Present: The Honorable	**BEVERLY REID OôCONNELL, United States Di**
Renee A. Fisher	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff:	Attorneys Present for Def
Not Present	Not Present

Proceedings: (IN CHAMBERS)

ORDER RE PLAINTIFFôS MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS JEREMY FOTI AND CHARLES MARSHALL, AND DEFENDANT JEREMY FOTIôS MOTION FOR SUMMARY OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION [284, 287]

I. INTRODUCTION

Pending before the Court are Plaintiff Federal Trade Commission's ("Plaintiff" or "FTC") Motion for Summary Judgment against Defendants Jeremy Foti ("Foti") and Charles Marshall ("Marshall") (Dkt. No. 284 (hereinafter, "FTC Mot.")), and Defendant Foti's Motion for Summary Judgment or, in the alternative, Motion for Summary Adjudication (Dkt. No. 287 (hereinafter, "Foti Mot.")). After considering the papers filed in support of and in opposition to the instant Motions, as well as the oral argument of counsel, the Court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant Foti's Motion for Summary Judgment.

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CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES ï GENERAL

Case No.	**SA CV 16-00999-BRO (AFMx)**	Date	September 5, 2017
Title	**FEDERAL TRADE COMMISSION V. DAMIAN KUTZNER, ET AL.**		

II. BACKGROUND

A. The Parties and Plaintiffôs Allegations[1]

The FTC brings the instant action against several corporate entities, Brookstone Law P.C. (California), doing business as Brookstone Law Group, Brookstone Law P.C. (Nevada), Advantis Law P.C. and Advantis Law Group P.C.[2] (*See* Dkt. No. 61 (hereinafter, "FACC") ¶¶ 6–7.) The

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Plaintiff alleges that Defendant Marshall "is a director, Chief Executive Officer, and Secretary of Advantis." (FAC ¶ 13.) "Marshall has also appeared as counsel in Brookstone's *Wright v. Bank of America* mass joinder case." (FAC ¶ 13.) "In 2015, Marshall was disciplined by the California Bar for violations related to mortgage assistance relief services, receiving a 90-day suspension from the practice of law in November 2015 for his ethical violations." (FAC ¶ 13.) Plaintiff claims that "[a]t all times material . . . , acting alone or in concert with others, [Marshall] formulated, directed, controlled, had the authority to control, or participated in the acts and practices set forth" in the FTC's FAC. (FAC ¶ 13.)

The instant action arises from the Individual Defendants' alleged scheme to defraud "consumers out of thousands of dollars in upfront and recurring monthly fees" in violation of the FTC Act and the Mortgage Assistance Relief Services ("MARS") Rule, 12 C.F.R. 1015. (Dkt. No. 142 at 4.) Specifically, Plaintiff claims that the Individual Defendants, operating through the Corporate Defendants, "convince consumers that if added to a 'mass joinder' case against their lender, they can expect a significant recovery, typically at least $75,000." (*Id.*) Plaintiff also claims that, despite their representations to the contrary, the Individual Defendants "have never won a mass joinder case, do not have the experience or resources to litigate them, and never sue on behalf of many paying consumers." (*Id.*)

The purported scheme began with Defendant Kutzner's ULG, a law firm offering advance fee loan modifications. (*Id.* at 5.) However, after the FBI and the United States Postal Inspectors raided ULG due to claims that its two primary attorneys committed mortgage modification fraud, and with ULG "unraveling," Defendant Kutzner, along with Defendants Torchia and Foti, set out to market mass joinder litigation through Brookstone. (*Id.*)

To market the mass joinder litigation, the Individual Defendants allegedly sent a substantial amount of form mailers to the public, which included the following aifirm aistatements: "you may be a potential plaintiff in

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had "a very strong case" and that prevailing in the litigation was "basically a done deal." (*Id.*)

In order to participate in the mass joinder litigation, the Individual Defendants would require consumers to pay upfront fees, including a large initial fee and subsequent monthly fees. (*Id.*) According to Plaintiff, the Individual Defendants failed to keep these fees in client trust accounts. (*Id.*) Plaintiff also claims that the mailers and fee agreements failed to include disclosures required by law. (*Id.*) Plaintiff avers that the Individual Defendants failed to provide the promised services, as many consumers were never added to a mass joinder case and the attorneys working for Brookstone and Advantis did not have sufficient experience to competently litigate the mass joinders. (*Id.*)

B. Procedural History

On May 31, 2016, Plaintiff filed its Original Complaint under seal. (Dkt. No. 1.) Plaintiff alleged two causes of action in its Original Complaint: (1) a violation of the FTC Act, 15 U.S.C. § 45(a); and, (2) a violation of the MARS Rule, 16 C.F.R. Part 322, recodified as 12 C.F.R. Part 1015 against Defendant Marshall and others, but not Defendant Foti. (Dkt. No. 1.) On July 5, 2016, Plaintiff filed a First Amended Complaint, adding Foti as a defendant, and alleging the same causes of action as its Original Complaint. (*See* FAC.)

On July 10, 2017, Plaintiff filed its Motion for Summary Judgment against Defendants Foti and Marshall. (FTC Mot.) Also on July 10, 2017, Defendant Foti filed his Motion for Summary Judgment or, in the alternative, Summary Adjudication. (Foti Mot.) On August 7, 2017, Defendant Foti (Dkt. No. 304 (hereinafter, "Foti Opp'n")) and Defendant Marshall (Dkt. No. 313 (hereinafter, "Marshall Opp'n")) opposed the FTC's Motion. Also on August 7, 2017, Plaintiff opposed Foti's Motion. (Dkt. No. 303

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(Dkt. No. 338.) On August 21, 2017, the Court ordered Plaintiff to file any response to Defendant Marshall's corrected Statement Disputing Plaintiff's Undisputed Facts and Conclusions of Law in Support of Summary Judgment by August 24, 2017. (Dkt. No. 339.) Plaintiff complied with the Court's order and filed its Undisputed Statement of facts and Conclusions of Law on Reply in Support of its Summary Judgment Motion on August 24, 2017. (Dkt. No. 341 (hereinafter, "FTC Mot. USF").)

The Court held a hearing on these Motions on August 28, 2017.

III. EVIDENTIARY OBJECTIONS

"In motions for summary judgment with numerous objections, it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." *Doe v. Starbucks, Inc.*, No. 08–0582, 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009). "This is especially true when many of the objections are boilerplate recitations of evidentiary principles or blanket objections without analysis applied to specific items of evidence." *Id.*;

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Court discusses below. First, Foti argues that the emails, scripts, and mailers that the Receiver collected from the Corporate Defendants' offices are inadmissible because they have not been authenticated, the

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the Corporate Defendants and the Individual Defendants engaged in the illegal conduct in question, and these facts are thus of consequence in determining the action. *See* Fed. R. Evid. 401. Defendant Foti's arguments on this point are therefore rejected.

B. Defendantôs Evidentiary Objections Regarding the FTCôs Expert Report Prepared by Dr. Isaacson

The Court **OVERRULES** Defendant's objection that Dr. Isaacson's report is inadmissible. Dr. Isaacson conducted a survey measuring the experience of consumers who retained the Corporate Defendants for their services. (*See* Dkt. No. 284-6.) Contrary to Defendant Foti's arguments, Dr. Isaacson's report does not violate Federal Rule of Evidence 702. As Dr. Isaacs Da A er p Ç Ɛ Ç Ψ M h ¥ Ç Ռ I M њ Ç Ռ I M ë M

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Finally, the evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise a genuine issue of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson*, 477 U.S. at 253.

V. DISCUSSION

The FTC argues that the undisputed facts establish that Defendants Foti and Marshall, through the acts of the Corporate Defendants, (1) violated the FTC Act by making material misrepresentations about the services that they provided to the consumers; and, (2) violated the MARS Rule by (a) failing to make the proper disclosures while communicating with consumers, (b) collecting improper fees before obtaining the promised result, and (c) misrepresenting material aspects of the services. (*See generally* FTC Mot.) Defendant Foti argues that "there is an absence of evidence to support the FTC's case," and that summary judgment should be entered in Defendant Foti's favor as a result. (*See* Foti Mot. at 2.) In determining these instant Motions for Summary Judgment, the Court considers all appropriate evidentiary material identified and submitted in support of and in opposition to both Motions; here, the two Motions address the same claims and the same underlying facts. *See Fair Housing Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132 (9th Cir. 2001); (Foti Mot.; FTC Mot.).

A. The Conduct of the Corporate Defendants

1. The Corporate Defendants Formed a Common Enterprise

At the outset, the Court finds that the undisputed facts establish that the Corporate Defendants formed a common enterprise. "[E]ntities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests of the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142–43 (9th Cir. 2010). Here, the undisputed facts are that Brookstone and Advantis shared staff

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and office space at multiple locations. (*See, e.g.*, FTC Mot. USF ¶¶ 64–67, 75–76, 78.) They had significant overlap in owners and direct overlap in control persons, including Foti. (*See, e.g.*, FTC Mot. USF ¶¶ 56, 231, 305, 308.) They also assisted one another in furthering the scheme, with Advantis coming on board when Torchia was being disbarred, using virtually the same misrepresentations in mailers, scripts, and websites. (*See* FTC Mot. USF ¶¶ 46–62, 84–89); *Network Servs. Depot, Inc.*, 617 F.3d at 1143 ("The undisputed evidence is that [defendant's] companies pooled resources, staff and funds; they were all owned and managed by [defendant] and his wife; and they all participated to some extent in a common venture to sell internet kiosks."). "Thus, all of the companies were beneficiaries of and participants in a shared business scheme . . . ." *Network Servs. Depot, Inc.*, 617 F.3d at 1143.

2. The Corporate Defendants Violated the FTC Act

"Section 5 of the FTC Act prohibits deceptive acts or practices in or affecting commerce and imposes injunctive and equitable liability upon the perpetrators of such acts." *Network Servs. Depot, Inc.*, 617 F.3d at 1138 (citing 15 U.S.C. § 45(a)). "An act or practice is deceptive if first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." *Stefanchik*, 559 F.3d at 928 (internal quotation marks omitted). "Express product claims are presumed to be material." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095–96 (9th Cir. 1994). "Deception may be found based on the 'net impression' created by a representation." *Id.*

The undisputed facts show that the Corporate Defendants made numerous deceptive statements to consumers. Brookstone's representatives said or suggested that hiring Brookstone would definitely or probably achieve at least one of the following five outcomes: consumers would (1) win a lawsuit against the company that holds their mortgage; (2) have the terms of the mortgage changed; (3) receive money; (4) have their mortgage voided; and/or (5) get their property free and clear of their mortgage. (FTC Mot. USF ¶ 176.) Brookstone's representatives told consumers that that they would definitely or probably win their lawsuit. (FTC Mot. USF ¶ 176.) In addition, consumers received advertising in the mail from the Corporate Defendants that stated: "you may be a potential plaintiff against your lender;" mass joinder is a way to "void your note(s), and/or award you relief and monetary damages;" "our team of experienced lawyers offers

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(FTC Mot. USF ¶ 132 (emphasis in original).)

Some consumers attended in-person sales meetings with the Corporate Defendants' "Banking Specialists," who were actually sales persons or "closers." (FTC Mot. USF ¶¶ 94–98.) At these meetings, the "Banking Specialists" would show consumers a "Legal Analysis" that stated consumers had multiple valid causes of actions against their lenders with no discussion of any defenses the lenders may have or the relative weakness of the various claims. (FTC Mot. USF ¶¶ 141–44, 167.)

The consumers declare they were solicited with mailers, claiming, among other things, that the mass joinder litigation would seek to "void your note[s]," and that "our team of experienced lawyers offers you a superior alternative to recovery." (FTC Mot. USF ¶¶ 100–01.) At in person meetings, sales people made various statements regarding consumers' likelihood of success and monetary relief, including: that they had "a very strong case[;]" prevailing in the litigation was "basically a done deal[;]" 'it was not a question of whether [the consumers] would win [the] cases, but how much money [the consumers] would get[;]" "the minimum amount [the consumer] would get would be $75,000[;]" the consumer was "entitled to a refund as a result of litigation between the Department of Justice and Bank of America[;]" and "Brookstone would succeed eventually." (FTC Mot. USF ¶¶ 136–39, 147–66.) None of these representations were accurate. The Corporate Defendants did not seek to void notes, did not have the promised experience or capabilities, and have never prevailed[4] in a mass joinder, thus failing to obtain the represented relief. (FTC Mot. USF ¶¶ 186–204.) "Some consumers who paid to be mass joinder clients were never [even] added to a mass joinder case." (FTC Mot. USF ¶ 199.)

In opposition to the FTC's Motion, Defendants Foti and Marshall argue that the Corporate Defendants' marketing was not deceptive, focusing on aspects of the marketing that were true. (Foti Opp'n at 6; Marshall Opp'n at 5.) However, even if some of the statements that the Corporate Defendants made as part of their marketing were

[4] Foti admits that Torchia declared: "Neither Brookstone nor Advantis has ever won a mass joinder case. Because there is always risk in litigation, I knew there was a possibility that we could in fact lose all of the lawsuits and that payment to Brookstone and Advantis would increase those consumers' losses." (FTC Mot. USF ¶ 186.)

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true, it does not change that the Corporate Defendants made misrepresentations. *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) ("[B]ecause each representation must stand on its own merit, even if other representations contain accurate, non-deceptive information, that argument fails.").

Defendant Foti argues that because the retainer agreement had a disclaimer in it, it nullifies any misrepresentations made in the marketing. (Foti Mot. at 14; Foti Opp'n at 8–9.) But this argument fails as a matter of law. *See Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) ("The Federal Trade Act is violated if [the advertising] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract."). Further, Foti admits a sales person told a consumer that the disclaimer "was just legal words in the retainer and they had to use them in the agreement, but there was no risk of losing." (FTC cons t theat , tisc4 Ă

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was recodified as 12 C.F.R. Part 1015, effective December 30, 2011. The FTC retains authority to enforce the MARS Rule pursuant to the Dodd-Frank Act § 1097, 12 U.S.C. § 5538.

The MARS Rule defines the term "mortgage assistance relief service provider" as "any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service" other than the dwelling loan holder, the servicer of a dwelling loan, or any agent or contractor of such individual or entity. 12 C.F.R. § 1015.2. Attorneys are covered by the MARS Rule. *See FTC v. A to Z Mktg., Inc.*, No. 13-00919-DOC (RNBx), 2014 WL 12479617, at *4 (C.D. Cal. Sept. 17, 2014) (explaining that attorneys are only exempt from the MARS Rule in "[u]nder certain conditions"). The Corporate Defendants were MARS providers because they offered to provide mortgage assistance relief services. *See id.*; (FTC Mot. USF ¶¶ 100, 104–07). In fact, Foti admits that the Corporate Defendants were MARS providers and that the mass joinder services were MARS. (*See* FTC Mot. USF ¶ 25.)

Plaintiff alleges that the Corporate Defendants violated the MARS Rule because they: (1) failed to make legally required disclosures (FAC ¶¶ 83); (2) asked for, or received, payment before consumers had executed a written agreement with their loan holder or servicer that incorporates the offer obtained by Defendants in violation of the MARS Rule (FAC ¶ 81); and, (3) misrepresented material aspects of their services (FAC ¶ 82).

a. The Corporate Defendants Failed to Make Legally Required Disclosures

Under 12 C.F.R. section 1015.4, certain written disclosures must be made to consumers if a company is providing MARS. These disclosures include statements that a consumer does not have to accept the relief, if any, obtained by the MARS provider and does not have to make any payments until the consumer has received the promised relief. 12 C.F.R. § 1015.4. The Corporate Defendants did not include the requisite disclosures in the mailers or the retainer agreements, and therefore violated 12 C.F.R. section 1015.4. n _

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b. The Corporate Defendants Took Advance Fees in Violation of the MARS Rule

Under 12 C.F.R. section 1015.5, "[i]t is a violation . . . for any mortgage assistance relief service provider to: []Request or receive payment of any fee or other consideration until the consumer has executed a written agreement between the consumer and the consumer's dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer." Essentially, the Corporate Defendants could only take a fee upon providing the promised result.

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d. The Attorney Exemption Does Not Apply to the Corporate Defendants

Defendant Foti, who is not an attorney himself, argues in his Motion for Summary Judgment that the Corporate Defendants cannot be held liable for any violations of the MARS Rule because the attorney exemption applies. (Foti Mot. at 9.) In response, Plaintiff argues that the attorney exemption is an affirmative defense, and that because (1) Foti did not plead this defense in his answer, and (2) Foti did not identify the attorney exemption in response to Plaintiff's interrogatories requiring Foti to identify all defenses on which he might rely, Foti should not be permitted to assert this defense because the FTC did not have the opportunity to seek discovery from Foti and third parties to rebut it. (FTC Opp'n at 7.)

"While the general rule is that a defendant should assert affirmative defenses in its first responsive pleading, Fed. R. Civ. P. 8(c), the Ninth Circuit has 'liberalized' the requirement that a defendant must raise affirmative defenses in their initial responsive pleading." *Helton v. Factor 5, Inc*D ÀÏ P R Ð MWQÐ% ¸P ` ĵ ¥ÇM

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5–6 (attorney exemption is a defense for which defendants have the burden of proof);

Mot. USF ¶ 322.) Marshall was also aware of Kuztner's history, including that ULG had been shut down by criminal law enforcement. (FTC Mot. USF ¶ 323.)

Defendant Foti argues that he believed the Corporate Defendants' representations to be true, that he had not done due diligence, and that he acted on the advice of counsel. (Foti Opp'n at 28–29.) However, Defendant Foti's arguments should be rejected, because none of Foti's arguments serve as a defense to the knowledge standard. *See Publ'g Clearing House*, 104 F.3d at 1171 (intent to defraud not required); *Affordable Media*, 179 F.3d at 1235 (defendants' claim to have done due diligence regarding truth of claims does not defeat "knowledge"); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) ("[R]eliance on advice of counsel [is] not a valid defense on the question of knowledge . . . .").

Thus, the undisputed facts establish that both Defendants Foti and Marshall are monetarily liable because each held the requisite knowledge. *See Affordable Media*, 179 F.3d at 1235 ("The extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability.").

3. Foti and Marshall Are Liable for the Full Amount Paid by Consumers

"[T]he Ninth Circuit has held that the power to grant any ancillary relief necessary to accomplish complete justice necessarily includes the power to order restitution." *Gill*, 71 F. Supp. 2d at 1048. The FTC does not need to show reliance by each consumer: "Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)]." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).[8]

The proper amount for restitution is the amount that the "defendant has unjustly received." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016). To

[8] Additionally, summary judgment is appropriate even if Defendants Foti and Marshall presented some satisfied consumers because "the existence of some satisfied customers does not constitute a defense under the FTCA." *See Stefanchik*, 559 F.3d at 929 n.12 (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989)).

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VI. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment against Defendants Jeremy Foti and Charles Marshall is **GRANTED**.

Defendant Jeremy Foti's Motion for Summary Judgment or, in the alternative, Motion for Summary Adjudication is **DENIED**.

IT IS SO ORDERED.

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proffered evidence supporting that this calculation includes all of the Corporate Defendants' revenue.
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