No. 10-56985

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee

and ROBB EVANS & ASSOCIATES LLC
Receiver-Appellee

v.

PAUL JEFFREY LUCAS,
Defendant-Appellant

On Appeal from the United States District Court
for the Central District of California
D.C. No. 8:09-CV-00770-DOC-AN

BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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STATEMENT OF JURISDICTION

The Federal Trade Commission ("Commission" or "FTC") initiated this action in the United States District Court for the Central District of California seeking relief under Section 13(b) of the FTC Act, 15 U.S.C. §53(b), for deceptive acts or practices that violated Section 5 of the FTC Act, 15 U.S.C. § 45(a). The district court's jurisdiction over this matter derived from 28 U.S.C. §§ 1331, 1337(a), and 1345, and from 15 U.S.C. §§ 45(a) and 53(b).

This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, to review the district court's final judgment, which was entered on June 25, 2010. Defendant-appellant Paul Jeffrey Lucas filed a Motion to Set Aside Judgment, pursuant to Fed. R. Civ. P. 60(b) and 60(d), on July 7, 2010, and the district court denied that motion on November 9, 2010. Lucas filed his Notice of Appeal on December 9, 2010, and that notice was timely, pursuant to Fed. R. App. P. 4(a)(1)(B) and 4(a)(4)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly granted the Commission's motion for summary judgment, where the Commission provided uncontested evidence that defendants deceived consumers by guaranteeing a full refund if they failed to successfully modify the consumers' mortgages.

2. Whether the district court properly held Lucas personally liable for the deceptive conduct, where he controlled one corporate defendant and had knowledge of the deceptive activities.

3. Whether the injunctive and monetary equitable relief imposed by the district court fell within its broad discretion.

4. Whether the district court abused its discretion in denying Lucas' post-judgment motions challenging the receivership, where the Receiver complied with its responsibilities in all respects and provided a complete accounting.

5. Whether the district court abused its discretion in denying Lucas' other post-judgment motions, which essentially challenged his counsel's litigation strategy.

STATEMENT REGARDING STATUTORY ADDENDUM

Pursuant to Fed. R. App. P. 28(f) and Ninth Circuit Rule 28-2.7, statutory provisions pertinent to this case, 15 U.S.C. § 45(a) and 15 U.S.C. § 53(b), are included in the Statutory Addendum bound with this brief.

STATEMENT OF THE CASE

Nature of Case, Course of Proceedings, and Disposition Below

The FTC initiated this action to halt a scheme in which defendants – in the guise of a law firm – deceptively marketed a program that would supposedly allow

consumers facing difficulty in making mortgage payments to obtain new and better terms from mortgage lenders. The Commission's two-count complaint, filed in July 2009, alleged that Lucas, two other individual defendants, and corporate defendants LucasLawCenter "incorporated" ("Lucas Law Center") and Future Financial Services ("FFS"), had violated Section 5 of the FTC Act, 15 U.S.C. § 45.[1] The Commission alleged in Count 1 that defendants had misrepresented that they would successfully secure the modification of their customers' mortgages, and alleged in Count 2 that defendants misrepresented that they would fully refund any fees consumers had paid them, if they were unable to secure such modifications. On June 3, 2010, the district court granted the Commission's motion for summary judgment as to Count 2, but denied it as to Count 1. D.176, SER 35-51.[2] The court also issued a permanent injunction and ordered $6,120,200 as equitable monetary relief. *Id.*

In this appeal, defendant Lucas (now representing himself *pro se*) asserts that the district court's summary judgment order should be reversed because there were contested triable issues. He also challenges the district court's denial of a

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[1] Section 5 prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce."

[2] Items in the district court's docket are referred to as "D.xx." "SER" refers to pages contained in the FTC's Supplemental Excerpts of Record filed under Ninth Circuit Rule 30-1.7.

plethora of post-judgment motions he filed challenging the propriety of the court-ordered receivership and the trial tactics of his former counsel.

STATEMENT OF FACTS

1. Defendants' Deceptive Scheme

Defendants operated a nationwide scheme in which cash-strapped consumers who wished to modify their mortgages were defrauded of over $6 million. The scheme was carried out using deceptive acts targeting consumers who were losing, or likely to lose, their homes in mortgage foreclosure proceedings.

A. Defendants' representations to consumers. Defendants repeatedly represented that they would secure modification of their customers' home loan mortgages in all or virtually all cases, or if they were unsuccessful in doing so, they would fully refund the customers' money.[3] Defendants made these misrepresentations widely through radio advertisements, two web sites, and calls by live telephone representatives. D.143 at Facts 68-71, SER 879-880, Report of Temporary Receiver's Activities (D.25-2) at 1, SER 1123. Lucas Law Center's sales representatives told consumers that the company would obtain modifications

[3] Lucas Law Center and FFS jointly operated the scheme in which FFS provided the staff and office facilities, but only the name "Lucas Law Center" was provided to the public. FTC's Statement of Uncontroverted Facts & Conclusions of Law in Support of Plaintiff's Motion for Summary Judgment (D.143) at Facts 14-19, 21, SER 867-69.

of their loans in all or nearly all cases in order to reduce their monthly mortgage payments. D.143 at Facts 85-92, SER 884-886.[4] Defendants emphasized their expertise in the mortgage industry and the advantages of having a law firm negotiate on behalf of the customer. D.143 at Facts 74-83, SER 880-884. While defendants claimed that Lucas Law Center worked with its "first class network of over 30 affiliated attorneys," there was no such affiliated network, and Lucas was the only attorney who worked there. D.143 at Fact 33, 78, 115-19, 152, SER 871, 881, 893, 901-02; D.25-2 at 12, SER 1234.[5]

Central to the defendants' deceptive scheme, defendants promised a full money-back guarantee if they could not obtain a loan modification for the

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[4] Lucas' argument that the firm would use only "best efforts" to modify its customers' mortgages, Appellant's Opening Brief ("Lucas Br.") at 4, is belied by extensive evidence showing that Lucas Law Center representatives stated that the company would modify the loans in all or substantially all cases. D.143 at Facts 85, 86, SER 884.

[5] While Lucas held an active California law license at the time of the activities at issue in this case, he is currently disbarred based on the activities at Lucas Law Center. *See* State Bar of California, Attorney Search: Paul Jeffrey Lucas #163076, http://members.calbar.ca.gov/fal/Member/Detail/163076 (last visited October 3, 2011). By taking advantage of Lucas' law license, defendants were able to circumvent a California statute that prohibited foreclosure consultants from demanding or collecting payment before all promised services have been completed, but that exempted licensed attorneys at the time of the conduct at issue here. *See* Cal. Civ. Code § 2945 (West 2009). California subsequently enacted legislation, effective October 11, 2009, to protect consumers from unscrupulous attorneys offering such mortgage loan modification services. *See* Cal. Bus. & Prof. Code § 6106.3(a) (West 2009); Cal. Civ. Code § 2944.6-.7 (West 2009).

consumer. Defendants made this representation several ways. First, Lucas Law Center's websites touted that: "We offer a money back guarantee if we cannot get you a work out agreement with your lender(s) as long as no [foreclosure] sale date has been set." D.143 at Fact 84, SER 884. Second, Lucas Law Center's sales representatives assured consumers during the initial sales pitch that consumers had nothing to lose because Lucas Law Center would provide a full refund if it could not obtain the loan modification. D.143 at Fact 103, SER 890. The Receiver confirmed (after reviewing defendants' documents) that Lucas Law Center's telephone scripts and websites touted a "100% money back guarantee if Lucas Law Center does not obtain a loan modification for the consumer." D.25-2 at 2, SER 1224. Third, the Lucas Law Center contract contained a specific provision describing its refund policy. D.143 at Fact 104, SER 890.

Defendants typically required up-front fees between $2000 and $3995 for their loan modification services. D.143 at Fact 98, SER 888-89; D.25-2 at 1, SER 1223. Some consumers paid the full fee during the initial sales call. D.143 at Fact 99, SER 889. In other cases, customers paid a substantial down payment of at least $1000 before Lucas Law Center would begin its loan modification services, with the remainder due before the promised modification was finalized. *Id.* At least a portion of the fee had to be paid before Lucas Law Center would begin its loan

modification services. D.143 at Fact 100, SER 889. In many instances, Lucas Law Center did not provide a copy of its contract to consumers until they had paid the fee, in whole or in part. D.143 at Fact 101, SER 889. Defendants entered into fee agreements with at least 2,159 consumers. D.143 at Fact 150, SER 901.

B. Lucas Law Center failed to provide the promised services. After receiving consumers' fees, Lucas Law Center provided little, if any, of the promised services. It seldom delivered the loan modification it promised to consumers. D.143 at Facts 123-24, SER 894-95.[6] Many consumers ultimately lost their homes or sought bankruptcy protection, incurring additional costs and expenses. D.143 at Fact 131, SER 896.

Critically, contrary to defendants' purported money-back guarantee, Lucas Law Center routinely denied consumers' requests for full refunds – and provided either a partial refund or no refund at all – when defendants' failed to obtain the promised loan modification. D.143 at Facts 132, 145, SER 897, 899-900; D.25-2 at 4, SER 1226. Some customers' requests for refunds were denied even after they

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[6] Lucas' assertion that Lucas Law Center "successfully negotiated over 800 refinances and modifications," Lucas Br. at 3-4, is belied by the evidence. In fact, Lucas Law Center staff could only locate 421 files that defendants claimed were completed modifications. The Receiver's review of a random sample of 63 of the 421 files determined that only 43 (or about two-thirds) actually showed a completed mortgage modification. D.143 at Facts 147-49, SER 900-01.

were initially approved for a full refund. D.143 at Fact 134, SER 897; D.151-1 at 166-68, SER 858-860. Lucas Law Center even denied refunds where its actions resulted in a modification that *increased* the amount of the monthly payment and put the consumer in a worse financial condition. D.25-2 at 4, SER 1226. While Lucas Law Center not surprisingly made refunds at times to customers who complained to government authorities or to the Better Business Bureau ("BBB"), it often failed to make full refunds even to those complaining customers. D.143 at Facts 135-36, SER 897-898.[7] The Receiver confirmed after reviewing defendants' files that they usually did not provide the promised full refunds when they failed to obtain modification of their customers' mortgages. D.143 at Facts 145-46, SER 899-90; D.25-2 at 3-4, SER 1225-26; Report of Receiver's Activities (D.51) at 2-3, SER 1201-02.[8] The Receiver found a large number of customer complaints at Lucas Law Center's offices. D.25-2 at 4, SER 1226.

C. Lucas' role at Lucas Law Center. Lucas was the CEO, CFO, Secretary, and a director of Lucas Law Center. D.143 at Fact 30, SER 870. He was the only

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[7] After January 28, 2009, Lucas Law Center simply never responded to the many consumer complaints and refund requests channeled through the BBB. D.143 at Fact 138, SER 898.

[8] The Receiver reviewed 76 sample customer files for which a result could be determined and concluded that only 23 (or approximately 30% of the) customers received a full refund when defendants failed to obtain a modification of their mortgages. D.143 at Fact 146, SER 900.

attorney employed by or affiliated with Lucas Law Center, and the only attorney whose name appeared on Lucas Law Center's website and on consumer correspondence. D.143 at Facts 32-33, 115-17, SER 871, 893; D.25-2 at 7-12, SER 1229-1234. He opened the company's American Express merchant account using his Social Security Number. D.143 at Fact 31, SER 871. He also discussed the status of loan modification applications with consumers, and signed contracts and refund checks (in those few instances they were issued). D.143 at Facts 34-35, SER 871. Lucas personally trained Lucas Law Center employees working in the intake department. D.143 at Fact 36, SER 871-72.[9]

D. Net receipts collected by defendants. Lucas Law Center collected $7,118,509.40 in fees from consumers during the period (June 20, 2008 to July 10, 2009) in which their deceptive scheme was operating, but only provided $998,308.97 in refunds. D.143 at Facts 139-40, SER 898. Lucas Law Center thus collected net receipts of $6,120,200.43 from consumers deceived by the scheme. D.143 at Fact 141, SER 898.

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[9] Lucas was joined in the scheme by defendants Betts and Sullivan. Betts owned, operated, and was an officer of FFS, and played a prominent role in the operations of both FFS and Lucas Law Center. D.143 at Facts 43-49, SER 873-74. Sullivan played a prominent role in the operations at both companies, promising loan modifications, handling company complaints, and determining whether or not to honor Lucas Law Center's refund policy. D.143 at Facts 57-67, SER 877-79.

2. Proceedings Below

The Commission filed a two-count complaint on July 7, 2009, charging defendants with violating Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). D.1, SER 1309-1330. Count 1 charged defendants with deceptively representing that they would obtain a mortgage loan modification in all or virtually all instances. Count 2 charged defendants with deceptively representing that they would provide full refunds to consumers if defendants were unable to modify their loans. The Commission also filed an *ex parte* application for a temporary restraining order ("TRO"), and moved to freeze defendants' assets and to appoint a receiver. D.3, SER 1303-08.

On July 9, 2009, the district court issued the TRO and appointed a temporary receiver. D.4, SER 213-278, D.24 (amended order), SER 147-212. The court entered a July 16, 2009, order extending the TRO, freezing defendants' assets, and appointing a permanent receiver. D.34, SER 140-146. The court entered a stipulated preliminary injunction on August 24, 2009. D.81, SER 74-139.

On April 26, 2010, the Commission moved for summary judgment. D.141, SER 922-926. On June 3, 2010, the district court granted in part the Commission's motion, D.176, SER 35-51, and entered a final order for permanent injunction and other equitable relief. D.177, SER 15-34.

The court denied the Commission's motion as to Count 1. D.176 at 8-10, SER 42-44. While the court held that Lucas Law Center promised a high success rate in obtaining mortgage modifications, it concluded that such representations were not uniform, which led to a "net impression" that a mortgage modification "was highly probable but not absolutely certain." *Id.* at 8-9, SER 42-43. According to the court, "[a] reasonable consumer, taking a promise that the modification would be successful in the context of an express promise for a refund if the modification was not successful, would understand that there was a chance that the modification would not be successful." *Id.* at 9, SER 43.

The court, however, granted summary judgment as to Count 2, holding that defendants had misrepresented their refund policy. *Id.* at 10-12, SER 44-46. The court held that the refund policy was not adequately qualified in the contract, because the contract was often not provided until after the consumer paid the fee, and because any qualification in the contract did not cure the deception in the initial sales pitch. *Id.* at 10-11, SER 44-45. The court also held that consumers would find the refund policy material to their purchasing decision. *Id.* at 11, SER 45. The court concluded that defendants had misrepresented their refund policy, because they did not provide the promised refunds in all instances when loans were not successfully modified. *Id.* at 12, SER 46.

The district court next concluded that all the defendants were jointly and severally liable. It held that all three individual defendants participated in or had the authority to control the deceptive acts, and were liable for monetary relief because they had the requisite knowledge of the misrepresentations. *Id.* at 12-14, SER 46-48. The court also imposed a permanent injunction, and ordered all defendants liable for $6,120,200 in monetary relief, representing defendants' gross sales minus refunds. *Id.* at 14-15, SER 48-49. It did not deduct the amount paid by consumers who received successful modifications, concluding that all customers' purchasing decisions were tainted by Lucas Law Center's misrepresentations about its refund policy. *Id.* at 15-16, SER 49-50.

The court issued a final order to take effect once all claims were resolved. D.177, SER 15-34. After the parties stipulated to dismiss Count 1 without prejudice, D.196, SER 788-790, the court dismissed that count on June 24, 2010. On June 25, 2010, the court entered a final judgment. D.201, SER 13-14.

After entry of the final judgment, Lucas filed *pro se* a number of motions and other documents, D.207-210, D.212-216, D.221, SER 755-787, 650-754, 284-291, including a motion to set aside the district court's judgment, primarily challenging his counsel's litigation conduct. D.209, SER 760-769.[10] On

[10] Lucas also moved, *inter alia*, to terminate the services of his attorney and to hold him in contempt (D.207, SER 781-787; D.214, SER 730-737), to withdraw

November 9, 2010, the court denied Lucas' motion, concluding that his counsel's "well-considered legal strategy" – including entering into stipulations – was designed to shield Lucas from possible criminal prosecution. D.237, SER 9-12. On November 9, 2010, and December 8, 2011, the court denied Lucas' remaining post-judgment motions as moot. D.238, SER 8, D.241, SER 1-2.[11] Defendant Lucas filed a timely notice of appeal on December 9, 2010. D.242, SER 279-283.

SUMMARY OF ARGUMENT

Defendants operated a deceptive scam promising cash-strapped consumers that they would persuade lenders to modify their mortgages or would fully refund their money. The district court properly found, based on the FTC's voluminous and uncontroverted evidence, that defendants had violated the FTC Act by deceptively promising consumers that they would provide full refunds if they failed to obtain a mortgage modification – and then refused to provide such

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his Fifth Amendment defense (D.208, SER 770-780), to set aside purportedly unauthorized stipulations and admissions (D.212, SER 747-754; D.214, SER 730-737), for an accounting and return of seized funds (D.213, SER 738-746), and for contempt against the Commission and its employees (D.221, SER 284-291). Lucas further filed an untimely opposition (D.216, SER 650-729) to the Commission's statement of uncontroverted facts and conclusions of law in support of its motion for summary judgment filed three months earlier (D.143, SER 861-921), and which had been resolved by the district court. (D.176, SER 35-51).

[11] The court also granted in part, on November 29, 2010 (D.239, SER 3-7), the Receiver's motion to wind up the estate (D.218, SER 300-633).

refunds. (Part I.A., *infra*). Lucas, as the CEO and owner of Lucas Law Center, is personally liable for the deceptive acts. (Part I.B., *infra*). The district court also properly imposed injunctive and equitable monetary relief. (Part I.C., *infra*).

There is no merit to Lucas' various objections to the proceedings below. His complaints about the receivership and the Receiver's accounting lack any support. (Part II, *infra*). Similarly, his appeal of the denial of several post-judgment motions – which essentially challenged the litigation tactics of his former counsel designed to protect Lucas against criminal prosecution – provides no basis for reversal. (Part III, *infra*).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo* and may affirm on any ground supported by the record. *Qwest Communs., Inc. v. Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56. *Id.* This Court must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 898 (9th Cir. 2006). The Court reviews district court rulings on the admissibility of evidence for abuse of discretion. *Reid*

Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1307 (9th Cir. 1983).

This Court reviews the district court's choice of remedies for abuse of discretion. *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008). The Court also reviews a district court's decision involving its supervision of an equitable receivership for abuse of discretion. *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). Finally, the Court reviews for abuse of discretion the district court's denial of a motion for relief from final judgment under Fed. R. Civ. P. 60(b), *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1100 (9th Cir. 2006), or denial of a motion to set aside a judgment for fraud on the court under Fed. R. Civ. P. 60(d). *See Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT DEFENDANTS FAILED TO DELIVER ON THEIR PROMISED REFUNDS, FOUND LUCAS INDIVIDUALLY LIABLE, AND IMPOSED INJUNCTIVE AND MONETARY EQUITABLE RELIEF ON DEFENDANTS

A. The District Court Properly Held that Defendants Misrepresented their Refund Policy

Section 5(a) of the FTC Act prohibits unfair and deceptive acts and practices in or affecting commerce. 15 U.S.C § 45(a). An act or practice is deceptive under Section 5(a) if it involves a material representation or omission that is likely to

mislead consumers acting reasonably under the circumstances. *FTC v. Cyberspace.com LC*, 453 F.3d 1196, 1199-1200 (9th Cir. 2006); *FTC v. Gill,* 265 F.3d 944, 950 (9th Cir. 2001). A representation is considered material if it "involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding a product." *Cyberspace.com*, 453 F.3d at 1201 (quotation omitted). Express claims, or deliberately made implied claims, used to induce a purchase, are presumed to be material. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994).

In determining whether a defendant's claims were deceptive or misleading, the court must evaluate the net impression of the representations as a whole. *Gill*, 265 F.3d at 956. The FTC need not prove reliance by each purchaser; rather, "[a] presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993).

Here, the district court properly granted summary judgment to the Commission on Count 2 of the Complaint because the FTC provided voluminous and uncontested evidence that defendants falsely promised that they would provide full refunds to consumers if defendants were unable to secure a successful

mortgage modification. D.176 at 10-12, SER 44-46; Statement of Facts ("SOF"), *supra*, at 5-6. The uncontested evidence supporting this claim consisted of consumer complaints, declarations, and deposition testimony, the defendants' own contracts, web sites, and telephone sales scripts, and defendants' stipulations and adverse inferences drawn from the assertion of their Fifth Amendment right against self-incrimination.[12] *See, e.g.,* D.143, SER 861-921; D.11, SER 1143-1302; D.38, SER 1206-1222; D.126, SER 969-984; D.130, SER 927-968; D.151-1, SER 858-860; D.185-1, SER 791-857.

For example, Lucas Law Center's web sites promised to refund consumers' money if defendants were unsuccessful in obtaining modification of their mortgages: "We offer a money back guarantee if we cannot get you a work out agreement with your lender(s) as long as no sale date has been set." SOF, *supra*, at 6. Defendants' sales representatives reinforced this impression by emphasizing that consumers had nothing to lose by hiring defendants because consumers were guaranteed their money back if defendants failed to obtain a mortgage modification. *Id.* As the district court held, defendants' representations about their

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[12] It is well settled that, in civil cases, a court may draw an adverse inference from an individual party's invocation of his Fifth Amendment right against self-incrimination, particularly where each fact is corroborated with other supporting evidence. *See, e.g., Baxter v. Palmigiano,* 425 U.S. 308, 316-19 (1976); *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 911 (9th Cir. 2008).

refund policy were material, because consumers would rely on the promised money-back guarantee in determining whether to hire defendants. D.176 at 11, SER at 45.

Uncontroverted facts further show that these representations were false. Lucas Law Center routinely failed to provide the promised full refunds when they were unable to obtain a modification of their customers' mortgages. SOF, *supra*, at 7-8. Some consumers received partial refunds, but only after making multiple calls and experiencing lengthy delays. While a few consumers obtained full refunds (usually only after complaining to government agencies or the BBB), many other consumers' requests for full refunds were repeatedly denied or simply ignored. *Id.* These uncontroverted facts establish that defendants misrepresented their refund policy as alleged in Count 2.

While Lucas makes the summary assertion that there were "disputed material triable issues of fact and law" to defeat summary judgment, Lucas Br. at 7, 10, he fails to cite to any specific material fact he claims is in dispute or to provide any reasons why summary judgment was improperly granted.[13] As shown above,

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[13] As noted above, Lucas submitted an untimely opposition to the FTC's statement of uncontested facts *after* the court's decision. D.216, SER 650-729. Further, Lucas' opposition was conclusory and uncorroborated as to each fact supporting Count 2 of the Complaint regarding defendants' misrepresentation of their refund policy.

the Commission provided voluminous and uncontested evidence showing that defendants misrepresented their refund policy. *See* D.143, SER 861-921; SOF, *supra,* at 4-8. Defendants failed to provide *any* probative evidence to rebut the FTC's evidence and cannot rely on bare denials to defeat summary judgment. *See* Fed. R. Civ. P. 56(e)(2).

Lucas has provided no other reasons (either in this Court or the district court) that would justify reversal. For example, the court below correctly rejected his argument that Lucas Law Center's refund policy was adequately qualified in the contract. Even apart from the fact that the contract was often not sent until after the consumers had paid at least a portion of the up-front fees, any qualification in the later-received contract could not cure the deception of the money-back guarantee made in the initial sales pitch. *See* D.176 at 10-11, SER 44-45, D.143 at Fact 101, SER 889.

Similarly, the court below properly rejected Lucas' argument that the FTC's motion should be denied because it was supported by testimony from only a limited number of injured customers. Once the FTC shows defendants made material and widespread misrepresentations, it need not demonstrate that each individual consumer relied on defendants' deceptions. *See Figgie*, 994 F.2d at

605.[14] Finally, the court below correctly rejected Lucas' argument that Lucas Law Center did not deceive consumers because it provided some refunds. The uncontested evidence shows that defendants did not provide full refunds in all (or even most) cases in which they were unable to secure a successful modification of their customer's mortgage. SOF, *supra*, at 7-8; D.176 at 10-12, SER 44-46. The FTC need not show that every customer was injured to find defendants liable under Section 5 of the FTC Act. *FTC v. Stefanchik*, 559 F.3d 924, 929 n.12 (9th Cir. 2008).

In sum, this Court should affirm the district court's holding that defendants misrepresented their refund policy as alleged in Count 2 of the Complaint.

B. The District Court Properly Held that Lucas was Personally Liable for the Unlawful Acts of his Purported Law Firm

The district court also properly concluded that Lucas was personally liable for the law violations committed by the corporate defendants.[15] An individual may

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[14] In any event, here, the FTC provided evidence of *hundreds* of consumer complaints about Lucas Law Center's deceptive practices sent to defendants, the FTC, the BBB, and the State Bar of California, as well as consumer deposition testimony and sworn declarations from nine consumers. *See, e.g.,* D.143 at Fact 110, SER 892; D.38, SER 1206-1222; D.11, SER 1243-1302.

[15] Because Lucas filed his notice of appeal *pro se*, he cannot prosecute this appeal on behalf of the other defendants, including the corporate defendants. *See* Fed. R. App. P. 3(c)(2); *D-Beam Limited Partnership v. Roller Derby Skates, Inc*., 366 F.3d 972, 973-74 (9th Cir. 2004) (corporations and other unincorporated associations must be represented by counsel).

be held personally liable for injunctive relief under Section 5(a) of the FTC Act if he participated directly in the corporation's acts or practices, or had authority to control them. *Cyberspace.com,* 453 F.3d at 1202 (*citing FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997)). Further, he may be subject to equitable monetary relief if he "had actual knowledge of material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.* Performance of the duties of a corporate officer is probative of an individual's participation or authority, and participation in corporate affairs is probative of knowledge, especially when the corporate defendants are small, closely held corporations. *FTC v. Affordable Media*, 179 F.3d 1228, 1235 (9th Cir. 1999); *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973). An individual's awareness of a high volume of consumer complaints demonstrates knowledge of deceptive practices. *FTC v. Amy Travel Serv., Inc.,* 875 F.2d 564, 574-75 (7th Cir. 1989).

The undisputed evidence shows that Lucas owned and controlled Lucas Law Center as its CEO, CFO, Secretary, and director. SOF*, supra,* at 8-9. He was the only attorney listed on either of Lucas Law Center's web sites and in email correspondence with consumers. *Id.* Lucas was also involved in Lucas Law

Center's daily activities, including signing contracts and discussing the status of modification applications with consumers. SOF, *supra,* at 9. His knowledge of Lucas Law Center's deceptive acts and practices is reflected by his personal involvement in all aspects of the company's operations, and his awareness of hundreds of consumer complaints about Lucas Law Center's deceptive activities. SOF, *supra*, at 8-9.

As the district court held, "Lucas clearly had the authority to control [Lucas Law Center's] deceptive practices," and he (and the other individual defendants) "were so involved with the day-to-day activities of LLC, a small company," that personal knowledge should be presumed, particularly given the large number of consumer complaints defendants received. D.176 at 13-14, SER 47-48. The Court should affirm this ruling.

C. The District Court Properly Imposed Injunctive and Equitable Monetary Relief Against Defendant Lucas

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides that a court may grant a permanent injunction against violations of "any provision of law enforced by the Federal Trade Commission." *See FTC v. H. N. Singer*, 668 F.2d 1107, 1111-13 (9th Cir. 1982). Once the equitable power of a court has been invoked under Section 13(b), the court can impose "any ancillary relief necessary to accomplish complete justice," including ordering redress or restitution to fully

compensate injured consumers. *Pantron I,* 33 F.3d at 1102; *Figgie,* 994 F.2d at 606-09.

The district court properly imposed injunctive relief in this case. An injunction is necessary when there is a "cognizable danger of recurrent violation" to ensure that final relief is effective. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Past unlawful conduct is "highly suggestive of the likelihood of future violations." *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (citation omitted). A court may also enjoin unlawful acts that can be anticipated from, or are related to, defendants' past conduct. *Gill*, 265 F.3d at 957-58.

Here, the district court properly enjoined defendants from selling any "mortgage loan modification or foreclosure relief service," the precise activity found to be deceptive here. D.177 at 4-5, SER 18-19. The court also enjoined defendants from misrepresenting or collecting advance fees for any financial service, and from misrepresenting any material fact relating to the sale of any good, that involved related abusive conduct. D.177 at 6-8, SER 20-22. The district court properly found these injunctive provisions to be "necessary" and "narrowly tailored," because "[t]he fraud perpetrated here was ongoing over an extended period of time, done with awareness, and targeted at a particularly vulnerable segment of the population." D.176 at 14, SER 48.

Finally, the district court properly imposed equitable monetary relief as restitution equal to the total sales of Lucas Law Center less any refunds it provided. *See Figgie,* 994 F.2d at 606. The amount of monetary relief should not be reduced by those few customers whose loans were actually modified, because defendants' deceptions regarding their refund policy "tainted" their customers' decision to hire defendants in the first place. *See McGregor v. Chierico*. 206 F.3d 1378, 1388-89 (11th Cir. 2000); *Figgie*, 994 F.2d at 606. As the district court concluded:

> LLC made misrepresentations to consumers about the availability of refunds, and those misrepresentations had the potential to result in the miscalculation of the risk of purchasing LLC's services by the consumer. If the consumer knew there was a risk of not receiving a refund when a modification was not successful, that could very well change the purchasing decision. The purchasing decision process was tainted, regardless of whether those consumers were eventually satisfied with their purchase.
>
> D.176 at 16 (citation omitted), SER 50.

The Receiver determined that defendants received $7,118,509.40 from their consumer victims, and refunded only $998,308.97, thus receiving net sales of $6,120,200.43. SOF, *supra,* at 9. Defendants failed to rebut this calculation of

consumer harm.[16] This Court should affirm the district court's order imposing a monetary judgment of $6,120,200. D.177 at 9, SER 23.

II. LUCAS' COMPLAINTS ABOUT THE RECEIVERSHIP ARE WITHOUT MERIT

Lucas also argues that the Receiver (and the FTC) failed to provide a proper accounting of the receivership assets, and claims that those funds were "misappropriated" and improperly "released" to the FTC, the BBB, or the State Bar of California. He requests that the Receiver provide a "proper accounting," and challenges district court orders denying his motion for an accounting (D.213, SER 738-746) and granting (in large part) the Receiver's motion to wind-up the receivership (D.218, SER 300-633). *See* Lucas Br. at 3, 4, 5, 6, 8, 9-10, 12-13. These arguments are wholly without merit.[17]

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[16] Further, any uncertainty as to the accuracy of the defendants' revenue figures must be borne by the defendants because the uncertainty was due to their own poor record-keeping practices. *See FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997).

[17] More specifically, Lucas challenges the district court's denial of his Motion for Accounting and Seized Funds (D.213, SER 738-746), and for a show cause hearing for contempt against the FTC and several of its employees predicated on his Motion for Accounting (D.221, SER 284-291). Lucas Br. at 8. The district court denied these two post-judgment motions as moot because it had already issued a final judgment in the case and had denied Lucas' Fed. R. Civ. P. 60 motion to set aside the judgment. D.238, SER 8, D.241, SER 1-2. Lucas also appeals, Lucas Br. at 9, the district court's granting (in part) (D.239, SER 3-7) the Receiver's motion to wind-up the receivership. D.218, SER 300-633, D.219, SER 292-299.

Lucas provides no grounds on which to challenge the district court's orders (under Fed. R. Civ. P. 60(b) and 60(d) or any other basis), for the simple reason that the Receiver *has* filed a complete and accurate accounting in this case. Since the inception of the receivership, the Receiver properly accounted for all funds and assets in the receivership estate. The Receiver provided the district court with two complete and accurate accountings of the assets it held and expenses incurred. *See* D.109, SER 984-994, D.109-2 at 2-3, SER 996-997 (covering July 2009 through September 2009) ("Receiver's First Accounting"); D.219 at 5-8, SER 296-299 (covering October 2009 through May 2010 and estimating expenses through the closing of the receivership) ("Receiver's Second Accounting"). These financial accountings were accompanied by meticulously detailed and sworn explanations for the fees and costs incurred by the Receiver and its counsel. *See* D.108-2, SER 1153-1187, D.109, SER 985-994, D.109-2 at 5-105, SER 997-1099, D.109-3, SER 1100-1152 (Receiver's First Accounting); D.218 at 23-26, SER 322-326; D.218-3 to -7, SER 350-633; D.219 at 2-3, SER 293-294 (Receiver's Second Accounting). The district court approved the Receiver's final report and accounting, concluding that the accounting was supported "with sufficient details" and that the Receiver's fee request was reasonable. D.239 at 3, 4, SER 5-6. The district court clearly did not abuse its discretion in denying Lucas' motion for an accounting (D.238, SER

8) or granting (in large part) the Receiver's motion to wind-up the receivership (D.239, SER 3-7). *See Hardy*, 803 F.2d at 1037-38.

Lucas provides no evidence that the Receiver improperly held or failed to account for the assets of the receivership estate, or improperly disbursed any receivership assets to the FTC, the BBB, the State Bar of California, or any other entity. The FTC never received any receivership funds and (because it was not the Receiver) had no obligation to provide an accounting.[18] Lucas also provides no legal authority to support his position.[19] The Receiver maintains possession of the

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[18] Lucas likewise provides no evidence of any sort of "conspiracy," "unethical alliance" or any improper conduct between the FTC, the State Bar of California, or the BBB, regarding disposition of the defendants' assets, *see* Lucas Br. at 3, 4 – and there is none. Further, Lucas' reliance on the opinion of a purported "forensic accountant" that the Receiver's accounting "showed misappropriation," Lucas Br. at 12, should be rejected as hearsay and lacking any evidentiary support.

[19] For example, *Albuquerque Nat'l Bank v. Citizens Nat'l Bank in Abilene,* 212 F.2d 943 (5th Cir. 1954) on which he relies, Lucas Br. at 12, simply held that banks as executors of a decedent's estate had a duty of trust to the estate and to the estate's beneficiaries. *Id.* at 950-51. The case had nothing to do with court-appointed Receivers and, in any event, the Receiver here complied in all respects with his duties to the receivership estate. Further, 28 U.S.C. § 3103, regarding the statutory obligations of a receiver in a federal debt collection procedure – including keeping an accurate accounting and filing reports – is simply inapplicable, because the Receiver here was as not appointed under that statute, but rather was appointed in equity to protect the receivership estate. In any event, the Receiver complied with all its obligations to file reports and provide a complete accounting.

funds from the receivership estate pending the appeal.[20] In sum, Lucas' challenges to the receivership or the Receiver's accounting should be rejected.

III. LUCAS' CHALLENGES TO THE DISTRICT COURT'S DENIAL OF HIS OTHER POST-JUDGMENT MOTIONS ARE WITHOUT MERIT

Lucas also appeals the district court's denial of a number of other post-judgment motions. *See* Lucas Br. at 7-10. These motions mainly challenge the litigation tactics of his former counsel, Richard Gilbert, Esq. Lucas claims, for example, that Mr. Gilbert stipulated to facts without Lucas' consent, did not inform Lucas of the consequences of asserting his Fifth Amendment right against self-incrimination, provided inadequate representation and filed an insufficient opposition to the FTC's motion for summary judgment, and refused to request a

[20] Any receivership assets not held by the Receiver remain in their original frozen accounts. Nothing in the district court's orders, *e.g.*, D.24, SER 147-212, D.81, SER 74-139, has ever prevented Lucas from obtaining information about those accounts directly from the pertinent financial institutions.

jury trial in this case. *See* Lucas Br. at 3-7, 10-13.[21] None of Lucas' complaints justify reversal and relitigating the issues in this case.

As a threshold matter, Lucas' complaints are untimely as they were raised for the first time in post-judgment motions. Lucas (or his counsel) should have raised these challenges – including to the admissibility of the stipulated facts or the adverse inferences from assertion of Lucas' Fifth Amendment rights – *before* the district court rendered its final judgment. *See Beech Aircraft Corp. v. U.S.*, 51 F.3d 834, 841 (9th Cir. 1995) (issue raised for first time in a post-judgment motion not saved for appeal). Lucas simply had no basis to seek relief from the district court's judgment "to remedy a litigation decision that [he came] to regret." *Latshaw*, 452 F.3d at 1101.[22] Further, Lucas' general complaints that Mr. Gilbert inadequately

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[21] Lucas raised these concerns in his Motion to Continue Trial, Reopen Discovery, Allow Jury Trial, and Reverse and Set Aside Partial Summary Judgment Order (D.209, SER 760-769) ("motion to set aside judgment"), which the district court denied. D.237, SER 9-12. Lucas also raised these arguments in several other post-judgment motions. *See* D.208, SER 770-780 ("Motion to Withdraw Fifth Amendment Defense"), D.212, SER 749-754 ("Motion to Set Aside Unauthorized Stipulations and Admissions"), and D.214, SER 730-737 ("Objection by Paul Jeffrey Lucas to any Stipulations Entered into by Richard C. Gilbert," and a request to hold Gilbert in contempt). The court denied these latter motions as moot (D.238, SER 8) because it had already entered a final judgment (D.201, SER 13-14) and had denied Lucas' motion to set aside judgment (D.237, SER 9-12).

[22] For example, while Lucas asserts that "a party may withdraw an earlier invocation of the Fifth Amendment *during civil litigation*," Lucas Br. at 11

represented the defendants below, *e.g.*, Lucas Br. at 6, does not justify reversal because Lucas simply had no right to effective assistance of counsel in this civil suit. *Nicholson v. Rushen*, 767 F.2d 1426, 1427 (9th Cir. 1985).[23]

In any event, even if this Court were to consider Lucas' specific challenges to the litigation conduct of his former counsel, none would justify reversal. The district court did not abuse its discretion in denying Lucas' post-judgment motions that sought relief under Fed. R. Civ. P. 60(b) or Rule 60(d).[24] Notably, "attorney

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(emphasis added), Lucas only attempted to do so *after* the district court had decided the case on the merits.

[23] Instead, his complaints about Mr. Gilbert are more appropriately addressed through a legal malpractice suit. *See Latshaw,* 452 F.3d at 1101. Lucas filed a malpractice suit against Mr. Gilbert which is currently pending in California state court. *Lucas v. Gilbert*, No. 30-2010-00398827-CU-PN-CJC (Calif. Sup. Ct. Orange Ct. filed August 12, 2010). The FTC takes no position on Lucas' arguments that Mr. Gilbert should be held in contempt for inadequate representation or for failing to return Lucas' case files and pleadings. Lucas Br. at 2, 6, 7-8, 13. The FTC similarly takes no position on the district court's denial (D.238, SER 8) of Lucas' post-judgment motions to hold Mr. Gilbert in contempt. D.207, SER 781-787, D.214, SER 730-737. Lucas' assertion that Mr. Gilbert has no malpractice insurance, Lucas Br. at 6, is unsupported and, in any event, irrelevant to the issues in this appeal.

[24] *See* D.209 at 4, SER 760-769. Fed. R. Civ. P. 60(b)(1) permits a court to "relieve a party . . . from a final judgment," based on "mistake, inadvertence, surprise, or excusable neglect," while Rule 60(b)(6) allows such relief "for any other reason that justifies relief." Fed. R. Civ. P. 60(d)(3) permits a district court to "set aside a judgment for fraud on the court." The "fraud" for purposes of this provision must be that which "harms the integrity of the judicial process." *Appling,* 340 F.3d at 780.

error is insufficient grounds for relief under both Rule 60(b)(1) and (6) . . . ." *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1997) ("neither ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1)"); *Latshaw,* 452 F.3d at 1101, 1103-04 (no relief for "deliberate actions" of counsel, including "careless or negligent, attorney mistake," gross negligence, or even intentional attorney misconduct.). Lucas has provided no reasons for relief from the court's judgment, particularly where – given Lucas' background as an attorney – he "demonstrated a degree of sophistication which makes it improper to absolve [him] of all responsibility for the actions of [his] attorney." *Anderson v. Air West Inc.*, 542 F.2d 522, 526 (9th Cir. 1976).[25]

First, Lucas' argument that Mr. Gilbert entered into stipulations and admissions without Lucas' authorization, Lucas Br. at 6, 8, 10, 11, and that the district court improperly denied his post-judgment motions based on this argument

[25] Lucas was first admitted to the California bar in 1992, and was eligible to practice law during the time of Lucas Law Center's deceptive activities. He was disbarred in California in July 2011 based on his activities at the company. *See* The State Bar of California: Attorney Search: Paul Jeffery Lucas - #163076, http://members.calbar.ca.gov/fal/ Member/Detail/163076 (last visited October 3, 2011).

(D.209, SER 760-769; D.212, SER 747-754; D.214, SER 730-737), fails.[26] As his agent and counsel, Mr. Gilbert had the authority to bind Lucas to tactical litigation decisions, including whether to enter into stipulations or admissions of fact. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962); *Town of N. Bonneville v. Callaway*, 10 F.3d 1505, 1509 (9th Cir. 1993); *see also Magallanes-Damien v. INS*, 783 F.2d 931, 934 (9th Cir. 1986) (holding that clients are "generally bound by the conduct of their attorneys, including admissions made by them, absent egregious circumstances"). Indeed, Mr. Gilbert represented that he had given Lucas actual notice of the Stipulation of Facts before the stipulation was filed. *See* D.217 at 2, SER 635.

Lucas thus errs when he asserts that the district court's judgment is "void," because it was based on the stipulations and admissions. Lucas Br. at 10.[27] Rather,

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[26] The only stipulation about which Lucas could be complaining is the Stipulation for Admissions of Fact by Plaintiff and Defendants, D.126, SER 969-984. These stipulations mostly contained admissions of fact readily proven from defendants' own advertisements, web sites, and contracts. While Lucas also sought to set aside the Stipulations in Lieu of Deposition for himself and for defendants Betts and Sullivan, Lucas personally signed the stipulation for his own deposition, *see* D.130 at 2, SER 928, D.185-1 at 28-29, SER 818-819, as did the other defendants for their depositions, and Lucas had no standing to seek relief on behalf of the other defendants because he was not their counsel.

[27] Lucas is not assisted by the one case upon which he relies, *Lubben v. Selective Service System,* 453 F.2d 645, 649 (1st Cir. 1972). *Lubben* held that "[a] void judgment [for purposes of vacating a judgment under Fed. R. Civ. P. 60(b)(4)]

Lucas had given Mr. Gilbert, as his counsel, authority to enter into such stipulations on his behalf. This approach was consistent with Mr. Gilbert's litigation strategy designed to preclude the need for the FTC to seek potentially incriminating testimony from Lucas. Mr. Gilbert stated that Lucas' primary goal was to avoid becoming a defendant in a criminal prosecution. *See* D.217 at 4, SER 637.[28]

Second, and for similar reasons, Lucas cannot complain that the district court improperly denied his Motion to Withdraw 5th Amendment Defense (D.208, SER 770-780). Lucas Br. at 2, 8, 11. Indeed, Lucas acknowledged that he deliberately followed Mr. Gilbert's strategy of invoking his Fifth Amendment

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is one which, from its inception, was a complete nullity and without legal effect," and provides the example of an absence of subject matter jurisdiction. Here, of course, there is no question of jurisdiction. The district court's judgment was not "void," because it relied (in part) on defendants' stipulations and admissions. Rather, Lucas simply disagrees with its outcome.

[28] In any event, every material fact upon which the district court found Lucas liable for Lucas Law Center's deceptive conduct was supported by substantial uncontested facts (including consumer complaints and declarations, and defendants' business records) *independent* of Lucas' stipulations. See, e.g., D.143 at Facts 27-40, SER 870-873, D. 143 at Fact 84, SER 884, D.143 at Facts 103-104, SER 890, D.143 at Facts 132-138, SER 897-898. Thus, even if there was any question about the admissibility of the stipulations, the court's judgment should be affirmed. *See* Fed. R. Civ. P. 61 (error harmless unless affects party's "substantial rights"); *Ketchikan Pulp Co.*, 699 F.2d at 1307 (admission of challenged evidence was harmless because evidence was just "drop in the bucket in light of the substantial evidence of wrongdoing.")

privilege in order to avoid criminal prosecution. D.208 at 6-7, SER 775-776. Consistent with this strategy, Lucas asserted his Fifth Amendment privilege and refused to answer any questions posed to him at his deposition (which he signed), *see* D.130 at 2, SER 928, D.185-1 at 5-10, 28-29, SER 795-800, or to provide his individual financial statements. *See* D.59, SER 1188-1199, D.102, SER 51-73.

Lucas, particularly as a practicing attorney, should have been fully aware of the risks of asserting his Fifth Amendment right. Indeed, the case upon which he relies, Lucas Br. at 11, applied the well-established precedent that "[a] 'party who asserts the privilege against self-incrimination must bear the consequences of lack of evidence,' * * * and the claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation." *U.S. v. 4003-4005 Fifth Ave., Brooklyn, NY*, 55 F.3d 78, 83 (2d Cir. 1995).[29] Further, as with his stipulations, every fact supporting Lucas' liability is corroborated with evidence independent of any adverse inferences drawn from the assertion of his Fifth

[29] Mr. Gilbert stated that Lucas knew these risks: "Mr. Lucas understood that a civil judgment would result based upon the evidence, specially [sic] the information contained in his website, the tape recordings of his employees making representations to prospective clients obtained by the FTC, and the pattern of non compliance [sic] with refunds to clients until after the clients file complaints with the State Bar Office of Discipline and, or, [sic] the Better Business Bureau, among other evidence." D.217 at 4, SER 637.

Amendment right. D.143 at Facts 27-40, SER 870-873, D. 143 at Fact 84, SER 884, D.143 at Facts 103-104, SER 890, D.143 at Facts 132-138, SER 897-898.

Third, Lucas' assertion that Mr. Gilbert failed to respond sufficiently to the FTC's summary judgment motion, Lucas Br. at 6, also fails. As the district court held, Lucas "offer[ed] no specific facts to support his charge that Mr. Gilbert's opposition brief was not sufficient." D.237 at 3, SER 11. The FTC supported its motion with voluminous evidence, including Lucas' own emails to his staff and numerous consumer complaints, establishing that defendants failed to honor their money-back guarantee. Mr. Gilbert's response to the FTC's motion was certainly reasonable particularly given his desire to protect his client from criminal prosecution.

Finally, Lucas complains that he was denied "his fundamental right" to a jury trial and that Mr. Gilbert failed to assert this purported right on his behalf. Lucas Br. at 5, 6, 7. This argument also fails. There is simply no constitutional right to a jury trial under the Seventh Amendment when the FTC brings cases under Section 13(b) of the FTC Act seeking equitable relief. *See, e.g., FTC v. Verity Intn'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006); *FTC v. Think All Publ'g, LLC,* 564 F. Supp. 2d 663, 665 (E.D. Tex. 2008).

In sum, Lucas provided no reasons under Fed. R. Civ. 60(b) or 60(d) to

justify relief from the district court's final judgment. The district court thus did not abuse its discretion in denying such relief.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment below as to defendant Lucas.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, plaintiff-appellee Federal Trade Commission is unaware of any known related cases currently pending in this court. This court dismissed an earlier proceeding in this case on August 21, 2009, when it denied defendants' petition for writ of mandamus and motion to order preparation of transcripts on an expedited basis in *Betts, et al. v. United States District Court for the Central District of California*, No. 09-72443 (9th Cir. filed July 31, 2009).

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

STATUTORY ADDENDUM

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15 U.S.C.A. § 45

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in **section 57a(f)(3)** of this title, Federal credit unions described in **section 57a(f)(4)** of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [**7 U.S.C.A. § 227(b)**], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a) of this section, the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that–

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims

15 U.S.C.A. § 53

§ 53. False advertisements; injunctions and restraining orders

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe–

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public–

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under **section 1391 of Title 28**. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found

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