NO. 16-16524-AA

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

LANIER LAW, LLC, *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO. 3:14-CV-00786-MMH-PDB
(HON. MARCIA MORALES HOWARD, U.S. DISTR. J.)

ANSWERING BRIEF FOR THE FEDERAL TRADE COMMISSION

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, 26.1-2 and 26.1-4, plaintiff-appellee Federal Trade Commission hereby certifies that the following persons or entities are known to have an interest in the outcome of this appeal:

Abyad, Imad, *FTC Attorney*

Burns, Anna, *FTC Attorney*

Cohen, Aaron, *Liquidating Agent*

Faughnan, Catherine, *Attorney for Edward Rennick*

Fortress Law Group, LLC, *Defendant-Appellant*

Federal Trade Commission, *Plaintiff-Appellee*

Howard, Hon. Marcia Morales, *U.S. District Judge*

Kirtz, Harold, *FTC Attorney*

Lanier, Michael W., *Defendant-Appellant*

Lanier Law LLC, *Defendant-Appellant*

Liberty & Trust Law Group of Fla., LLC, *Defendant-Appellant*

Marcus, Joel, *FTC Attorney*

Metzler, Theodore (Jack), *FTC Attorney*

Mateo, Marcela C., *Assistant U.S. Attorney*

Redstone Law Group, LLC, *Defendant*

Rennick, Edward William III, *Defendant*

Robles, Rogelio, *Defendant-Appellant*

Sinasohn, Gideon, *FTC Attorney*

Stanko, Brandon, *Attorney for Rogelio Robles*

Further, the Federal Trade Commission certifies that no known publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Like appellant Michael Lanier, the Federal Trade Commission believes that oral argument is unnecessary in this case. It involves no legal issues that have not been settled in this Court, and no material facts in genuine dispute. The facts and legal issues are fully set out in the district court's exhaustive opinion, and in the parties' appellate briefs.

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STATEMENT OF JURISDICTION

The Federal Trade Commission (FTC) disagrees with appellant's statement of jurisdiction (Br. x).

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345; 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b); and 12 U.S.C. § 5538(a)(3).[1] The district court entered its summary judgment decision on July 7, 2016 (D.281, hereinafter "Op."), and entered its Final Order for Permanent Injunction and Monetary Judgment (D.292, hereinafter "Final Order") on August 12, 2016.

On October 10, 2016, Michael Lanier filed a notice of appeal on behalf of "Defendant, Lanier Law, et al." Neither the caption nor the

[1] The FTC brought this action against Michael Lanier and others pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b), 57b; the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 *et seq.* (Telemarketing Act); and Section 626 of the 2009 Omnibus Appropriations Act, Pub. Law 111-8, 123 Stat. 524, 678 (Mar. 11, 2009) (2009 Omnibus Act), *as clarified by* Section 511 of the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. Law 111-24, 123 Stat. 1734, 1763-64 (May 22, 2009) (Credit Card Act), and *amended by* Section 1097 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law 111-203, 124 Stat. 1376, 2102-03 (July 21, 2010) (Dodd-Frank Act), 12 U.S.C. § 5538, for violating Section 5 of the FTC Act, 15 U.S.C. § 45; the Telemarketing Sales Rule, 16 C.F.R. Part 310; and the Mortgage Assistance Relief Services Rule, 16 C.F.R. Part 322, *recodified as* Mortgage Assistance Relief Services (Regulation O), 12 C.F.R. Part 1015.

body of the notice of appeal referenced Michael Lanier as a party-appellant. The notice stated: "The several law firms included as appellants are defendant law firms under which Michael W. Lanier, Esq. practices as a sole practitioner and was their sole principal."

On November 29, 2016, after this Court denied Michael Lanier's application for membership to its bar and rejected his appearance as counsel on behalf of his law firms, Lanier filed an "Amended Notice of Appeal" on behalf of "Defendant, Michael W. Lanier, Esq, individually." This amended notice expressly stated that "Lanier's initial Notice of Appeal (Doc. 303) had listed Lanier's law firms as Appellants." D.309.

On April 27, 2017, after requesting and reviewing the parties' positions on whether it has jurisdiction over this appeal, this Court ruled that the November 29, 2016, notice of appeal is "untimely." But it reserved for later consideration the issue of "whether the original notice of appeal filed on October 10, 2016, is effective to perfect an appeal on behalf of Michael Lanier in his personal capacity." As we show below (Argument § I), the October 10, 2016, notice of appeal is ineffective to perfect Lanier's own appeal. This Court is thus without jurisdiction in this case, and Lanier's appeal should be dismissed.

ISSUES PRESENTED FOR REVIEW

The FTC sued Michael Lanier and others for operating a mortgage relief scam that duped consumers into paying thousands of dollars in advance fees in exchange for false promises of significant reductions in the consumers' mortgage obligations. Following discovery, the FTC moved for summary judgment. It relied in part on scores of declarations from victims of defendants' scheme. It also relied on declarations from attorneys recruited by Michael Lanier, ostensibly as local counsel, to circumvent an order of the Florida Supreme Court that suspended his law license in connection with his deceptive mortgage relief operation. In response, Lanier did not directly deny any part of the FTC's statement of undisputed facts. The district court granted the FTC summary judgment. The issues on review are:

1. Whether Michael Lanier properly invoked the appellate jurisdiction of this Court to review the district court's final judgment.

2. Whether the district court was correct to consider the FTC's proffered declarations, which contained admissible testimony.

3. Whether the district court rightly granted the FTC's motion for summary judgment.

STATEMENT OF THE CASE

A. Rules and Statutes Governing Mortgage Relief Services

The 2008 housing and financial markets crisis left millions of consumers in dire financial straits and in serious fear of losing their homes to foreclosure. The U.S. Government responded by initiating a series of measures, such as the Home Affordable Modification Program and the Home Affordable Foreclosure Alternatives Program, to reduce the financial burden on those affected by that economic calamity. *See Mortgage Assistance Relief Services*, 75 Fed. Reg. 75,092, 75,093-94 (Dec. 1, 2010). Congress then enacted legislation (including parts of the 2009 Omnibus Act, the Credit Card Act, and the Dodd-Frank Act, *see supra* note 1) to provide consumers with additional protections in the financial products and services sector. Congress also authorized the FTC to promulgate a rule regarding unfair and deceptive practices involving mortgage loan modification and foreclosure rescue services. 75 Fed. Reg. at 75,093. On December 1, 2010, the FTC promulgated its Mortgage Assistance Relief Services (MARS) Rule, 16 C.F.R. Part 322. *See* 75 Fed. Reg. 75,092. That rule is now known as "Regulation O" and

is codified at 12 C.F.R. Part 1015; we refer to it as the MARS Rule (Regulation O).[2]

The MARS Rule (Regulation O) prohibits sellers and providers of MARS from making certain representations or engaging in deceptive conduct, 12 C.F.R. § 1015.3; requires providers to make some specified disclosures, *id.* § 1015.4; bars the collection of advance fees for MARS, *id.* § 1015.5; prohibits aiding or abetting others in violating the Rule, *id.* § 1015.6; and imposes on providers various recordkeeping and compliance requirements, *id.* § 1015.9. Attorneys who provide MARS "as part of the practice of law" may be exempt from the MARS Rule if they satisfy specified conditions that include compliance with state laws and regulations, including law licensing regulations. *Id.* § 1015.7.[3]

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[2] The Dodd-Frank Act transferred the rulemaking authority under the 2009 Omnibus Act from the FTC to the newly formed Consumer Financial Protection Bureau (CFPB). The CFPB then re-codified the FTC's MARS Rule as its own "Regulation O." The FTC has concurrent authority with the CFPB to enforce the MARS Rule, 12 U.S.C. § 5538(a)(3)—in addition to its general direct authority to regulate unfair or deceptive acts or practices, including by attorneys, pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45. *See infra* 55-56.

[3] The district court concluded that defendants here did not qualify for the MARS Rule attorney exemption. Op. 69; *see infra* 25-26. Lanier does not challenge that aspect of the court's decision on appeal.

Violations of the Rule constitute unfair or deceptive acts or practices under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). 12 U.S.C. § 5538(a)(1); 15 U.S.C. § 57a(d)(3). *See supra* note 2.

From 2011 through 2014, the defendants in this case provided mortgage assistance relief services covered by the MARS Rule (Regulation O) and other rules. Defendants lured consumers by promising them that, in return for upfront fees (expressly unlawful under the governing rules) ranging typically from $1000 to $4000, defendants would negotiate on their behalf with mortgage holders to secure more affordable monthly payments, lower interest rates, and even reduced principal balances. Defendants reaped over $13 million from their scheme, but for the vast majority of their customers, the promises of substantial mortgage relief were empty. The district court found that the defendants acted as a "deceptive" common enterprise, with Michael Lanier "squarely at the center." Op. 74.

The FTC sued Michael Lanier, a Florida attorney, his law firms Lanier Law, LLC, and Liberty & Trust Law Group of Florida, LLC,[4]

[4] Lanier is the sole principal of both Lanier Law—which did business as Fortress Law Group, Redstone Law Group, Vanguard Law Group,

and his associates,[5] for violating the FTC Act, the Telemarketing Sales Rule, 16 C.F.R. Part 310 (TSR), and the MARS Rule (Regulation O). *See, supra*, note 1. The complaint alleged that the defendants violated the statute and rules by, among other things, misrepresenting their ability to obtain mortgage modifications that would substantially reduce consumers' loan obligations or help them avoid foreclosure; charging consumers advance fees for MARS; failing to include in their communications with the general public and with their customers legally required disclosures; initiating outbound telephone calls in violation of the TSR; and failing to pay the required fees to access the National Do-Not-Call list administered by the FTC, as required by the TSR. *See* Amended Complaint for Permanent Injunction and Other Equitable Relief (D.91) ¶¶33-66.

B. The FTC's Motion for Summary Judgment

After discovery, the FTC filed a motion for summary judgment (D.246). The motion was supported with documentary evidence from

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and The Law Offices of Michael W. Lanier—and Liberty & Trust Law Group. Op. 8-9.

[5] The complaint named Rogelio Robles, Edward Rennick, and their corporations Surety Law Group, LLP, Fortress Law Group, PC, and Redstone Law Group, LLC.

defendants' own records; defendants' deposition testimony and interrogatory answers; and affidavits of the FTC investigators who searched defendants' business premises, their business and banking records, and their websites.

This extensive evidence showed that defendants acted as a common enterprise and marketed MARS to consumers via direct telemarketing, on their websites, and with mailings. D.246 ¶¶12-26, 44-70. The documentary evidence also showed that defendants failed to properly disclose to consumers that they were not affiliated with the government or with any lender or servicer; that the lender could refuse to modify the loan; that consumers had the right to refuse any offer of relief that defendants obtained from lenders; and that defendants can request payment of fees only once the consumer accepted an offer that defendants obtained on their behalf from a lender. *Id.* ¶¶32-36. Finally, this evidence showed the amount of money that defendants collected from consumers via their deceptive scheme. *Id.* ¶107.

The FTC also supported its motion with declarations from scores of defendants' customers. *See* PX2-PX25 (D.6-10–D.6-33), PX301-PX338 (D.246-8–D.246-11). Each declaration recited that the declarant would

testify at trial on the matters set forth in the declaration. Each provided information about defendants' promises of substantial reductions in the customer's mortgage payments, interest rates, or principal amounts; and about defendants' promises of performing audits of customers' loan documents to extract better mortgage terms from their lenders. D.246 ¶¶27-30. The customers also recounted how they never received any mortgage modifications, despite paying the defendants thousands of dollars in up-front fees. *Id.* ¶¶31, 40-41. This evidence showed that defendants' misrepresentations were material to the customers' decisions to pay the fees and that defendants' failure to keep their promises harmed the victims. *Id.* ¶¶37-39.

Finally, the FTC proffered declarations from several lawyers, *see* PX400-PX406 (D.246-12), who unwittingly became a part of defendants' scheme after being recruited by Lanier himself to form a network of *of counsel* attorneys, ostensibly to carry out the local functions of the loan modification process in their respective jurisdictions. D.246 ¶¶64, 98. Like the consumers, the lawyers' declarations stated that they would testify at trial on the matters in the declarations. The lawyers stated that, in fact, they did minimal, if any, work for the defendants; that

they had no direct contacts with their supposed clients (defendants' customers); and that their contributions amounted to little more than ensuring that some documents were signed and dated, and apparently having their names appended to some documents that defendants sent to customers and lenders—with no substantive input (or even authorization) from those attorneys. D.246 ¶¶74-79, 83-90.

This voluminous evidence went effectively unchallenged. Lanier's response to the FTC's motion was styled as an "affidavit," *see* D.253, 264, but instead of providing disputed facts, it mainly comprised legal arguments concerning the FTC's use of declarations to support its motion and Lanier's purported exemption from the requirements of the MARS Rule by virtue of his status as an attorney. *See* D.253, at 5-6, 14; D.264. In reference to the FTC's proffered statement of undisputed facts, Lanier's affidavit contained only the type of general denials and conclusory factual assertions typically found in the answer to a complaint. For example, Lanier stated: "I specifically deny any and every allegation of wrongdoing in the Amended Complaint, either alone or in concert with anyone else." D.253, at 5. Lanier also questioned the veracity of the FTC declarants (his customers, the *of counsel* attorneys,

and the FTC's investigators), but offered no evidence whatsoever to support his naked challenges. D.253, at 16, 20-26.

C. The District Court's Findings and Conclusions

The district court granted the FTC's motion for summary judgment, in an exhaustive 78-page opinion (D.281),[6] and entered its Final Order (D.292) against Lanier and his co-defendants.[7]

1. *Lanier's Central Role in Defendants' Common Enterprise*

As relevant to this appeal, the district court found that Lanier, a Florida-licensed attorney, offered MARS to consumers nationwide via a number of fictitious entities, including Fortress Law Group, Redstone Law Group, Vanguard Law Group, and The Law Offices of Michael W.

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[6] The court also denied Lanier's motion for partial summary judgment (D.248), in which he sought to blame his *of counsel* attorneys for any inadequate representation of his customers. The court found that the *of counsel* attorneys had no substantive role in the loan modification scam; that Lanier had instructed them upon hiring that they had no fiduciary duties to his customers; and that the defendants in fact impeded contact between the *of counsel* attorneys and Lanier's customers. Op. 40-42.

[7] Following the FTC's settlement with Rennick and his corporate entities, and this Court's dismissal of the appeals of other defendants for want of prosecution (*see* CA11 Orders of December 20, 2016, and January 12, 2017), Michael Lanier is the only remaining defendant in this case.

Lanier (all "doing/business/as" names for his Florida law firm, Lanier Law, LLC). Op. 8-9. His co-defendants initially provided staffing for his MARS operation under contracts with Lanier. Op. 9-10. But, "after they 'figured out that there was a way that a nonattorney could own a law firm out of DC'," Op. 12 (quoting PX201 (Robles Depo.) (D.246-1), at 32), Lanier and his co-defendants set up District of Columbia entities (Fortress Law Group, LLP; Redstone Law Group, LLP; and Surety Law Group, LLP), which purported to be D.C. law firms but "were merely 'virtual offices'," for their Florida operations. Op. 11-12.

Lanier Law and the D.C. entities "utilized a substantially similar business model." Op. 15. They "operated as 'law firms'." *Id.* They did this by having one attorney as a member or partner in the firm and entering into agreements with "*of counsel*" attorneys in other states to "expand their operations to those states." *Id.* Lanier "found and hired these attorneys." *Id.* The *of counsel* attorneys acted as "independent contractors." Op. 16. Lanier's law firms paid them a monthly retainer of $150-300, for 3-6 "billable hours," then at the rate of $75 per hour for additional work. *Id.* But "the work they actually performed on behalf of the law firms was very limited." Op. 17.

Lanier used the D.C. "law firms" and *of counsel* network to circumvent an order of the Florida Supreme Court that suspended his law license in connection with the same MARS scam at issue in this case. *See* PX1A_252-265 (D.6-7). Following complaints from consumers and others concerning the deceptive MARS offerings of his law firm, Lanier Law, the Florida Bar charged Lanier with unauthorized practice of law, failure to supervise non-attorney staff, sharing fees with non-attorneys, and improper solicitation practices. Op. 11; PX1A_237-250 (D.6-7). Lanier consented to two of these charges: the failure to supervise and improper solicitation. PX1A_252-262 ¶¶O, T, BB, RR, ZZ (D.6-7). Thus, on July 24, 2013, the Florida Supreme Court suspended Lanier from the practice of law for forty-five days, commencing August 23, 2013. Op. 11; PX1A_264 (D.6-7). On October 31, 2013, Lanier formed his other Florida law firm, Liberty & Trust Law Group, *see supra* note 4, and resumed his MARS operations. Op. 11.[8]

[8] Lanier and his co-defendants set up the D.C. entities in late 2012, after the Florida Bar began investigating Lanier Law's practices, in December 2011, but just before it filed its complaint against Lanier on November 5, 2012. Op. 11.

Lanier played a central role in the operations of the D.C. entities. He was a partner in one of these entities for a period of time and an authorized representative for another. Op. 12-14. He claimed that he transferred his non-Florida clients to the D.C. entities, but no client files were physically transferred, PX202_73:7-9 (Rennick Depo.) (D.246-1), and the same employees who handled those customers before the alleged transfer continued to handle them afterwards—even using the same computer server and database. Op. 12-14; PX200_24:17-20 (Lanier Depo.) (D.246-1). Defendants continued to use Lanier's own MoneyGram and credit card Merchant Account portals to collect customer payments for the D.C. entities, as they had for the Lanier law firms. Op. 13-14. And Lanier himself continued to oversee the *of counsel* network on behalf of the D.C. entities, including attorney recruitment, compensation, and termination. Op. 14.

The district court also found "ample undisputed" evidence that defendants operated as a common enterprise. Op. 43. Lanier owned defendants Lanier Law and Liberty & Trust Law Group, and briefly shared ownership of D.C.'s Redstone Law Group. He used non-party entities, owned by his co-defendants, to staff his MARS operation, and

conceded his supervisory authority over those entities to the Florida Bar. Op. 43. Defendants had "numerous employees in common"; shared offices, marketing material, and commingled funds; and some *of counsel* attorneys signed their agreements with all defendant law firms. Op. 44-48.

Thus, the court concluded, defendants "were operating as a single common enterprise controlled primarily by Rennick, Robles, Lanier and Young." Op. 49; *see also id.* at 74 ("the evidence places Lanier and Robles squarely at the center of this deceptive enterprise").

2. *Defendants' Marketing of MARS Offerings*

Defendants used various means to lure consumers to their scam, including solicitation flyers, websites, and direct telemarketing, including placing calls to consumers whose phone numbers were registered on the National Do-Not-Call list. Op. 23-25. Many consumers, the court found, were enticed by flyers with "the appearance of an official government notice," entitled "Economic Stimulus Mortgage Notification." Op. 25; *see, e.g.*, PX311_Att. A (D.246-8) (2012 version); PX324_Att. A (D.246-10) (2013 version). The flyers generally began with the following:

> You are hereby notified that the property located at [specific address] has been pre-approved for a special program by the Government Insured Institutions. In addition, this property is prequalified for an Economic Advantage Payment or Principle [*sic*] Reduction Program, designed to bring your house payments current for less than you owe or your principal balance down.

Op. 25 (quoting PX13_Att. A). The flyers urged consumers to contact their "Non Profit Housing Counseling Organization for your county," by calling a phone number, which connected callers to the defendants. Op. 25-26. They touted "savings" such as "*Reduced Principal Interest Payments*," "*Loan Payment Reduction*," and "*Delinquent Mortgage Payment Assistance*." *Id.* (quoting PX13_Att. A). Many of these flyers identified the sender as the Department of Loss Mitigation and Forensics (DOLMF), an entity owned by defendant Robles, which provided staffing and processing services to Lanier. Op. 10, 26.

The flyers contained varying forms of purported disclaimers, but the district court found these disclaimers insufficient to cure the initial misrepresentations to consumers. Op. 54. Many were vague or confusing; others appeared only in fine print. One flyer noted, for example, that the sender "is independent of all government agencies," but also stated that "[t]hese programs may require the use of

Government Insured Funds." Op. 26 (quoting PX13_Att. A). Other flyers omitted the reference to the consumer's "Non Profit Housing Counseling Organization." Op. 26 n.28. Yet others noted, in fine print, that defendants' offer "has not been approved or endorsed by any government agency," and that the flyer "is not a notice from your Lender." *Id.* (quoting PX324_Att. A). Notwithstanding the disclaimers, the court concluded, "everything about this Flyer is deceptive and misleading." Op. 52.[9]

Lanier and his co-defendants also used their *of counsel* network to market their MARS offerings nationwide by promising consumers legal representation through local counsel. Some of their flyers noted, for example, that their law firm "has working arrangements with experienced and competent lawyers and law firms in many other states * * *. Those lawyers * * * usually assume primary responsibility for each client's case, and may be assisted by [defendants' law firm's]

[9] Lanier denied drafting, approving, or sending the flyers, but the court found that denial insufficient to create a genuine dispute. As he conceded in his Florida Bar plea for consent judgment, PX1A_252-262 (D.6-7), Lanier was responsible for the activities of entities such as DOLMF and the other defendants that commissioned and used the flyers to solicit customers on his behalf. Op. 27, 25 n.27.

counsel, with the client's consent." Op. 26 n.28 (quoting PX300_183; PX18_Att. A). But Lanier's own arrangements with the *of counsel* attorneys belied such representations. Lanier contracted for merely "reviewing files 'to see that they were properly completed, signed and dated,' with 'no litigation, no court appearances, and no legal research'." Op. 18 (quoting PX402_¶4 (*of counsel* attorney declaration)). And even when the *of counsel* attorneys were asked, on occasion, to review pleadings—which Lanier's customers would be filing *pro se*—their review "was largely editorial, correcting typographical errors, grammar, syntax and formatting." Op. 19.[10]

3. *Consumer Declarations Concerning Defendants' Deceptive Sales Pitch*

The FTC proffered scores of consumer declarations documenting "promises and guarantees regarding substantial modifications to a consumer's loan." Op. 51; *see* PX2-PX25 (D.6-10–D.6-33), PX301-PX338

[10] Likewise, defendants employed D.C. attorneys to set up their D.C. entities, nominally as law firm members or partners. *See supra* 12-13. But those lawyers were not involved in defendants' MARS scheme. Op. 21. Indeed, one of them testified that a signature purporting to be his on several documents was, in fact, "not his actual signature and those documents were not reviewed or signed by him." Op. 23; *see* PX203_66, 79-81, 126-28 (D.246-1) (Kane Depo.).

(D.246-8–D.246-11). The district court "thoroughly reviewed" these declarations, and found that the consumers recounted "similar experiences" with defendants or their representatives and described "conversations with salespersons which were replete with misrepresentations." Op. 27 & n.30.

Typically, a consumer would have an initial phone conversation with one of defendants' employees or agents (such as the so-called Department of Loss Mitigation and Forensics), who would tell the consumer that one of defendants' law firms (Lanier Law or one of the D.C. entities) "could obtain a loan modification for the consumer with significantly lower payments and a lower interest rate," and "could get the consumer a reduction in principal, removal of fees, or amounts past due wiped away." Op. 28.[11] Some consumers were "promised" or "guaranteed" such a loan modification. One consumer stated in her declaration, for example, that a Lanier Law representative told her that "their service was almost guaranteed to stop the foreclosure" and that

[11] Defendants' sales agents told many consumers that they needed a lawyer, which defendants would provide, to obtain a loan modification. But these consumers reported that they never spoke with a lawyer or saw any evidence that one had worked on their behalf. Op. 30, 38.

she "would be able to get a loan modification." The representative "promised that Lanier Law could substantially lower" her monthly payments and interest rate. PX316_¶6 (D.246-9). Another consumer stated that a DOLMF agent recommended Lanier Law to her and "sounded like the modification would be a sure thing." PX311_¶4 (D.246-8). Yet another consumer stated in her declaration: "I told him that I could not afford to pay Fortress [$3,000] unless I was sure that I would be able to get the modification. He promised that Fortress would get me the modification and that I should not worry." PX332_¶8 (D.246-10).

Indeed, the court found that "[c]onsumers were often reassured that the [defendants] had success rates upwards of 80 and 90%." Op. 29. To convince consumers of these outlandish success figures (*see infra* 23-24), defendants would explain that, as part of their service, they would be performing an "audit" or "examination" of the consumer's loan documents, "to find errors made by the lender which would increase the consumer's bargaining power or even 'require' the lender to approve a

modification." Op. 29 (citing PX13_¶¶5, 9; PX22_¶6; PX25_¶¶4, 8; PX321_¶7 & Att. B; PX324_¶¶7-8; PX335_¶7).[12]

Some consumers "were told that they had been 'approved' or that they 'qualified' for programs designed to keep them in their homes." Op. 29-30. Lanier sent letters to consumers, for example, congratulating them on being "approved" for the "Homeowner Retention Program" and the "Homeowner Bailout Program." PX317_Att. B (D.246-9); *see* PX17_Att. C (D.6-25), PX21_Att. B (D.6-29) (similar letters from Lanier Law d/b/a Fortress Law Group). *See also, e.g.*, PX7_Att. A (D.6-15) (same letter from D.C.'s Fortress Law Group); PX312_Att. B (D.246-8) (letter from DOLMF recommending Lanier Law and congratulating consumer on being approved for "loan modification program" by the "underwriting department").

[12] Defendants "had consumers execute several forms as part of an 'Application for Foreclosure Defense Services'," including a "Service/ Retainer Agreement." Op. 32. Buried in these documents was a disclaimer that "the attorney has made no guarantees concerning the outcome of this case." Op.33 (quoting PX21_12). The court concluded that "the handful of written disclaimers were simply too little and too late to change the deceptive net impression" of defendants' initial representations. Op. 54.

The district court found that, in reliance on such representations, "even skeptical consumers were eventually persuaded to hire one of the Law Firms to save their homes." Op. 30-31. The court thus had "no difficulty concluding that these promises and guarantees, used to induce consumers to retain a Law Firm's services, were material and misleading." Op. 53.

Lanier challenged the FTC's reliance on, and the district court's consideration of, these consumer declarations in support of the FTC's motion for summary judgment. *See* Op. 5-7. He argued that they were inadmissible hearsay under Rule 807 of the Federal Rules of Evidence (FRE). Op. 5. The court rejected the claim as "specious," noting that the summary judgment posture of the case meant that "Rule 56, not FRE 807, is the applicable authority." *Id.* Under Rule 56, "to the extent the declarations contain testimony that would be admissible in Court if the declarant were called to testify, the Court may appropriately consider these declarations in resolving" summary judgment motions. Op. 6. The declarations met the Rule 56 requirements, the court explained, because "the declarants state that they are over 18 years of age, have

personal knowledge of the facts stated, and would testify to those facts if called." *Id.*

4. *The Consumer Harm Resulting from Defendants' Deceptive Practices*

The district court found that, once consumers were persuaded to employ defendants' services, they "were told that they must pay an advance fee before the Law Firm would perform any work." Op. 31. As described above, the MARS Rule (Regulation O) prohibits such up-front fees. 12 C.F.R. § 1015.5. The fees typically ranged from $1000 to $4000. *See, e.g.*, PX327_¶¶9-10 (D.246-10); PX21_¶11 (D.6-29). Some consumers were also charged a monthly fee while "additional work" was allegedly being performed on their behalf. Op. 31.

The court also found that defendants caused further harm by instructing "many consumers * * * to stop making their mortgage payments, or advis[ing them] to pay the [defendants] instead of their mortgage." Op. 31. One consumer reported that a Fortress Law Group agent told her to stop paying her mortgage even though she and her

husband had, up to that point, been making their mortgage payments in full and on time. Op. 31-32 (citing PX332_¶11).[13]

After securing payment, however, defendants effectively abandoned their customers. Op. 37. Customers reported in their declarations, for example, that their lenders often never heard from the defendants or received any paperwork from them on customers' behalf. *E.g.*, PX2_¶9 (D.6-10), PX5_¶6 (D.6-13), PX6_¶5 (D.6-14), PX26_¶9 (D.39-1), PX301_¶13 (D.246-8), PX328_¶10 (D.246-10). Even worse, the district court found, for most consumer declarants, defendants never secured a mortgage modification of any sort. Op. 38. For the few that did obtain a modification, the new loan terms were not nearly as advantageous as defendants had promised, and some actually resulted in a *higher* monthly payment. *Id.*

In contrast to the FTC's detailed and voluminous evidence, defendants presented no evidence "of *any* consumer who received a loan

[13] In their service agreements, *see supra* note 12, the defendants buried a disclaimer that they "never at no time recommend that homeowners miss their scheduled mortgage payments." Op. 33 (quoting PX 21_12). The court found the disclaimers insufficient to change "the deceptive net impression" of defendants' representations. Op. 54.

modification substantially reducing their monthly payment or who otherwise was satisfied with Defendants' services." Op. 39.

5. *Defendants' Law Violations*

The district court concluded that defendants violated Section 5 of the FTC Act, 15 U.S.C. §45, in two ways. They violated the statute *directly* by making material misrepresentations that caused substantial consumer harm. They also violated it *indirectly* by violating the MARS Rule (Regulation O) and the TSR. Op. 50-70; *see supra* note 2.

Defendants violated Regulation O, 12 C.F.R. Part 1015, in three ways. They violated §1015.5(a) when they "demanded and received fees for their services prior to performing *any* work." Op. 56. They violated §1015.3(b)(1) because they "made numerous misrepresentations regarding the likelihood of obtaining a loan modification, especially with respect to reductions in monthly payments, interest rates, and principal balances." Op. 57. And they violated § 1015.4 by failing to make proper disclosures on their flyers and websites, and in their communications with customers. Op. 57-60.

The court rejected defendants' claim that they were entitled to the attorney exemption under Regulation O. *See* 12 C.F.R. § 1015.7(a) and

(b). It concluded, first, that their challenge to the general application of the Rule to attorneys was unfounded. It reasoned that "Congress provided the CFPB with the authority to enact Regulation O, including its application to attorneys engaged in the practice of law." Op. 67. As such, the court held, Sections 1015.7(a)(3) and (b) of the Rule "were validly issued and the FTC may enforce these provisions against Defendants here." *Id*.

It also held that defendants did not qualify for exemption under those Sections. "State professional regulations uniformly prohibit attorneys from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation," and "the undisputed evidence establishes" that defendants here "engaged in conduct involving deceit and misrepresentation." Op. 69.[14]

Finally, the court concluded that Lanier's authority and control over the defendants and his knowledge of their practices (*supra* 11-14)

[14] The court concluded that defendants violated the TSR, 16 C.F.R. Part 310, by directly calling consumers whose telephone numbers were listed on the National Do-Not-Call list, and by failing to pay the required fees to obtain the data from that registry. Op. 70.

place him "squarely at the center of this deceptive enterprise," and thus made him individually liable for all the misconduct. Op. 72-74.

The district court entered a permanent injunction against Lanier and his co-defendants and ordered them to pay jointly and severally $13,586,713 in restitution. Op. 74-77; Final Order (D.292), at 12.

STANDARD OF REVIEW

This Court "review[s] a district court's evidentiary rulings at the summary judgment stage only for abuse of discretion." *Wright v. Farouk Sys., Inc.*, 701 F.3d 907, 910 (11th Cir. 2012). The Court finds abuse of discretion only when the district court applies an erroneous legal standard, or when it bases its decision on clearly erroneous findings of fact. *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013).

The Court reviews a grant of summary judgment *de novo*. *SEC v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014). The Court "appl[ies] the same legal standards" as the district court did, and "construe[s] the facts and draw[s] all reasonable inferences in the light most favorable to the non-moving party." *Id.*

SUMMARY OF ARGUMENT

1. The Court lacks jurisdiction over this appeal. It already has ruled that Lanier's November 29, 2016, notice of appeal is "untimely," and the only other filing that could possibly function as his notice of appeal is the October 10, 2016, notice of appeal he filed as counsel on behalf of his law firms. But the October notice does not objectively indicate Lanier's intent to appeal in his personal capacity. Lanier's name does not appear as a party-appellant in either the caption or body of that notice. Its designation of party-appellants as "Lanier Law, et al." utterly fails to provide the notice required by Federal Rule of Appellate Procedure 3. And the statement in the October notice that the "several law firms included as appellants" are those "under which Michael W. Lanier, Esq. practiced as a sole practitioner" plainly shows Lanier's intention to act *through* his law firms rather than in his personal capacity. Indeed, Lanier himself conceded, in his November 29 notice, that "Lanier's initial Notice of Appeal (Doc. 303) had listed Lanier's law firms as Appellants."

2. Lanier is flatly wrong that the district court improperly relied on declarations of defrauded consumers and other witnesses when it

granted summary judgment. Federal Rule of Civil Procedure 56 expressly contemplates the use of declarations, so long as the declarant is competent to testify, and the declaration's content is based on his or her personal knowledge and would be admissible at trial. The court properly found that the proffered declarations met those conditions, and they therefore were plainly appropriate to consider on a motion for summary judgment. Lanier's claim that the declarations constitute inadmissible hearsay confuses the declarations' testimonial *content*, which would be admissible at trial, with the *form* in which that content was presented to the court.

3. Lanier's other challenges to the court's summary judgment are meritless. He claims the court impermissibly weighed the evidence and made credibility findings, but he points to no contrary evidence that the district court could have "weighed" that would have created a genuine dispute over a material fact. That consumer declarations contained many similarities, or were drafted by counsel, or that declarants had some personal stake in the case does not preclude the court's consideration of the declarations or render the court's acceptance of

them a "credibility" finding. That is especially so when the declarations were corroborated by evidence from other sources.

Lanier's challenge to the district court's ruling that Lanier operated a common enterprise of interrelated firms is specious. He disputes having control over some components of the enterprise, but he conceded his "supervisory authority" over their employees, who staffed his law offices and acted as sales agents. Similarly, whether or not he managed the D.C. "law firms" themselves, there is no dispute that he managed the *of counsel* network on their behalf, and allowed those firms to access his client database and use his merchant account portals to process consumer payments. Those undisputed facts clearly supported the finding that Lanier was at the center of defendants' common enterprise.

Lanier's argument that he cannot be tarred with responsibility for the deceptive "Economic Stimulus" marketing flyer is also specious. Whether or not he *personally* drafted, sent, approved, or "used" the flyer is immaterial. He does not dispute that his co-defendants commissioned and used the deceptive flyer. Because Lanier had knowledge of, and

authority to control, the deceptive conduct of his co-defendants, he is personally liable for their deceptive scheme.

4. Finally, Lanier's claim that the FTC's statutory authority does not extend to defendants' activities because the practice of law is not "commerce" is unfounded. This case does not even implicate the practice of law. Lanier is licensed to practice law only in Florida, yet his deceptive scheme took place mostly outside that state. And the superficial activities of his *of counsel* attorneys do not constitute the practice of law "by any definition." Moreover, Lanier's claim that the practice of law cannot be deemed "commerce" is grossly mistaken. The courts have long endorsed federal regulation, including by the FTC, of some aspects of attorneys' conduct. Lanier neither acknowledges nor distinguishes that judicial approval.

ARGUMENT

I. THIS COURT LACKS JURISDICTION

This Court has already ruled that the November 29, 2016, notice of appeal that Michael Lanier filed in his personal capacity is "untimely to appeal from the district court's August 12, 2016, final judgment." CA11 Order of April 27, 2017. It thus cannot trigger this Court's

appellate jurisdiction, for "the taking of an appeal within the prescribed time is mandatory and jurisdictional." *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (internal quotation marks and citation omitted); *see Green v. Drug Enforcement Admin.*, 606 F.3d 1296, 1300 (11th Cir. 2010) (same).

Therefore, this Court can have jurisdiction over Lanier's appeal *only if* some document filed within the permissible appeal period can be deemed to function as his notice of appeal. No document filed by Lanier in the district court on or before October 11, 2016,[15] however, can be properly construed as his notice of appeal. The only one that comes close is the October 10, 2016, notice of appeal that he filed, as counsel, on behalf of his law firms.[16] But that notice falls significantly short of the

[15] Rule 4 of the Federal Rules of Appellate Procedure provides that in civil actions such as this one, involving a United States agency, "notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from * * *." Fed. R. App. P. 4(a)(1)(B). Here, the district court entered its final judgment on August 12, 2016, so Rule 4 gave Lanier 60 days from that date, until October 11, 2016, to file his notice of appeal.

[16] Lanier filed two other documents during that period, a Response to Order to Show Cause (D.294) and a Notice Acknowledging Receipt of Final Order (D.297), but neither could possibly be read to satisfy the requirements for a notice of appeal. *See* Fed. R. App. P. 3(c).

standard for qualifying as an effective notice of appeal on behalf of Lanier himself.

Rule 3 of the Federal Rules of Appellate Procedure governs the form and content of a notice of appeal, and its requirements, like those of Rule 4, are "jurisdictional in nature." *Becker v. Montgomery*, 532 U.S. 757, 765 (2001); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 844 (11th Cir. 2006). As relevant here, Rule 3 provides that the notice of appeal must:

> specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "defendants," "the plaintiffs A, B, et al.," or "all defendants except X."

Fed. R. App. P. 3(c)(1)(A). As the text of the Rule makes clear, the notice of appeal need not explicitly name every appealing party. But for the notice to be effective, a specific party's "intent to appeal" must be " 'objectively clear' from all of the circumstances." *Holloman*, 443 F.3d at 844 (quoting Fed. R. App. P. 3(c) advisory committee's note to 1993 amendment). This "objective intent standard," together with other Rule 3(c)(1) requirements, form "the proper test" for whether a notice of

appeal is effective. *Rinaldo v. Corbett*, 256 F.3d 1276, 1279 (11th Cir. 2001).

Here, the October 10, 2016, notice of appeal does not objectively demonstrate Lanier's intent to *himself* appeal the district court's final judgment. His name does not appear in that notice as a party-appellant (as opposed to appearing as counsel for other parties), either in the caption or in the body of the notice.[17] The notice explains that the "several law firms included as appellants" are entities "under which Michael W. Lanier, Esq. practiced as a sole practitioner and was their sole principal." But that description implies that Lanier had opted to act *through* his law firms, as their counsel, rather than to appeal the final judgment in his personal capacity.

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[17] As a putative *pro se* appellant, Lanier was also required to sign the notice of appeal. Fed. R. App. P. 3(c)(2). His signature, as "Michael W. Lanier, *pro se*," appears below the Certificate of Service appended to the October 10 notice of appeal. It is not clear whether Lanier also intended his signature to cover the notice itself, and there is no other indication that he was appealing in his individual capacity. In fact, Lanier himself indicated in his Appellant's Response to the Jurisdictional Question that his use of the term "*pro se*" was meant to indicate merely that he, *as counsel*, had not yet been admitted to the bar of this Court. *See* Lanier Jurisdictional Response, at 1_¶3 (Lanier "signed [the October 10, 2016] Notice of Appeal *pro se* because he was not admitted to practice before this Court.").

This inference is confirmed by Lanier's own later conduct. On November 23, 2016, this Court decided that Lanier could not act as counsel to his appellant law firms because his application to this Court's bar had been denied.[18] Had Lanier originally intended to appeal in his personal capacity, he presumably would have so informed the Court by letter or other means. Instead, Lanier responded to his inability to represent the only parties that had actually appealed by filing the untimely November 29, 2016, notice of appeal as "Michael W. Lanier, Esq[.], individually." This latter filing objectively shows beyond doubt that Lanier had intended to act merely as counsel, and *not* as a party-appellant, in the earlier-filed October 10, 2016, notice of appeal. Indeed, Lanier expressly admitted in his November 29 notice that "Lanier's initial Notice of Appeal (Doc. 303) had listed Lanier's law firms as Appellants." Thus, the October 10, 2016, notice of appeal cannot be reasonably construed as a notice of appeal on behalf of Lanier himself.

[18] Later, on January 12, 2017, this Court dismissed the appeals of those law firms for failure to retain counsel.

Nothing in Lanier's response to this Court's jurisdictional question mandates otherwise. First, contrary to Lanier's claim (Lanier Jurisdictional Response, at 1_¶1, 2_¶6), the designation of the party-appellants in the October 10, 2016, notice as "Lanier Law, et al., hereinafter the 'Lanier Defendants'," does not objectively specify Lanier himself as part of that group of appellants. *See Torres*, 487 U.S. at 318 (the "et al." designation, without more information to specify the intended appellants, "utterly fails" to provide the notice required by Rule 3).[19] In fact, Lanier's use in the October 10 notice of the term "et al."—which only an attorney representing multiple parties may use, *see* Fed. R. App. P. 3(c)(1)(A)—further evinces his intention to act solely as counsel, and not as a party-appellant. *See Holloman*, 443 F.3d at 844-45 (counsel's appeal of sanctions order against him dismissed because "[counsel] did not file a separate notice of appeal in his own name, and

[19] Although the 1993 amendments to Rule 3 were intended in part "to reduce the amount of satellite litigation spawned by [*Torres*]," Fed. R. App. P. 3 advisory committee's note to 1993 amendment, the reasoning of *Torres* regarding the use of "et al."—literally meaning "and others"—remains just as valid post those ameliorative changes. *See Nat'l Union Fire Ins. Co. v. Cavins*, 226 Fed. Appx. 895, 898 (11th Cir. 2007) (presence of "et al." in caption of notice of appeal does not save it from being "ambiguous" and "far from objectively clear" concerning the identity of the intended appellants).

he did not list himself as a party on [his clients'] notice of appeal," which he had filed as counsel).

Likewise, the fact that the term "Lanier Defendants" had been used in some district court papers to include Michael Lanier does not remove the ambiguity of that term for purposes of Rule 3. Anyhow, the October 10, 2016, notice of appeal did *not* state that the appeal was taken "on behalf of the Lanier Defendants." Rather, it stated that "Defendant, Lanier Law, et al., *hereinafter the 'Lanier Defendants,'* hereby appeals * * *." D.303 (emphasis added). This language—which defined the term "Lanier Defendants" for purposes of the notice of appeal—adds no more clarity as to the identity of the appellants than does the term "et al."[20]

Lastly, Lanier attempts to blame the Clerk of this Court for the deficiencies in his notice of appeal. *See* Lanier Jurisdictional Response, at 2_¶¶5-6, 3_¶8. But even if that were a legitimate response to begin

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[20] Lanier also references his filing of a Civil Appeal Statement, Appearance of Counsel Form, and Certificate of Interested Persons (Lanier Jurisdictional Response, at 2_¶4), but he does not indicate what relevance those filings have to this Court's jurisdiction. At any rate, none of these documents was filed on or before October 11, 2016, so none of them can be properly deemed his personal notice of appeal.

with, his reported conversations with the Clerk's office seem to relate to his filing of the November 29, 2016, notice of appeal—which, as this Court already found, was untimely anyway. Nothing in those reported conversations can have any bearing on the only jurisdictional issue remaining here: whether the earlier-filed October 10, 2016, notice can be properly construed as Lanier's own notice of appeal.

In sum, the October 10, 2016, notice of appeal did not indicate that Lanier intended to appeal the district court's final judgment in his personal capacity. Because the untimely November 29, 2016, notice was likewise ineffective, this Court is without jurisdiction to adjudicate Lanier's appeal, and his appeal should be dismissed.

II. THE DISTRICT COURT PROPERLY CONSIDERED THE PROFFERED DECLARATIONS CONTAINING ADMISSIBLE TESTIMONY

Lanier renews his challenge to the district court's consideration of the FTC's proffered declarations of investigators, consumers, and *of counsel* attorneys. (Br. 17-30). His argument fails because it betrays utter misapprehension of the role—and routine use—of declarations in the summary judgment process.

Rule 56(c) of the Federal Rules of Civil Procedure, which governs the procedure for summary judgment, expressly contemplates the use of

declarations to support (or oppose) a summary judgment motion. It provides, in part:

> (1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including * * * affidavits or declarations * * *.
> >
> > * * *
>
> (2) *Objection That a Fact is Not Supported by Admissible Evidence*. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.
>
> * * *
>
> (4) *Affidavits or Declarations*. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Fed. R. Civ. P. 56(c). As the text of the rule makes plain, the use of declarations is an integral part of the process of presenting the trial court with the record material that supports (or defeats) a summary judgment motion—on equal footing with other forms of evidence, such as "depositions, documents, * * * stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). So long as the party

proffering the declaration can show that the facts set out therein would be admissible at trial, and that the declarant meets the personal knowledge and competency-to-testify prongs of Rule 56(c)(4), then the district court can—indeed, must—consider the proffered declaration in deciding whether summary judgment is appropriate.

Here, the district court correctly found that the FTC's proffered declarations from consumers, *of counsel* attorneys, and investigators met the Rule 56(c)(4) requisites, because "the declarants state that they are over 18 years of age, have personal knowledge of the facts stated, and would testify to those facts if called." Op. 6 (citing PX1A, PX1B, PX2-PX25, PX300-PX338). *See also supra* 7-10, 18-21, 23-24 (detailing the admissible contents of those declarations). Indeed, "Lanier fail[ed] to identify any declaration of record that does not comply with these requirements, nor [did] he raise any hearsay, personal knowledge, or other relevant challenge to any specific portion of a declarant's testimony." Op. 6. Thus, it was appropriate for the court to consider these declarations in support of the FTC's motion (and in opposition to Lanier's motion for partial summary judgment, *see supra* note 6).

Lanier's objection to the proffered declarations seems to be based on his view that the test of admissibility in Rule 56(c)(4) precludes their use because they constitute "inadmissible hearsay." (Br. 18). But Lanier is confusing the testimony *contained in* the proffered declarations—which plainly would be admissible at trial—with the *form* in which that testimony is proffered to the court at the summary judgment stage. This Court has long "allow[ed] *otherwise admissible* evidence to be submitted in *inadmissible form* at the summary judgment stage, though at trial it must be submitted in admissible form." *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996); *see also Macuba v. Deboer*, 193 F.3d 1316, 1324 (11th Cir. 1999) (same).[21] The point of the Rule is not that the declarations themselves would be admissible. The admissibility requisite of Rule 56(c)(4) mandates only "that the information they contain (as opposed to the affidavits themselves) would be admissible at trial." 10B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE (hereinafter, "Wright & Miller")

[21] Contrary to Lanier's claim (Br. 19), the admissibility rule applies equally to declarations supporting or opposing summary judgment. *See* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact *cannot be or is* genuinely disputed * * *."); (c)(4) ("An affidavit or declaration used to *support or oppose* a motion * * *."). (Emphasis added).

§2738 (4th ed. April 2017). The same is true for declarations.[22] "Thus, ex parte affidavits [or declarations], which are not admissible at trial, are appropriate at a summary-judgment hearing to the extent they contain admissible information that could be introduced as evidence at trial." *Id.*

Lanier seems to recognize the distinction between a proffered declaration and the testimony it contains. *See* Br. 19 ("The underlying witness' [*sic*] *live testimony in court* might be admissible, but that witness' [*sic*] *declaration* is *always* going to remain an out-of-court statement, offered for its truth, so as to need a hearsay exception."). But he ignores the import of that distinction in the summary judgment context in which, as the district court correctly noted, "Rule 56, not FRE 807, is the applicable authority." Op. 5. Lanier's reliance on cases concerning the admissibility of declarations *in lieu of* trial testimony (Br. 21-23) is thus fundamentally flawed. The FTC proffered its declarations, *not at trial* (in lieu of live testimony), but in support of its

[22] "A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit." Fed. R. Civ. P. 56 advisory committee's note to 2010 amendment.

summary judgment motion.[23] "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee's note to 1963 amendment. Where the evidence that a party seeks to present to the court is testimonial in nature, waiting until the trial to present it through live witnesses would defeat the point of that procedure.

As Lanier would have it (Br. 27-28), courts would have to deny summary judgment every time a material fact depended on witness testimony. But such a rule would contravene the text of Rule 56, and its core purpose of "determining whether there is the need for a trial."

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[23] The cases on which Lanier principally relies are inapposite. In *Cynergy, LLC v. First Am. Title Ins. Co.*, 706 F.3d 1321 (11th Cir. 2013), the affiant's death precluded his trial testimony, so his affidavit *itself* had to be admissible at trial under FRE 807's hearsay exception.

In *FTC v. E.M.A. Nationwide, Inc.*, No. 12-2394, 2013 WL 4545143 (N.D. Ohio Aug. 27, 2013), *aff'd*, 767 F.3d 611 (6th Cir. 2014), the evidence at issue involved, *not* affidavits or declarations, but "consumer complaints * * * made to consumer protection units in various municipalities." *Id.* at *2. The question was whether the complaints *themselves* would to be admissible at trial under FRE 807.

By contrast, the declarations at issue here could readily be reduced to an admissible form at trial: the declarants testified to facts from personal knowledge, and averred their ability and willingness to testify to those same facts if called.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). It would also result in serious harm to law enforcement policy. Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action'." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Especially in cases such as this one, where the conduct at issue involves the deception of thousands of consumers, precluding the use of declarations at the summary judgment stage would force the government into a dilemma: either incur the enormous trial cost of putting numerous consumers on the witness stand—to testify in open court to exactly what their proffered declarations would have stated—or forgo entirely this aspect of its proof, thus jeopardizing the success of its case, and by extension its consumer law enforcement program. This Court should not countenance such unwise policy.[24]

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[24] Lanier claims in a passing sentence that the district court's asset freeze precluded his deposing the declarants. (Br. 28). His perfunctory and undeveloped argument should be summarily rejected. A party "waives an argument" if he fails to "elaborate or provide any citation of authority in support of the argument." *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007) (internal quotation marks and

III. THE DISTRICT COURT PROPERLY GRANTED THE FTC'S MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Thus, "[o]nce the movant adequately supports its motion, the burden shifts to the nonmoving party to show that specific facts exist that raise a genuine issue for trial." *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 815 (11th Cir. 2010). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *see Allen v.*

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citations omitted). Even if it were properly raised, the claim lacks merit. The district court denied his request to lift the asset freeze because his frozen assets (about $176,000) "fall far short of Lanier's potential liability" of over $13 million, and in light of "evidence of [Lanier's] unaccounted-for withdrawal of [$100,000] from the Lanier Law bank account." Order of Dec. 22, 2015 (D.244), at 2-3, 7. The court rightly decided to retain the asset freeze. That "the frozen assets fell far short of the amount needed to compensate [defendants'] customers" is "reason enough * * * to deny [defendants'] attorney fee application." *CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 775 (9th Cir. 1995); *see FTC v. Lalonde*, 545 Fed. App'x 825, 832 (11th Cir. 2013) (describing *Noble Metals*' holding as "persuasive[]"). Moreover, nothing in the record indicates that Lanier, an attorney in his own right, even interviewed the declarants (by phone, for example) to determine if depositions were actually warranted.

Bd. of Pub. Educ. for Bibb Cty., 495 F.3d 1306, 1313 (11th Cir. 2007) (same). And a factual dispute is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"; thus, "[t]he mere existence of a scintilla of evidence in support of [the nonmoving party's] position will be insufficient" to defeat a summary judgment motion. *Anderson*, 477 U.S. at 248, 252; *see Allen*, 495 F.3d at 1313 (same).

Here, the district court concluded that no material fact was subject to genuine dispute, *see supra* 11-27, and thus granted summary judgment against Lanier and his co-defendants. On appeal, Lanier makes a number of challenges to that ruling (Br. 30-39), but none of them withstands scrutiny.

A. The District Court Properly Concluded That There Were No Genuine Issues of Material Facts Precluding Summary Judgment

First, Lanier argues that the district court erred in "making credibility determinations and weighing conflicting evidence" at the summary judgment stage. (Br. 30-36). The court did no such thing. Indeed, as to the central issue in this case—whether Lanier actually helped any of his customers—there was no "conflicting evidence."

Rather, as the district court explained, "neither Lanier Law nor the DC Entities present[ed] evidence of *any* consumer who received a loan modification substantially reducing their monthly payment or who otherwise was satisfied with Defendants' services." Op. 39.

Lanier faults the court for noting the declarations' similarities in recounting consumer experiences. (Br. 31). Similarities are hardly surprising given that the defendants used the same marketing methods and the same deceptive sales pitches to lure consumers nationwide. *See supra* 15-21. But more importantly, Lanier does not explain how pointing out similarities could show that the court weighed conflicting evidence or made credibility determinations. There was no such evidence, and no such determinations to be made, because Lanier "fail[ed] to * * * raise any hearsay, personal knowledge, or other relevant challenge to any specific portion of a declarant's testimony." Op. 6. His naked claims on appeal are simply not borne out by the record.

Nor does the credibility of a declarant become a "genuine" issue merely because parts of the declaration were drafted by someone else, or because the declarant has a personal interest in the outcome of the

case. (Br. 31-32). Declarations are often drafted by counsel, and victims of a scam always have an interest in the case against the perpetrators of the scam. So long as the declaration meets the requirements of Rule 56(c)(4), and it is signed under penalty of perjury, the court may deem its content truthful. *See supra* 39-40. Lanier does not contend that any declaration failed to meet those requirements.

Likewise, Lanier's assertion (Br. 32-33) that the district court improperly found credible a declaration stating that Lanier had attempted to influence the declarant's testimony in a bankruptcy proceeding is both irrelevant and unconvincing. It is irrelevant because before the district court, he neither denied nor responded to the consumer's charge. Op. 39 n.33. The district court could hardly have made a credibility determination based on weighing the evidence when there was no contrary evidence to weigh.

It is also unconvincing because the bankruptcy court's show cause order that Lanier claims refutes the declaration had to do with his inadequate representation of the consumer in her bankruptcy proceedings, not with allegations of influencing her testimony. *See* Order to Show Cause Directed at Michael Winston Lanier, *In re Tselane*

Greer, No. 14-22789-BKC-JKO (Bankr. S.D. Fla. Sept. 11, 2014) (ECF No. 19). Thus, contrary to Lanier's argument here, the discharge of that show cause order shows nothing about the credibility of the consumer's declaration.

The same flaw infects Lanier's credibility challenge to the *of counsel* attorneys' declarations. (Br. 34-35). Even assuming *arguendo* that their statements were false, as Lanier claims, he has not shown that he presented any evidence supporting those challenges to the district court. The court therefore could not have erred in weighing conflicting evidence.

More generally, Lanier's unsupported blanket denials of the FTC's voluminous evidence cannot raise a genuine dispute of fact. "When a motion for summary judgment is properly made and supported, the nonmoving party may not rest on the mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial." *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir. 2009); *see Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984) (same). Having failed before the district court to "show that specific facts exist that raise a genuine issue for trial," *Dietz*, 598 F.3d at 815,

Lanier cannot claim now on appeal that one exists; his "failure to do so [before the trial court] will result in the waiver of the objection." Wright & Miller, *supra*, §2738.

B. The District Court Correctly Held Lanier Liable for the Deceptive Practices of Defendants' Common Enterprise

Lanier claims that the district court's "common enterprise" ruling is erroneous. (Br. 36-38). His challenge to the extensive evidence underlying that ruling, *see supra* 11-15, is based on two statements in the district court's opinion that, Lanier claims, are factually incorrect. The challenge is entirely unfounded.

Lanier claims that the court's statement that he "conceded his supervisory authority over *those entities* to the Florida Bar," Op. 43 (emphasis added), is incorrect because he only conceded his supervisory authority over "the specific non-lawyer case manager * * * who answered the phone." Br. 36-37 & n.8. Lanier selectively quotes from the district court's opinion to imply that "those entities" in the quotation referred to *all* the entities operating as a common enterprise, including "Lanier Law, Redstone DC, Fortress DC, Surety, Liberty & Trust, as well as several [nonparties]." Br. 36 (alteration by Lanier). But the

court's statement actually referred to only "Pinnacle and DOLMF," the two nonparties that "provided staffing and enrollment services for Lanier Law." Op. 43. Read properly, the court's statement is entirely accurate. The "person who answered the phone" in the Lanier Law offices was always an employee of those staffing companies. *See* Op. 9-10. Lanier does not dispute that fact, nor could he. And the only conduct of those companies that was at issue was that of those employees "who answered the phone" at Lanier Law. The district court thus rightly concluded that Lanier conceded his control over *those entities* (i.e. the two staffing companies) when he conceded supervisory authority over their employees who worked at his law firm. Lanier's implication that the court was referring to all the components of the common enterprise is patently false.

Equally specious is his challenge to the court's statement that, after the Florida Bar began its investigation of Lanier's activities, he "continued to be actively involved in the [D.C. entities'] management." Op. 50. Lanier objects to the court's characterization of his role as being involved in those firms' "management." But that characterization is not material to the issue of Lanier's role in defendants' common enterprise.

Lanier does not dispute that he and his co-defendants set up the D.C. firms, that he continued to administer the *of counsel* network of attorneys on behalf of those firms, that he allowed the firms to continue accessing his clients' database and using his credit card merchant portal accounts to process consumer payments, and that he continued to deal with the principals of the firms—of which he himself was one for a period of time—as "friends." Op. 49-50. Whether or not Lanier "managed" the firms, his activities contributed significantly to defendants' operation of their law firms "as a singular operation with multiple component parts." Op. 50. The district court accurately described Lanier's own role as "squarely at the center of this deceptive enterprise." Op. 74.

C. Whether or Not Lanier Personally Used the Deceptive "Economic Stimulus" Marketing Flyers Is Not a Material Fact That Precludes Summary Judgment

Lanier also claims that the district court erred in holding that "the most egregious example of deceptive conduct by Lanier Law and the DC Entities is the use of the Economic Stimulus Flyer." Op. 51. Lanier specifically denied any part in drafting, sending, approving or using

that flyer. (Br. 38-39). He argues that the court impermissibly weighed the conflicting evidence on this issue.

Lanier's argument fails for two reasons. First, his general denial, without any evidence to support it, is "insufficient" to create a genuine issue of fact. *Anderson*, 477 U.S. at 252; *Allen*, 495 F.3d at 1313; *see also Graff*, 310 F. App'x at 301; *Fullman*, 739 F.2d at 557.

More significantly, whether Lanier personally "used" the flyers is not a material fact in this case. An issue is material only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248; *Allen*, 495 F.3d at 1313. Pursuant to the law governing individual liability under the FTC Act, Lanier is personally liable for the deceptive practices of his co-defendants if he *either* "participated directly in the [deceptive] practices or acts or had authority to control them." *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1233 (11th Cir. 2014). "Authority to control, in turn, may be established by 'active involvement in business affairs and the making of corporate policy' and by evidence that 'the individual had some knowledge of the practices'." *Id.* (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)). Lanier does not dispute either (1) that his co-defendants, acting

as a common enterprise, commissioned these deceptive flyers and used them to reel in consumers, Op. 27; *see supra* note 9, or (2) that he was actively involved in the business affairs of the common enterprise and knew of his co-defendants' practices, *see supra* 12, 14, 50-52. Thus, as the court rightly held, Lanier is "individually liable for the deceptive acts of the common enterprise," Op. 72, including their use of the Economic Stimulus flyer.

IV. THE DISTRICT COURT HAD JURISDICTION TO DECIDE THIS CASE

Finally, Lanier makes a passing argument on appeal against what he characterizes as the district court's "subject matter jurisdiction." (Br. 39). He argues that the FTC's statutory authority does not extend to this case, because "the Lanier Defendants' practice of law" is not "commerce"—presumably within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44. *See* Amended Complaint (D.91) ¶16. Lanier's argument is faulty both factually and legally.

First, this case concerns the sale of bogus mortgage-relief services to distressed homeowners nationwide; it does *not* involve the practice of law. Lanier himself was licensed to practice law only in Florida, so the only authorized law practice he could possibly claim would be the

provision of legal services to Florida consumers. But the great majority of Lanier's victims lived outside Florida. Lanier himself testified in deposition that his Lanier Law customers were all *non*-Florida residents. PX200_37:18-38:7, 50:7 (D.246-1). Likewise, all the consumers who complained to the Florida Bar about Lanier's deceptive practices, and nearly all the consumer declarants in this case, have been *non*-Florida residents. *See* PX1A_237-247 (D.6-7), PX2-PX25 (D.6-10–D.6-33), PX301-PX338 (D.246-8–D.246-11). For these consumers, defendants' deceptive acts cannot be deemed Lanier's own "practice of law" because he was not a licensed attorney in their respective states. Whatever legal services defendants provided to these non-Florida customers, they could have delivered them only through their *of counsel* network of local attorneys. But, as the district court rightly concluded, "the superficial work given to these attorneys" can hardly "constitute[] the 'practice of law' by any definition." Op. 68; *see supra* 17-18.

Even if Lanier had been practicing law, he is wrong that it gives him a get-out-of-jail-free card. The district court noted, in rejecting Lanier's claim for attorney exemption under Regulation O, that "the federal government, with the United States Supreme Court's approval,

has historically regulated some aspects of the practice of law." Op. 67 (internal quotation marks and citation omitted). That determination was plainly correct. In *Heintz v. Jenkins,* for example, the Supreme Court held that lawyers regularly engaged in consumer debt-collection litigation on behalf of creditor-clients must comply with the terms of the Fair Debt Collection Practices Act. 514 U.S. 291, 295-97 (1995); *see Miljkovic v. Shafritz and Dinkin, P.A.*, 791 F.3d 1291, 1296-1301 (11th Cir. 2015) (same). Likewise, in *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975), the Court held that the federal antitrust laws extend to a local bar association's issuance of a fee schedule for legal services. *See also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (FTC Act's prohibition on restraints of trade extends to court-appointed attorneys' group-boycott seeking higher legal fees).

The only case that Lanier cites in support of his argument, *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), does not help him. To begin with, that decision concerned the business of insurance, not the practice of law. *Id.* at 534-35. More importantly, the quotation on which Lanier builds his entire argument regarding the practice of law being "not commerce," (Br. 39), comes from the *dissent*. *Id.* at 573

(Stone, C.J., dissenting). And that dissenting view was long ago superseded by the Court's later decisions, which, as discussed above, plainly deem some aspects of the practice of law to be commerce within the ambit of federal regulation, including by the FTC.

CONCLUSION

For the reasons stated above, this Court should dismiss Lanier's appeal, or, alternatively, affirm the decision of the district court.

Respectfully submitted,

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13 June 2017

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Answering Brief for the Federal Trade Commission complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 11,529 words, using the word count of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and that it complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & (6) because it was prepared in 14-point Century Schoolbook typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2017, I filed the foregoing Answering Brief for the Federal Trade Commission using the Court's appellate CM/ECF system, and, pursuant to 11th Cir. R. 31-3, I caused 7 paper copies of the foregoing brief to be mailed, via express next-day delivery, to the Clerk of this Court. I further certify that on June 13, 2017, I caused 2 paper copies and an electronic copy of the foregoing to be served on the only remaining defendant-appellant at the following U.S. postal mail, via express next-day delivery, and email addresses:

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