No. 12-55209

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee

DAVID KISSI,
Movant-Appellant

v.

COUNTRYWIDE HOME LOANS INC., *et al.*,
Defendants

On Appeal from the United States District Court
for the Central District of California
D.C. No. 2:10-cv-04193-JFW-SS

ANSWERING BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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STATEMENT OF JURISDICTION

The Federal Trade Commission ("Commission" or "FTC") initiated the underlying enforcement proceeding 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(a) 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 order entered January 18, 2012, rejecting the postjudgment filing of a nonparty. Appellants filed a notice of appeal on January 25, 2012, and that notice was timely pursuant to Fed. R. App. P. 4(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion by rejecting the nonparty appellants' filing nineteen months after the final consent judgment was entered and the case was closed.

2. Whether the nonparty appellants had standing to file this appeal where they showed no "extraordinary circumstances" justifying an appeal.

STATEMENT OF THE CASE

Nature of Case, Course of Proceedings, and Disposition Below

The FTC initiated the underlying action on June 7, 2010, to halt a scheme in which defendants, subsidiaries of Countrywide Financial Corporation ("Countrywide") engaged in unlawful mortgage servicing practices. The Commission's complaint alleged that defendants had violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a),[1] by marking up fees relating to a number of default-related services concerning mortgage loan defaults. The Commission also alleged that the defendants had engaged in unlawful practices in servicing loans for borrowers who were in Chapter 13 bankruptcy. D.1, SER 45-59.[2] On June 15, 2010, after the parties entered into a stipulated settlement, the district court entered a final Consent Judgment and Order ("Consent Order") in which it issued a permanent injunction and ordered $108 million in monetary relief. D.6, SER 20-44. The case was closed upon entry of the Consent Order. SER 61, 62 (docket sheet notations). In July 2011, a redress administrator began sending redress

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[1] Section 5(a) 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.

checks to thousands of consumers injured as alleged in the Commission's complaint.

Nineteen months after the case was terminated, *pro se* appellants David Kissi and Edith Truvillion ("the Kissis") – who were not parties in the case – filed a self-styled "Motion for Reconsideration." D.10, SER 19. The district court rejected the proffered motion and declined to file it, because the case was closed. *Id.* The Kissis purport to appeal that order.[3]

STATEMENT OF FACTS

We summarize briefly the facts of the underlying enforcement action, although they have limited bearing on the disposition of the present appeal. The Commission alleged that defendants Countrywide Home Loans, Inc. and BAC Home Loans Servicing, LP, both mortgage servicer subsidiaries of Countrywide, engaged in unlawful mortgage servicing practices, including charging customers inflated fees for certain default-related services performed by third-party vendors and charging fees for such services that were unnecessary. D.1 at 5-10, SER 49-54. The complaint also alleged that defendants made various misrepresentations

[3] The Kissis improperly attached various documents to their brief which should not be considered as they were not admitted below, lack foundation, and consist of hearsay. Documents not part of the clerk's record are not part of the record on appeal. *See* Fed. R. App. P. 10(a); *Kirshner v. Uniden Corp. of America,* 842 F.2d 1074, 1077 (9th Cir. 1988); *United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979).

about their mortgage loans to borrowers who were in Chapter 13 bankruptcy. D.1 at 10-11, SER 54-55. The complaint charged that these practices constituted deceptive or unfair acts in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). D.1 at 11-13, SER 55-57.

The parties submitted a proposed Consent Order, D.2, which the court entered on June 15, 2010. D.6, SER 20-44. The Consent Order, *inter alia*, permanently enjoined defendants from engaging in certain business practices "in connection with the Servicing of any Loan in default or Chapter 13 Bankruptcy," and imposed other loan servicing and bankruptcy servicing requirements. D.6 at 6-15, SER 25-34. The Consent Order also imposed $108 million as monetary relief "to remedy the violations of law alleged by the FTC," and required that those funds "be deposited into a fund administered by the Commission or its agent to be used for equitable relief for consumers whose Loans were serviced by Defendants prior to their acquisition by Bank of America, including but not limited to consumer redress . . ." D.6 at 15-16 (¶ XIII), SER 34-35. Defendants were required to provide "all information reasonably required to administer redress." D.6 at 17-18 (¶ XIV), SER 36-37. The court retained jurisdiction of the case "for purposes of construction, modification, and enforcement of this Order," D.6 at 23 (¶ XX), SER

42, but the case was otherwise "terminated." *See* SER 61, 62 (notations on docket sheet).

In July 2011, the Redress Administrator sent redress checks to consumers whose loans were serviced by Countrywide between January 1, 2005 and July 1, 2008, and who were subject to the company's allegedly unlawful practices. *See* "FTC Returns Nearly $108 Million to 450,000 Homeowners Overcharged by Countrywide for Loan Servicing Fees," Federal Trade Commission (July 20, 2011), http://www.ftc.gov/opa/ 2011/07/countrywide.shtm. Neither the Kissis nor their home address were included in the list of eligible redress recipients obtained from the defendants.

On January 18, 2012, the Kissis sought to file a "Motion for Reconsideration." D.10, SER 19. The court clerk issued a "notice of document discrepanc[y]," indicating that the "[c]ase is closed," pursuant to which the court ordered the Kissis' motion be "rejected" and returned to the Kissis without filing. *Id.* On January 25, 2012, the Kissis noticed their appeal. D.11, SER 14-18.[4]

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[4] On March 22, 2012, more than two months after the Kissis noticed their appeal, the district court approved and entered a Supplemental Consent Judgment and Order ("Supplemental Order"). D.15, SER 1-13. The Supplemental Order resolved the FTC's allegations that defendant BAC Home Loans had violated the Consent Order by, *inter alia,* assessing against homeowners between June 17, 2010 and June 30, 2011, more than $36 million in improper fees for title and other default-related services that were illegal or not authorized under their loan documents, and by charging fees for title services that were not clearly disclosed in

SUMMARY OF ARGUMENT

This appeal should be dismissed because the district court properly rejected the Kissis' filing made over nineteen months after the case was closed. (Part I) In any event, the Kissis' claims are patently without merit because, as nonparties, they lacked standing to file their motion below and this appeal. (Part II)

STANDARD OF REVIEW

This Court reviews a district court's "inherent power" to manage its docket for abuse of discretion. *S. California Edison Co. v. Lynch*, 307 F.3d 794, 807 (9th Cir. 2002) (citation omitted). The Court reviews whether an appellant has standing *de novo*. *See Mortensen v. County of Sacramento*, 368 F.3d 1082, 1086 (9th Cir. 2004).

ARGUMENT

I. THIS APPEAL MUST BE DISMISSED BECAUSE THE KISSIS FILED THEIR MOTION WHEN THE CASE WAS CLOSED

The Kissis filed their self-styled "Motion for Reconsideration" more than 19 months after the Consent Order was entered. The court properly "rejected" the

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its fee schedule. Based on the defendant's representation that it had refunded or reversed $28 million, the Supplemental Order required it to pay an additional $8 million to compensate consumers for losses resulting from defendants' alleged violation of the Consent Order. D.15 at 5-6 (¶ I), SER 5-6.

Kissis' filing, and returned it to them without it being filed, because the case was closed at the time of filing. D.10, SER 19.

It is well established that "district courts have the inherent authority to control their dockets," *United States v. W.R. Grace,* 526 F.3d 499, 509 (9th Cir. 2008) (citation omitted); *Lynch*, 307 F.3d at 807, including managing their caseload in order "to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citation omitted). The district court's June 15, 2010 Consent Order that implemented the parties' agreement was a "final judgment," *see Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004); *Gilmore v. People of the State of California*, 220 F.3d 987, 1000 and n.17 (9th Cir. 2000), and as such effectively terminated the litigation. *See* SER 61, 62 (notations on the district court docket sheet indicating that case was "closed" and "[t]erminated").

The district court's order rejecting the Kissis' filing was undoubtedly proper given the substantial amount of time that had elapsed since the case had closed, particularly where the Kissis were not parties to the case.[5] Indeed, the Kissis filed

[5] Fed. R. Civ. P. 60(b) permits *parties* to move for relief from a final judgment on certain grounds, although even in that context the party must file their motion either within a year of the judgment or "within a reasonable time" (depending on which Rule 60(b) provision is invoked). Here, not only are the Kissis nonparties, but their filing more than year and half after the Consent Order was entered was most certainly unreasonable.

their motion nearly six months *after* consumers began receiving redress checks from the redress administrator. Further, as nonparties, the Kissis' filing was not for one of the limited purposes for which the court retained jurisdiction over the case. *See* D.6 at 23 (¶ XX), SER 42 (jurisdiction retained "for purposes of construction, modification, and enforcement of this Order."). Opening the case to consider the Kissis' motion on the merits could have prejudiced the parties to the litigation or other claimants, or adversely affected the proceeding, and the Kissis provide no reason for filing their motion so late. *Cf. Ahanchian v. Xenon Pictures, Inc*., 624 F.3d 1253, 1261 (9th Cir. 2010) (applying four-factor equitable test to determine if a party's late filing could be excused under Fed. R. Civ. P. 60(b)(1)).

The court thus acted fully within its authority to manage its docket and to dispose of its cases expeditiously by rejecting the Kissis' late-filed motion. Because their filing was improper, *a fortiori* they had no right to a hearing in support of that motion.[6]

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[6] None of the authority cited by the Kissis supports their arguments that the court should have considered their motion and granted a hearing. *See* Appellants' Brief ("App. Br.") at 2, 3. Md. Code Regs. Rule 2-311(f) (2012) provides for hearings on motions in Maryland state proceedings, but is irrelevant to this case. The Fourth Amendment to the U.S. Constitution protects individuals from, *inter alia*, "unreasonable searches and seizures," but likewise is irrelevant to whether the Kissis deserve a hearing. Other cited authority discuss the standards applied under Fed. R. Civ. P. 8(a) or 12(b)(6), but do not support the Kissis' arguments.

II. THE KISSIS WERE NONPARTIES WHO LACKED STANDING TO FILE THEIR MOTION OR THIS APPEAL

Even if the Kissis had filed their motion before the underlying case had been closed, it would necessarily have been rejected on the merits. In *Citbank Int'l v. Collier-Traino, Inc*., 809 F.2d 1438, 1439-40 (9th Cir. 1987), this Court held that a nonparty bank lacked standing to file a postjudgment motion to vacate a judgment, and to appeal the district court's refusal to consider that motion, applying the same standards for both. Under those standards, a nonparty has standing "only in exceptional circumstances" where 1) it participated in the proceedings below, and 2) the equities favor hearing the appeal. *Citibank Int'l,* 809 F.2d at 1441; *Lynch*, 307 F.3d at 804 (citation omitted); *see, e.g.*, *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113-14 (9th Cir. 1999) (nonparty investor had standing to appeal Receiver's distribution order where he participated extensively in proceeding for several years, fully documented investments, formally objected to Receiver's distribution plan, and appeared *pro se* at hearing); *SEC v. Wencke*, 783 F.2d 829, 834-35 (9th Cir. 1986) (nonparty shareholder had standing to appeal a district court's disgorgement order where he had participated extensively in district court's case and the equities favored appeal).

Here, the Kissis were not parties in this litigation, which was a public law enforcement action filed by the FTC, and they cannot show any "exceptional

circumstances" to permit their appeal. They did not participate in the proceeding below in any capacity before they filed their motion. They did not seek to intervene under Fed. R. Civ. P. 24, which in any event would have been very unlikely to succeed as courts have routinely denied intervention by consumers finding that the FTC adequately protects their interests. *See, e.g.*, *FTC* v. *First Capital Consumer Membership Services, Inc*., 206 F.R.D. 358, 365-66 (W.D.N.Y. 2001) (denying motion of creditor, standing in the shoes of consumers, to intervene). The Kissis had no private right of action under FTC Act Section 5. *N.J. Wood Finishing Co. v. Minnesota Mining and Manuf. Co.,* 332 F.2d 346, 352 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965). They do not assert that their motion was filed for the limited purposes for which the district court retained jurisdiction. *See* D.6 at 23 (¶ XX), SER 42 (jurisdiction retained "for purposes of construction, modification, and enforcement of this Order."). They never filed their own independent action against defendants seeking relief.

Further, the equities do not favor hearing their appeal. Perhaps most importantly, they fail to show that they had any colorable claim to redress here. The $108 million judgment used for consumer redress was limited "to remedy the violations of law alleged by the FTC" in its complaint. D.6 at 15, SER 34. The Kissis make no showing or even argue that they were injured by inflated fees

assessed in connection with default-related services by the defendants between January 1, 2005 and July 1, 2008, or that they were in Chapter 13 bankruptcy during the relevant period.[7]

Instead, the Kissis appear to confuse this case with two other government settlements to resolve charges that banks and mortgage loan servicers engaged in a variety of illegal mortgage lending and servicing practices.[8] They also appear to

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[7] While the Kissis attach the Supplemental Order to their brief, their notice of appeal was based on the district court's rejection of their motion filed approximately two months *before* the Supplemental Order was entered, and when only the original Consent Order was in effect. In any event, the Kissis make no showing that they were injured by the defendants' violation of the original Consent Order between June 17, 2010 and June 30, 2011, that led to the monetary judgment in the Supplemental Order, nor do they cite any particular provisions in the Supplemental Order for which they allege they were injured and deserve redress.

[8] For example, the Kissis argue that they should be included in a purported "Global Settlement" "reached between BOA et al and the USA et al," and they caption their brief as one "To Justify Why They Should Be Included in The Global Mortgage Settlement Between USA et al and Bank of America et al." App. Br. at 1, 2. They may be referring to the settlement in *United States v. Bank of America Corp.*, 1:12-cv-361-RMC (D.D.C. filed March 14, 2012), the largest federal-state civil settlement ever obtained, in which Bank of America and the other four largest mortgage loan servicers agreed to a $25 billion settlement to resolve allegations of mortgage loan servicing and foreclosure abuses and fraud. *See* "25 Billion Mortgage Servicing Agreement Filed in Federal Court," Department of Justice (March 12, 2012), http://www.justice.gov/opa/pr/2012/ March/ 12-asg-306.html. Indeed, Bank of America is not even a defendant in the instant case. The Kissis also argue that they deserve redress because they were "threatened with foreclosure" and "charged high interest rates" merely because they are Black. App. Br. at 1, 2. This assertion mirrors charges brought and settled by the Department of Justice in December 2011 in its $335 million settlement – the largest residential fair lending settlement in history – to resolve widespread

assert they are eligible for redress here based on a $3 million claim they filed in a state court action against the defendants for "fraud," App. Br. at 2, 3, which is likewise irrelevant to this case.[9] In sum, the Kissis fail to show any "extraordinary circumstances" necessary to support their standing to appeal.

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allegations of lending discrimination by Countrywide and its subsidiaries against more than 200,000 African American and Hispanic borrowers. *See United States v. Countrywide Financial Corp*., No. CV-11-10540-PSG (C.D. Cal. filed December 21, 2011).

[9] The Kissis attach to their brief the complaint in *Kissi, et al. v. Bank of America/Country Wide, et al.,* No. CAL 12-09927 (Md. Pr. George's Ct. Circuit Ct., filed April 3, 2012), that was removed to federal court on April 30, 2012, and dismissed on June 27, 2012. *See Kissi, et al. v. Bank of America/Country Wide, et al.,* No. 8:12-cv-01322-JFM (D. Md). In its dismissal memorandum, the court noted that "Plaintiff [Kissi] has filed over 85 civil cases beginning in 1991 throughout the country. In this action he has not stated any facts that state a plausible claim for relief," and barred Kissi from amending his complaint due to his "long history of vexatious litigation in which he has engaged . . ." *Id.*

CONCLUSION

For the foregoing reasons, the Court should dismiss the Kissis' appeal.

Respectfully submitted,

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Signature s/ Michael D. Bergman

Attorney for Plaintiff-Appellee Federal Trade Commission

Date Aug 1, 2012

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, plaintiff-appellee Federal Trade Commission is not aware of any known related case pending in this Court.

Date: August 1, 2012

s/ Michael D. Bergman
Attorney
Federal Trade Commission

9th Circuit Case Number(s) 12-55209

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