MARK S. HEGEDUS, DC Bar No. 435525
(admitted *pro hac vice*)
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
(202) 326-2115 (tel)
(202) 326-2477 (fax)
mhegedus@ftc.gov

MILES D. FREEMAN, CA Bar No. 299302
(Local Counsel)
Federal Trade Commission
10990 Wilshire Boulevard, Suite 400
Los Angeles, CA 90024
(310) 824-4332 (tel)
(310) 824-4380 (fax)
mfreemen@ftc.gov

ATTORNEYS FOR APPELLANT
FEDERAL TRADE COMMISSION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE

TABLE OF AUTHORITIES

CASES

TREATISES

summary judgment, the Bankruptcy Court misapplied governing law on issue preclusion. Furthermore, although the FTC's Adversary Complaint set forth each

after the affiliate marketers paid him from money they had collected from their clients. *Id.* In 2014, Lake contracted with HOPE Services, an affiliate company run by Brian Pacios and others (collectively the "HOPE Defendants"). *Id.* (HOPE Services later changed its name to HAMP Services. FTCER227.)

Lake and the HOPE Defendants carried out their scheme in three phases. In phase one, the HOPE Defendants would mail advertisements for mortgage modification services and make unsolicited phone calls to distressed homeowners. *Id.* at 697. The marketing materials falsely represented that HOPE was a non-profit affiliated with the U.S. Government that could help consumers successfully obtain mortgage modifications. *Id.* Consumers who expressed interest were asked to provide some initial documentation, after which the HOPE Defendants told them that they were preliminarily approved for a loan modification. *Id.*

In phase two, the HOPE Defendants told consumers that they needed to make three monthly "trial mortgage payments," through the HOPE Defendants, to the lenders' trust accounts. In reality, the accounts were not the lenders' trust accounts at all, but belonged to the HOPE Defendants themselves. *Id.* After the first payment, the HOPE Defendants would hand the consumers off to Lake, *id.*, paying him $800 per account from the initial trial mortgage payment. *Id* at 702.

In phase three, Lake and his Advocacy Department would contact the consumers, assure them that the modification process was underway (even though

The MARS Rule a 2

1

2

3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
I

FTCER283-299. In January 2020, the District Court (Judge Guilford) found Lake guilty based on his plea admissions and convicted him. FTCER302.

D. Rather Than Paying the Judgment Against Him, Lake Files for

were further ratified by Lake's guilty plea, which established that he acted with the intent to defraud. FTCER064. Lake thus could not relitigate the facts in the Adversary Proceeding, and the FTC was entitled to summary judgment as a matter of law.

In the first of the three judgments under review, the Bankruptcy Court denied the FTC's motion for summary judgment. FTCER068. The court held that the Enforcement Judgment did not establish justifiable reliance on Lake's misrepresentations, thus defeating application of the fraud exception to discharge. In the court's view, because the FTC did not have to show justifiable reliance to prove Lake's MARS Rule and TSR violations, there were no findings on justifiable reliance to be given preclusive effect in the Adversary Proceeding. FTCER075-078.

The Foce

"equates to proof by a preponderance of the evidence of justifiable reliance." FTCER082 (underscoring in original).[4]

The Bankruptcy Court declined to rule on the other four elements of the fraud exception. FTCER085. The court said that its order "is without prejudice to the FTC to file a motion for partial summary judgment based on issue preclusion with respect to issues other than justifiable reliance." *Id.*

After discovery, Lake moved to dismiss the Adversary Complaint. His chief argument was an attack on the legal bases for the underlying judgment. FTCER086. The FTC filed a motion for partial summary judgment, FTCER184, arguing on independent grounds that (1) the evidence in the Adversary Proceeding showed no disputed issues of material fact on the five elements of the fraud exception, FTCER207-215; and (2) the Enforcement Judgment and the Criminal Action precluded relitigation of those elements, FTCER216-223.

In the second order on review, the Bankruptcy Court granted Lake's motion

1
2
3
4
5
6
7
8
9
10
11

misreading of this Court's ruling. The Enforcement Judgment leaves no room for doubt that Lake's debt for violating the MARS Rule and TSR is a debt for money obtained by "false pretenses, a false representation or actual fraud." The Court determined explicitly that "[f]raud was the HOPE Defendants' business model, and Lake knew it." That understanding permeates the Court's understanding throughout the Enforcement Judgment, including its findings that Lake violated the MARS Rule and TSR and its imposition of a $2,349,885 monetary judgment.

2. The Bankruptcy Court erred in denying the FTC's motion for summary judgment. The question of justifiable consumer reliance was fully litigated and decided in the FTC's favor in the underlying proceeding before this Court, but the Bankruptcy Court held that the Enforcement Judgment did not preclude relitigation of that question. The ruling was wrong for two independent reasons.

First, the Bankruptcy Court wrongly insisted that preclusion could apply only if the words "justifiable reliance" appear in the Enforcement Judgment. Under the law, however, where an earlier court necessarily decided an issue, issue preclusion applies even in the absence of an express finding. The Bankruptcy Court overlooked the core finding of the Enforcemt,wrding of eling befor2 (n,sa8.5 (u)86s3.6 (t)

could apply only if the same rule of law governed both the underlying violations

prior case presents a mixed question of law and fact in which the legal issues predominate" and is also reviewed *de novo*. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir. 1998). A bankruptcy court's rulings on summary judgment are reviewed *de novo, U.S. Dep't of Educ. V. Wallace (In re Wallace)*, 259 B.R. 170, 178 (C.D. Cal. 2000), and a district court sitting as an appellate court has the authority to consider any issue presented by the record, even if not addressed by the bankruptcy court. *Matter of Pizza of Hawaii, Inc*., 761 F.2d 1374, 1379 (9th Cir.1985).

ARGUMENT

Three orders of the Bankruptcy Court are now before this Court on appeal: the order denying the FTC's motion for summary judgment (FTCER068), the order dismissing the FTC's Adversary Complaint (FTCER373), and the order denying as moot the FTC's motion for partial summary judgment (FTCER381). At the outset, the dismissal order was erroneous and should be reversed. In addition, the Bankruptcy Court erroneously denied summary judgment on the justifiable reliance element of the fraud exception. Finally, this Court should exercise its discretion and rule on the remaining elements of the fraud exception to discharge of debt, because the necessary issues were already decided in earlier litigation. Rulings in the FTC's favor on all three orders would allow the Court to instruct the Bankruptcy Court to enter judgment in the FTC's favor.

I. THE BANKRUPTCY COURT ERRED IN DISMISSING THE COMPLAINT.

In the first ruling under review, the Bankruptcy Court granted Lake's motion for judgment on the pleadings, which Lake had styled as a "motion to dismiss."[5] Rather than accept the Adversary Complaint's allegations as true, as it was obligated to do, the Bankruptcy Court ruled on its own initiative that a "person can violate the [MARS Rule and TSR] without obtaining money by false pretenses, a false representation or actual fraud." FTCER377.[6] That ruling ignored the Adversary Complaint's allegations that *in this case* Lake's violations of the MARS Rule and TSR *did involve* fraud and that his debt was obtained by false pretenses, a false representation or actual fraud.

Under Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(c), the Bankruptcy Court was required to construe the Adversary Complaint's allegations as true and in the light most favorable to the FTC, much like a 12(b)(6) motion. *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1014 (9th Cir. 1988). And like a Rule 12(b)(6) motion, judgment on the pleadings is proper only "when the moving party clearly

---

[5] Lake filed the motion long after he had answered the Adversary Complaint. Given that posture, Lake's motion could not be construed as a motion to dismiss for failure to state a claim under Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(b)(6). Rather, Lake's motion should have been construed as a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). *See Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980).

[6] The Bankruptcy Court did not address Lake's arguments in his motion (FTCER088-110) or the FTC's arguments in opposition (FTCER346-357).

The fraud exception applies where five elements are met: (1) the debtor engaged in "misrepresentation, fraudulent omission or deceptive conduct"; (2) the debtor had "knowledge of the falsity or deceptiveness of his statement or conduct"; (3) the debtor had an "intent to deceive"; (4) the creditor justifiably relied on the representations or conduct; and (5) the creditor was damaged as a result of the debtor's representations or conduct. *Id*. The Adversary Complaint plausibly pleaded all five elements.

1. The Adversary Complaint alleges that Lake engaged in "misrepresentation, fraudulent omission or deceptive conduct."

To satisfy the first element of the fraud exception, a creditor must demonstrate "misrepresentation, fraudulent omission or deceptive conduct by the debtor." *Slyman*, 234 F.3d at 1085; *Deitz*, 760 F.3d at 1050. A debtor is liable under § 523(a)(2)(A) for fraud committed by others where "he acts in concert with others in a scheme." *Barnes v. Roberts (In re Roberts)*, 538 B.R. 1, 10 (Bankr. C.D. Cal. 2015) (citing *Arm v. A. Lindsay Morrison, M.D., Inc.* (*In re Arm*), 175 B.R. 349, 352-53 (9th Cir. B.A.P. 1994), *aff'd*, 87 F.3d 1046 (9th Cir. 1996)). That is because a debtor who is a "knowing and active participant in [a] scheme to defraud" meets the deceptive conduct element. *See Chesterfield v. Buck (In re Buck)*, 75 B.R. 417, 420-21 (N.D. Cal. 1987); *Bank of Cordell v. Sturgeon (In re Sturgeon)*, 496 B.R. 215, 223-24 n.15 (B.A.P. 10th Cir. 2013) (same, citing cases).

1

2

3

accord Household Credit Servs., Inc. v. Ettell (In re Ettell)

diligence into how his affiliates operated, such as asking for references or searching the internet for information about them to assure himself that they were not acting fraudulently. FTCER030 ¶ 47. Nor did he ask affiliates how they marketed MARS to consumers or when they requested and received consumer fees. *Id.* Even after he had associated with an affiliate, he continued to consciously avoid knowledge of the affiliate's practices regarding advance payments, and he admitted to never asking consumers or affiliates about advance fees. FTCER030 ¶ 48.

Indeed, with respect to the HOPE Defendants, Lake had notice of their fraudulent plans from the outset, yet took no genuine steps to mitigate the dishonesty. When he saw their prototype "approval form," he suggested a different form that was more "honest and compliant" because it did not falsely tell consumers that a government agency had approved the consumers' loan modifications. FTCER031 ¶¶ 51-52. Nevertheless, he admitted that he never investigated what form the consumers actually received. FTCER031 ¶ 52. Lake's conscious avoidance continued throughout his work with the HOPE Defendants, despite his receipt of information that indicated fraud. FTCER031 ¶ 53. Even after he received two subpoenas from the State of Washington about his MARS work and after the Advocacy Department was named as a defendant in a HOPE client's lawsuit alleging fraud, Lake admitted that he never asked the HOPE Defendants

whether he could see their marketing materials, never asked them what they told consumers or where consumers' payments went, and never verified that the HOPE Defendants sent refunds to consumers. *Id.*

Those allegations support the claim that Lake had knowledge and reckless disregard for the truth about the HOPE Defendants' fraudulent scheme, as well as an intent to deceive, thus satisfying the second and third elements of the fraud exception.

3. The Adversary Complaint alleges that consumers justifiably relied on Lake's representations or conduct.

To satisfy Section 523(a)(2)(A), the FTC needed to show that consumers justifiably relied on Lake and the HOPE Defendants' false misrepresentations. *See Field v. Mans*, 516 U.S. at 74. As the Ninth Circuit has explained, justifiable reliance "turns on a person's knowledge under the particular circumstances." *Citibank (S.D.), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1090 (9th Cir. 1996). "Justification is a matter of the qualities and characteristics of the particular plaintiffs, and the circumstances of the particular case, rather than application of a community standard of conduct to all cases." *Field*, 516 U.S. at 71. Reliance on a misrepresentation is "justifiable" even if other, accurate information is available unless a consumer "would at once recognize at first glance that the statement was false." *Id.* at 71-72 (cleaned up). Consumers are "entitled to rely upon representations" corresponding to their ordinary understanding, and to establish

that their reliance on representations was "justifiable," the FTC need not prove that they went out of their way to conduct "some kind of investigation or examination" to discover the falsity of the representations. *Id.* at 72 (cleaned up). Reliance is justifiable so long as the deceit was not apparent. *In re Roberts*, 538 B.R. at 10.

The Adversary Complaint plausibly alleges that consumers justifiably relied on misrepresentations committed by Lake and in which he participated. The HOPE Defendants lured consumers through the false pretenses of affiliation with the U.S. Government and preliminary modification approval. FTCER025-026 ¶¶ 25-29. Given those representations, consumers had every reason to make trial mortgage payments in the hopes of obtaining

D e T E - r T 6(f)3

*4Tc 0Tw (9(n 0)2(FE-r)3TCE-r1ERE-r6(Tc 0Tw .4(0)2(¶0Tc 0Tw .4(0)2(8(c)1(f*4Tc 9.0Tw 7.0Td.*

payments. To increase consumers' reliance on him and prevent them from learning the truth, he instructed them to communicate only with him, not with their lenders, and to continue to make the payments. FTCER027 ¶ 35.

The Adversary Complaint alleges that Lake's false representations and deceptive omissions, as well as those of the HOPE Defendants, were material to consumers' decisions to begin and continue making the trial mortgage payments. FTCER034 ¶ 65, FTCER038 ¶ 82. And Lake's active concealment of the truth ensured that consumers were unaware of and could not discover the fraud. The allegations in the Adversary Complaint amply support a case of justifiable consumer reliance on the fraudulent conduct. *See Field*, 516 U.S. at 71-72.

4. The Adversary Complaint alleges that consumers were harmed as a result of Lake's representations or conduct.

In the Enforcement Judgment, this Court determined consumers were defrauded of $2,349,885, and that Lake was jointly and severally liable for that amount given his direct participation in the scheme. Section 523(a)(2)(A) excepts from discharge "any debt" for money or property obtained by fraud. *Cohen v. De La Cruz*, 523 U.S. at 223. The debtor, here Lake, need not "obtain" the money or property directly from the victim. *Ghomeshi v. Sabban* (*In re Sabban*), 384 B.R. 1, 6-7 (B.A.P. 9th Cir. 2008), *aff'd in part*, 600 F.3d 1219 (9th Cir. 2010). The Adversary Complaint alleges that Lake provided the critical third phase of the HOPE Defendants' fraudulent scheme and indeed amplified the consumer losses

1
2
3
4
5
6
7
8
9
10
11
12
13
14

it applied a form of issue preclusion against the FTC. That approach was error, because the Enforcement Judgment is replete with findings of fraud.

The Bankruptcy Court was incorrect in concluding that because Lake's judgment debt stemmed from his violations of FTC rules, the Bankruptcy Court needed "to determine whether the FTC Judgment is a debt for money … obtained by false pretenses, a false representation or actual fraud."

making material misrepresentations about matters such as the government affiliation, the terms of loan modifications, and the nature of the trial mortgage

the trial payments, some portion of which were actually sitting in Lake's own bank account." *Id.*

Turning to Lake's substantial assistance for the HOPE Defendants' TSR violations, this Court noted that "the substantial assistance provision in the TSR has three elements: (1) there must be an underlying violation of the TSR; (2) the person must provide substantial assistance or support to the seller or telemarketer violating the TSR; and (3) the person must know or consciously avoid knowing that the seller or telemarketer is violating the TSR." *Id.* at 700-701at 7

1
2
3
4
5
6
7
8
9
10
11
12
13

misrepresentations, a finding that by definition independently satisfies the "justifiable reliance" element of the fraud exception.

A. This Court's Binding Holdings Are Irreconcilable with the LD 1 BDC Tool's

that consumers justifiably relied on them. Most salient, this Court found that the HOPE Defendants had falsely told consumers that their trial mortgage payments were being held in trust for their lenders. *Lake*, 181 F. Supp. 3d at 699, 701. Lake knew that this representation was false, *id.* at 701, but he "conceal[ed]" the truth," *id.* at 700, and "refuse[d] to inform customers about the location and use of their trial payments," *id.* at 701. This Court found that consumers relied on these false representations when they continued to make the trial mortgage payments, increasing the harm they suffered. *Id.* at 702. The only rational interpretation of those findings is a determination that consumers justifiably relied on Lake's misrepresentations.

The Bankruptcy Court articulated several reasons for concluding that the Enforcement Judgment had not established justifiable reliance. They all fail on examination.

judgment, that decision may preclude relitigation of the issue in suit *on a different cause of action* involving a party to the first case." *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (emphasis added). Factual findings in a prior proceeding may be given preclusive effect in a subsequent proceeding "even if the issue recurs in the context of a different claim." *Taylor v Sturgell*, 553 U.S. 880, 892 (2008); *see also Pac. Boring, Inc. v. Staheli Trenchless Consultants, Inc.*, 138 F. Supp. 3d 1156, 1163 (W.D. Wash. 2015) (claims need not be identical so long as issues are). Thus, even though the MARS Rule and TSR are not the same rules of law as the fraud exception, the factual findings necessary to hold Lake liable in the Enforcement Judgment could and did suffice to preclude relitigation of justifiable reliance in the Adversary Proceeding.

Next, the Bankruptcy Court stated that because Lake was held liable under the substantial assistance provisions of the MARS Rule and TSR and because the "threshold for what constitutes substantial assistance is low," the FTC failed to show that "'substantial assistance' and 'material omission' (where there is a duty to disclose) are one and the same thing." FTCER076. The Bankruptcy Court said that it "can envision nondisclosures that, while satisfying the low threshold for 'substantial assistance," nevertheless do not rise to the level of a material omission for purposes of determining fraud." *Id.* And here, in the Bankruptcy Court's view,

"[f]indings regarding the materiality of omissions and the duty to disclose were not necessary—nor does it appear they were made." *Id.*

The Bankruptcy Court's concern seemed to be that a hypothetical non-material nondisclosure that does little to support a fraudulent scheme could still constitute substantial assistance. That concern is misplaced here. This Court noted the importance of "back-end" services provided by Lake, which served as "critical support" to MARS providers, and it contrasted those services with ones that do not further offending practices. *Lake*, 181 F. Supp. 3d at 699. Far from being "not related to the [HOPE Defendants'] offending practices" (FTCER077), Lake's support "played an integral part in the HOPE Defendants' scheme." *Lake*, 181 F. Supp. 3d at 700. Lake's "'advocacy' on the back end meant that clients continued to make 'trial payments' to the HOPE Defendants." *Id.*

With respect to the materiality of the failures to disclose, the Bankruptcy Court wrongly concluded that this Court had not found the nondisclosures to be material. Addressing the Ninth Circuit's decision in *Apte v. Japra* (*In re Apte*), 96 F.3d 1319 (9th Cir. 1996)

Defendants failed to make mandatory disclosures, it erroneously concluded that hat this Court had not identified the specific nondisclosures or whether they were material. *Id*.

The Bankruptcy Court's reasoning overlooks this Court's core finding about Lake's nondisclosure—his failure to disclose to consumers the fraudulent nature of the HOPE Defendants' services, including the fact that their trial mortgage payments were not being held in trust for their lenders. *Lake*, 181 F. Supp. 3d at 701. Lake's nondisclosure was material to consumers because it "involve[d] information that [was] important to consumers and, hence, likely to affect [consumers'] choice of, or conduct regarding, goods or services." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (cleaned up). Consumers made trial mortgage payments because they "hope[d] they were actually getting something for their money." *Lake*, 181 F. Supp. 3d at 700.

Thus, contrary to the Bankruptcy Court's view (

Ninth Circuit held that the sublessee had shown justifiable reliance, explaining that the defendant's failure to disclose the master lessor's rejection of the sublease condition was material to the sublessee's decisions and that the defendant had a duty to disclose the truth. *Id.* at 1323-24. A party to a transaction has a duty to disclose "facts basic to the transaction," the Ninth Circuit held, and this duty extends to the other party who is "ignorant of materials fact which he does not have an opportunity to discover." *Id*. at 1324.

Here, just as in *Apte*, Lake knew that consumers made trial mortgage payments "in the hope that they were actually getting something for their money." *Lake*, 181 F. Supp. 3d at 700. Nevertheless, he failed to disclose the fact that the payments were not going to lenders' trust accounts and affirmatively kept consumers in the dark about the truth. *Id.* at 701. These findings readily establish that Lake's nondisclosure was material, that he had a duty to disclosure the truth about the payments, and that his victims justifiably relied on the false promise that their payments were being held in trust.

In sum, the Bankruptcy Court was simply wrong when it denied summary

B.

necessarily found that consumers had justifiably relied on Lake's and the HOPE Defendants' misrepresentations.

Under Section 13(b), reasonable reliance is presumed if the evidence shows that the defendant made and widely disseminated material misrepresentations and that consumers purchases goods or services as a result. *See Figgie*, 994 F.2d at 605-06; *see also FTC v. Gugliuzza*, 527 B.R. 370, 377 (C.D. Cal 2015). The "reasonable reliance" necessary for this Court's imposition of equitable monetary relief under Section 13(b) *a fortiori* satisfies the "justifiable reliance" requirement of Section 523(a)(2)(A), *Gugliuzza*, 527 B.R. at 377, because reasonable reliance is a more demanding standard than justifiable reliance. *Field*, 516 U.S. at 72-74.

There is no question that this Court's findings established reasonable reliance. Lake's and the HOPE Defendants' misrepresentations were widely disseminated, robbing over 400 consumers of $2,349,885. Consumers seeking mortgage relief were distressed homeowners and reasonably relied on misrepresentations that the HOPE Defendants were affiliated with the U.S. Government, that consumers had already been approved for government-affiliated loan modifications, and that consumers' trial mortgage payments would be held in trust to be paid to lenders. *Lake*, 181 F. Supp. 3d at 699, 701. These misrepresentations were material because they induced these distressed homeowners to make those payments. *Id.* at 699, 701; *Cyberspace.com*, 453 F.3d

the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchase the defendant's products." *Id.* at 605-06.

Next, the Bankruptcy Court focused on the statement in *Figgie* that a "presumption of *actual reliance* arises once the Commission has proved that the

defendants' products." *FTC v. Security Rare Coin & Bullion*, 931 F.2d 1312, 1316 (8th Cir. 1991); *see also FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985). *Figgie* explicitly relied on these standards as the context for what it termed "actual reliance."[10]

Further, "reasonable reliance" under the FTC Act more than satisfies the fraud exception's requirement of "justifiable reliance." In *Field*, the Supreme Court concluded that § 523(a)(2)(A)'s reference to "justifiable reliance" required more than "mere reliance in fact," but less than conduct "conform[ing] to the standard of the reasonable [person]." *Field*, 516 U.S. at 70-71. That "reasonable person standard" is what the Ninth Circuit has required under the FTC Act. *See Pantron I*, 33 F.3d at 1102 ("misrepresentations or omissions of a kind usually

Fh8.3 (su)8.3 (t] S0e)3.5 ncq.2 (

Act thus exceeds "justifiable reliance." *Gugliuzza*, 527 B.R. at 327; *In re Abeyta*, 387 B.R. at 855.

The Bankruptcy Court also erroneously questioned whether justifiable reliance under Section 523(a)(2)(A) may even be established by a presumption. FTCER082. The Ninth Circuit, however, has held that it can. In *Apte*, the Court of Appeals explained that reliance or causation could be presumed where there is a failure to disclose material facts that an investor would have considered important in making a decision. 96 F.3d at 1323. It rested that conclusion on the Supreme Court's decision in a securities fraud case that presented similar issues of widespread reliance on misinformation. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972). The Ninth Circuit stated that the "reasoning of these securities cases applies equally to fraud cases in the bankruptcy context"

personally liable for monetary relief, this Court necessarily found that consumers

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28r

Moreover, in the Criminal Action, Lake pleaded guilty to engaging in a criminal conspiracy to defraud consumers through the same deceptive conduct at issue here. FTCER264 ¶ 8, FTCER267 ¶ 14. These findings would satisfy the first element of the fraud exception on their own.

B. Knowledge of Fraud and Intent to Deceive.

Findings in the Enforcement Judgment and Criminal Action also resolve the second and third elements of the fraud exception—knowledge of the fraud and intent to deceive. Both knowledge and intent under the fraud exception can be satisfied by showing "actual knowledge of the falsity of a statement, or "reckless disregard for its truth." *In re Gertsch*, 237 B.R. at 167-68. "Intent to deceive can be inferred from the totality of circumstances, including reckless disregard for the truth." *Id.*

This Court's Enforcement Judgment satisfies the knowledge and intent elements by ruling that Lake violated the substantial assistance provision of the MARS Rule and TSR. As noted above, an element of substantial assistance under both the MARS Rule and the TSR is that the person "knows or consciously avoids knowing" of the underlying violations. 12 C.F.R. § 1015.6; 16 C.F.R. § 310.3(b). This standard is the same as the "actual knowledge … or reckless disregard for the truth" standard under the fraud exception. *See In re Gertsch*, 237 B.R. at 167. Thus, this Court's prior finding that Lake violated both MARS and the TSR

precludes Lake from relitigating knowledge and intent. As the Enforcement Judgment underscored,

In many cases the harm he inflicted was "certainly much more" than the fee he received directly. *Id.* at 702. By "persuad[ing] consumers to stick around while he 'advocated' for them with their lenders," the harm against these consumers continued to add up. *Id*. He therefore remains liable for the entire harm under the FTC Act and the fraud exception. *In re Sabban*, 384 B.R. at 6-7.

CERTIFICATE OF C 0 Tc 0 4CID 0 BDC 32 J N0 4CID 0 BDC 32 J N0 4CID