejudiced, the court found, because it had already taken Marshall's deposition without the benefit of his amended answer and affirmative defenses; allowing

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[17] Marshall's claim that nearly all his assets frozen under the TRO asset freeze—which purportedly made it so difficult for him to retain counsel—were unrelated to the Brookstone/Advantis scheme, Br. 46, is unsupported and irrelevant. The district court's authority under Section 13(b) to freeze defendants' assets to permit effective final relief has been upheld numerous times, and there is no obligation to trace moneys from the wrongdoing to those assets. *Commerce Planet*, 815 F.3d at 601 (citing *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373-74 (2d Cir. 2011)).

amendment would require additional depositions and discovery, with the discovery deadline approaching. That disposition fell well within the court's discretion under the Rules.

Marshall moved again at the end of July 2017 for leave to file an almost-identical amended answer. DE.296 [ER_2075-2118]. His motion did not address any of the deficiencies the court had identified earlier, and the court once again denied it for lack of good cause. DE.343 at 4-6 [ER_68-70].

The court likewise reasonably refused Marshall's belated attempt to extend discovery. Just three weeks before discovery closed, he asked not only to extend discovery, but to postpone trial for at least five months. He claimed that because he had decided not to assert the Fifth Amendment any longer, the extension was necessary to give him time to provide his initial disclosures (which had been due nearly a year earlier) and more substantive discovery responses, to take his own discovery, and prepare for trial. DE.292 [ER_2035-51].

The district court reasonably denied an extension because Marshall had not diligently pursued his claims and had failed to comply with court orders and procedures by ignoring his discovery obligations throughout the litigation. DE.336 at 5-6 [ER_75-76]. In particular, he had not provided his Rule 26(a)(1) initial disclosures nor had he taken any discovery. *Id.*[18]

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[18] Marshall's reliance (Br. 43) on *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1255 (9th Cir. 2010), is misplaced. There, this Court found an abuse of discretion in denying a one-week extension to oppose a summary judgment motion where the party had only five business days to respond to the motion, and

Finally, Marshall suggests that the court unfairly denied his extension motions, but granted the FTC's request to extend discovery. Br. 41, 47, 52 (citing DE.318 [ER_79-80]). The situations are not comparable. The court granted the FTC's request for extra time because Marshall had failed to produce long-overdue discovery responses, including hundreds of relevant emails he had repeatedly failed to produce. DE.318 [ER_79-80]; DE.331 [ER_77-78].[19] Marshall, by contrast, sought an extension to begin discovery, on which he had entirely defaulted.

IV. The District Court Properly Held Marshall in Contempt for Using Frozen Money

The district court found Marshall in contempt when he transferred, with knowledge of the TRO freezing all of his assets, $24,500 of those assets to his criminal defense lawyer. DE.260 at 11-12 [ER_93-94] (citing *FTC v. Johnson*, 567 F. App'x 512, 515 (9th Cir. 2014)). The court ordered Marshall to return the $24,500 to the Receiver by June 19, 2017. DE.260 at 19 [ER_101].[20] Marshall challenges the contempt order. Br. 53-58.

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the district court improperly found that a short delay in filing an opposition was not excusable neglect. *Id.* at 1255, 1258-62. Here, by contrast, Marshall moved to amend his answer more than two months after the deadline to do so, and requested a five month extension to take discovery only three weeks before the end of the discovery period. Unlike *Ahanchian*, the court also properly applied governing law.

[19] Marshall was sanctioned for his failure to produce those emails. DE.318 at 2 [ER_80]; DE.350 [SER_21].

[20] To prove civil contempt, the moving party must first show, by clear and convincing evidence, that the non-moving party disobeyed

The court properly rejected Marshall's argument that he had a right under *Luis v. United States*, 136 S. Ct. 1083 (2016), to pay for criminal defense notwithstanding the asset freeze. For one thing, Marshall was not under criminal indictment or even investigation. His belief (Br. 54-58) that there might have been a "related criminal matter" or a "secret criminal investigation" is pure conjecture and insufficient to justify his conduct. The district court thus rightly concluded that "[t]his case is not a criminal case; accordingly the Sixth Amendment does not apply." DE.260 at 10 [ER_92] (citing *United States v. $292, 888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995)). This Court was unpersuaded by the same argument when it denied Marshall's petition for mandamus. *Marshall v. U.S.D.C., C.D. Cal., Santa Ana*, No. 17-71781 (9th Cir. Sept. 12, 2017).[21]

Moreover, even if there had been a criminal proceeding, *Luis* held that in a criminal case the Sixth Amendment requires a district court to allow a

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a specific and definite court order, and that such disobedience was (1) beyond substantial compliance, and (2) not based on a good faith and reasonable interpretation of the court's order. *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). If the moving party makes that showing, the contemnors need to show why they could not comply. *Affordable Media*, 179 F.3d at 1239 (citation omitted).

[21] Marshall also complains about certain unidentified stipulations supposedly filed by the FTC, which he asserts "direct[ed] actions" against him even though he did not sign them. Br. 53. Marshall may be referring to recent stipulations filed by the Receiver (not the FTC) and court orders to continue the receiverships. *See* DE.414; DE.415; DE.438; DE.439. Marshall was not a signatory or party to those stipulations because they did not affect him; they dealt with the assets of other defendants.

defendant to pay for defense counsel using frozen assets that are not traceable to the allegedly criminal conduct. *Id.*, 136 S. Ct. at 1095-96; *U.S. Currency*, 54 F.3d 564 at 569. But "the Sixth Amendment does not govern civil cases." *Turner v. Rogers,* 564 U.S. 431, 441-43 (2011). Courts have recognized that *Luis* applies only to untainted assets frozen before trial under the criminal forfeiture statutes and not where funds are being held by a court-appointed receiver in a civil case or by pretrial attachment by a plaintiff seeking damages in a civil suit. *See United States v. Johnson*, No. 2:11-cr-501-DN, 2016 WL 4087351, at *3 (D. Utah July 28, 2016); *Estate of Lott v. O'Neill*, 204 Vt. 182, 165 A.3d 1099 (2017).

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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RULE 28-2.6 STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, no other cases in this Court are deemed related to this appeal.

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