UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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June 13, 2014

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 11-13569-DD
Case Style: Federal Trade Commission v. Stephen Lalonde
District Court Docket No: 0:09-cv-61840-JJO

The enclosed judgment is hereby issued as the mandate of this court.

The record on appeal will be returned to you at a later date.

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

Sincerely,

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 11-13569

District Court Docket No.
0:09-cv-61840-JJO

FEDERAL TRADE COMMISSION,

Plaintiff - Appellee,

versus

STEPHEN LALONDE,

Defendant - Appellant.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: October 23, 2013
For the Court: John Ley, Clerk of Court
By: Djuanna Clark

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-13569
Non-Argument Calendar

D.C. Docket No. 0:09-cv-61840-JJO

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

versus

STEPHEN LALONDE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 23, 2013)

Before DUBINA, HULL, and FAY, Circuit Judges.

PER CURIAM:

Stephen Lalonde, proceeding *pro se*, appeals from a magistrate judge's grant of summary judgment in favor of the Federal Trade Commission ("FTC") on its

claims that Lalonde violated the Credit Repair Organizations Act ("CROA"), 15 U.S.C. §

scheduling issues. The magistrate ruled on these motions and extended the final discovery deadline to July 30, 2010. On August 9, 2010, Lalonde filed a motion to further extend that deadline by 90 days ("First Motion to Extend Discovery"), but the magistrate denied the motion because Lalonde had not established good cause for further modifying the case management schedule.

The FTC moved for summary judgment as to all six counts in the complaint. Lalonde then filed a motion to proceed *in forma pauperis* ("IFP"), 28 U.S.C. § 1915, and requested that the magistrate appoint counsel to represent Lalonde due to the complex nature of the case and the potential monetary judgment that could be rendered against him. The magistrate denied Lalonde's motion because he had "intimate familiarity" with the facts of the case and had demonstrated that he could present his defense to the court.

In December 2010, Lalonde filed a memorandum opposing summary judgment and a motion for reconsideration of his First Motion to Extend Discovery. In his motion for reconsideration he attached a signed statement setting forth what additional discovery would show. The magistrate determined that, because Lalonde had not been diligent in conducting discovery, an extension of time was not warranted.

After the FTC replied to Lalonde's response to its summary judgment motion, Lalonde filed a sur-repd o0 ent g

Exhibits," which included the unsigned interrogatory responses of Michael Ammundsen, an ex-emploP.(x)]TJ 0 Tc 0 Tw (-)Tj uae

Ammundsen's affidavit because Lalonde failed to present any evidence showing that it could not have been obtained timely through due diligence.

On appeal, Lalonde raises 15 different issues. We have consolidated some of the challenges. In Part II we discuss the issues surrounding the asset freeze. In Part III we discuss the magistrate's decision not to appoint counsel. In Part IV we discuss Lalonde's challenges to discovery and scheduling rulings. In Part V we review the grant of summary judgment in favor of the FTC. In Part VI we discuss the monetary and injunctive relief.

II.

Lalonde first

Incident to its express statutory authority under section 13(b) of the FTC Act to grant a permanent injunction, a district court has the inherent power to grant ancillary relief, including freezing assets and appointing a receiver. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984); 15 U.S.C. § 53(b). A district court may freeze a defendant's assets to ensure the adequacy of a disgorgement remedy. *Levy*, 541 F.3d at 114. However, "the general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment." *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1521 (11th Cir. 1994) (quotation and alteration omitted).

A civil litigant has the right to retain counsel of his choice under the Fifth Amendment's Due Process Clause. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1117–18 (5th Cir. 1980). The Ninth Circuit has persuasively held that the right to retain counsel does not require the release of frozen assets so that a defendant in a civil case may hire attorneys or experts, or otherwise defend his claim. *See CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 775 (9th Cir. 1995) ("A district court may . . . forbid or limit payment of attorney fees out of frozen assets.").

As a general rule, a party does not have standing to appeal an order or judgment to which he consented. *See Hofmann v. De Marchena Kaluche &*

Asociados, 657 F.3d 1184, 1187 (11th Cir. 2011). A party may seek modification of a consent order under Rule 60(b), which provides relief from a judgment or order for:

> (1) mistake, inadvertence, surprise, or excusable negl

60(b)(1)–(5). Additionally, Lalonde has not shown he is entitled to Rule 60(b)(6) relief. Lalonde had no right to use the frozen assets for his defense. *See Noble Metals*, 67 F.3d at 775. His other arguments amount to an attempt to relitigate an asset freeze to which he consented. These are not circumstances sufficiently extraordinary to merit relief. *See Galbert*, 715 F.3d at 1295. Accordingly, Lalonde failed to show that the magistrate was required to vacate the stipulated order freezing the assets of CapSouth and CPM.

III.

Lalonde next argues that the magistrate erred by denying Lalonde's request to proceed IFP and have counsel appointed. In his reply brief, Lalonde argues that the magistrate should have appointed counsel to represent Lalonde because he was unable to effectively present his case and unable to conduct effective discovery due to his incarceration.

We review a district court's denial of a motion for leave to proceed IFP for an abuse of discretion. *See Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1306 (11th Cir. 2004). We review a district court's decision not to appoint counsel for an abuse of discretion. *Smith v. Sch. Bd. of Orange Cnty.*, 487 F.3d 1361, 1365 (11th Cir. 2007). "[T]he abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1280 (11th Cir. 2010)

his opposition, the court may: (1) defer the motion for summary judgment; (2)

motion to compel the receiver to provide him with all paper and electronic files it had in its possession. The magistrate provided Lalonde with the right to use a proxy to inspect all of the documents, records, and files in the receiver's possession. Although Lalonde now argues on appeal that he did not have a proxy

replies because the FTC did not raise any new issues in its reply to Lalonde's response opposing summary judgment. *See* S.D. Fla. L.R. 7.1(c) (providing that a party may not file a sur-reply without prior leave of the court). The magistrate also did not abuse his discretion in striking the evidence attached to Lalonde's sur-replies, specifically Ammundsen's responses to the interrogatories and his affidavit. Lalonde conceded that he did not mail the interrogatories until August 8, 2010, after the close of all discovery, and he has provided no reason why he was unable to obtain Ammundsen's May 2011 affidavit any sooner. Thus, Lalonde has not shown excusable neglect with respect to his failure to timely file Ammundsen's responses to the interrogatories or Ammundsen's affidavit. *See* Fed.R.Civ.P. 6(b). Accordingly, the magistrate did not abuse his discretion with respect to any of the challenged rulings.

A.

Lalonde argues that, with respect to Counts 1, 2, 4, and 6 of the FTC's complaint, the FTC failed to prove that he "participated directly" in any of the deceptive activities of the corporate defendants, such that he should be held individually liable for those activities. Lalonde claims that it was "company policy not to lie or guarantee," and he did not monitor consumer calls. Lalonde further argues that consumers and the corporate defendants entered into contracts before any services were performed and the contracts set forth the "procedures that employees and consumers were required to adhere to." Lalonde argues that "money was regularly refunded" to consumers who were not satisfied.

Lalonde further argues that the evidence shows that the managers of the corporate defendants acted alone and without authority with respect to illegal activity. Lalonde claims that managers and employees of the corporate defendants stole company data and started a competing company and that one of the managers used marijuana with the employees of the corporate defendants. Lalonde asserts that he terminated all of the managers due to their improper actions. Lalonde claims that he discredited the FTC's expert, as he showed that a credit score of 620 was not needed to obtain the government loans being offered to consumers, and he showed that credit scoring analytics were not proprietary. Lalonde also argues that he was unable to obtain loans for consumers due to the "chaos" in the lending

industry, and not because the defendants were misleading consumers. He also

a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material. *See FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003).

Once the FTC has established corporate liability, the FTC may establish individual liability by showing, "that the individual defendants participated directly in the practices or acts or had authority to control them . . . [and] had some knowledge of the practices." *Gem Merch. Corp.*, 87 F.3d at 470 (internal quotation marks omitted).

Here, the FTC's undisputed evidence established that the corporate defendants had committed the violations at issue in the complaint. First, with respect to Counts 1 and 2, 1st Guaranty, Crossland, and Scoreleaper qualified as credit repair organizations under the CROA because they used the internet and telephones to purportedly provide credit repair services to improve their consumers' credit records, credit histories, or credit ratings. The undisputed evidence showed that the credit repair organizations violated the CROA, as alleged

credit scores that were too low to obtain mortgages.[2] Ex-employees of 1st Guaranty declared that they would falsely state or imply to 1st Guaranty

illustrates the falsity of the credit repair organizations' representations that they could easily obtain mortgages for consumers. Moreover, the evidence showed that the credit repair organizations lacked the information necessary to truthfully claim that they could raise consumers' credit scores.

Next, the undisputed evidence showed that credit repair organizations violated the CROA as alleged in Count 2 because they did not start their credit repair services until consumers paid in full. Lalonde asserts that the credit repair services were not paid for until complete, but he did not cite evidence that supports this assertion.

The evidence concerning Count 4, alleging a violation of the FTC Act with respect to the trade practices of 1st Guaranty, Crossland, and Scoreleaper, is the same evidence summarized with respect to Count 1, and this evidence established that those companies' representations concerning their credit repair services were likely to mislead consumers acting reasonably under the circumstances. *See Tashman*, 318 F.3d at 1273. Lalonde does not challenge the magistrate's determination that those representations were material, and so the argument is abandoned. *See Irwin v. Hawk*, 40 F.3d 347, 347 n.1 (11th Cir. 1994).

Next, with respect to Count 6, an ex-employee of 1st Guaranty declared that he offered loan modification services to prospective consumers with credit problems and who had existing loans. The ex-employee further declared that 1st

Guaranty's employees described the company's loan modification services as highly successful and that there was a "very high probability" that consumers' loans could be favorably modified. Further, consumers declared that Crossland represented to them that it would modify their loans, but Crossland never actually obtained loan modifications despite having been paid fees for such a service, and there is no evidence in the record that any of the corporate defendants obtained a loan modification for a consumer. Additionally, the FTC's expert report stated that, given the deep analysis needed to determine if a consumer would be eligible for a favorable loan modification, 1st Guaranty and Crossland could not lawfully claim that they could secure a loan modification that would make mortgage payments more affordable based solely on phone conversations and a preliminary review of credit reports. Based on the undisputed evidence set forth in the FTC's expert report, 1st Guaranty's and Crossland's representations concerning its loan modification services were misleading. *See Tashman*, 318 F.3d at 1273. Lalonde does not challenge the magistrate's determination that the representations were material.

Next, the magistrate did not err in holding Lalonde individually liable for the violations alleged in Counts 1, 2, 4, and 6. First, the evidence showed that Lalonde had authority to control the actions of 1st Guaranty, Crossland, and Scoreleaper. The managers of 1st Guaranty and Crossland reported directly to Lalonde, and

Lalonde was the sole account holder of all of 1st Guaranty's, Crossland's, and Scoreleaper's bank accounts, with the exception of one of 1st Guaranty's accounts, where he was a joint signatory.

Further, the undisputed evidence also showed that Lalonde had actual knowledge of the deceptive trade practices, or at the very least, an awareness of a high probability of fraud along with an intentional avoidance of the truth.[4] Lalonde stipulated that he frequently communicated with his managers, and the evidence showed that he had the ability to monitor the calls of the sales staff. Lalonde also had access to information on all activities of the corporate defendants, such that he knew or should have known of the unlawful practices. Lalonde's argument about his ex-managers' and ex-employees' thefts and drug use is not relevant to whether Lalonde had knowledge of the corporate defendants' deceptive practices. Accordingly, Lalonde has not shown that the magistrate erred in granting summary judgment in favor of the FTC with respect to Counts 1, 2, 4, and 6.

B.

Lalonde argues that the FTC failed to prove that he should be individually liable for any violation of the TSR. Lalonde further argues that all consumers

[4] Lalonde apparently intended his statement of controverted facts to be considered evidence, but the statement was unsworn, and was not made under penalty of perjury, so the magistrate could not consider it in determining whether summary judgment should be granted. *See Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980); 28 U.S.C. § 1746.

contacted the corporate defendants by way of advertisements, and the advertisements were "all compliant." He also argues that inbound telephone calls initiated by consumers were exempt from the TSR's coverage. In his reply brief, Lalonde argues that the February 2009 contract showed that consumers agreed that they sought out the company before hiring Crossland for credit repair services.

Under the TSR, "telemarketing" is defined as a program "which is conducted to induce the purchase of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(dd). A "telemarketer" is defined as a "person who, in connection with telemarketing, initiates or receives telephone calls to or from a consumer or donor." 16 C.F.R. § 310.2(cc).

Section 310.4(a)(4) of the TSR is violated when a seller or telemarketer engages in conduct involving "requesting or receiving payment of any fee . . . in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person." 16 C.F.R. § 310.4(a)(4). "[T]elephone calls initiated by a consumer" in response to an advertisement are ordinarily exempt from the TSR. 16 C.F.R. § 310.6(b)(5). The TSR, however, does cover inbound telemarketing where the calls are made "in response to . . . advertisements involving goods or services described in

[§ 310.4(a)(4)]." *Id.* A violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of section 5(a) of the FTC Act. *See* 15 U.S.C. §§ 57a(d)(3), 6102(c).

Here, 1st Guaranty, Crossland, and Scoreleaper were telemarketing by induc

participated in Florida administrative proceedings concerning the activities underlying Count 5, and Count 5 was "duplicitous" of those proceedings.

Here, the district court did not lack jurisdiction over Lalonde or 1st Guaranty because they signed the Florida "Stipulation and Consent Agreement."[5] The State of Florida, Office of Financial Regulation simply agreed to forego state administrative proceedings against 1st Guaranty, Lalonde, and Spectrum for the violation of Florida law that occurred when Lalonde was convicted of federal offenses in 2009. The agreement had nothing to do with the FTC's enforcement of federal law concerning deceptive trade practices. Accordingly, Lalonde's argument as to this issue is without merit.

VI.

Lalonde argues that the magistrate abused his discretion when he imposed permanent injunctive relief and monetary relief against Lalonde. Specifically, Lalonde argues that the magistrate improperly banned Lalonde from telemarketing activities because the corporate defendants were not engaging in telemarketing as defined by the TSR. Lalonde further argues that a ban on mortgage-related activity was improper and overreaching because the loans underlying Count 5 were originated by Delta Financial Corporation ("Delta"), not by 1st Guaranty. Lalonde contends that the magistrate erred when it combined the revenue of the corporate

[5] Spectrum was not a party to the state Stipulation and Consent Agreement.

test is whether "the defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future." *See CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1346–47 (11th Cir. 2008).

Section 13(b) also provides the district court with the power to order restitution and disgorgement. *Gem Merch. Corp.*, 87 F.3d at 468–70; 15 U.7C9Tw 2.556 a 26100

With respect to the monetary relief the magistrate granted against Lalonde, the magistrate properly combined the "gross sales" or net revenue of the corporate defendants. *See Wash. Data*, 704 F.3d at 1327. Next, Lalonde offers no evidence to support his assertion that all of 1st Guaranty's revenue was from "loan income," such that the magistrate should not have included any of its revenue in the restitution award. The FTC's evidence included the declaration of a Supervisory Investigator for the FTC who declared that, after reviewing 1st Guaranty's financial statements, he determined that $254,881 of 1st Guaranty's gross revenue was attributable to credit repair services.

not abuse his discretion with respect to the ordered injunctive and monetary relief.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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John Ley
Clerk of Court

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October 23, 2013

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 11-13569-DD
Case Style: Federal Trade Commission v. Stephen Lalonde
District Court Docket No: 0:09-cv-61840-JJO

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

For questions concerning the issuance of the decision of this court, please call the number referenced in the