No. 17-56476

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

CHARLES T. MARSHALL,
Defendant-Appellant.

On Appeal from

the United States District Court for the Central District of California
No. 8:16-cv-00999-BRO-AFM
Hon. David O. Carter

ANSWERING BRIEF OF THE FEDERAL TRADE COMMISSION

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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 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

[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.

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 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

[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).

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

[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.

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*, 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

[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].

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 $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].

[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].

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 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."

[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.*

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 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,

[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].

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" for "Advantis Law." DE.341 ¶319

[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).

[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

[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].

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 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].

[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.

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 misrepresentations 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. Individuals 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 supporting 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 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

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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).

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]

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

[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].

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.

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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).

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) 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

[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.

witness credibility nor even determine if there were disputed facts. Rather, 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

[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.*

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 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

[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 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 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]

[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 the district court improperly found that a

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.

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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].

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.

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

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

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 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

[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.

*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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Dated: November 14, 2018

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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.

/s/ *Michael D. Bergman*
Michael D. Bergman
Attorney
Federal Trade Commission

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