No. 13-4169

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

E.M.A. NATIONWIDE, INC., *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Ohio
Case No. 1:12-cv-2394

BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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Dated: February 13, 2014

STATEMENT REGARDING ORAL ARGUMENT

The Federal Trade Commission ("FTC" or "Commission") believes that oral argument would aid the Court in resolving this case.

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* *Authorities on which we chiefly rely are marked with asterisks.*

Glossary

Abbreviation	Reference
E.M.A.	Defendant-Appellant E.M.A. Nationwide, Inc., d/b/a EMA or Expense Management America
First United	Defendant-Appellant 1UC Inc., d/b/a First United Consultants
FTC Act	Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq.
FTC	Federal Trade Commission
MARS Rule	Mortgage Assistance Relief Services Rule, 16 C.F.R. Part 322 (subsequently recodified as "Regulation O," 12 C.F.R. Part 1015)
MLAT	U.S.-Canada Multilateral Treaty on Mutual Legal Assistance in Criminal Matters (or "Mutual Legal Assistance Treaty")
New Life	Defendant-Appellant New Life Financial Solutions, Inc.
RCMP	Royal Canadian Mounted Police
TSR	Telemarketing Sales Rule, 16 C.F.R. Part 310

Chronology of Key Events in District Court Proceeding

Date	Title of Filing, Order, or Event **("Short Title")**	Docket Entry
9/25/2012	Complaint for Permanent Injunction and Other Equitable Relief (**"Complaint"**)	RE 1
	FTC's Motion for *Ex Parte* Temporary Restraining Order and for Preliminary Injunction (**"P.I. Motion"**)	RE 5
10/10/2012	Defendants' Motion for a Stay of Proceedings (**"First Stay Motion"**)	RE 12
10/11/2012	Opinion and Order Denying Motion for Stay (**"Order Denying First Stay Motion"**)	RE 15
10/25/2012	Stipulated Preliminary Injunction Between Plaintiff and Defendants Michaels, *et al.* (**"Stipulated P.I. Order"**)	RE 27
1/4/2013	Case Management Conference Scheduling Order	RE 81
	OPENING OF DISCOVERY IN SUPPORT OF OR OPPOSITION TO DISPOSITIVE MOTIONS	
2/11/2013	Order (**"Case Management Order"**)	RE 105
6/4/2013	Defendants' Renewed Motion for a Stay of Proceedings (**"Renewed Stay Motion"**)	RE 141
6/11/2013	FTC's Opposition to Renewed Stay Motion	RE 146
6/12/2013	Order [denying Renewed Stay Motion (RE 141)]	RE 149
6/14/2013	Defendants' First Requests for Production to FTC	RE 162-1
7/1/2013	*CLOSING OF DISCOVERY IN SUPPORT OF OR OPPOSITION TO DISPOSITIVE MOTIONS*	
7/8/2013	*DEADLINE FOR DISPOSITIVE MOTIONS*	
	FTC's **Motion for Summary Judgment**	RE 157
7/22/2013	*DEADLINE FOR RESPONSES TO DISPOSITIVE MOTIONS*	
7/24/2013	Defendants' Motion for Extension of Response Filing Deadline	RE 161

Date	Title of Filing, Order, or Event **("Short Title")**	**Docket Entry**
7/25/2013	Defendants' Motion to Continue Plaintiff's Summary Judgment Motion Under Rule 56(d) (**"Motion for Additional Discovery"**)	RE 165
7/29/2013	Order [denying Defendants' Motion for Extension of Response Filing Deadline (RE 161)]	RE 166
7/29/2013	Order [denying Defendants' Motion for Additional Discovery (RE 165)]	RE 167
8/27/2013	Amended Opinion and Order (**"Summary Judgment Order"**)	RE 173
9/24/2013	Defendants' Notice of Appeal	RE 179

Note: Shaded rows indicate Orders that Defendants are challenging in this appeal.

JURISDICTION

The district court's jurisdiction over the case below derives from 28 U.S.C. §§ 1331, 1337(a), and 1345. This Court's jurisdiction derives from 28 U.S.C. § 1291. The district court issued a final and appealable order on August 27, 2013. Appellants filed a timely notice of appeal on September 24, 2013.

ISSUES PRESENTED

1. Whether the district court abused its discretion in refusing to allow Defendants additional discovery before ruling on the FTC's Motion for Summary Judgment, given that they had made virtually no efforts to obtain evidence during the nearly six-month period allotted for discovery relating to dispositive motions, they already had copies of most of the additional materials they claim they needed, and the outcome of the case would not have changed even if they had obtained access to more of those documents.

2. Whether the district court abused its discretion in declining to stay the civil law enforcement proceeding pending possible criminal proceedings, given the absence of any plausible indication that such proceedings were imminent.

3. Whether the district court erred in granting the FTC's Motion for Summary Judgment, where the FTC submitted "overwhelming" evidence demonstrating Defendants' liability, while Defendants presented no factual evidence at all and made no valid legal arguments to counter the FTC's showing.

STATEMENT OF THE CASE

Overview of Procedural History and Rulings Presented for Review

This case arises from a civil law enforcement action that the Commission brought against perpetrators of what is sometimes referred to as a "last dollar fraud" scheme: that is, a set of deceptive practices designed to cheat the most financially distressed consumers out of what little money they have left. For the Defendants in this case, others' economic distress was their economic opportunity, and consumers struggling to pay their mortgages and other debts were their prey. The perpetrators of this scam falsely promised thousands of consumers that they could renegotiate their mortgages and other debts and enable them to reduce their burdensome payments. In reality, they pocketed consumers' hefty payments without providing any services, and thus managed to cheat thousands of consumers out of millions of dollars, until the Commission, in conjunction with Canadian authorities, shut down their unlawful operation.

The Defendants in this civil law enforcement case include two individuals – (Daniel Michaels and James Benhaim) and seven interrelated corporate entities that they owned or controlled: three U.S. companies (E.M.A. Nationwide, Inc. ["E.M.A."]; New Life Financial Solutions, Inc. ["New Life"]; and 1UC Inc. ["First United"] and four Canadian companies (7242697 Canada Inc., 7242701 Canada Inc., 7246293 Canada Inc., and 7246421 Canada Inc.). The Commission filed the

Complaint commencing the case on September 25, 2012 (RE 1). The Complaint alleged that the Defendants had deceptively marketed and sold purported debt consolidation, loan modification, and mortgage relief services, and collected payments from consumers, without providing any of the promised services, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45; the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310; and the Mortgage Assistance Relief Services Rule ("MARS Rule"), 16 C.F.R. Part 322 (subsequently recodified as "Regulation O," at 12 C.F.R. Part 1015).[1]

The district court granted the FTC's unopposed Motion for Summary Judgment ("Motion for Summary Judgment") (RE 157) in an order issued on August 27, 2013 ("Summary Judgment Order") (RE 173). The district court ruled against the Defendants on all 12 counts in the Complaint, and imposed personal liability on Michaels and Benhaim, jointly and severally with the corporate entity defendants, to pay an equitable monetary judgment of $5.7 million for the restitution of consumers' net losses. Defendants never filed a brief or any evidence opposing the FTC's Motion for Summary Judgment before the district court. However, they now contend that the district court erred in finding no genuine issue

[1] The Complaint also named Phillip Kwon, Nissim Ohayon, and Joseph Shamolian as defendants, but all of them later consented to the entry of consent decrees resolving the cases against them – Shamolian on May 13, 2013 (RE 138); Kwon on June 27, 2013 (RE 154); and Ohayon on September 13, 2013 (RE 177) – and none of them is a party to this appeal. Thus, the term "Defendants" is used herein to refer only to Michaels, Benhaim, and the seven corporate defendants.

of material fact, and ask this Court to vacate the Summary Judgment Order. *See* Appellants' Brief, pp. 45-60; *cf.* Argument, Part II, pp. 43-56, *infra*.

Defendants also seek review of two procedural orders in which the district court rejected their maneuvers intended to delay the proceeding and block the district court's adjudication of the charges against them. Defendants seek review of the district court's denial of their "Motion to Continue Plaintiff's Summary Judgment Motion Under Rule 56(d) (RE 165) ("Motion for Additional Discovery"), which they filed on July 25, 2013, over three weeks after the end of the nearly six-month period allowed for discovery. Although Defendants conducted virtually no discovery during that period of time, they take issue with the district court's decision not to defer consideration of the FTC's summary judgment motion in order to allow them time for additional discovery. *See* Appellants' Brief, p. 23-39; *cf.* Argument, Part I.A, pp. 26-36, *infra*. Defendants also challenge an order (RE 149) denying their *second* motion to stay all proceedings in this civil case in deference to a purportedly imminent criminal indictment that never actually materialized (RE 141). *See* Appellants' Brief, pp. 39-44; *cf.* Argument, Part I.B, pp. 36-42, *infra*.

As discussed below, Defendants' appeal is entirely without merit.

Statement of Facts

The following is drawn from the facts set forth in the FTC's Motion for Summary Judgment (RE 157), the district court's Summary Judgment Order (RE 173), and the record evidence cited in those documents.

1. Defendants' Deceptive Scheme

In 2010, Michaels and Benhaim set up a "boiler room" telemarketing operation in Montréal, where they employed telemarketers to place thousands of cold calls to financially distressed U.S. consumers who were burdened by heavy mortgage, credit card, tax, or student loan debts. Michaels and Benhaim gave their sales agents written scripts to use in soliciting consumers to sign up for their purported debt settlement and mortgage assistance services. The telemarketers began these calls by "congratulating" consumers for qualifying for a special "expense reduction" program, and represented that they either (i) were affiliated with consumers' existing creditors, (ii) were operating on behalf of fictitious government programs (*e.g.*, the "Obama Debt Relief Initiative" or "Save America Initiative"), or (iii) had special relationships with creditors that would allow them to achieve results that consumers could not obtain themselves.

Defendants' telemarketers claimed that they could negotiate with consumers' lenders to reduce their monthly payments, interest rates, and outstanding principal balances by as much as 50 to 70 percent. They asserted that

they charged no fees or only nominal amounts, and represented that consumers could cancel at any time and receive full refunds. Defendants also maintained websites in which they made similar representations.

Consumers who agreed to buy these services were given lengthy contracts to sign, and were instructed to stop sending monthly payments to their creditors, and instead, to remit somewhat lower monthly amounts to Defendants, who supposedly would place these funds in special escrow accounts and use them to pay off consumers' debts. Defendants also directed consumers not to contact their lenders, but rather, to let Defendants do all the talking.

Defendants retained consumers' payments, but provided none of the promised services. Consumers who raised questions – often after making several monthly payments totaling thousands of dollars – were told that Defendants were retaining these payments as "advance fees." Defendants typically neglected to notify consumers that their debt renegotiation contracts could be referred to other companies; and even when they disclosed this information, they failed to disclose that those third parties would impose additional fees. When consumers sent cancellation letters and demanded their money back, Defendants often refused to issue refunds, or resisted doing so. Those consumers who persisted, or who pursued "chargebacks" (*i.e.*, reversal of charges that had been billed to their credit cards or debited from their checking accounts), collectively, managed to obtain

over $4.3 million in refunds or repayments. Nonetheless, after deducting this amount from the total amount obtained from U.S. consumers, Defendants' net collections from this scheme amounted to over $5.7 million during the period from March 2010 through late 2012.

2. Defendants' Use of Interrelated U.S. and Canadian Corporations to Implement Their Common Enterprise.

Michaels and Benhaim used a network of dummy corporations to perpetrate their scam. At first, they held out their services through a U.S. company called "E.M.A. Nationwide, Inc." (also d/b/a Expense Management America) ("E.M.A."), initially incorporated in California and listing a California address as its principal place of business. This enabled them to present the appearance of a domestic company, and allowed them to contract with third party U.S. payment processors to collect consumers' payments and deposit them to U.S. bank accounts, through which funds were transferred to Canadian accounts.

Late in 2010, as consumer complaints and refund demands began to pour in, and state law enforcement officials started making inquiries, Defendants abandoned that corporate identity and began operating as "New Life Financial Solutions, Inc." ("New Life") using similar incorporation documents, and listing the same officers, business address, and registered agents. Early in 2012, for similar reasons, they swapped out that corporate identity and began operating as "1UC, Inc." (also d/b/a First United Consultants) ("First United"). Phillip Kwon,

Joseph Shamolian, and Nissim Ohayon were listed, in succession, as the nominal owners of the three U.S. companies; but Michaels and Benhaim retained total control of the companies' operations and received virtually all the profits of the venture.

Michaels and Benhaim also used the four numbered Canadian corporations, more or less interchangeably, to enter contracts, make payments for renting office space and hiring employees, receive funds from the U.S. entities, and transfer profits to Michaels' and Benhaim's personal accounts. These entities all used the same business address, commingled funds to pay each other's employees and other expenses, and frequently transferred money to one another.

A formidable body of detailed evidence reveals the extent to which Michaels and Benhaim used these closely interrelated corporate entities to carry out a single, integrated business operation.[2] For example, payroll and banking records, lease agreements, and emails variously identified Michaels, Benhaim, and a number of their staff members – from one month to the next, and sometimes, even simultaneously – as officers, employees, or representatives of several different corporate entities.[3] Benhaim identified himself in some emails as an officer of

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[2] *See generally* Motion for Summary Judgment, RE 157-1, Page ID #2897-99 & notes 19-22 (Mem. of Pts. & Authorities); *id.*, RE 157-2, Page ID #2941-44 (declaration of FTC investigator).

[3] *See* Motion for Summary Judgment, RE 157-1, Page ID #2897-99 & notes 19-22 (Mem. of Pts. & Authorities); *id.*, Exhibits, RE 157-2, Page ID #2941-

E.M.A. and in others as an officer of First United, and issued directives concerning authorization for fund transfers through New Life's accounts, as well as those of E.M.A. and First United.[4] In another email, Benhaim informed a third party (with a "cc" to Michaels) that "New Life Financial will be changing its company name and upgrading its process. . . . [W]e have the new company incorporated as 1UC Inc. and will be changing our name to 1st United Consultants."[5] The evidence also reveals numerous transfers of funds among bank accounts held in the names of the seven corporate entities, and shows that one Canadian entity paid the rent for premises for which a different Canadian entity had signed the lease.[6]

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44 (declaration of FTC investigator). For example, records show that a number of Defendants' staff members were employed by one of the four Canadian corporations, but identified themselves in emails as representatives of New Life one month and First United a month or two later. *Id.*, RE 157-4, Page ID #3274-80, #3293-96, #3303-13 (employee emails); RE 157-4, Page ID #3281-92, #3297-3302, #3314-19, #3326-46 (payroll and banking records).

[4] *See id.*, RE 157-4, Page ID #3254-75, #3320-25 (Benhaim emails).

[5] *Id.*, RE 157-6, Page ID #3633. *See generally id.*, Page ID #3600-3715 (emails and other documents regarding formation of new corporate entities and establishment of bank accounts and other financial arrangements for these entities).

[6] *Id.*, RE 157-1, Page ID #2899-2900 (Mem. of Pts. & Authorities); *id.*, Exhibits, RE 157-2, Page ID #2944-47 (declaration of FTC investigator); RE 157-4, Page ID #3355-3564 (bank records showing fund transfers among companies); *id.*, Page ID #3565-75 (bank records showing lease payments by 7246293 Canada, Inc.); *id.*, Page ID #3576-95 (lease in the name of 7246421 Canada, Inc.).

3. The Investigations and the Complaint

The FTC and the Competition Bureau of Canada began separate, but coordinated, investigations of these activities in 2011, with the assistance of other agencies in a joint law enforcement task force organized to combat cross-border telemarketing fraud. Other Canadian and U.S. agencies participating in this task force included the Royal Canadian Mounted Police ("RCMP"), Québec provincial authorities, the U.S. Postal Inspection Service, and the U.S. Department of Justice ("DOJ").

On September 25, 2012, the FTC filed the Complaint (RE 1) in the court below. Counts 1-3 of the Complaint alleged that Defendants had engaged in "deceptive acts or practices" prohibited by Section 5 of the FTC Act, by falsely representing that they would renegotiate and obtain settlements of consumers' mortgages and other debts, so as to make consumers' payments substantially more affordable and reduce the total principal owed. Complaint, RE 1, Page ID #14-17. Counts 4-8 alleged that Defendants had violated the TSR by (i) misrepresenting the costs of their services, (ii) misrepresenting material aspects of their services' performance (*i.e.*, the amount of debt payments that consumers would save by signing up for the services), (iii) improperly collecting advance payments before obtaining any debt modifications; and (iv) placing unsolicited commercial calls to consumers whose phone numbers were listed on the National Do-Not-Call

Registry. *Id.*, Page ID #17-18. Counts 9-12 alleged that Defendants violated the MARS Rule by (i) requesting or receiving payments from consumers before consumers had executed written loan modification agreements with their mortgage holders or servicers; (ii) misrepresenting the cost of their services and their likelihood of successfully achieving mortgage modifications; and (iii) failing to provide a set of mandatory disclosures specified by the rule. *Id.*, Page ID #19-25.

With the Complaint, the FTC simultaneously filed an *ex parte* motion for issuance of a temporary restraining order and preliminary injunction ("P.I. Motion") (RE 5), together with over 1,000 pages of exhibits including declarations from over 20 consumers and copies of the contracts and other documentation those consumers had received from Defendants. On September 28, the district court issued an order (RE 8) denying the temporary restraining order requested by the FTC, and scheduling a preliminary injunction hearing for October 12, 2012.

On September 27, 2012 – two days after the FTC filed its Complaint and P.I. Motion – the RCMP executed a search warrant at Defendants' Montréal offices. They seized computers, smartphones, hard-copy documents, and electronically stored records, and arrested and interviewed about 40 employees. On September 28, the RCMP executed a search warrant at a Canadian bank and seized funds in U.S. and Canadian dollars held in bank accounts and in a safe deposit box; and they subsequently executed additional search warrants and seized

materials at Michaels' residence and a storage locker. Canadian law gave Defendants the right to obtain access to the seized records by filing an application with a Canadian court,[7] but they never filed such an application. In addition, pursuant to the U.S.-Canada Multilateral Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT"), the RCMP was authorized to share these materials with DOJ upon a Canadian court's approval of a formal request.[8]

4. The First Stay Motion and the Stipulated Preliminary Injunction

Michaels and six of the seven corporate defendants filed a motion to stay all proceedings, including motions and discovery, on October 10, 2012 – two days before the scheduled hearing on the FTC's P.I. Motion. Motion for a Stay of Proceedings ("First Stay Motion") (RE 12). In this motion, they asserted that Michaels was "now facing an imminent criminal prosecution" in connection with

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[7] *See* Canada Crim. Code, § 490 (available at http://yourlaws.ca/criminal-code-canada/490-detention-things-seized) (setting forth procedures for a person from whom anything has been seized to apply to have the items returned).

[8] DOJ, on December 10, 2012, submitted such a request to the Canadian Department of Justice, which in turn filed the request in the appropriate court on January 24, 2013. *See* RE 165-6, Page ID #4168-4202 (*Request for Legal Assistance Presented by the Gov't of the United States of America re Investigation of Dan Michaels, James Benhaim, and Others*, Ex Parte Application for the Gathering of Evidence, No. 500-36-006603-131 (Superior Ct., Crim. Div., Province of Québec, Dist. of Montréal, filed Jan. 24, 2013). Defendants formally opposed the request, but the court ultimately granted it (in part) on May 21, 2013. *See* RE 141-1, Page ID #2471.

the same conduct. *Id.*, Page ID #1318. They argued that compelling him to defend the FTC's civil suit and a parallel criminal prosecution relating to the same conduct simultaneously could jeopardize his constitutional rights, and that staying the proceeding would serve judicial economy. *Id*. The motion also asserted that "[t]he records and computers seized pursuant to the search warrant [by the RCMP] include all of the corporate records that are necessary for the Defendants to defend themselves in the civil case." *Id.*, Page ID #1319.

On October 11, 2012, the district court denied this motion, observing that "[t]he indictment has not yet issued, nor is there evidence in the record indicating when that may occur." Order ("Order Denying First Stay Motion"), RE 15, Page ID #1357. The court reasoned that, in the event of an indictment, "allowing for both actions to proceed simultaneously [would be] most efficient." *Id.* Moreover, the court stated that "the discovery process [could] be structured to . . . mitigate[]" the "burden placed upon them in needing to defend . . . two separate actions," and pledged to "ensure that their constitutionally enshrined right to adequately defend themselves in both actions is not hampered." Page ID #1357-58. The district court concluded that "a stay is unwarranted," particularly given "the serious allegations made by the FTC and the possibility that more consumers may be harmed should the alleged practices continue." Page ID #1358.

The district court conducted the preliminary injunction hearing as scheduled, on October 12, 2012. The Defendants agreed to the entry of a stipulated preliminary injunction, which the district court entered on October 25 ("Stipulated P.I. Order") (RE 27).[9]

5. Discovery

The district court established a nearly six-month time frame for the parties to conduct discovery in support of or opposition to dispositive motions, lasting from January 4, 2013, through July 1, 2013. Specifically, on January 4, the district court issued an order scheduling a case management conference for February 8, 2013, but directing the parties to commence discovery immediately, notwithstanding Fed. R. Civ. P. 26(f). *See* Case Management Conference Scheduling Order, RE 81, Page ID #1951, #1953. The district court conducted the case management conference by telephone, and on February 11, 2013, issued an order specifying deadlines and adopting other procedural parameters to govern the case ("Case Management Order") (RE 105). The district court established deadlines of July 1, 2013, for completing discovery needed to support or defend dispositive motions; July 8 for filing dispositive motions; and July 22 for oppositions to dispositive

[9] Defendant Michaels later failed to comply with the provisions in the Stipulated P.I. Order requiring him to submit accounting statements revealing his monthly expenditures. *See* FTC Motion for Order to Show Cause Why Defendant Michaels Should Not be Held in Contempt for Violating the Preliminary Injunction, RE 155 (filed June 26, 2013); Order (granting contempt motion), RE 164 (entered July 25, 2013).

motions. Case Management Order, RE 105, Page ID #2179. Discovery in preparation for trial could continue until September 2, 2013, and the trial was scheduled to take place during the two-week period beginning September 23. *Id.*, Page ID #2179, #2182.

The FTC made extensive use of the discovery window established by the district court. During this period, it served 11 subpoenas to third party custodians of documents, and interrogatories and requests for production of documents to Kwon, Ohayon, and Shamolian (and provided the requisite notices to all defendants). The FTC also served requests for admissions and for production of documents to Defendants Michaels and Benhaim; and requests for production of documents to the seven named corporate defendants.

By contrast, Defendants did almost nothing. From January 4, 2013 through the close of summary judgment discovery on July 1, 2013, Defendants never served any interrogatories or requests for admissions upon the FTC; they never sought any information from co-defendants Kwon, Ohayon, or Shamolian; and they did not serve the FTC with a request for production of documents until June 18, 2013 – just 13 days before the July 1 deadline for the close of discovery relating to dispositive motions. *See* Defendants' First Requests for Production (RE 162-1). They never noticed a single deposition – even though the FTC, in its initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A) (*see* RE 142-3,

Page ID #2490-99), had given them ample information about likely sources of evidence, including the identities and contact information of more than 40 individuals and corporate entities likely to have discoverable information.

In particular, the Defendants failed to make any serious effort to obtain copies of the documents or information that the RCMP had seized at their Montréal premises. They made no showing that they ever took advantage of the opportunity to apply to a court in Canada for return of the seized materials. Nor did they make any attempt to obtain materials from third parties likely to have duplicate copies of such documents, such as the banks and other financial institutions from which the FTC had obtained data, or the recipients of emails or other correspondence that Defendants had sent. Defendants made a half-hearted attempt to obtain documents from DOJ by issuing a premature subpoena to three DOJ attorneys on January 3, 2013 – even though they knew, at the time, that the Canadian government had not yet released the documents in response to DOJ's request under the MLAT – but they never followed up or made any effort to correct the procedural defects after DOJ objected.[10]

[10] DOJ objected to the subpoena on procedural grounds, such as Defendants' failure to submit the statements required under DOJ's regulations (28 C.F.R. §§ 16.21-16.29), the service of the subpoena before the discovery period had opened, and the subpoena's demands for production at improper locations and without allowing reasonable time to comply. DOJ also objected on grounds of vagueness, overbreadth, and privilege. *See* RE 165-7, Page ID #4203-05 (letter from DOJ counsel to Defendants' counsel, January 17,

On May 9, 2013, Defendants' counsel sent FTC counsel an email stating, simply, "Please send us *all* of the discovery that you have not turned over." RE 142-1, Page ID #2485 (emphasis in original). This request did not purport to be a document request pursuant to Fed. R. Civ. P. 34(b): it did not describe with particularity what items or categories or items were sought; did not specify a reasonable time, place, or manner for production; and did not specify any preferred format for production of electronically stored information. *See* RE 142-2, Page ID #2486-89 (FTC counsel's response). Nonetheless, on June 14, 2013, the FTC provided Defendants a thumb drive containing approximately 5 gigabits of electronically stored information, including all the documents it had gathered through subpoenas and civil investigative demands, and all the information from the RCMP that the FTC had in its possession. *See* RE 162-2, Page ID #4094-97 (letter from FTC counsel to Defendants' counsel listing contents of electronic data provided to Defendants). The FTC also sent Defendants' counsel the passphrase needed to access the securely encrypted data on the thumb drive.[11]

2013). Defendants could have attempted to correct these deficiencies – for example, by submitting the required statements, narrowing the scope of the specific documents they sought, and excluding privileged materials – but have made no showing that they made any attempt to do so. Nor did they seek an order compelling compliance from the court below or any other court.

[11] The data included extensive sensitive personally identifiable information ("SPII") of individual consumers, and consequently, the FTC was legally obligated to transmit such data in a securely encrypted format, with strong authentication controls, to ensure that only authorized persons could access the

As noted above, Defendants electronically served their First Requests for Production on the FTC on June 18, 2013 (RE 162-1, Page ID #4086-4093). The FTC provided a timely response on July 22, 2013, in compliance with the 30-day deadline established by Fed. R. Civ. P. 6(d) and 33(b)(2).

6. Defendants' Procedural Motions

During June and July, 2013, Defendants filed three separate procedural motions, all seeking delays in the proceedings. The district court exercised its discretion to deny all three of these motions.

A. On June 4, 2013, Defendant Michaels filed a "Renewed Motion for a Stay of Proceedings" ("Renewed Stay Motion") (RE 141), invoking arguments essentially identical to those he had raised in support of his First Stay Motion (RE 12) on October 10, 2012. Michaels acknowledged that his Renewed Stay Motion was premised on the same rationale as his First Stay Motion, and he did not take issue with the legal standard or analysis applied by the district court in the Order Denying First Stay Motion (RE 15). Michaels asserted that "recent developments" justified the district court's reassessment of the stay request,

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data. *See* Federal Information Security Management Act of 2002, 44 U.S.C. §§ 3541-3549; *see also* OMB Memo to Heads of Exec. Depts. and Agencies, *Safeguarding and Responding to Breach of Personally Identifiable Info.*, M-07-16 (May 22, 2007) (available at www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf); OMB Memo to Heads of Exec. Depts. and Agencies, *Protection of Sensitive Agency Information*, M-06-16 (June 23, 2006) (available at www.whitehouse.gov/omb/memoranda/fy2006/m06-16.pdf) (same).

Renewed Stay Motion, RE 141, Page ID #2468 – in particular, an email from DOJ regarding negotiation of a plea agreement in lieu of a fraud indictment, which Michaels characterized as demonstrating that a criminal indictment was a "guaranteed eventuality." Page ID #2471. However, DOJ had sent that email on November 11, 2012 (*see* Page ID #2470, #2477) – *seven months* before the filing of the Renewed Stay Motion – and Michaels cited no further communications with DOJ concerning the purportedly "imminent" indictment. (In fact, to the FTC's knowledge, no such indictment has been issued as of the date of the instant Brief.)

Michaels also argued that a stay would harm no one because Defendants had ceased their allegedly unlawful business activities and, due to the Stipulated P.I. Order, could not resume them. *Id.*, Page ID #2475. The FTC countered that a stay would harm the interests of consumers who were injured by Defendants' misconduct, by delaying their receipt of restitution and increasing the risk that any funds available for restitution could be dissipated. FTC Opp. to Renewed Stay Motion, RE 146, Page ID #2516-17 (filed June 11, 2013).

The district court denied this Renewed Stay Motion on June 12, 2013 (RE 149, Page ID #2550).

B. On July 8, 2013, the FTC filed its Motion for Summary Judgment (RE 157), together with over 1,000 pages of exhibits (in addition to the exhibits filed earlier as attachments to the P.I. Motion). These exhibits included

additional consumer declarations; the affidavit of an FTC undercover investigator who had posed as a consumer and recorded telephone conversations with Defendants' sales agents; and information from banks, Internet service providers, and payment processors that the FTC had obtained by means of civil investigative demands and subpoenas, including email correspondence with a payment processor revealing details about the mechanics of Defendants' operations. Defendants did not submit a brief or any evidence in opposition to the Motion for Summary Judgment by the July 22 deadline established in the Case Management Order. Two days after that deadline had passed, on July 24, they filed a Motion for Extension of Response Filing Deadline (RE 161). The only argument Defendants advanced to justify such a delay was that they had encountered technical difficulties in attempting to access the password-protected, encrypted documents that the FTC had produced in response to their belated document request. RE 161, Page ID #4069-72; *see* pp. 17-18 & note 11, *supra*. The district court denied this motion on July 29 (RE 166, Page ID #4206). Defendants have not appealed this ruling.

C. On July 25, 2013, Defendants filed their Motion for Additional Discovery (RE 165). They invoked Fed. R. Civ. P. 56(d), which permits district courts to defer considering motions for summary judgment and allow additional time for further discovery, if the non-moving party shows, by affidavit or

declaration, that it cannot present facts essential to justify its opposition. *Id.*, Page ID #4116. Notwithstanding the July 1 deadline set forth in the Case Management Order for completing discovery needed to support or defend dispositive motions, Defendants argued that they had not been able to obtain the records that the RCMP had seized, and cited several categories of such documents that supposedly were essential to their defense.

In particular, Defendants asserted that, if they could obtain access to the "seized contracts and consumer case files, which include email communications with the consumers," they could demonstrate "genuine issues of material fact concerning the FTC's allegations that consumers were misled and that [Defendants] misrepresented their services." *Id.*, Att. 1 (Declaration of Attorney David Seltzer in Support of Motion) ("Seltzer Decl."), RE 165-1, Page ID #4126. According to Defendants, these "clear and unambiguous contracts would plainly illustrate that the consumers were well aware of the transaction into which they were entering and that they voluntarily agreed to the terms of said contract [*sic.*]." Motion for Additional Discovery, RE 165, Page ID #4119. Defendants also claimed that other documents held in Canada, such as records of "bank accounts" and "corporate correspondence illustrating [the] hierarchy" of Defendants' operations, *id.*, Page ID #4121, would enable them to show genuine issues of material fact "as to whether [the] corporate defendants operated as a common

enterprise" and whether Defendant Michaels "control[led] the alleged unlawful business practice." Seltzer Decl., RE 165-1, Page ID #4126.

The district court denied this Motion for Additional Discovery on July 29, 2013 (RE 167, Page ID #4207).

7. Summary Judgment Order

On August 27, 2013, the district court issued its Summary Judgment Order (RE 173). The district court conducted "its own, searching review" of the unrebutted evidence submitted by the FTC, Page ID #4273, and concluded that the FTC had satisfied the standards for summary judgment with respect to all 12 counts in the Complaint. Page ID #4276-81.

In particular, the district court concluded that "[t]he evidence is overwhelming" that the seven interrelated corporate entity defendants "shared common officers and ownership, commingled funds, and ignored any corporate formalities when dealing with third parties," thus qualifying as a "common enterprise." Page ID #4283-84.[12] It further determined that there was no genuine issue that Michaels and Benhaim controlled the corporate entities and their

[12] *See* pages 7-9 & notes 2-6, *supra*.

deceptive practices, and that they knew about the misrepresentations to consumers. Page ID #4284-85.[13]

Accordingly, the district court held both Michaels and Benhaim personally liable, jointly and severally with the corporate defendants, for a monetary equitable judgment of over $5.7 million for restitution of net consumer losses. Page ID #4285-86. The district court determined that the FTC had sufficiently justified the restitution award, thus shifting the burden to Defendants to demonstrate any inaccuracies; and concluded that Defendants' "failure to file a brief in opposition to Plaintiff's motion for summary judgment precludes them from doing so." Page ID #4286.

SUMMARY OF THE ARGUMENT

Defendants' challenges to the district court's Summary Judgment Order and two related procedural rulings are meritless. This Court should reject those challenges and affirm the Summary Judgment Order.

First, the district court did not abuse its discretion in denying Defendants' Motion for Additional Discovery and refusing to defer its ruling on the FTC's summary judgment motion. Defendants knew that the FTC was preparing to file a dispositive motion; they received copies of every subpoena and discovery request;

[13] The Court denied the FTC's motion to admit certain documents into evidence, but ruled that the Commission's showing was sufficient without that evidence. Page ID #4273-75.

and they were aware of the issues that the FTC would raise from the very beginning of the nearly six-month period during which discovery was allowed. Yet they made virtually no effort to obtain evidence during that time period, and they provided no legitimate excuse for their dilatory and inadequate discovery efforts. Defendants pretend that the only possible source of exculpatory evidence was the trove of records seized by the RCMP at their Montréal premises, but this is transparent posturing. Defendants could have obtained much of the same information through other means. Indeed, they *did* receive such information from the FTC, which submitted that evidence into the record. Given the duplicative nature of the materials the Defendants sought to obtain, additional discovery would have made no difference to the outcome. *See* Part I.A, pp. 26-36, *infra*.

Second, the district court did not abuse its discretion in denying the Defendants' Renewed Stay Motion. District courts have broad authority to control their dockets and schedules through the grant or denial of stays. Defendants failed to demonstrate that a criminal indictment would imminently be issued. And even if a parallel criminal case had been pending, the Defendants had no constitutional right to a stay, and the district court reasonably concluded that it could have managed discovery in a manner that would mitigate any burdens on Defendants and protect their rights to avoid self-incrimination. *See* Part I.B, pp. 36-42, *infra*.

Third, Defendants fail to demonstrate that the district court erred in granting the FTC's Motion for Summary Judgment. The contrived legal arguments Defendants offer in their appellate brief are too little and too late, given that they failed to present any such legal arguments before the district court. *See* Part II.A, pages 43-47, *infra*.

Finally, Defendants cannot plausibly refute the district court's well-supported conclusion that their material representations to consumers were misleading, given the overall net impression created primarily by their telemarketers' sales pitches enticing consumers to sign up for their services, which the supposed disclaimers or caveats in their fine-print contracts did not offset. Nor can they point to anything in the record to refute the "overwhelming" evidence before the district court that the corporate entities operated as a "common enterprise." *See* Part II.B, pages 47-56, *infra*.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTIONS TO MODIFY DOCKET DEADLINES.

Standard of Review

This Court "reviews for abuse of discretion a claim that summary judgment was prematurely entered because additional discovery was needed[.]" *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 627

(6th Cir. 2002). The same abuse of discretion standard is applied to a challenge to a "district court's denial of . . . motions to conduct additional discovery after the cut-off date." *Wayne v. Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994).

Similarly, "[a] district court's decisions regarding the timetable" of its docket – such as denials of motions to stay – "will not be reversed absent an abuse of discretion." *Louis Vuitton Malletier S.A. v. LY USA Inc.*, 676 F.3d 83, 96 (2d Cir. 2012). A "[d]istrict [c]ourt . . . clearly abuse[s] its discretion in entering" a stay order that "could place [a civil] case in limbo for years." *Ohio Envt'l Council v. U.S. Dist. Court*, 565 F.2d 393, 396 (6th Cir. 1977). *See also Clinton v. Jones*, 520 U.S. 681 (1997) (reversing district court's stay of civil case against President Clinton as an abuse of discretion).

A. The District Court Did Not Abuse its Discretion in Refusing to Allow Defendants Additional Time for Discovery Before Ruling on the FTC's Motion for Summary Judgment.

Parties "complaining that [a] district court granted summary judgment without allowing adequate discovery must be able to show that [they] could have obtained information through discovery that would disclose material facts." *Lanier v. Bryant*, 332 F.3d 999, 1006 (6th Cir. 2003). Unless they can explain "what information they hoped to be able to uncover" through additional discovery and "how [it] would have aided their opposition to summary judgment," this Court is "simply unable to conclude that the district court's limitations on the discovery

process constituted an abuse of discretion." *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997).

Defendants argue that, by denying their Motion for Additional Discovery (RE 165), the district court wrongly denied them access to vital and indispensable information and left them unable to oppose the FTC's Motion for Summary Judgment. Appellants' Brief, pp. 21, 23. They contend that, because they were unable to retrieve the business records, computers, and other materials that the RCMP had seized at their Montréal premises, they "[could] not present facts essential to justify [their] opposition" to the FTC's summary judgment motion; and they argue that the district court should have "defer[red] considering the motion" or "allow[ed] [them more] time to obtain affidavits or declarations or take discovery." Motion for Additional Discovery, RE 165, Page ID #4116 (quoting Fed. R. Civ. P. 56(d) & (d)(1)). These arguments do not withstand scrutiny.

In considering either "a challenge to . . . a denial of a motion to extend the discovery period" or "a more general claim that the district court acted prematurely by granting summary judgment . . . and preclud[ing] necessary discovery," this Court takes into account factors such as "(1) when the appellant learned of the issue that is the subject of the desired discovery; (2) whether the desired discovery would have changed the ruling below; (3) how long the discovery period had lasted; (4) whether the appellant was dilatory in its discovery efforts; and

(5) whether the appellee was responsive to discovery requests." *Plott v. General Motors Corp.*, 71 F.3d 1190, 1196-97 (6th Cir. 1995) (citations omitted). *Accord*, Appellants' Brief, p. 31-32 (listing the same five factors, as quoted in *CenTra, Inc.v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008)).

These factors strongly support the conclusion that the district court properly exercised its discretion to deny Defendants' request for additional discovery. First, Defendants make no showing that access to the materials in the custody of the RCMP would have enabled them to defeat the Commission's summary judgment showing.[14] Defendants argue – incorrectly – that, if only they had been able to use those supposedly indispensable documents, they could have demonstrated "genuine issues of material fact" regarding two key issues:

1. The FTC's allegations that "consumers were misled and that Defendants misrepresented their services" could have been challenged, according to Defendants, if they had been able to rely on

[14] This analysis draws from the second factor set forth in the *Plott* case. The first *Plott* factor is clearly inapplicable. Defendants cannot and do not argue that they had inadequate notice of the need for evidence on these core issues, or that the court's focus on those points took them by surprise. This case is nothing like those in which district courts were held to have abused their discretion by issuing final, dispositive orders without giving the losing parties adequate notice of the critical issues that would determine the outcome and depriving them of the opportunity to conduct discovery on those issues. For example, in *Bennett v. City of Eastpointe*, the police department defendants' motions for summary judgment focused exclusively on the civil rights plaintiffs' Fourth Amendment claims, but the summary judgment order disposed of *all* the plaintiffs' claims, including those premised on the Fourteenth Amendment. 410 F.3d 810, 816-18 (6th Cir. 2005).

their customer contracts from their Montréal office to "show precisely what representations were made to the consumers and the specific terms of the deal between [the] Defendants and their customers," which, in turn, would confirm that "Defendants provided the precise debt settlement or financial consulting services represented in the contracts." Appellants' Brief, pp. 34-35; *see also* Motion for Additional Discovery, RE 165, Page ID #4119; Seltzer Decl., RE 165-1, #4126-27.

2. The FTC's allegations concerning the individual Defendants' culpability could have been countered, they argue, if they had been able to use "bank records, statements, and other corporate documents that had been seized by the Canadian government [to] provide evidence of the relevant companies' corporate hierarchies." Appellants' Brief, p. 35. Based on that evidence, Defendants claim, they could have countered the FTC's showings that "the corporate defendants operated as a common enterprise" and that Michaels and Benhaim controlled that enterprise and knew of its unlawful business practices. Seltzer Decl., RE 165-1, Page ID #4126.

Contrary to Defendants' assertions, the additional Montréal documents they claim to have needed would have made no difference to the district court's ultimate

rulings on either (i) the relationship between their consumer contracts and their alleged misrepresentations, or (ii) the corporate entities' operations as a "common enterprise" under the control of the individual Defendants. For one thing, Defendants did not need access to the cache of materials seized by the RCMP to obtain customer contracts pertinent to their alleged misrepresentations, because they already possessed copies of those very documents – and, to the extent they needed additional, similar materials, they could have readily obtained them from other sources. The same is true of the corporate correspondence, bank records, and other documents that pertain to the corporate hierarchy and the individual Defendants' control and knowledge of its operations.

First, Defendants received copies of contracts, correspondence, corporate records, and other materials from the FTC, which filed them on September 25, 2012, as exhibits to its P.I. Motion, and on June 8, 2013, as exhibits to its Motion for Summary Judgment. The FTC also gave Defendants numerous documents in the categories that they claim they needed in its document productions responding to Defendants' informal email of May 9, 2013, and their First Requests for Production, served on June 14, 2013. Those productions included every document that the FTC had received from the RCMP.

Defendants' complaints about their lack of access to consumer contracts are particularly audacious. Their own advocacy confirms that they already *had* access

to those contracts; indeed, their brief before this Court is larded with quotations from them. *See* Appellants' Brief, pp. 20-21, 48-49, 55, 58 (quoting consumer contracts that the FTC had submitted into the record as attachments to the P.I. Motion and the Motion for Summary Judgment).[15] This makes it manifestly clear that, if Defendants had wished to oppose the FTC's Motion for Summary Judgment by referring to consumer contracts, they could have used contracts already in the record before the district court, as they have now done in their appellate brief. Access to additional contracts would not have changed the outcome of the case.

Similarly, Defendants cannot seriously claim an inability to access their banking records. Long before the due date for their opposition to the FTC's dispositive motion, it became clear during the course of discovery that Defendants already had extensive bank records in their possession. Indeed, they refused to turn over these materials in response to the FTC's subpoenas until compelled to do

[15] The FTC submitted declarations from twenty-five consumers, including some consumers who had signed contracts with each of the three U.S. corporate defendants. *See* P.I. Motion, Exhs. PX 17 – PX 40, RE 5-2, 5-3, 5-4, 5-5, Page ID #317-1085; Motion for Summary Judgment, Exh. PX 48, RE 157-2, Page ID #2913-2921. Twenty of those declarations were accompanied by attachments containing the consumers' written contracts with Defendants. *See, e.g.*, PX 17, Att. A, RE 5-2, Page ID #320-27 (New Life contract); PX 32, Att. B, RE 5-4, Page ID #756-65 (First United contract); PX 36, Att. A, RE 5-5, Page ID #864-82 (EMA contract). The FTC provided the contact information of each of these consumer declarants to Defendants on February 5, 2013, as part of its initial disclosures. *See* FTC Initial Disclosures Pursuant to Rule 26(a)(1), RE 142-3, Page ID #2490-99.

so by the district court. *See* Memorandum Opinion & Order, RE 127, Page ID #2359-60 (issued April 25, 2013 by Magistrate Judge Kenneth McHargh). Moreover, as with the customer contracts, the FTC filed hundreds of pages of highly revealing banking records and corporate correspondence as attachments to its Motion for Summary Judgment.

Furthermore, in reviewing a party's motion for additional discovery pursuant to Rule 56, "[t]he overarching inquiry . . . is whether the moving party was diligent in pursuing discovery." *Dowling v. Cleveland Clinic*, 593 F.3d 472, 478 (6th Cir. 2010). Here, Defendants clearly were not. Defendants (i) had a nearly six-month window for conducting discovery of evidence to support or oppose dispositive motions – from January 4 through July 1, 2013 – but (ii) conducted virtually no discovery during that period of time. *Cf. Plott*, 71 F.3d at 1196-97 (third and fourth factors). For example:

- Defendants could have tried to obtain evidence pertaining their representations (or misrepresentations) to consumers, and the services they provided (or failed to provide), by taking depositions of their customers (including those whose sworn declarations the FTC had filed) or their telemarketing sales agents. But they took no depositions at all.
- They could have tried to obtain additional banking records or copies of relevant correspondence in the same way as the FTC did – by serving third

party subpoenas on banks, payment processors, or other entities with which they transacted business. They failed to do so.

- They could have tried to elicit evidence supporting their theory that Kwon, Shamolian, or Ohayon – not Michaels or Benhaim – controlled the corporate entities by serving interrogatories, requests for admissions, or document requests upon those three individuals (who, at the time, were parties in the case), or by taking their depositions. Such information probably would have been far more relevant to the argument that they now claim they wanted to make than anything in the cache of documents seized by the RCMP. But they never took advantage of such opportunities.

In six months, Defendants issued only one subpoena (the defective document demand to DOJ) and served only one document request (to the FTC, less than two weeks before the deadline for discovery for dispositive motions). To the extent Defendants' approach to discovery hampered their ability to oppose the FTC's Motion for Summary Judgment, the blame rests solely with them.

Furthermore, Defendants have also failed to show that they acted diligently in attempting to obtain purportedly needed evidence by other available means. As noted above, Canadian law allows a person whose records have been seized the right to apply to a Canadian court to gain access to such records. See page 12 & note 7, *supra*. Defendants complain that the FTC did not affirmatively "assist"

them in securing records from the RCMP (Appellants' Brief, pp. 10, 29); but they never submitted into the record below any copy of a motion, application, other filing submitted to any Canadian government authority seeking the return of their records, nor any hearing transcript supporting their contentions; and they have never explained or substantiated their argument that they needed any assistance from the FTC to request return of such materials.

It is particularly noteworthy that the Defendants did not even file their Motion for Additional Discovery (RE 105) until July 25, 2013 – over three weeks after the relevant discovery cut-off date (July 1), and several days after their deadline for responding to the FTC's Motion for Summary Judgment. "Where the full period for pretrial discovery has run its course, a party should generally be precluded from reopening discovery [long] after it has closed in a last-ditch attempt to salvage a deficient claim or defense." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1114 (6th Cir. 2001). *See also Schaffer by Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 732 (6th Cir. 1996) ("Rule 56(f) is not a substitute for diligently pursuing discovery.").

Finally, applying the fifth *Plott* factor, Defendants cannot excuse their own failure to conduct discovery by leveling unfounded accusations that the FTC was insufficiently responsive to their discovery requests. They complain that they received "limited discovery which was only produced by the FTC on July 22,

2013," the date on which they should have filed their opposition to the FTC's Summary Judgment Motion. Appellants' Brief, p. 13; *see also id.*, pp. 29-30, 37-38. But the FTC's production was timely: Defendants did not serve their *First* Requests for Production to the FTC (RE 162-1) until June 14, and pursuant to Fed. R. Civ. P. 33(b)(2), the FTC had 30 days to respond.

Similarly, Defendants' contention that the FTC had not responded to their request for a list of the consumers it intended to call as witnesses is unavailing. Motion for Additional Discovery, RE 165, Page ID #4121-22. The district court's Case Management Order did not require the FTC or Defendants to provide one another with lists of witnesses they planned to call at trial until shortly before the trial was to begin, several months later – specifically, by September 14 (three days before the pre-trial conference, scheduled for September 17). *See* Case Management Order, RE 105, Page ID #2181, #2183. The FTC had given Defendants contact information for numerous consumers months before, and had filed over 20 customer declarations as exhibits to its P.I. Motion; Defendants fail to explain why they did not conduct any depositions or seek any other information from any of these consumers during the period allotted for discovery.

In sum, Defendants' lack of access to the materials seized by the RCMP is a red herring. They could have conducted discovery and gathered evidence from other sources to build their case, just as the FTC did. Their failure to do so within

the ample period of time allotted by the district court does not mean that there was anything wrong with the procedural ground rules established and enforced by the district court; and the district court did not abuse its discretion in denying their Motion for Additional Discovery.

B. The District Court Did Not Abuse its Discretion in Declining to Stay the Case in Deference to a Supposedly "Imminent" Criminal Indictment.

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936). Defendants' arguments challenging the district court's denial of the Renewed Stay Motion ignore controlling legal principles and mischaracterize the facts concerning the posture of the case before the court below. Accordingly, this Court should reject Defendants' contention that the district court's denial of the requested stay was such an egregious abuse of discretion that the "ensuing summary judgment order should be vacated." Appellants' Brief, p. 40.

In ruling on Defendants' first request for a stay in October 2012, the district court began with the well-recognized proposition that "[a] stay of civil proceedings due to a pending criminal investigation is an extraordinary remedy[.]" Order Denying First Stay Motion, RE 15, Page ID #1357 (citing *Louis Vuitton*, 676 F.3d

at 98); *accord*, *Crawford & Sons, Ltd. v. Besser*, 298 F. Supp. 2d 317, 319 (E.D.N.Y. 2004). As this Court has recognized, moreover, "the burden is on the party seeking the stay to show that there is pressing need for delay, and that neither the other party nor the public will suffer harm from entry of the order." *Ohio Envt'l Council*, 565 F.2d at 396.

As the court below properly concluded, Defendants failed to meet that burden. In its initial October 2012 order (which Defendants do not challenge here) the court carefully considered the six factors that Defendants themselves cite as pertinent. Order Denying First Stay Motion, RE 15, Page ID #1357 (quoting *United States v. Ogbazion*, 2012 WL 4364306, at *2 (S.D. Ohio Sept. 24, 2012)); *accord Louis Vuitton*, 676 F.3d at 99 (same); *cf.* Appellants' Brief, p. 40-41.[16] The court rejected Michaels' principal argument – *i.e.*, that a criminal indictment against him, involving the same issues as the civil proceeding, was "imminent" – as too speculative to warrant granting a stay. While acknowledging that a related criminal investigation was underway – "[a]lthough the exact parameters of the criminal investigation are unknown" – the district court determined that such an

[16] These factors include "(1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest." Order Denying First Stay Motion, RE 15, Page ID #1357.

"indictment has not yet issued, nor is there evidence in the record indicating when that may occur." Order Denying First Stay Motion, RE 15, Page ID #1357.

In his Renewed Stay Motion (RE 141) in June 2013, Michaels provided only a rehash of arguments presented in the First Stay Motion (RE 12). But even then, an indictment still had not issued, and there was still no evidence in the record indicating whether or when that might occur. Michaels argued, however, that "recent developments" should alter that conclusion and show that an indictment had become a "guaranteed eventuality." Renewed Stay Motion, RE 141, Page ID #2468, #2469, #2471.[17] But the only "recent development" he offered to support this claim was an email from an Assistant U.S. Attorney – sent more than six months previously – indicating that DOJ had evidence supporting a prosecution and inquiring into Michaels' interest in cooperating and negotiating a guilty plea. *Id.*, Page ID #2470-71; *see also id.*, Exh. A (copy of DOJ email), RE 141-2, Page ID #2477. This email provided no greater certainty as to whether or when an indictment would issue than the information before the district court when it rejected the First Stay Motion. Moreover, the lapse of time between the date of the DOJ email and the date of the Renewed Stay Motion further undermined Michaels'

[17] Defendants continue to use the same overstated characterization ("guaranteed eventuality") in their Brief before this Court, and contend that "there is no question that Defendant Dan Michaels will be indicted" (Appellants' Brief, p. 41) – even though no indictment had issued by December 2013, when they filed their Brief. Nor has one issued as of the date of the present brief, so far as the FTC knows.

claim that a criminal prosecution was a "guaranteed eventuality." The district court did not abuse its discretion in rejecting such arguments – nor in doing so summarily, given that it had previously explained why the same arguments were insufficient.

Wholly apart from the timing of events in the ongoing criminal investigation, moreover, Defendants err in their apparent premise that a stay of civil proceedings pending parallel criminal proceedings is automatically, or at least typically, granted. On the contrary, as the court below correctly held, it is an "extraordinary remedy." Order Denying First Stay Motion, RE 15, Page ID #1357. Defendants cite, for example, a district court decision to stay a government agency's civil enforcement case because the court believed a "criminal indictment was imminent." Appellants' Brief, p. 44 (citing *Chao v. Fleming*, 498 F. Supp. 2d 1034 (W.D. Mich. 2007)). The court in that case acknowledged, however, that "pre-indictment requests for a stay are usually denied" due to "the uncertainty surrounding when, if ever indictments will be issued, as well as the effect of the delay on the civil trial." 498 F. Supp. 2d at 1038 (citations omitted). As explained above, Defendants here failed to present any evidence dispelling such uncertainty. Furthermore, in *Chao*, the district court limited the duration of the stay to 90 days, since without "further indication that an indictment is in the works," a stay for a longer duration would have been unjustifiable. The court below reasonably

concluded that there was no justification for the stay of six months or longer sought in the Renewed Stay Motion, RE 141, Page ID #2476.

Defendants also contend that, if parallel civil and criminal proceedings had been pending simultaneously, a stay of the civil case would have been "necessary to protect Mr. Michaels' Constitutional rights." Appellants' Brief, p. 41. This is wrong. "The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). Thus, "[i]n the absence of substantial prejudice to the rights of the parties involved, simultaneous parallel civil and criminal proceedings are unobjectionable under our jurisprudence." *Id.* (quoting *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980)). As the Supreme Court explained in *United States v. Kordel*, 397 U.S. 1, 11 (1970), "[i]t would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." The district court relied on this uncontroversial legal premise when it concluded that "allowing for both [civil and criminal] actions to proceed simultaneously" was not only permissible, but also would yield "the most efficient outcome." Order Denying First Stay Motion, RE 15, Page ID #1357.

Defendants reiterate Michaels' argument that, if discovery in both a civil and a criminal case had proceeded simultaneously, "it is highly likely that both parties [in the civil case would have] approach[ed] this Court for protective orders, to address Defendant's Fifth Amendment Rights, to compel production of documents . . ., or to resolve other related conflicts . . . ." Renewed Stay Motion, RE 141, Page ID #2472; *accord* Appellants' Brief, p. 42. The district court rejected this concern in October 2012, when it concluded that "the discovery process can be structured" to mitigate concerns over the burdens of Defendants' "needing to defend [themselves] in two separate [civil and criminal] actions," and reassured Defendants that the court would carefully "ensure that their constitutionally enshrined right to adequately defend themselves in both actions is not hampered." Order Denying First Stay Motion, RE 15, Page ID #1357-58. Defendants fail to show that the district court could not have kept that commitment, nor do they show that such relief was any more justified when the district court denied the Renewed Stay Motion in June 2013.

Defendants contend that, "if both the civil and criminal proceedings had gone forward concurrently," they could have been unfairly exposed in "the civil case to arguments for summary judgment based on . . . any plea agreement in the criminal case that would be *binding* upon [them] . . . in the civil proceeding." Appellants' Brief, p. 42. But this never happened. Such a hypothetical,

counterfactual scenario cannot support a ruling that the district court abused its discretion.

Defendants' remaining arguments have even less purchase in light of what actually occurred in the civil case. In June 2013, they expressed concern that, "if this civil proceeding precedes resolution of the criminal proceeding, [Michaels'] Fifth Amendment Privilege Against Self-Incrimination may be severely threatened" – for example, because civil discovery could place him "at risk of waiving his Fifth Amendment privilege, or accepting an adverse inference in this civil proceeding after asserting the privilege." Renewed Stay Motion, RE 141, Page ID #2473. But by that point, Michaels and the other Defendants had steadfastly maintained their Fifth Amendment privilege claims throughout the course of discovery, and nothing in the civil discovery process compelled them to waive those privilege claims. And the Summary Judgment Order did not rely on an adverse inference against them in connection with their assertion of that privilege. Thus, the district court's denial of Michaels' Renewed Stay Motion provides no basis for vacating the Summary Judgment Order.[18]

[18] Defendants also contend that their Renewed Stay Motion established, among other things, that a stay was necessary "to ensure that EMA Defendants were able to access their very own highly relevant and necessary files, which had all been seized." Appellants' Brief, p. 5; *accord*, *id.* at 2-3. But the Renewed Stay Motion did not make such an argument; and in any event, that argument is more properly directed to the distinct issue of Defendants' supposed need for additional

II. THE DISTRICT COURT DID NOT ERR IN GRANTING THE FTC'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT.

Standard of Review

"This [C]ourt reviews a grant of summary judgment *de novo*. In other words, it employs the same test as that used by the district court to determine whether a grant of summary judgment was appropriate." *Front Row Theatre, Inc. v. Am. Mfrs. Mut. Ins. Cos.*, 18 F.3d 1343, 1346 (6th Cir. 1994). Under Fed. R. Civ. P. 56(e), "a party opposing a properly supported motion for summary judgment" cannot defeat such a motion "without any significant probative evidence" or "set[ting] forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

A. Defendants Cannot Disturb the District Court's Sound Summary Judgment Ruling by Offering New Factual Contentions and Legal Arguments That They Never Presented to the Court Below.

The FTC submitted a formidable body of factual evidence – including 25 consumer declarations and 186 other exhibits – demonstrating that the Defendants had violated the statutes and rules as alleged in the Complaint; and after "conducting its own, searching review," the district court found that the evidence of Defendants' culpability as a "common enterprise" was "overwhelming." Summary Judgment Order, RE 173, Page ID #4273, #4283; *see* pages 7-9 and

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discovery prior to the grant of summary judgment – and, as shown in the preceding section, is no more successful in that regard.

notes 2-6, *supra*. In contrast, Defendants submitted nothing at all – no factual evidence to counter that presented by the FTC; no analysis or interpretation of the factual evidence in the record; and no legal arguments to respond to those in the FTC's Motion for Summary Judgment. Thus, they cannot seriously maintain that the district court erred in granting that Motion. Having failed to submit any evidence to refute the FTC's factual showing, and having waived any and all arguments concerning the merits of the case before the district court, Defendants cannot expect this Court to entertain newly concocted interpretations of the evidence or original legal arguments that they never presented to the court below.

First, Defendants may not use their appellate brief to inject new factual contentions that were not in the record before the district court in order to demonstrate the existence of "genuine issues of material fact." *See Cacevic v. City of Hazel Park*, 226 F.3d 483, 491 (6th Cir. 2000) (where appellants "proffer[] evidence that might or might not show a genuine issue of material fact after the district court had granted the defendants' motion for summary judgment, that evidence will not be considered by [this Court] on review"). For example, Defendants contend, as a factual matter, that each of the three U.S. corporate Defendants (E.M.A., New Life, and First United) operated "as an entirely separate company," engaged in "entirely different business practices," and provided "different services to their clients pursuant to written contracts specific to each

entity." Appellants' Brief, pp. 47, 48; *see generally id.*, pp. 19-21, 46-55. They concede, however, that "[t]he precise nature of [these] businesses is . . . *not part of the record*." *Id.*, p. 19, n.6 (emphasis added). This Court has made clear that it "will not entertain on appeal factual recitations not presented to the district court when reviewing a district court's decision." *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 995 (6th Cir. 2007) (citation omitted).

Defendants also may not introduce new legal arguments that they failed to present to the district court in opposing the FTC's Motion for Summary Judgment. Defendants offer a new spin on the factual evidence introduced by the FTC in challenging to what they characterize as the district court's "improper misapplication of the law to the facts" and misinterpretation of documents in the record. Appellants' Brief, pp. 50, 56. For example, they assert that the district court should have discerned "genuine issues of material fact" based on the inconsistencies between Defendants' representations to consumers (as evidenced by consumers' declarations and Defendants' telemarketing scripts), on the one hand, and the language of the contracts that consumers signed, on the other. *See, e.g.*, *id.*, pp. 56-59. They also attempt to identify subtle discrepancies between the contract documents and telemarketing scripts used by each of the three U.S. corporate Defendants, and contend that these differences raise questions about the entities' supposedly distinct activities and their operation as a "common

enterprise." *Id.*, pp. 50-53; *see also id.*, p. 46 ("evidence of one [corporate] entity's representations [should not be used] to hold another entity liable for alleged misconduct and statutory violations").

But contrary to their contention that "these material facts . . . were disputed in the very record itself," *id.*, p. 60, Defendants' appellate brief is the first time they have ever aired any such arguments. They never presented them to the court below. In general, "the failure to present an issue to the district court forfeits the right to have the argument addressed on appeal. . . . It is well settled that this [C]ourt's function is to review the case presented to the district court, rather than a better case fashioned after a [district court's] unfavorable order." *Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006).[19]

Defendants apparently believe the district court should have anticipated by intuition their newly-hatched theory on how to interpret the evidence. This Court has made clear, however, that a district court "is not required to speculate on which portion of the record the non-moving party [might] rel[y]." *Guarino v. Brookfield*

[19] Courts have recognized that the general rule that "appellate courts do not consider any issue not passed upon below" is subject to narrow exceptions in certain extraordinary circumstances, such as where the issue newly raised on appeal "involves a question of law that requires no additional factual development," the legal issue is exceptionally important, and "the state of the law is uncertain." *In re Morris*, 260 F.3d 654, 663-64 (6th Cir. 2001) (citations omitted). Such exceptions clearly do not apply here. The disputed issues are primarily factual (or mixed questions of law and fact); and the district court applied well-settled principles of law, as discussed below.

Township, 980 F.2d 399, 404 (6th Cir. 1992) (citing *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1990)). Indeed, because the FTC's motion was unopposed, the district court below was particularly mindful of the need to "conduct[] its own, searching review" of the record to ensure that the FTC had discharged its burden. *See* Summary Judgment Order, RE 173, Page ID #4273 (citations omitted). But this does not mean that Defendants were free to do nothing and simply rely on the district court "to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). Rule 56 "requires the non-moving party to do its own work," and where it fails to do so – "for example, by remaining silent – its opportunity is waived[.]" *Guarino*, 980 F.2d at 405, 406.

B. The District Court Correctly Granted Summary Judgment To The FTC.

Even if the Court were to allow Defendants to present their untimely new arguments, the conclusions that the district court reached in its Summary Judgment Order are entirely correct. The Commission showed that, under controlling legal principles, there was ample basis to hold Defendants liable for multiple violations of the FTC Act and the TSR.

1. Defendants Used Deceptive Practices to Harm Consumers.

As the district court recognized, the FTC can "prove that Defendants violated Section 5 by engaging in deception . . . [by] showing that Defendants'

representations were . . . likely to mislead customers acting reasonably under the circumstances[,] [and] . . . likely to affect the consumer's decision to buy the product being sold." Summary Judgment Order, RE 173, Page ID #4276 (citing 15 U.S.C. § 45(a), and *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)). Here, as in *Tashman*, the "overwhelming evidence shows that misrepresentations were made and that reasonable consumers were likely to (and, in fact, did) rely on those statements." *Id.* *See also FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) ("Given the voluminous evidence showing that very few people made money using the [Defendants'] [p]rogram as promised in the advertising materials and telemarketing pitches, . . . and the absence of significantly probative contrary evidence from [Defendants], we conclude that the district court correctly granted summary judgment on the FTC Act claim because the marketing material made misrepresentations in a manner likely to mislead reasonable consumers.").[20]

Defendants' attempts to rely on language in their contracts to refute the district court's determination of consumer deception, in essence, boil down to the unsupportable proposition that any deception in their telemarketers' initial telephone calls to consumers was cured by later disclosures in contracts into which

[20] "Identical principles of deception from Section 5 of the FTC Act apply to the TSR, and a violation of the TSR amounts to both a deceptive act or practice and a violation of the FTC Act." *FTC v. Washington Data Resources, Inc.*, 856 F. Supp. 2d 1247, 1273 (M.D. Fla. 2012), *aff'd on other grounds*, 704 F.3d 1323 (11th Cir. 2013) (*per curiam*); *see also Stefanchik*, 559 F.3d at 929-30; 15 U.S.C. §§ 57a(d)(3) & 6102(c)(1).

consumers entered. For example, Defendants suggest that there should be no grounds for concern if Defendants' actual services failed to live up to the promises they made in their telemarketing calls to consumers, so long as the "verbal representations . . . [were] expressly contradicted by the representations made in the New Life customer contracts themselves – contracts that New Life customers knowingly signed." Appellants' Brief, pp. 53-54.[21]

Defendants are clearly wrong, however in supposing that the language in the consumer contracts is all that matters, and that contrary representations in sales calls are immaterial. In addressing whether a defendant made a claim likely to mislead consumers acting reasonably under the circumstances, a court must determine the "net impression" of all of the claims made by a seller on a consumer acting reasonably under the circumstances. See *FTC v. Gill*, 265 F.3d 944, 956 (9th Cir. 2001). The court below properly relied on *FTC v. Tashman*, which instructs that "representations violate Section 5 if the FTC proves that, based on a common sense net impression of the representations as a whole, the representations are likely to mislead reasonable customers to their detriment. . . . [B]oth the

[21] *See also* Appellants' Brief, p. 57 (implying that a representation during a sales call that induced a customer to sign up for Defendants' services should not be deemed "deceptive" if, "the day after she signed her contract . . . she received" a truthful document that contradicted the initial representation); *id.*, pp. 58-59 (where Defendants' telemarketers made statements to consumers that were "directly contradicted by the . . . contract that [the consumer] knowingly signed," these contradictory facts in the record should preclude a grant of summary judgment).

advertisements and the disclosure documents must be construed together to evaluate the net impression of the representations to consumers." 318 F.3d at 1283 (citations omitted).

While written contractual disclaimers are factors that may be considered in determining a reasonable consumer's net impression, such disclaimers are not dispositive. To the contrary, disclaimers buried in the fine-print of a contract, following on lavish express, unqualified claims, should be accorded little, if any, weight in determining a reasonable consumer's net impression. Bold initial promises by defendants that they subsequently attempt to recant with fine-print disclaimers are not unusual in Commission enforcement actions alleging deception. Numerous decisions address the issue of what subsequent disclaimers must state and how prominent they must be to negate prior deception. Consistent with net impression analysis, these cases uniformly hold that, if the initial sales claims made to consumers are deceptive, subsequent disclaimers can only neutralize the initial deceptive claims if the disclaimers are as prominent as those misrepresentations.[22]

[22] *See, e.g., FTC v. Washington Data Resources*, 856 F. Supp. 2d 1247, 1274-75 (M.D. Fla. 2012) (in a mortgage modification scam, disclaimers on the sixth page of a retainer agreement did not change the net impression created by prior oral and written representations by the defendants, including savings claims made in postcards sent to prospective customers and oral claims of savings promised by telemarketers to consumers); *FTC v. Medical Billers Network*, 543 F. Supp. 2d 283, 305-06 (S.D.N.Y. 2008) (misrepresentations made in

One decision in this line of cases is particularly instructive here, in light of its similar factual setting regarding a purported debt reduction program. In *FTC v. Connelly*, 2006 WL 6267337 (C.D. Cal. Dec. 20, 2006), the district court observed, "disclaimers [such as in a contract] do not automatically exonerate deceptive behavior and disclaimers are particularly inadequate when they appear in a different context than the claims they purport to repudiate." *Id*. at *10.[23]

The ruling below fully comports with this standard. The district court properly recognized that, in assessing whether "Defendants violated Section 5 by engaging in deception, . . . it is the overall net impression that counts." Summary Judgment Order, RE 173, Page ID #4276; *see id.*, n.26 (citing *Tashman*). The evidentiary record presented by the Commission included numerous examples of Defendants' sales pitches – evidenced not only by consumer declarations, but also by the written scripts used by Defendants' telemarketers, as well as transcripts of phone conversations with undercover FTC investigators – and demonstrated the wide divergence between the promises that consumers understood Defendants to

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advertisements and telemarketing calls are not "cure[d]" by making accurate representations in contract with the consumer); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001) (after defendants made unqualified claims in radio advertisements that they could improve consumer's credit reports, disclaimers in contract between defendants and consumer do not repudiate the unqualified claims made to prospective purchasers).

[23] That court denied the Commission's summary judgment motion, holding that the effect of the disclaimers on consumers was a question of fact. The case settled before trial so this factual question was never judicially resolved.

have made and the services consumers actually received from Defendants (or lack thereof). *See, e.g.*, Summary Judgment Order, RE 173, Page ID #4277-78 & notes 29-39 (and exhibits cited therein); *id.*, #4279-80 & notes 46-50 (and exhibits cited therein).

The district court did not err in declining to accord much significance to the contract language on which Defendants rely so heavily, given the evidence that those detailed, technical documents were insufficient to dispel the glowing representations Defendants had made to entice consumers to sign up for their services.[24] By contrast, the "evidence before [the district] [c]ourt . . . shows that Defendants did little to nothing to actually assist their clients. Summary Judgment Order, RE 173, Page ID #4278.[25] This record fully supported the lower court's

[24] *See, e.g.*, Summary Judgment Order, RE 173, Page ID #4277 (citing sales pitches containing the following representations: "we will already be lowering your rate and payment!!!!"; "we will save a substantial (or significant) amount of money on a monthly basis"; "On your mortgage, we will work with 3rd parties whose bank connections with help to reduce your interest rate and monthly payments significantly"; "For student loans, tax debt, medical bills, and any other type of debt you have, [our contacts] specialize in reducing your balances owed, your payments and wiping out this debt in the quickest way possible."); *id.*, Page ID #4280 (Defendants told a consumer they "could reduce [his] credit card debt by up to seventy percent" and instructed employees to inform consumers "could help cut their 'debt by 50% OR MORE!!!'").

[25] The Summary Judgment Order cites evidence that one consumer was told "that EMA would relieve between sixty and sixty-five percent of her debt, and that she would only be charged $215.65," but in fact, she "ended up paying $1,078.25 in fees, and received no assistance." RE 173, Page ID #4280. Defendants' appellate brief fails to even mention, let alone refute, evidence of this

conclusion that there was "no genuine issue of material fact as to whether Defendants made material representations likely to mislead consumers."

2. Defendants Operated a "Common Enterprise."

The district court's conclusion that Defendants operated a common enterprise, Summary Judgment Order, RE 173, Page ID #4283-84, is soundly supported in the record and fully consistent with extensive case law, which makes clear that, where interrelated businesses function as a "common enterprise," each of them – as well as parties who own or control them – can be held liable for deceptive acts or practices committed by any of them (or collectively, by the enterprise as a whole). Summary Judgment Order, RE 173, Page ID #4282-83; *see also* Motion for Summary Judgment, RE 157-1, Page Id #2909. Defendants' efforts to draw distinctions between the activities of the three U.S. corporate entities are unavailing.

This Court long ago set forth the standards for determining when nominally separate companies are acting as a common enterprise. The Court, in *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261 (6th Cir. 1970), affirmed the Commission's conclusion that [a parent holding company] dominated and controlled [a series of subsidiaries], and that they formed a single enterprise for the purposes of Section 5," on the basis of the following factors – all of which fit this case exactly.

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nature (and as discussed above, they supplied no information or explanation of any kind to the district court).

- "the parent . . . interchanged personnel with its subsidiaries and maintained common or overlapping officers and directors," *id.* at 267;
- the parent's frequent "creation, dissolution, and replacement of lookalike subsidiaries throughout its existence," even though the descriptions of the purportedly separate companies' "corporate purposes and the nature of business to be transacted" in their articles of incorporation were "identical word for word," *id.* at 269;
- "the corporate agents of the old and new subsidiaries were practically all the same people," *id.*; and
- the "elements within the [defendants'] corporate complex have never dealt with each other as independent commercial entities, and . . . have interchanged business functions as the circumstances warranted in a manner which was wholly inconsistent with any purported corporate separation between the parent and the subsidiary." *Id.* at 270.

Other circuits have reached consistent conclusions, applying essentially the same analysis in holding entire networks of interrelated companies (and their owners and control persons) jointly and severally liable. *See, e.g.*, *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127,

1142-43 (9th Cir. 2010); *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1182 (N.D. Ga. 2008), *aff'd*, 356 Fed. Appx. 358 (11th Cir. 2009) (*per curiam*); *Joseph A. Kaplan & Sons, Inc. v. FTC*, 347 F.2d 785, 787 n.4 (D.C. Cir. 1965).

The district court in the present case identified the following factors as indicating that a group of companies should be deemed a "common enterprise": where they "(1) maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing." Summary Judgment Order, RE 173, Page ID #4283 (citing *FTC v. Washington Data Resources, Inc.*, 856 F. Supp. 2d at 1271. Each of the factors on this list – as well the characteristics articulated by the *P.F. Collier* Court and the similar lists of factors set forth in other courts' decisions[26] – applies squarely to Defendants. These precedents, as well as the "overwhelming" record evidence that

[26] *See, e.g.*, *Nat'l Urological Group*, 645 F. Supp. 2d at 1182 ("When corporations act as a common enterprise, each may be held liable for the deceptive acts and practices of the other [under the FTC Act]. . . . Some of the factors that courts evaluate to determine whether a common enterprise exists include common control; the sharing of office space and officers; whether business is transacted through a maze of interrelated companies; the commingling of corporate funds and failure to maintain separation of companies; unified advertising; and evidence that reveals that no real distinction exists between the corporate defendants."); *Network Servs. Depot*, 617 F.3d at 1142-43 (companies "regularly transferred money to one another and paid each others' expenses," exhibited "strongly interdependent economic interests," "pooled resources [and] staff," "were all owned and managed" by the same individuals, "were beneficiaries of and participants in a shared business scheme," and "all participated to some extent in a common venture" involving deceptive acts or practices).

the corporate Defendants, in fact, were not separate or distinct, clearly refute Defendants' arguments premised on formalistic distinctions between these corporate entities.[27]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's Summary Judgment Order.

Respectfully submitted,

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Dated: February 13, 2014

[27] *See, e.g.*, Appellants' Brief, p. 55 ("[e]ven if New Life made such representations or engaged in this conduct, it is not evidence that E.M.A. violated the law."); *id.*, p. 52 ("the District Court cannot hold New Life liable for representations made by a separate and distinct entity – First United.").

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C)(i), I certify that the foregoing Brief of Plaintiff-Appellee Federal Trade Commission contains 13,623 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

/s/_____
David L. Sieradzki

February 13, 2014

CERTIFICATE OF SERVICE

I certify that, on February 13, 2014, I filed the foregoing document via the Electronic Case Filing (ECF) system, and that the document was served on all parties' counsel of record through the CM/ECF system.

/s/_____
David L. Sieradzki

February 13, 2014

STATEMENT REGARDING DESIGNATION OF RELEVANT DISTRICT COURT RECORDS

Appellee the Federal Trade Commission respectfully submits that its Designation of Relevant Records from the district court's electronic record, pursuant to 6 Cir. R. 30(g)(1), will be filed under separate cover.

Case No. 13-4169

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff/Appellee,

v.

E.M.A. NATIONWIDE, INC., et. al., Defendants/Appellants.

ADDENDUM TO BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellee the Federal Trade Commission ("FTC") respectfully submits this Designation of Relevant District Court Documents, pursuant to 6 Cir. R. 28(b)(1)(a)(i) and 30(g)(1)(A), as the Addendum to its principal brief filed on February 13, 2014.

* * * * *

Record Entry #	Description of Document	Page ID #	Date in Record
RE 1	Complaint for Permanent Injunction and Other Equitable Relief	#1 – #27	9/25/2012
RE 5	Plaintiff's Motion for *Ex Parte* Temporary Restraining Order with Appointment of Receiver, Asset Freeze and Accounting, Expedited Discovery, and Order to Show Cause Why a Preliminary Injunction Should Not Issue	#67 – #70	9/25/2012

Record Entry #	Description of Document		Page ID #	Date in Record
RE 5-2	Plaintiff's Exhibits in Support of Motion for an *Ex Parte* Temporary Restraining Order, Volume I			9/25/2012
	PX 17	Declaration of Myrna D. Albandia with attached contract and other documents from New Life	#317 – #333	
RE 5-3	Plaintiff's Exhibits in Support of Motion for an *Ex Parte* Temporary Restraining Order, Volume II			
	PX 18-PX 27	Declarations of ten consumers with attached contracts and other documents from Defendants	#336 – #613	
RE 5-4	Plaintiff's Exhibits in Support of Motion for an *Ex Parte* Temporary Restraining Order, Volume III			
	PX 28-PX 35	Declarations of eight consumers with attached contracts and other documents from Defendants	#616 – #851	
RE 5-5	Plaintiff's Exhibits in Support of Motion for an *Ex Parte* Temporary Restraining Order, Volume IV			
	PX 36-PX 40	Declarations of five consumers with attached contracts and other documents from Defendants	#856 – #1085	
RE 8	Order (denying FTC motion for *ex parte* temporary restraining order [RE 5])		#1306 – #1307	9/28/2012
RE 12	Defendants' Motion for a Stay of Proceedings		#1316 - #1322	10/10/2012
RE 15	Order (denying defendants' motion for a stay of proceedings [RE 12])		#1356 – #1358	10/11/2012
RE 27	Stipulated Preliminary Injunction Between Plaintiff and Defendants Michaels, *et al.*		#1476 – #1499	10/25/2012
RE 81	Case Management Conference Scheduling Order		#1951 – #1961	1/4/2013
RE 105	Order ("Case Management Order")		#2179 – #2196	2/11/2013

Record Entry #	Description of Document	Page ID #	Date in Record
RE 127	Memorandum & Order (requiring defendants to turn over documents responsive to FTC's pending document requests) (issued by Magistrate Judge Kenneth McHargh)	#2359 – #2360	4/25/2013
RE 138	Stipulated Final Order for Permanent Injunction and Settlement of Claims between Plaintiff and Defendant Phillip Kwon	#2440 - #2460	5/13/2013
RE 141	Defendants' Renewed Motion for a Stay of Proceedings	#2465 – #2466	6/4/2013
RE 141-1	Memorandum in Support of Defendants' Renewed Motion for a Stay of Proceedings	#2467 – #2476	
RE 141-2	Email from Ass't U.S. Atty. Richard Goldberg to Sara Dill, Counsel for Dan Michaels, re: "*USA v. Dan Michaels, EMA, et al.*" (11/14/2012)	#2477	
RE 141-3	Exhibit Report, Exhibits Seized by Gendarme France Panneton, location: 5929 Trans-Canada #308, Ville St.-Laurent, QC; date: 2012-09-27	#2478 – #2481	
RE 142-3	FTC's Initial Disclosures Pursuant to Rule 26(a)(1) (2/5/2013)	#2490 – #2499	6/5/2013
RE 146	FTC's Opposition to Renewed Stay Motion	#2514 – #2518	6/11/2013
RE 149	**Order (denying Renewed Stay Motion [RE 141] and other procedural motions)**	#2550 – #2551	6/12/2013
RE 154	Motion for Entry of Stipulated Final Order for Permanent Injunction and Settlement of Claims between Plaintiff and Defendant Joseph Shamolian	#2798 – #2799	6/27/2013
RE 155	FTC's Motion for Order to Show Cause Why Defendant Michaels Should Not Be Held in Contempt	#2823 – #2831	6/26/2013
RE 157	FTC's Motion for Summary Judgment	#2878 – #2880	7/8/2013
RE 157-1	FTC's Memorandum of Points and Authorities in Support of Motion for Summary Judgment	#2881 – #2911	

Record Entry #	Description of Document		Page ID #	Date in Record
RE 157-2	FTC's Mo. for Summary Judgment, Mem., Exhibits, Volume II		#2912 – #3035	7/8/2013
	PX 50	Supplemental Declaration of Mary Jo Vantusko in Support of FTC's Motion for Summary Judgment (& attachments A – R)	#2934 – #3035	
RE 157-3	FTC's Mo. for Summary Judgment, Mem., Exhibits, Volume III		#3036 – #3212	
RE 157-4	FTC's Mo. for Summary Judgment, Mem., Exhibits, Volume IV		#3213 – #3352	
	PX 70	Email from James Benhaim, First United, directing a stop of all fund transfers to E.M.A., New Life, and First United bank accounts, and stating "We… will have new corporations soon to replace the old corps with."	#3254 – #3255	
	PX 71	Emails from James Benhaim, E.M.A., re one-day closure of New Life and First United accounts, and re New Life customer complaints	#3256 – #3258	
	PX 72	Email from James Benhaim, E.M.A., with attached agreement for fund transfers to First United (3/1/2012)	#3259 – #3273	
	PX 73-PX 75	Emails from James Benhaim, First United, re staff members authorized for client care on E.M.A., New Life, and First United accounts	#3274 – #3280	
	PX 76-PX 79	Bank records: 7246293 Canada, Inc. payments to Tiffany Joseph	#3281 – #3292	
	PX 80	Email from Suray Mendez, New Life (3/21/2012)	#3293 – #3294	
	PX 81	Email from Suray Mendez, First United (4/18/2012)	#3295 – #3296	
	PX 82-PX 83	Bank records: 7246293 Canada, Inc. payments to Suray Mendez	#3297 – #3302	

Record Entry #	Description of Document		Page ID #	Date in Record
RE 157-4	PX 84	Email to "Napoleon", First United (4/10/2012)	#3303 – #3305	7/8/2013
	PX 85	Email to "Napoleon", New Life (3/31/2012)	#3306 – #3307	
	PX 86	Email exchange with Ross Taylor, E.M.A., re transfers of funds to New Life (12/20/2010)	#3308 – #3310	
	PX 87	Email from Rouzbeh Rahmani, E.M.A., stating that "Ross Taylor" is his "work name" (8/19/2010)	#3311 – #3313	
	PX 88-PX 89	Bank records: 7246293 Canada, Inc. payments to Rouzbeh Rahmani	#3314 – #3319	
	PX 90	Emails to and from James Benhaim, E.M.A., re "Users for New Life," explaining that Ross Taylor's real name is Ross Rahmani and David Gold's real name is David Pereque	#3320 – #3325	
	PX 91-PX 97	Bank records: 7246293 Canada, Inc. payments to David Pereque and to other persons identified elsewhere as employees of one or more of the U.S. corporate defendants	#3326 – #3346	
RE 157-5	FTC's Mo. for Summary Judgment, Mem., Exhibits, Volume V (PX 100 – PX 127)		#3353 – #3595	
	PX 100-PX 123	Bank records: fund transfers among the U.S. and Canadian corporate defendants	#3355 – #3564	
	PX 124-PX 126	Bank records: 7246293 Canada, Inc. rent payments to Construction Claritel, Inc.	#3565 – #3575	
	PX 126	Lease agreement between 7246421 Canada, d/b/a E.M.A. and Construction Claritel, Inc.	#3576 – #3595	

Record Entry #	Description of Document		Page ID #	Date in Record
RE 157-6	FTC's Mo. for Summary Judgment, Mem., Exhibits, Volume VI		#3596 – #3895	7/8/2013
	PX 137	Emails from James Benhaim, Vice-President, E.M.A., to Doug Bertram, Meracord, re: Change of Company Name (2-27-2012 and 2-28-2012)	#3631 – #3634	
	PX129-PX 164	Emails and other documents regarding formation of new corporate entities and establishment of bank accounts and other financial arrangements for these entities	#3602 – #3715	
RE 157-7	FTC's Mo. for Summary Judgment, Mem., Exhibits, Volume VII		#3896 – #4007	
RE 157-8	FTC's Mo. for Summary Judgment, Mem., Exhibits, Volume VIII		#4008 – #4038	
RE 161	Defendants' Motion for Extension of Response Filing Deadline		#4069 – #4073	7/24/2013
RE 162	FTC's Response to Motion for Extension of Response Filing Deadline		#4083 – #4085	7/24/2013
RE 162-1	Defendants' First Requests for Production to FTC (6/14/2013)		#4086 – #4093	
RE 162-2	Letter from FTC Counsel Chris Panek to Defendants' Counsel, David Seltzer and Menachem Mayberg, transmitting thumb drive in response to informal request for documents and listing contents of data stored on drive (6/14		#4094 – #4097	
RE 164	Opinion & Order (granting FTC's Motion for Order to Show Cause Why Defendant Michaels Should Not Be Held in Contempt [RE 155])		#4114 – #4115	7/25/2013

Record Entry #	Description of Document	Page ID #	Date in Record
RE 165	Defendants' Motion to Continue Plaintiff's Summary Judgment Motion Under Rule 56(d) ("Motion for Additional Discovery")	#4116 – #4124	7/25/2013
RE 165-1	Declaration of David Seltzer in Support of Rule 56(d) Motion to Continue Summary Judgment	#4125 – #4127	
RE 165-6	Request for Legal Assistance Presented by the Gov't of the United States of America re Investigation of Dan Michaels, James Benhaim, and Others, Ex Parte Application for the Gathering of Evidence, No. 500-36-006603-131 (Superior Ct., Crim. Div., Province of Québec, Dist. of Montréal, filed Jan. 24, 2013)	#4162 – #4202	
RE 165-7	Letter from Eric Beckenhauer, DOJ, to Sara Dill, counsel for Defendants, re objections to document subpoenas (1/17/2013)	#4203 – #4205	
RE 166	Order [denying Defendants' Motion for Extension of Response Filing Deadline (RE 161)]	#4206	7/29/2013
RE 167	**Order [denying Defendants' Motion to Continue Plaintiff's Summary Judgment Motion Under Rule 56(d) (RE 165)]**	#4207	7/29/2013
RE 173	**Amended Opinion and Order ("Summary Judgment Order")**	#4271– #4287	8/27/2013
RE 177	Motion for Entry of Stipulated Final Order for Permanent Injunction and Settlement of Claims between Plaintiff and Defendant Nissim N. Ohayon	#4353 – #4354	9/13/2013
RE 179	Notice of Appeal	#4401 – #4403	7/29/2013

Respectfully submitted,

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February 19, 2014

Certificate of Service

I certify that, on February 19, 2014, I filed the foregoing document via the Electronic Case Filing (ECF) system, and that the document was served on all parties' counsel of record through the CM/ECF system.

s/ David L. Sieradzki