IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

10-10046-C

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

FIRST UNIVERSAL LENDING, LLC, *et al*.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LESLIE RICE MELMAN
Assistant General Counsel for Litigation
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-2478

OF COUNSEL:
GIDEON E. SINASHON
HAROLD E. KIRTZ
Attorneys
Federal Trade Commission
Southeast Region
Atlanta, Georgia 30303

CERTIFICATE OF INTERESTED PERSONS

No. 10-10046-C

Federal Trade Commission v. First Universal Lending, LLC, et al.

Pursuant to Circuit Rules 26.1-1 and 27-1(9), this is to certify that the following is a complete list of all attorneys, persons, and entities known to have an interest in the outcome of this appeal:

Berg, Michelle, Counsel for Receiver

Daly, John F., Deputy General Counsel, Federal Trade Commission

Elbein, Bradley, Director, Southeast Region, Federal Trade Commission

Federal Trade Commission, Appellee

Feingold & Kam

Feingold, David J., Member, Feingold & Kam, Appellant

Finley & Bologna International

Finley, Chandler L., Attorney, Finley & Bologna International

First Universal Lending, LLC, Appellant

First Universal Holdings, LLC

Greenberg, Murray A., Stearns Weaver Miller Weissler Alhadeff & Sitterson

Kirtz, Harold E., Attorney, Federal Trade Commission

Kudman, Tama, Counsel for Receiver

No. 10-10046-C, Federal Trade Commission v. First Universal Lending, LLC

Lending Partners, LLC

Marucci Law

Marucci, Rocco G., Attorney, Marucci Law

Melman, Leslie Rice, Assistant General Counsel, Federal Trade Commission

Moscowitz, Jane W., Receiver for First Universal Lending, LLC

Rosenbaum, Robin S., United States Magistrate Judge

Schloss, Adam R., Attorney, Feingold & Kam

Shonka, David C., Principal Deputy General Counsel, Federal Trade Commission

Sinasohn, Gideon E., Attorney, Federal Trade Commission

Tom, Willard K., General Counsel, Federal Trade Commission

Zausner, David, Appellant

Zausner, Sean, Appellant

Zloch, William J., United States District Judge

STATEMENT OF ORAL ARGUMENT

The Federal Trade Commission believes that oral argument will assist the Court in resolving the issues presented in this case.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

*Authorities primarily relied on

FEDERAL STATUTES

STATE STATUTES

RULES AND REGULATIONS

Telemarketing Sales Rule

STATEMENT OF JURISDICTION

The Federal Trade Commission ("FTC" or "Commission"), an independent agency of the United States, brought an action in the United States District Court for the Southern District of Florida, pursuant to Sections 5, 13(b), and 19 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 53(b), and 57b, seeking a permanent injunction against defendants' deceptive acts and practices and equitable monetary relief for injured consumers. The Commission also sought interim relief, including a preliminary injunction and an asset freeze. The district court's jurisdiction is derived from 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. §§ 53(b), 57b.

On December 18, 2009, the district court entered a preliminary injunction, including an asset freeze and appointment of a receiver, pending a determination of the merits of the Commission's complaint. Doc. 53, RE Tab 9. A notice of appeal was timely filed on December 28, 2009. Doc. 59. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court, having found a likelihood that the Federal Trade Commission would succeed in demonstrating that defendants, contrary to their representations to consumers, failed to obtain mortgage modifications that would make consumers' mortgage payments substantially more affordable, abused its discretion in issuing a preliminary injunction.

2. Whether defendants' affiliation with lawyers and purported affiliation with lenders insulates their deceptive sales practices from the general proscriptions in the FTC Act against unfair or deceptive acts or practices.

3. Whether, having found a likelihood that the Commission would succeed in establishing that the individual defendants controlled the corporate defendant and knew about the deceptive practices, the district court abused its discretion in entering a preliminary injunction and asset freeze.

4. Whether the FTC's submission of a revised proposed preliminary injunction order directly to the district court and without service on counsel, if error, was prejudicial error.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This interlocutory appeal arises from an action by the Federal Trade Commission ("FTC" or "Commission"), pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, alleging that First Universal Lending, LLC ("FUL"), and three individuals, Sean Zausner, David Zausner, and David J. Feingold,[1] violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, by making misrepresentations to consumers in connection with their marketing of mortgage modification services. The Commission's complaint seeks a permanent injunction and monetary equitable relief. Doc. 3 at 10, RE Tab 2 at 10.

1. Defendants and Their Operations

a. First Universal Lending

Defendant FUL is a Florida limited liability company with its principal place of business in Palm Beach Gardens, Florida.[2] Doc. 120 at 1-2, 23-24. From about

---

[1] Mr. Feingold has also entered an appearance in this appeal as counsel of record for all the defendants.

[2] FUL also conducted business from "branch offices," including Coral Springs and Pompano Beach. Doc. 73 at 159-60 (Moscowitz), Doc. 78 at 44 (Feingold).

January 2008 to November 2009, FUL, or its successor, First Universal Holdings LLC ("FUH"), marketed and sold mortgage loan modification and foreclosure relief services ("modification services") to consumers nationwide. *See* Doc. 120 at 1-2, 6-51. FUL presented itself as a diversified lending institution and full service provider of services related to real estate transactions. Doc. 121 at 27. According to FUL's website, those services included "complete loan restructuring services which assist clients to renegotiate existing loan relationships in an attempt to create new and more affordable loan transactions." *Id.*

In Spring 2009, defendants decided to change their business model. They were aware of new and more restrictive state laws – providing, in particular, that only certain attorneys or licensed financial institutions would be able to charge advance or ongoing monthly fees for modification services.[3] Doc. 76 at 97-98 (Feingold). FUH was created to implement a new business model – one that defendants believed would allow the company to continue charging ongoing monthly fees for modification services and also achieve higher margins. Doc. 67

[3] Fla. Stat. § 501.1377(2)(b)5, 7 (2009) (definition of foreclosure-rescue consultant and exclusions for financial institutions and certain attorneys); Fla. Stat. § 501.1377(3)(b) (2009) (prohibition on payments to foreclosure-rescue consultants before completion of all services in a written agreement). The applicability of these provisions of Florida law to the defendants' operations is not at issue in this appeal. It therefore is not necessary for this Court to determine whether, in collecting ongoing monthly fees for mortgage modification services, the defendants were in compliance with Florida law.

at 84-88 (Feingold); Doc. 76 at 97-98 (Feingold).

On September 28, 2009, having previously assigned at least one bank account to FUH (Doc. 123 at 4, 63-68), FUL returned its Florida mortgage lending license. Doc. 76 at 23 (Feingold). According to defendants, existing FUL clients were transferred to FUH for purposes of "service" and billing.[4] Doc. 67 at 91-92 (Feingold); Doc. 76 at 84 (Kudman). But, as the receiver and her counsel concluded, the changes were superficial. FUH had the "same owners, same premises, same employees, nearly identical operations, assigned bank accounts, and [continued to use] the FUL name in conducting the business."[5] Doc. 124-1 at 2 n.1; *see also* Doc. 76 at 101 (Kudman). For all practical purposes, FUL and FUH were "pretty interchangeable." Doc. 73 at 133 (Moscowitz). The only difference of significance was that consumers, once they expressed their interest in a loan modification, were told by an "opener" that they would be referred to a lawyer for assistance. Consumers were then switched to a "closer," who, making the same kinds of promises that FUL had used earlier, persuaded them to sign form contracts

[4] As of December 6, 2009, there were 1,098 former FUL accounts being serviced by FUH. Doc. 73 at 45 (Moscowitz); Doc. 124-1 at 5.

[5] Indeed, for the license year October 1, 2009, to September 30, 2010, the City of Palm Beach Gardens had issued occupancy permits for the same location to both FUL and FUH. Doc. 123 at 6-7; Doc. 37 at 6-7; Doc. 74 at 8-9 (Liggins).

with one of four affiliated law firms.[6] *See* discussion pp. 17-21, *infra*.

b. Individual Defendants

Defendant Sean Zausner is a 50% owner of Lending Partners, which in turn owns FUL.[7] He is the "managing partner" of FUL and was in "charge of all of the major decisions." Doc. 76 at 123 (Kudman). He held himself out as President (Doc. 76 at 203-4 (Zausner)), was a signatory on the company's bank account (Doc. 120 at 2, 25-28),[8] and was active in responding to consumer complaints (Doc. 120 at 3, 62-67). As President, Sean Zausner had ultimate responsibility for consumer complaints and refund requests. Doc. 76 at 128 (Kudman). He denied responsibility for day-to-day oversight of sales (Doc. 77 at 6 (Zausner)), but admitted that he "trained [sales personnel] during the [2007 to 2008] mortgage days, * * * sat next to them, * * * did mortgages, * * * did Lendingtree." Doc. 77 at 10-11 (Zausner); Doc. 65 at 9, RE Tab 10 at 9; *see also* Doc. 77 at 41 (Moscowitz) (receiver found a huge stack of sales leads in his office).

---

[6] Two law firms – Marucci Law Firm and Finley & Bologna International – sought leave to file untimely amicus briefs in this Court, but the Court denied their motions.

[7] Doc. 76 at 172 (Zausner); Doc. 120 at 2, 29-31 (Lending Partners partnership agreement); id. at 2, 35 (FUL operating agreement).

[8] Sean Zausner was also listed as a FUH manager in a June 23, 2009, filing with the Florida Secretary of State – about the time the business was "trying to get up operating." Doc. 76 at 27 (Feingold).

Defendant David Feingold was another key member of the FUL/FUH management team.[9] With Sean Zausner, Mr. Feingold was involved in strategic planning, including FUL's restructuring and the change in direction to the so-called "law firm outsourcing model." Doc. 67 at 85-88, 91-92 (Feingold); Doc. 124-2 at 7. He was listed as a signatory on a FUL bank account,[10] and addressed BBB membership issues. Doc. 111 at 3-4; Doc. 120 at 61. Moreover, his compensation (and that of his law firm) were tied to FUL's and FUH's revenues and profits. In addition to $300,000 for rent and insurance, in 2009 Mr. Feingold's law firm was paid "probably $1,500,000 for legal fees;" but "[those] fees were fix fee capped, equating to what Mr. Zausner took from the business * * *." Doc. 78 at 8, 9 (Feingold). Indeed, although FUL occupied premises rented by Mr. Feingold's law firm, from 2007 to 2008 FUL did not pay its share of the rent ($25,000 per month),

---

[9] David Feingold was identified as "General Member" on FUL's 2008 W-2s. Doc. 123 at 4, 59-60. Mr. Feingold's explanation was that Paychex had copied information from the W-2s that it also prepared for his law firm, Feingold & Kam. Doc. 75 at 56-57 (Feingold).

[10] It is not clear whether Mr. Feingold was also a FUL officer, and, if so, for which period of time. He is listed as FUL's "President" in a January 2007 resolution filed with FUL's bank. Doc. 120 at 2, 26. However, his name does not appear as "President" in a January 2009 resolution. That resolution states that it supersedes a 2008 resolution. *Id.* at 28. However, the superseded 2008 resolution is not in the record.

or cover insurance premiums that averaged $8,000 to $9,000 each month.[11] Doc. 78 at 6-7 (Feingold).

Defendant David Zausner is a 50% owner of Lending Partners, which in turn owns FUL.[12] He is also a signatory on FUL's bank account and at various times held himself out as Vice President of Marketing. Doc. 120 at 2-3, 28, 55. According to Executive Committee minutes, he also handled consumer complaints. *See* Doc. 124-2 at 2; *see also* Doc. 115 at 25. A significant part of his responsibilities was "putting in place SalesForce," the software that defendants used to track contacts with consumers and lenders regarding loan modification services. Doc. 76 at 124 (Kudman); Doc. 76 at 61 (Feingold).

2. Proceedings Below

On November 18, 2009, the Commission filed a complaint in the United States District Court for the Southern District of Florida, alleging that defendants had represented, in all or virtually all cases, that they would obtain mortgage and loan modifications for consumers that would make consumers' payments substantially more affordable. Doc. 3 at 8, RE Tab 2 at 8. In actuality, the

---

[11] At one point, FUL owed Mr. Feingold close to $600,000 – an amount FUL did not begin paying back until 2009. Doc. 78 at 6 (Feingold).

[12] Doc. 76 at 172 (Zausner); Doc. 120 at 2, 29-31 (partnership agreement of Lending Partners); *id.* at 2, 35 (FUL operating agreement).

complaint alleged, in most instances defendants do not obtain modifications that will make their loans more affordable. *Id.* Therefore, the complaint alleged, defendants' representations constitute an "unfair or deceptive act or practice" in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). *Id.* The complaint also alleged that because defendants had misrepresented material aspects of the performance, efficacy, nature, or central characteristics of the loan modification services they sell, their misrepresentations also violate Section 310.3(a)(2)(iii) of the Commission's Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(2)(iii). *Id.* at 9.

Contemporaneously with the filing of its complaint, the Commission moved for an *ex parte* temporary restraining order ("TRO"), including an asset freeze and a temporary receiver for the corporate assets, and an order to show cause why a preliminary injunction should not issue continuing substantially the same relief pending an adjudication of the merits. Docs. 5-6, RE Tab 14; Doc. 7; Doc. 8, RE Tab 15; Docs. 9-11. On November 19, 2009, the district court (per Hon. William Zloch) entered a TRO, finding that the FTC had demonstrated a likelihood of success on the merits and good cause to believe that immediate and irreparable injury to the court's ability to grant final monetary relief would occur in the absence of an asset freeze and other interim relief. Doc. 14, RE Tab 6. The TRO entered by the district court applied to the individual defendants and to the "Corporate

Defendant" – *i.e.*, "First Universal Lending, LLC, and its successors and assigns, and d/b/a's." Doc. 14 at 3, RE Tab 6 at 3.

The district court conducted an evidentiary hearing on the Commission's motion for a preliminary injunction from December 7 to December 11, 2009. The FTC offered live testimony from five consumer witnesses (Messrs. LaCourse, Garcia, Bryant, Griffie; Ms. Christopher), an FTC investigator (Mr. Liggins), the equity receiver (Ms. Moscowitz), the receiver's attorney (Ms. Kudman), and one of the individual defendants, Sean Zausner. *See* Docs. 67, 73-78. The court also received into evidence all 43 of the Commission's documentary exhibits (*see* Doc. 50), including the sworn declarations of 16 consumers (Doc. 110); the declaration of the President of the Better Business Bureau ("BBB") of South Florida, including 268 attached complaints (Docs. 111-119); and the FTC investigator's declaration and supplemental declaration (Docs. 120-121, 123).[13] Other FTC exhibits included the receiver's report (Docs. 124-1); copies of internal FUL documents – *i.e.*, Executive Committee minutes (Doc. 124-2) and company sales material and scripts found on the premises (Doc. 122 to 122-12). The court also heard the testimony of defendant David Feingold and received into evidence defendants' six documentary

[13] The investigator's primary role was to research business records related to companies which FTC staff believed may have been engaged in unlawful conduct. Doc. 73 at 213-16. He did not sponsor the 16 sworn consumer declarations that were received into evidence at the hearing. *See* Doc. 67 at 47-48, 62-65.

exhibits. *See* Docs. 67, 75-76, 78 (Feingold); Doc. 51.

At the conclusion of the hearing, the district court issued a bench ruling granting the Commission's motion for a preliminary injunction and stated that findings of fact and conclusion of law would follow. The court asked the FTC to submit a form of a proposed preliminary injunction that was consistent with the court's oral ruling. Doc. 77 at 68, RE Tab 13 at 68. On December 18, 2009, the court entered an order for a preliminary injunction (Doc. 53, RE Tab 9)[14] and, on January 11, 2010, filed findings of fact and conclusions of law. Doc. 65, RE Tab 10.

After reviewing the documentary evidence and hearing live testimony, the court agreed that defendants had misrepresented to consumers that they would obtain loan modifications that would make consumers' payments substantially more affordable in all or virtually all instances. Doc. 65 at 16-17, RE Tab 10 at 16-17.

---

[14] The order signed by the district court expanded the definition of "Corporate Defendant" to mean "First Universal Lending, LLC, subsidiaries, affiliates, fictitious business entities or business names, and its successors and assigns, including but not limited to First Universal Holdings, LLC." Doc. 53 at 3, RE Tab 9 at 3. With the exception of correcting FUH's name and adding the phrase "but not limited to," the definition was the same as the FTC had proposed to the court on December 4, 2009, and served on defendants. The order entered by the court after the hearing differed in two additional respects. It added a definition for "debt negotiation service" (and made related changes in text) and deleted a section entitled "Requirement to Notify Consumers." *Compare* Doc. 53, RE Tab 9 *with* Doc. 35-1. In other respects, the order entered by the court after the hearing was substantially the same as the version submitted by the FTC initially.

Based on the record, the court found that FUL was able to achieve loan modifications for no more than 1% to 10% of its customers. Doc. 65 at 11, RE Tab 10 at 11. The court noted that the individual defendants were either owners, officers, or members of FUL, or had held themselves out as such, and "formulated, directed, controlled, or participated in the acts and practices of First Universal." Doc. 65 at 3-4. RE Tab 10 at 3-4. He noted that all three individuals regularly attended Executive Committee meetings, which included discussions with five supervisory salesmen, and that all of their offices, including defendant David Feingold's, were located in the executive suite, where much of FUL's operations was located. Doc. 65 at 9-11, RE Tab 10 at 9-11. Indeed, the court noted, the "full scope of business activities were discussed in the Executive Committee meetings, including discussions of sales activities" and "all of the company's operations were brought before the Committee." Doc. 65 at 9-10, RE Tab 10 at 9-10.

Based on these findings, the district court concluded that the Commission had demonstrated a "substantial likelihood" that it would succeed in establishing that defendants had violated Section 5 and the TSR and that "the public interest in halting Defendants' law violations and preserving assets for a meaningful monetary remedy far outweigh[ed] any interest Defendants may have in continuing to falsely advertise their services." Doc. 65 at 15, 17, RE Tab 10 at 15, 17. The district court

also concluded that the individual defendants, Sean Zausner, David Zausner, and David Feingold, were individually liable. As the court explained, they "have had the authority to control in their respective roles as owners, partners, and corporate officers of the deceptive business practices." Doc. 65 at 18, RE Tab 10 at 18. They "also [had] the requisite knowledge for individual liability," including "notice of misleading practices through responding to consumer complaints." Doc. 65 at 19, RE Tab 10 at 19. Accordingly, the court froze their assets pending an adjudication of the merits.

Specifically, the preliminary injunction freezes accounts that the individual defendants control. Doc. 53 at 10-11, RE Tab 9 at 10-11. By its terms, the freeze does not apply to assets acquired after the date of the order if they are not derived from prohibited conduct. Doc. 53 at 12, RE Tab 9 at 12. The preliminary injunction also permits defendant David Feingold to access funds from trust fund and client service accounts if those funds were not received or disbursed for mortgage loan modification services. Doc. 53 at 12-13, RE Tab 9 at 12-13. Mr. Feingold raised the issue to the district judge at the conclusion of the preliminary injunction hearing. FTC counsel responded by stating that "we would ask Mr. Feingold to provide for us information that helps us to understand what part of [trust fund and client service accounts] is derived from monies – from First

Universal * * * versus regular clients. And then the parts that are not from First Universal we would not object to lifting the asset freeze." The district court then made that part of its ruling. Doc. 77 at 69, RE Tab 13 at 69.[15]

B. Statement of Facts

1. FUL Marketing and Sales Representations

FUL promoted and sold mortgage loan modification services to consumers throughout the United States. Generally, FUL charged consumers monthly fees ranging from $200 to over $700. Doc. 110-12 at 2-3 ($200/month); Doc. 110-11 at 1 ($732/month); Doc. 110-13 at 1-2 ($700/month). FUL obtained most of its mortgage loan modification business through direct calls to consumers,[16] using Internet-based lead generating websites to obtain their contact information. Doc. 77 at 25-30, 35-38 (Zausner); Doc. 77 at 41 (Moscowitz).

In the initial contact, consumers were told that their monthly mortgage

---

[15] Since the district court issued the preliminary injunction, Mr. Feingold has not sought the assistance of the FTC or the district court in gaining access to frozen funds.

[16] Of the 19 FUL consumers who testified at the hearing or submitted sworn declarations admitted as exhibits, 13 testified that they had received telephone calls from representatives who stated that they were calling from FUL. Doc. 73 at 19-20 (LaCourse), 32 (Garcia), 88 (Bryant); Docs. 110-1 at 1, 110-2 at 1, 110-6 at 1, 110-7 at 1, 110-8 at 1, 110-10 at 1, 110-13 at 1, 100-14 at 1, 100-15 at 1, 110-16 at 1. Other consumers called FUL, usually because they found FUL's website after an Internet search. Doc. 110-3 at 1, 110-4 at 1, 110-5 at 1, 110-9 at 1, 110-11 at 1, 110-12 at 1-2.

payments would be lowered to an affordable or manageable level.[17] Other consumers were given detailed promises on the results that could be achieved. For example, consumers were told that the company would lower their monthly mortgage payments or interest rates "by half," or were quoted a monthly payment or interest rate.[18] Still others were told that missed mortgage payments would be deferred or forgiven (Doc. 110-8 at 1; Doc. 110-12 at 2), or that interest and penalties on late payments would be waived and no foreclosure would occur (Doc. 110-6 at 1). These specific representations were reinforced by more general assurances of success or representations that the company had a "special relationship" with the lender. Doc. 110-3 at 1; Doc. 110-4 at 1; Doc. 110-9 at 1; Doc. 110-15 at 1-2; Doc. 110-16 at 1. Some consumers were told they would receive refunds if the company could not modify their loans. Doc. 110-1 at 2; Doc. 110-5 at 2.

---

[17] *See* Doc. 110-3 at 1; Doc. 110-5 at 1; Doc. 110-12 at 2; Doc. 73 at 21 (LaCourse) (lower interest rate, possibly reduction in principal).

[18] Doc. 110-1 at 1, Doc. 110-16 at 1 (lower monthly payment by half); Doc. 110-2 at 1(reduce payment by $400/month); Doc. 110-4 at 1, Doc. 110-15 at 1 (lower interest rate by half); Doc. 110-11 at 1 (cut debt in half, debt free in five years); Doc. 110-13 at 1 (30 year fixed at 3-5% interest rate); Doc. 110-14 at 1 (lower interest rate to around 5%); Doc. 73 at 33-34 (Garcia) (FUL could reduce his $1,150 payment by $450-$500, maybe $600); Doc. 73 at 90 (Bryant) (lower $1,500 payment by "about half").

2. Failure to Provide Promised Mortgage Modification Services

Consumers who asked how long the loan modification process would take generally were quoted a period of from 60-90 days to 3-4 months.[19] After enrolling, consumers often had difficulty getting information about the status of their loan modifications. For example, consumers were told to be patient, that FUL was working on the case or waiting for paperwork, or that the lender was busy or causing delay.[20] In the end, in many cases FUL did not deliver on the general or detailed loan modification promises it had made to consumers.[21] Indeed, consumer declarants reported that their lenders had little or no contact with FUL.[22]

In addition to failing to obtain the promised loan modifications, FUL

---

[19] Doc. 110-4 at 1, Doc. 110-6 at 2 (60-90 days); Doc. 73 at 35 (Garcia) (2-3 months); Doc. 110-5 at 2, Doc. 110-9 at 1, Doc. 110-16 at 2 (3 months), Doc. 110-7 at 1, Doc. 110-8 at 1 (3-4 months).

[20] Doc. 110-2 at 2 ("almost never got to speak with a representative at FUL and I had to leave countless voicemail messages that were not returned"); Doc. 110-12 at 3 ("I was rarely able to speak directly with anyone at FUL and had to leave a voicemail message" and "when I did get a call back, it was always days after leaving my message."); *see also* Doc. 110-5 at 3 ("I kept getting switched to new representatives."); Doc. 110-6 at 3 ("I went through at least two loan specialists and no one ever seemed reliable.").

[21] See Doc. 110-1 at 4, Doc. 110-2 at 4, Doc. 110-4 at 3, Doc. 110-7 at 2, Doc. 110-8 at 3, Doc. 110-9 at 3, Doc. 110-11 at 2, Doc. 110-12 at 4, Doc. 110-13 at 4, Doc. 110-14 at 2, Doc. 110-15 at 2, Doc. 110-16 at 3-4.

[22] Doc. 110-2 at 2-3, Doc. 110-5 at 3, Doc. 110-15 at 2 (little contact); Doc. 110-3 at 2, Doc. 110-7 at 2, Doc. 110-11 at 2, Doc. 110-12 at 4 (no contact).

continued to charge consumers ongoing monthly fees, even after the promised period of time for negotiating a loan modification had elapsed.[23] In some cases, when consumers complained about monthly billing that continued beyond the promised time period, FUL told consumers to be patient with the process (Doc. 100-5 at 3), it was still working on the case (Doc. 110-1 at 3, Doc. 110-4 at 2-3, Doc. 110-13 at 3), or claimed it "was close" to an agreement with the lender (Doc. 110-1 at 3, Doc. 110-9 at 2-3). Consumers who stopped paying FUL sometimes received high pressure demands to continue making payments.[24]

3. FUH Marketing Representations and Service

After the transition to FUH (*see* pp. 4-6, supra), defendants continued to solicit new loan modification business, relying primarily on an independent website, Lowermybills.com, for telemarketing leads.[25] FUL, however, was not

---

[23] Doc. 110-1 at 1, 3 (3 months billed, 30-60 days process promised), Doc. 110-6 at 1, 3 (8 months billed, 60-90 day process promised), Doc. 110-16 at 2-4 (billed for almost a year, 3 month process); Doc. 73 at 35 (Garcia) (billed from April to October, 2-3 month process promised).

[24] Doc. 110-2 at 3 (FUL called and pressed me for the payment), Doc. 110-10 at 3 (after cancellation, consumer received a nasty phone call from an argumentative FUL representative who tried to convince me to continue paying), Doc. 110-13 at 3 (an FUL representative tried to talk me into continuing with FUL's contract; and when the consumer refused, the representative said I should "stop 'crying' and 'whining'").

[25] The receiver testified that she found a "huge stack of them in Mr. Sean Zausner's office." Doc. 77 at 41 (Moscowitz).

defunct and had not been dissolved. Doc. 76 at 6 (Feingold). Indeed, defendants continued to use its name, or one of FUL's fictitious names, in outbound telephone calls. According to scripts found by the receiver at Palm Beach Gardens (Doc. 73 at 46 (Moscowitz)), an FUH "opener" would call a consumer, stating that he was calling from FUL or from Transcontinental Lending – one of FUL's fictitious names. Doc. 123 at 2-3, 17-21 (Jim Robinette "opening pitch" from FUL or Transcontinental Lending); *id*. at 52-53 (Joseph Turner "opening pitch" from FUL); Doc. 122-3 at 3 (opener script: "I am from Transcontinental Lending"), *see also* Doc. 120 at 2, 28 (FUL bank authorization resolution listing FUL's fictitious names, including Transcontinental Lending). He would inquire whether the consumer was struggling with a mortgage, or just looking to reduce his payments. Doc. 73 at 57 (Moscowitz). After eliciting details about mortgages and other debts, the "opener" would tell the consumer he was not eligible for financing. *Id.* at 64. The "opener" indicated, however, that he could refer him to a law firm for further assistance. *Id.* at 57, 64.

The consumer was transferred then to a "closer," who solicited the consumer's agreement to sign a form contract with one of FUH's affiliated law firms.[26] *Id.* The law firms compensated FUH "for its overhead plus $100 per file,

[26] Defendants argued below that they sought affiliations with law firms because of new provisions of Florida law, which allows financial institutions and

per month." Doc. 76 at 10 (Feingold). About 3,000 new clients were obtained by FUH in this manner.[27] Doc. 73 at 133 (Moscowitz).

Two consumers who were solicited in this manner testified at the preliminary injunction hearing. Doc. 73 at 100-124 (Christopher), Doc. 73 at 173-210 (Griffie). Both consumers were referred to the same "closer" who represented to one consumer that he worked with the Marucci Law Firm (Griffie), and to the other one that he worked with Stratton & Feinstein (Christopher). *Id*. at 101, 175. The promises and guarantees that induced Ms. Christopher and Mr. Griffie to sign the contracts were substantially the same as those defendants had made to consumers prior to FUL's transition to FUH. Doc. 73 at 102, 107, 175-77; Doc. 122-13 at 4. Indeed, scripts found at Palm Beach Gardens once the TRO was served made such representations. *See* Doc. 122-2 at 4 (objection sheet: goal to be in a home paying

---

certain attorneys to charge monthly fees without violating a general prohibition on collecting such charges prior to completing mortgage modification services. *See* Fla. Stat. § 501.1377 (2009); Doc. 76 at 97-98 (Feingold). The Commission expresses no view on whether defendants' operations complied with Florida law, and this Court need not reach that issue in order to dispose of this interlocutory appeal.

[27] There is one FUH contract in the record. Under the contract, the consumer is obligated to pay a fee of $3,250 to FUH in five equal monthly installments of $650. Doc. 122-10 at 1. The agreement grants the law firm and "any person or entity affiliated" with the firm authority to represent the consumer in commercial law issues "regarding indebtedness and for the settlement and resolution of matters involving the [consumer's] commercial and personal debts." *Id*.

5.5% rather than 15%), Doc. 122-6 at 1 (we now have interest rates as low as 1-2%, lowering interest rates, reducing principal balance, making payment affordable), Doc. 122-9 at 2 (lower your monthly payments to an affordable level, typically we see anywhere from a 30% to 40% reduction in payments). The scripts also made representations regarding how long it would take to obtain modification of a consumer's loan. Doc. 122-2 at 5 (average of two to three months to complete a loan modification), Doc. 122-6 at 1 (five months), Doc. 122-9 at 2 (process normally takes 90-120 days).

Because the TRO intervened, Ms. Christopher and Mr. Griffie were not enrolled long enough to assess the company's performance after the transition to FUH. However, there was every indication that FUH's track record in obtaining promised loan modifications for former FUL customers was poor.[28] *See* Doc. 110-4 at 2-3 (Frye); Doc. 110-7 at 1-2 (Hibbs); Doc. 110-16 at 3-4 (Schultz); Doc. 73 at 23-24 (LaCourse), Doc. 73 at 35-36 (Garcia). Defendants also failed to meet the promised time frames. *See id.* at 35 (Garcia) (billed from April to October, two to three months promised); Doc. 110-16 at 2-4 (Schultz) (billed for almost a year, three months promised); Doc. 110-4 at 1,3 (Frye) (cancelled when no results within promised time period); Doc. 110-7 at 1-2 (Hibbs) (same). The scripts, pitches, and

[28] These consumers received services both before and after July 31, 2009 – the date on which FUL transferred a bank account to FUH. Doc. 123 at 4, 65-68.

notes found by the receiver reflected the use of "rebuttals, closers, openers" and high pressure, boiler room techniques that the receiver, an attorney, testified were "not how [she pictured] lawyers get clients." Doc. 73 at 142 (Moscowitz).

4. Better Business Bureau Complaints and Florida Attorney General Investigation

As of November 12, 2009, 268 consumers had filed complaints with the BBB – the vast majority relating to FUL's practices in connection with the marketing and servicing of loan modification services. *See* Docs. 111-119. Those allegations were generally consistent with practices reported by the FTC's consumer witnesses – namely, that defendants had promised specific results,[29] and specific timelines for completion of the loan modification process.[30] After FUL's BBB membership was revoked (Doc. 111 at 3), defendant David Feingold sought its reinstatement, contending that the number of complaints was low, given the size of FUL's operations. Doc. 111 at 3-4.

At about the same time that FUL was contesting its BBB rating and membership revocation, FUL was also under investigation by the Florida Attorney

---

[29] Doc. 111 at 19, 48, 61, 64; Doc. 114 at 26, 38; Doc. 115 at 27, 29, 41; Doc. 116 at 28, 31, 56, 62; Doc. 118 at 29, 34, 37.

[30] Typically, consumers were told that their modifications would take from two to three months. *See* Doc. 111 at 31, 45, 48, 51, 58, 61, 68, 72; Doc. 112 at 7, 41; Doc. 113 at 9, 17, 20, 41, 49; Doc. 114 at 9, 26; Doc. 115 at 3, 19, 29, 41; Doc. 116 at 4, 16, 56, 69; Doc. 117 at 27, 54; Doc. 118 at 29, 34.

General. On May 7, 2009, in the letter that defendants have attached to their brief,[31] Mr. Feingold, responding to Florida's request for documents, represented that FUL had "maintained a consistent rating with the Better Business Bureau of between an A and B-," and that a majority of its peers "maintain BBB ratings of between C- and F." Doc. 17-3 at 3, Doc. 21 at 22, RE Tab 17 at 22. In that letter, he did not mention that FUL had been expelled from the BBB three weeks earlier, or that FUL's rating had fallen to a "D-" in March of the same year. Doc. 111 at 3. As of December 2, 2009, Florida's investigation was "still active." Doc. 24 at 15.

SUMMARY OF ARGUMENT

Evidence presented to the district court in support of the Commission's motion for a preliminary injunction showed that defendants used deceptive representations to induce consumers to pay for mortgage loan modification services that many or most consumers never received. Before the Commission filed its complaint, defendants First Universal Lending ("FUL") sought affiliations with law firms, apparently to take into account new restrictions on collecting advance and ongoing fees for modification services, except by certain attorneys and financial institutions. After purportedly transferring FUL's existing customers and a bank

[31] The May 7, 2009, letter was not offered or received into evidence at the preliminary injunction hearing. It appears in the record as an attachment to defendant Feingold's motion for partial access to funds frozen by the TRO. *See* Doc. 17-3 at 1-2, Doc. 21 at 20-21, RE Tab 17 at 20-21.

account to a new company, First Universal Holdings ("FUH"), defendants, working from the same premises and operating with the same management, ownership, and employees, continued making misrepresentations to consumers about their mortgage loan modification services.

The district court, after considering the documentary evidence, including the report of the equity receiver, and hearing five days of live testimony, concluded properly that the Commission was likely to succeed on the merits of its complaint allegations, and that the individual defendants were jointly and severally liable with the company for the misrepresentations that the company made. The record shows that defendants engaged in deceptive practices both before and after they repackaged themselves. Furthermore, the record contains ample evidence of the individual defendants' control over the practices and their knowledge of a multitude of consumer complaints. Given these circumstances, the district court did not abuse its discretion in entering a preliminary injunction against defendants' conduct and freezing their assets pending an adjudication of the merits.

Contrary to defendants' contentions, the affiliations that FUH developed with law firms did not insulate defendants' deceptive marketing of modification services from the prohibitions of the Federal Trade Commission Act. Their purported affiliations with lenders and financial institutions are not established. But even

assuming that such affiliations existed during the relevant time period, the exemption that Congress has provided for banks and other regulated financial institutions from the prohibitions of the Act do not apply to other entities simply on the basis of their interaction with exempt entities.

As for defendant Feingold's contention that the asset freeze has paralyzed the resources of his law firm, in fact the record shows that the provisions of the preliminary injunction order do not govern, directly or indirectly, the activities of Feingold & Kam. Furthermore, the asset freeze is limited in nature, and any assets acquired by Mr. Feingold after the effective date of the preliminary injunction order fall outside the scope of the asset freeze. As for any frozen funds in the law firm's accounts, the district court provided that they could be released upon a showing by Mr. Feingold that such funds were not received as payment for modification services or disbursed for any purpose related to modification services. That precaution was well warranted in light of the evidence of Mr. Feingold's involvement in, and control over, FUL's mortgage loan modification activities.

Lastly, defendants' claim that they had no opportunity to review the revised proposed order before it was entered is not well founded. Defendants' were provided with a draft order prior to the preliminary injunction hearing. If there were any error, defendants suffered no prejudice.

ARGUMENT

I. The District Court Properly Enjoined Defendants' Unlawful Conduct and Froze their Assets Pending an Adjudication of the Merits

A. Standard of Review

The order at issue in this appeal is in aid of an action for a permanent prohibitory injunction and monetary equitable relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Under Section 13(b), "in proper cases the Commission may seek, and after proper proof, the court may issue a permanent injunction." In an action for a permanent injunction action under Section 13(b), the district court has inherent equitable authority to impose the full range of equitable remedies, including monetary equitable remedies such as restitution and rescission. *See FTC v. Gem Merchandising Corp*., 87 F.3d 466, 469 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp*., 748 F.2d 1431, 1433-34 (11th Cir. 1984); *accord*, *FTC v. Security Rare Coin & Bullion Corp*., 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Amy Travel Service, Inc*., 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. World Wide Factors, Ltd*., 882 F.2d 344, 346-47 (9th Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc*., 861 F.2d 1020, 1026 (7th Cir. 1988); *FTC v. H. N. Singer, Inc*., 668 F.2d 1107, 1111-13 (9th Cir. 1982). Because the district court is empowered to order a permanent injunction and monetary equitable relief, it is similarly authorized to order related preliminary and ancillary relief, including such preliminary relief (*e.g.*,

asset freezes and equitable receiverships) as may be necessary to ensure the availability of permanent relief. *Id.*

The scope of review of an order granting preliminary injunctive relief – including an asset freeze – is particularly narrow. *See, e.g.*, *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs*., 425 F.3d 964, 968 (11th Cir. 2005); *SEC v. Unique Fin. Concepts*, *Inc*., 196 F.3d 1195, 1198 (11th Cir. 1999); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc*., 51 F.3d 982, 986-87 (11th Cir. 1995). As this Court has recognized, an order granting preliminary relief can be overturned only upon a showing of an abuse of discretion. *See*, *e.g.*, *United States v. Endotec, Inc*., 563 F.3d 1187, 1194 (11th Cir. 2009). While the district court's conclusions of law are subject to *de novo* review, any underlying factual findings are reviewed only for clear error. *See SEC v. ETS Payphones*, *Inc*., 408 F.3d 727, 731 (11th Cir. 2005); *Unique Fin. Concepts*, *Inc*., 196 F.3d at 1198.

B. The District Court Did Not Abuse Its Discretion in Entering a Preliminary Injunction and Asset Freeze Against FUL

The gist of appellants' contentions is that the FTC sued the wrong party**.** App. Br. 27, 53. According to appellants, FUL had turned in its lending license (App. Br. at 17 n.9) and completed the transition from FUL to FUH before the Commission filed its complaint and served the TRO. App. Br. at 5-6, 16-17, 27. Appellants contend that once FUH entered into affiliation agreements with law

firms, they were engaged in "outsourcing" work for law firms and, therefore, their solicitation of consumers to buy modification services was tantamount to the practice of law and thus insulated from the proscriptions of the FTC Act and the TSR. App. Br. 49-54. Additionally, they allude vaguely to affiliations with financial institutions which, they contend, entitles them to the exemption that Congress has granted banks and certain other regulated financial institutions. App. Br. 54-58. Appellants also assert that a lot of the mortgage modification business addressed by the Commission's complaint was generated by independently owned branch offices, and that, if there were any misrepresentations, they are not responsible for them. App. Br. at 24, 43. Indeed, they contend, they had many satisfied customers and the record of complaints was not excessive given the size of the business. App. Br. at 9, 44, 47-48. For the reasons stated below, each of these contentions is without merit.

1. The Commission is likely to succeed in demonstrating that appellants' deceptive practices continued unabated and warranted preliminary injunctive relief

Even if appellants had completed the transition from FUL to FUH before the Commission filed a complaint (and ceased the alleged practices), that would not demonstrate that the Commission "sued the wrong company." App. Br. at 27, 53. The cessation of unlawful conduct does not oust the district courts of authority to

grant injunctive relief. *See*, *e.g.*, *United States v. W.T. Grant Co*., 345 U.S. 629, 633, 73 S. Ct. 894, 897-98 (1953); *FTC v. Accusearch, Inc*., 570 F.3d 1187, 1201 (10th Cir. 2009). Any other rule would lead to an absurd situation in which, regardless of the egregious nature of a company's past practices, the Commission's ability to enforce the prohibitions of the FTC Act would turn on how swiftly those who have used the business to implement their unlawful scheme are able to repackage themselves.

In any event, the record demonstrates that appellants' unlawful practices continued throughout 2008 and 2009, albeit in a slightly different form, after they created FUH. As discussed above (pp. 26-27, *supra*), defendants decided to move to "law firm outsourcing" in Spring 2009, apparently in light of new provisions in Florida law that restricted the collection of up-front and ongoing monthly fees for mortgage loan modifications to certain lawyers and financial institutions. The record shows, however, that appellants' practices and management remained fundamentally the same. Doc. 124-1 at 2 n.1; Doc. 73 at 133, 168-69 (Moscowitz); Doc. 76 at 101 (Kudman); *compare* Doc. 124-2 at 7 (minutes April 14, 2009) *with* Doc. 124-2 at 8 (minutes Oct. 29, 2009). FUH marketed modification services using the same monthly fee structure and sales personnel continued to make lavish promises to consumers about the availability of loan modification and the speed

with which it could be accomplished. Doc. 73 at 102, 107 (Christopher), 175-77 (Griffie); Doc. 122-13 at 4 (Christopher); Doc. 122-13 at 7, 9, 11 (Christopher); Doc. 122-14 (Griffie); *see also* Doc. 122-2 at 4-5, Doc. 126-1, Doc. 122-9 (scripts containing sales promises for consumers found in plain view on desks at Palm Beach Gardens location). As the receiver concluded, "FUH [was] a successor to FUL with the same owners, same premises, same employees, nearly identical operations, assigned bank accounts, and with the continued use of the FUL name in conducting the business." Doc. 124-1 at 2 n.1.

Furthermore, given that consumers continued to receive solicitations from representatives who said they were calling from FUL,[32] it is not at all clear that FUL ceased to exist, even after transfer of an FUL bank account to FUH. Indeed, less than one month before the TRO was served and one month after FUL turned in its Florida lending license, the October 29, 2009, minutes of the Executive Committee still carried the designation "Executive Committee of First Universal Lending." Doc. 124-2 at 8.

As for appellants' further contention that they have been charged erroneously with making misrepresentations by sales personnel in independently owned branch

---

[32] FUH "openers" called consumers and represented that they were calling from FUL or one of its registered fictitious names. Doc. 123 at 2-3, 10-24, 52-53; Doc. 124-4.

offices (App. Br. at 24, 43), the record is to the contrary. Although the exact nature of the relationship between the "branch offices" and Palm Beach Gardens remains unclear, the "branch offices" generated clients for Palm Beach Gardens, which "held ultimate control." Doc. 76 at 121-22 (Kudman).

Indeed, all the consumer contracts in the record bear the address of FUL at Palm Beach Gardens, not the addresses of branch offices. *See* Doc. 110-1 at 2, 12-15; Doc. 110-2 at 2, 6-10; Doc. 110-4 at 5-22; Doc. 110-11 at 2, 5-12; Doc. 110-12 at 3, 8-15; Doc. 110-15 at 5-13. Furthermore, when the BBB received complaints about the activities of First Universal Lending, it forwarded them for a response to Palm Beach Gardens, not to a branch office. *See* Docs. 111-19. Indeed, with few exceptions (*see*, *e.g.*, Doc. 116 at 28), the BBB complaints, and the company's responses to those complaints, do not even mention branch offices. Appellants' authority – and ability – to close branch offices and transfer customer accounts to Palm Beach Gardens further demonstrate that they controlled the branch offices and therefore are responsible for any misrepresentations they made. Doc. 73 at 50, 159-160 (Moscowitz); Doc. 75 at 69 (Feingold); Doc. 78 at 44 (Feingold); Doc. 76 at 122 (Kudman). *See also* discussion p. 27, *supra*.

Finally, appellants contend that preliminary relief is inappropriate because they paid $1.8 million in refunds and received a limited number of consumer

complaints,[33] compared to their 500,000 plus customers. App. Br. at 9, 44, 47-48. Those figures are not a proper basis for estimating the relevant factor – *i.e.*, appellants' loan modification success rate. Indeed, the district court found that appellants' success amounted to no more than between 1% and 10% of their loan modification customers. Doc. 65 at 11, RE Tab 10 at 11. Appellants do not offer evidence to support a different success rate. But according to their own sales pitch, appellants were working on 3,000 to 4,000 clients each month (Doc. 122-7 at 2; Doc. 73 at 74-75 (Moscowitz)), a quantity that translates to 66,000 to 88,000 customers for the 22 months that the Commission alleged FUL and FUH were selling loan modification services. Using appellants' own figure of 7,254 successful modifications (Doc. 17-3 at 6, Doc. 21 at 25, RE Tab 17 at 25), appellants' loan modification success rate was at best approximately 10%.[34] As the district court found, Mr. Feingold's representation to the BBB that the company provided services to 700,000 consumers (Doc. 111 at 4) demonstrates that the actual success rate could very well have been as low as 1%, the lower end of the range noted by the court.

---

[33] These statistics are taken from the letter to the Florida Attorney General. Doc. 17-3, Doc. 21 at 20-25, RE Tab 17 at 20-25. The letter was not offered or received into evidence at the preliminary injunction hearing.

[34] There is no evidence, however, that the 7,254 "successful" modifications claimed by appellants represent actual satisfied customers who obtained loan modifications that substantially reduced their payments, as appellants had promised.

Doc. 65 at 11, RE Tab 10 at 11.

In any event, appellants' reliance on the volume of consumer complaints and the amounts they paid in refunds is unavailing. The failure of consumers to complain, even the existence of some satisfied customers, is not a defense under the FTC Act. *See*, *e.g.*, *Amy Travel Service, Inc.*, 875 F.2d at 572. The payment of refunds likewise does not sanitize a defendant's unlawful practices, or preclude the Commission from seeking equitable relief. *See*, *e,g.*, *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201-02 (9th Cir. 2006); *FTC v. Think Achievement Corp.,* 312 F.3d 259, 261 (7th Cir. 2002). If companies could absolve themselves of unlawful practices merely by paying refunds, they would have free reign to market anything deceptively so long as they return the proceeds of their unlawful practices to those consumers who are persistent enough to succeed in reaching them to complain.

2. The prohibitions of the FTC Act apply to appellants' marketing practices even if they are soliciting mortgage modification clients for law firms.

Appellants also contend that the preliminary injunction entered by the district court is an improper and unauthorized regulation of the practice of law. App. Br. at 49-54. According to appellants, the only company still operating when the Commission filed its complaint and served defendants with a TRO was FUH, a firm that was engaged in soliciting clients for law firms. Accordingly, they contend, its

activities "are all left solely to the regulation of the Florida Bar, and any other state's bar where FUH was operating." App. Br. at 50.

This argument fails for two reasons. First, even if law firms in fact "outsourced" marketing or other functions to FUH, that would not provide FUH with an exemption from the overarching prohibitions of the FTC Act.[35] FUH is not a law firm, and there is no indication that it is regulated by the local or state bar. Second, it is long established that lawyers and law firms are subject to statutes of general application unless it can be shown that their inclusion clearly is contrary to the relevant statutory text, purpose, and history. For example, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004 (1975), the Supreme Court rejected the proposition that title search and examination services performed by attorneys were exempt from antitrust review under Section 1 of the Sherman Act, 15 U.S.C. § 1. In so doing, the Court specifically rejected the argument that, due to regulation

---

[35] Appellants' contention (App. Br. at 50-52) that the American Bar Association and the Florida Bar have approved certain kinds of outsourcing by law firms is a red herring. The ethical opinions cited by appellants provide guidance to law firms and lawyers concerning the extent to which law firms and lawyers must oversee service providers. They do not purport to provide an exemption for lawyers, "outsourcing companies," or anyone else from the prohibitions in the FTC Act against unfair or deceptive marketing practices. Furthermore, the Commission's complaint does not allege that appellants violated the canons of ethics, or were engaged in the unauthorized practice of law. Rather, the complaint alleges that that defendants engaged in deception in their marketing of mortgage and loan modification services.

by the state bar, the practice of law was *ipso facto* exempt from the prohibitions of the Sherman Act. Such a sweeping exemption, the Court explained, would enable lawyers "to adopt anticompetitive practices with impunity." *Goldfarb*, 421 U.S. at 787, 95 S. Ct. at 2013. Likewise, in *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995), a unanimous Court held that the Fair Debt Collections Practices Act ("FDCPA") applies to the litigating activities of lawyers. The Court, again applying the presumption against implicit exemptions, noted that "nothing either in the [FDCPA] or elsewhere indicat[es] that Congress intended to authorize the FTC to create this exception from the Act's coverage * * * [that] falls outside the range of reasonable interpretations of the Act's express language." 514 U.S. at 298, 115 S. Ct. at 1492-93.

Appellants have not made any showing that Congress intended to exempt lawyers, or firms that provide services for lawyers, from the prohibitions of the FTC Act. Indeed, courts have not hesitated to apply the prohibitions of the Act to lawyers and other professionals. *See*, *e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S. Ct. 768 (1990) (condemning boycott by group of court-appointed attorneys as prohibited horizontal agreement among competitors); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008) (holding that negotiating practices of physician group constituted unlawful horizontal price-fixing); *FTC v.*

Gill, 265 F.3d 944 (9th Cir. 2001) (holding an attorney and his contractor liable for deceptive representations regarding their credit repair services).

Appellants' reliance on the decision of the district court in *ABA v. FTC*, 671 F. Supp. 2d 64 (D.D.C. 2009) is unavailing. In that case, the court held that Congress, in granting specific rulemaking authority to the FTC under the Fair and Accurate Credit Transactions Act, did not intend to include attorneys within that term, for purposes of that statute. *Id.* at 74-82. *ABA*, however, does not stand for the proposition that appellants urge this Court to adopt here – namely, that lawyers are exempt from the more general proscriptions of Section 5 and the TSR.

3. The exemption that Congress has provided for regulated financial institutions does not apply to FUL.

Appellants further contend (App. Br. at 54-58) that FUL was an "affiliate enterprise" for banks, savings and loans, and credit unions and conducted a "substantial portion" of its business through them. Accordingly, they assert, FUL's alleged practices are not subject to the prohibitions of the FTC Act. *Id.* at 55.

As a factual matter, this argument rests primarily on unsupported assertions in defendant Feingold's letter to the Florida Attorney General – *i.e.*, Doc. 17-3 at 1-2, Doc. 21 at 20-21, RE Tab 17 at 20-21. The letter does not provide details about the nature of FUL's relationship with the listed financial entities, or even identify which time period was involved. Furthermore, the letter was not offered or received into

evidence at the hearing on the Commission's motion for a preliminary injunction.

In his testimony, Mr. Feingold alluded to two lenders, including one bank, who purportedly used FUL to provide some services to consumers seeking to modify their loans with the banks during the mortgage foreclosure crisis. Doc. 67 at 78-79 (Feingold). But if FUL could support these assertions, that still would not avail FUL. Indeed, courts have rejected such attempts to extend exemptions from the FTC Act to entities solely on the basis of services they provide on behalf of, or under contract to, entities that are themselves exempt. As a general rule, exemptions for specific entities under the FTC Act are available for entities with the specific status, not to other entities simply based on their interaction with exempt entities. *See*, *e.g.*, *National Fed'n of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005) (third-party telefunders calling on behalf of nonprofit organization are subject to the FTC's jurisdiction even though the organization itself is not); *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980) (firm under contract to airlines to publish schedules is not exempt because air carriers themselves are exempt); *FTC v. American Standard Credit Sys*., 874 F. Supp. 1080, 1086 (C.D. Cal. 1994) (provider of credit card marketing and other services for banks is not exempt). Appellants do not articulate any basis for departing from these principles here.

C. The District Court Did Not Abuse Its Discretion in Entering a Preliminary Injunction Against the Individual Defendants

The relevant standards for personal liability for violations of the FTC Act are well established. An individual may be held liable for injunctive relief for the corporate defendant's violations of the FTC Act if he either (a) participates in the challenged conduct; or (b) has authority to control it. *See*, *e.g.*, *Cyberspace.com, LLC*, 453 at 1202; *Gem Merchandising Corp.,* 87 F.3d at 470; *Amy Travel Service, Inc.*, 875 F.2d at 573. An individual's status as a corporate officer, authority to sign documents on behalf of the corporate defendant, active involvement in business affairs, and the making of corporate policy are all factors that tend to demonstrate an individual's authority to control. *See*, *e.g.*, *FTC v. Publishing Clearing House, Inc*., 104 F.3d 1168, 1170 (9th Cir. 1997); *Standard Educators, Inc. v. FTC,* 475 F.2d 401, 403 (D.C. Cir. 1973).

Additionally, to hold an individual jointly and severally liable for monetary equitable relief, the FTC must show, in addition to the above, that he has actual knowledge of material misrepresentations, was recklessly indifferent to their truth or falsity, or, at a minimum, was aware of a high probability of fraud and intentionally avoided the truth. *See*, *e.g.*, *Amy Travel Service, Inc*., 875 F.2d at 574. The degree of an individual's participation in business affairs is probative of his knowledge. *Amy Travel Service, Inc.*, 875 F.2d at 574. In the present case, there is ample

evidence that all three of the individual defendants participated directly and substantially in the full range of the companies' business affairs and strategic initiatives. Accordingly, the district court did not err in concluding that the Commission was likely to succeed in showing that they were jointly and severally liable for the alleged practices.

The Zausners and David Feingold participated in monthly meetings of the Executive Committee, which also included five supervisory sales representatives. *See* Doc. 76 at 178-79 (Zausner); Doc. 124-2. Executive Committee minutes show that the three individuals attended all its meetings; and they are listed as the first three attendees for each session. Doc. 124-2. The minutes further show that, beginning in early 2008, a wide range of loan modification sales and service issues were discussed, including the length of the loan modification process and how it should be presented to consumers (Doc. 124-2 at 3) and consumer complaints (Doc. 124-2 at 2-3). Other topics reflected in the minutes included customer service, the duties of "closers," charge-offs, training and monitoring of sales personnel, leads, customer service, complaints, length of client service. Doc. 124-2 at 1-8. Although Sean Zausner denied that the individual defendants were "members" of the Executive Committee, his testimony is simply not credible given the scope of the issues discussed, their regular attendance at monthly meetings, and the absence of

anyone else who might be considered an "Executive" in any conventional sense.[36] See Doc. 124-2 (minutes indicate the members are the attendees); Doc. 124-2 at 4 (six members determine that two new members should be brought in). The minutes show that the only others present at Executive Committee meetings were five sales supervisors whom Sean Zausner had previously trained. Doc. 76 at 178-79 (Zausner); *compare* Doc. 124-4 *with* Doc. 124-2 at 6-8. Thus, the record demonstrates that the individual defendants were not only fully aware of the full range of sales and service issues, they were also collectively responsible for determining management's response to them.

The individual defendants' active involvement in responding to consumer complaints and addressing FUL's membership status with the BBB further demonstrates both their role in management and their knowledge of material misrepresentations. *See*, *e.g.*, Doc. 111 at 2-4. For example, on April 16, 2009, Mr. Feingold responded immediately to the BBB's decision to revoke FUL' s membership. Doc. 111 at 3-4. And both Zausners had responsibility for, or

[36] When asked whether the five sales supervisors could fire him, Sean Zausner, President and 50% owner, responded that he would "have to look at any documents that are out there," including ones in his office that "he wasn't allowed to go through for the trial." Doc. 76 at 213-14.

responded to, consumer complaints, including those referred by the BBB.[37] Doc. 120 at 3, 62-67; Doc. 124-2 at 2. Moreover, Sean Zausner trained the Executive Committee sales members when he did sales from 2004-2007 (Doc. 77 at 6 (Zausner)), and sales leads from Lowermybills.com were found in his office (Doc. 77 at 41 (Moscowitz)).

As for appellants' repeated claim that David Feingold was merely outside counsel (App. Br. at 7, 22-23, 29-31, 32-34), the record shows to the contrary. With his compensation and his law firm's cash flow tied so directly to the amount of money the Zausners took from the company, David Feingold effectively became an equity partner. *See* discussion pp. 7-8, *supra*. As the receiver's counsel explained, while technically Mr. Feingold may have been outside counsel to FUL and FUH,

> He almost sound[ed] like a profit partner in the business because there is no hourly rate * * * the service fee * * * is capped * * * at an even amount with the other partners of the business * * * Everybody is making one third * * *.

Doc. 76 at 122-23; *see also* Doc. 76 at 133 ("So although you can call it [legal fees] a cap, it is based on the profits of the corporation"). Certainly, his decision to refrain from telling the Florida Attorney General that FUL's BBB membership had been revoked and misrepresentations of the company's BBB ratings suggest more of a

---

[37] Indeed, one of the company's owners, posing as a concerned consumer, even contacted the BBB to question the company's rating downgrade. Doc. 111 at 3.

stake in the firm than what one would expect of outside counsel. *Compare* Doc. 17-3 at 3, Doc. 21 at 22, RE Tab 17 at 22 *with* Doc. 111 at 3-4.[38] Coupled with the degree to which Mr. Mr. Feingold's finances and those of his law firm were inextricably intertwined with FUL's success, his conduct in this regard strongly suggests a much larger role in the operations than "outside counsel."

Defendants further argue that the preliminary injunction has paralyzed the lawyers who are fighting it, in contravention of settled law (App. Br. at 15) and "indirectly affect[ed]" the law firm of Feingold & Kam (App. Br. at 8). These contentions are without merit.

The provisions of the preliminary injunction order do not govern, directly or indirectly, the activities of Feingold & Kam. Moreover, the asset freeze is very limited in nature. Notably, the order states that any assets acquired by Mr. Feingold

---

[38] Furthermore, although the record is not well developed on this point, Mr. Feingold played some role in considering the matter of law firm affiliations for FUH. He testified that Sean Zausner asked him, "well, how about law firms. I know that law firms are going to India. You're a lawyer. You must know a lot of people. What about the law firm model. Law firms charge a lot of money. There's margins there, et cetera." Doc. 67 at 87 (Feingold).

After the preliminary injunction issued, the receiver noticed the deposition of one of the lawyers who was affiliated with FUH, Mr. Rocco Marucci. In a summary of the deposition, the receiver noted that Mr. Feingold was responsible for recruiting Mr. Marucci's law firm. Doc. 83-4 at 1. Although Mr. Marucci's deposition testimony was given after the district court's January 11, 2010 order, appellants have designated the receiver's report (with summary of the deposition) as part of the record on appeal. *See* Doc. 86 at 2.

after the effective date of the order its effective date fall outside the scope of the asset freeze. Doc. 53 at 12, RE Tab 9 at 9. As for the small amount frozen in Feingold & Kam accounts, the Court permitted Mr. Feingold to disburse funds that are held in client trust accounts so long as a showing is made that the funds were not received as payment for modification services or disbursed for any purpose related to mortgage loan modification services. Doc. 53 at 12-13, RE Tab 9 at 12-13. Mr. Feingold, however, has not asked for any relief from the asset freeze since the preliminary injunction was issued, or documented at any time that the funds were not derived from mortgage modification services. His complaints in this regard are therefore baseless.

II. The Absence of an Opportunity to Review the Revised Proposed Preliminary Injunction Was At Most Harmless Error

Finally, appellants allege that the FTC's submission of a revised proposed preliminary injunction, as directed by the district court at the conclusion of the hearing (Doc. 77 at 68, RE Tab 13 at 68), violated their rights and the local rules. App. Br. at 18-20. According to appellants, because the FTC submitted the revised proposed order directly to chambers, they were "denied the opportunity to object to the erroneous language of the FTC's proposed order(s), which the District Court signed." *Id.* at 20.

Although appellants lacked an opportunity to review the revised proposed

order prior to its entry, they suffered no prejudice as a result. At the close of the preliminary inunction hearing, the district court gave an abbreviated ruling, granted the Commission's motion for a preliminary injunction, and stated that the court would enter "a written order which will articulate more specifically the reasons of the courts." Doc. 77 at 68, RE Tab 13 at 68. The court then asked the FTC to prepare a "proposed order regarding findings of facts and conclusions of law and a preliminary injunction." *Id.* Furthermore, the preliminary injunction that the district court signed made only inconsequential revisions (none of which appellants contend are erroneous) to the proposed preliminary injunction that the Commission filed and served on December 4, 2009, in conjunction with its motion for a preliminary injunction. Doc. 35-1. *See* discussion p. 11, *supra*. Indeed, after the district court entered the preliminary injunction, defendants did not seek reconsideration, file objections, or otherwise assert surprise or prejudice as a result of their inability to review the preliminary injunction before it was entered. Given these circumstances, if FTC counsel's failure to serve counsel with the revised proposed order was error, it was harmless. Thus, it provides no basis for this Court to overturn the relief granted by the district court. *See* 28 U.S.C. § 2111 ("On the hearing of any appeal * * *, the court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties); *United*

States v. Frazier, 387 F.3d 1244, 1266 (11th Cir. 2004).

CONCLUSION

For all the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

OF COUNSEL:
GIDEON E. SINASHON
HAROLD E. KIRTZ
Attorneys
Federal Trade Commission
Southeast Region
Atlanta, Georgia 30303

/s/ Leslie Rice Melman
LESLIE RICE MELMAN
Assistant General Counsel for Litigation
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-2478

May 14, 2010

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 10,893 words, as counted by the WordPerfect word processing program.

May 14, 2010

/s/ Leslie Rice Melman
Leslie Rice Melman

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2010, I electronically filed the foregoing Brief for Plaintiff-Appellee Federal Trade Commission at the EDF website for the United States Court of Appeals for the Eleventh Circuit. Also on this day, an original and six paper copies were sent by overnight delivery to the Court and, using the same manner of service, two paper copies were sent to the following individuals:

David J. Feingold, Esq.
Feingold & Kam
5100 PGA Boulevard
2nd Floor
Palm Beach Gardens, FL 33418

/s/ Leslie Rice Melman
Leslie Rice Melman