Willard K. Tom
General Counsel

Laura M. Sullivan
Leah E. Frazier
James L. Chen
lsullivan@ftc.gov; lfrazier@ftc.gov; jchen2@ftc.gov
Federal Trade Commission
600 Pennsylvania Avenue
Mail Drop NJ 3158
Washington, DC 20580
Tel: (202) 326-3327 (Sullivan);(-3332) Frazier;(-2659) Chen
Fax: (202) 326-3768

John D. Jacobs (Local Counsel)
jjacobs@ftc.gov
California Bar No. 134154
Federal Trade Commission
10877 Wilshire Blvd., Ste. 700
Los Angeles, CA 90024
Tel: (310) 824-4343
Fax: (310) 824-4380
jjacobs@ftc.gov

Attorneys for Plaintiff FTC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Federal Trade Commission, Plaintiff, v. Federal Loan Modification Law Center, LLP, et al. Defendants.	Case No. SACV09-401 CJC (MLGx) MEMORANDUM IN SUPPORT OF PLAINTIFF FTC'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT BOAZ MINITZER Judge: Hon. Cormac J. Carney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

I. INTRODUCTION

Plaintiff Federal Trade Commission ("FTC" or "Commission"), pursuant to Federal Rule of Civil Procedure 56(c), hereby requests that this Court enter summary judgment against defendant Boaz Minitzer ("Minitzer" or "Defendant"), holding him individually liable for corporate Defendants' (collectively, FedMod) deceptive acts and practices in violation of the FTC Act in connection with the sale of mortgage loan modification services. Until this Court halted their business practices, FedMod deceived thousands of homeowners by falsely promising that FedMod would get them loan modifications that would save their homes from foreclosure. In most cases, FedMod did little or nothing to help these vulnerable homeowners and did not obtain loan modifications for the vast majority of them. FedMod advertised its services nationally on television, radio, and the Internet, instructing consumers to contact the company through a toll-free telephone number or its website. FedMod charged large, up-front fees for its services typically exceeding $1000. During this time, Defendant Minitzer controlled FedMod and knew of its deceptive acts and practices.

Summary judgment is appropriate because the FTC has presented overwhelming, uncontroverted evidence that FedMod violated the FTC Act and Defendant Minitzer had the authority to control, directly participated in, and knew of the unlawful acts. Thus, there is no genuine issue for trial. The FTC requests that the Court enter an equitable order against Defendant Minitzer imposing a judgment for the full amount of consumer loss during his time at the company, as well as permanent injunctive relief to prevent him from engaging in the same or

reasonably related conduct that would injure consumers, specifically bans on his sale or marketing of any mortgage relief service and any financial-related good or service.

II. JURISDICTION AND VENUE

The FTC is an independent agency of the United States government created by the FTC Act, 15 U.S.C. § 41 *et seq*. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC, through its own attorneys, to initiate federal district court proceedings to enjoin violations of the FTC Act and secure appropriate equitable relief, including rescission of contracts and restitution, the refund of monies paid, and the disgorgement of ill-gotten gains. *See, e.g. FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111-13 (9th Cir. 1982); *FTC v. Gill*, 71 F. Supp.2d 1030, 1047- 491176 (C.D. Cal. 1999).

Defendant Minitzer is a California resident who transacts and has transacted business in the Central District of California. Statement Of Uncontroverted Facts And Conclusions Of Law In Support Of Plaintiff's Motion For Summary Judgment ("Facts") ¶ 312.

Defendant agrees that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b), and that venue is proper in the Central District of California. *See* Facts ¶¶ 313-14.

III. FACTUAL BACKGROUND

A. Procedural Background

The FTC initiated this action by filing its Complaint on April 3, 2009. On April 6, 2009, the FTC filed an *ex parte* Motion for Temporary Restraining Order, which the Court granted on April 10, 2009. After a Show Cause hearing on April 24, 2009, the Court entered a Preliminary Injunction finding that "there was good cause to believe" that the Defendants, including Defendant Minizter, "might be engaging in, and may continue to engage in, practices that violate Section 5 of the FTC Act." Since that time the Court has entered stipulated orders as to several of the Defendants[1] and defaulted the remaining corporate defendants for their failure to defend.[2] Defendant Minitzer is the only active defendant remaining in this litigation.

---

[1] The Court has entered Stipulated Final Orders against Federal Loan Modification Law Center, LLP, Anz & Associates, PLC, Venture Legal Support, PLC, Anz, Broughton, and Oscherowitz.

[2] The Court entered default against Defendants LegalTurn, Inc., Federal Loan Modification, LLC, SBSC Corporation, Federal Loan Modifications, and relief Defendant MGO Capital for their failure to defend. In a separate motion, the FTC is requesting that the Court enter default judgments against the defaulted corporate defendants.

On September 30, 2010, the FTC filed its Second Amended Complaint, which added Defendant Legal Turn. LLC as a liability defendant. The company formerly had been named as a relief defendant in the litigation, and the Court entered default against the company for its failure to defend. The FTC will request that the Court enter default and default judgment against Legal Turn. LLC in the event that the company fails to file a timely answer to the Second Amended Complaint.

B. The FedMod Enterprise

In May 2008, Defendants Minitzer and Oscherowitz formed FedMod, which sold mortgage loan modification services under the name "Federal Loan Modification" to consumers who were fearful of losing their homes. Facts ¶¶ 1-2,7. FedMod operated through a series of related and successor companies. Facts ¶¶ 8,11-12 . In the beginning, FedMod did business as Federal Loan Modification, LLC, Federal Loan Modifications, and SBSC Corporation. Facts ¶ 8 A few months after FedMod began operating, Defendant Broughton joined the business and later became a principal. Facts ¶ 9. Soon thereafter, to claim an exemption from California state law banning the collection of advance fees for foreclosure relief services except by attorneys, Facts ¶ 90, FedMod began to call itself a law firm and Defendant Anz served as its nominal head. Facts ¶ 65. At that time, Defendants Legal Turn. LLC ("LegalTurn"), LegalTurn, Inc., and Federal Loan Modification Law Center, LLP ("FLM Law Center") anchored the FedMod enterprise.[3] Facts ¶ 93. Despite the changes in FedMod's structure over time, it operated as a single, continuous business from its founding in May 2008 until the end of July 2009. Facts ¶¶ 38, 95, 96. Further, during FedMod's existence, Defendant Minitzer, along with Defendants Oscherowitz and Broughton,

[3] Because of ethics rules prohibiting attorneys from splitting fees with non-attorneys, defendants restructured the enterprise so that Defendants Broughton, Minitzer, and Oscherowitz, non-attorneys, could continue to share in FedMod's profits after it began operating as a law firm. Facts ¶ 93. To do so, Defendants created a distinct corporate entity, comprised of LegalTurn, Inc. and Legal Turn. LLC, which served as the law firm's administrative management company. Facts ¶ 16.

exercised control over all FedMod operations and shared in the enterprise's profits, even after it purportedly became a law firm. Facts ¶¶ 94, 95, 97,104.

Most of FedMod's business practices remained unchanged after its nominal transition to a law firm. Throughout, the enterprise targeted distressed homeowners using a nationwide internet, television, and radio advertising campaign. Facts ¶¶ 4-6. The advertisements told consumers that FedMod could help them save their homes and instructed them to call its toll-free telephone number or visit its website. Facts ¶¶ 2,11,19 . When consumers called FedMod's toll-free number or contacted the company through its website, FedMod sales people pitched its services with false claims of high success rates and promises that it could achieve specific loan modifications for consumers. Facts ¶¶ 164-201. Moreover, to make its services appear more legitimate, FedMod created the impression it was affiliated with the federal government. Facts ¶¶ 202-213. The company permeated the airwaves with advertisements, including one radio ad characterized as "an important public announcement," Facts ¶ 202, and other ads hawking its services as the "Federal Loan Modification Program." Facts ¶¶ 202, 204.

IV. LEGAL STANDARD FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is properly granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P.

56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate an absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden under Rule 56(c), the burden shifts to the non-moving party to produce "specific facts showing there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[a] non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment." *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). If the non-moving party's evidence "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

V. VIOLATIONS OF THE FTC ACT

The FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). "An act or practice is deceptive if (1) there was a representation, omission, or practice (2) the representation, omission or practice is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission or practice is material." *Stefanchik*, 559 F.3d at 928.

In divining whether a particular claim is made, courts consider the "overall net impression" of the representation. *See Stefanchik* at 928; *FTC v. Gill*, 71 F. Supp. 2d 1030, 1043 (the Court looks at "overall net impression" in deciding questions of ad interpretation); *see also FTC v. Cyberspace*, 453 F.3d 1196, 1200

(9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures."). Consumer testimonials further imply a claim. *See, e.g., Porter & Dietsch, Inc. v. FTC* , 605 F.2d 294, 301-03 (7th Cir. 1979) (finding ads conveyed extravagant weight-loss claims through use of testimonials). Courts have authority to determine implied claims that are communicated to consumers without the aid of extrinsic evidence. *See Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 652-53 (1985) (no need to conduct survey of public to determine if misleading); *Kraft, Inc. v. FTC*, 970 F.2d 311, 320 (7th Cir. 1992) (extrinsic evidence not required to prove conspicuous, implied claims).

False representations are likely to mislead consumers acting reasonably. *See, e.g., FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 258 (E.D. N.Y. 1998). Moreover, reasonable consumers are not required to doubt the veracity of express claims. *Pantron* at 1095.

Finally, for purposes of FTC Act liability, "[a] misleading impression caused by a solicitation is material if it involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.com,* 453 F.3d at 1201. "Implied claims are presumptively material where there is evidence that the seller intended to make the claim go to the heart of the solicitation or the characteristics of the produce or service offered." *FTC v. Stefanchik,* 2007 WL 1058579 * 5 (W.D. Wash. Apr. 3,

2007), *aff'd,* 559 F.3d 924 (citing *Kraft, Inc. v. FTC*, 970 F.2d at 322). When claims are express courts can presume materiality. *See Pantron*, 33 F.3d at 1095-96.

A. This Court Should Enter Summary Judgment as to Count I - Defendants' Representations That They Can Obtain a Loan Modification or Stop Foreclosure in All or Virtually All Instances Are False

Throughout its operation, FedMod made a number of false statements, primarily through telephone and email communications with consumers, that, as a whole, misled consumers into believing it would modify their mortgages or stop foreclosure in the vast majority of cases. The uncontroverted evidence, consisting of deposition testimony, undercover calls, sales scripts, consumer and former employee declarations, and company records, show that FedMod routinely represented to consumers it had success rates in the high nineties, would reduce interest rates to as low as 2%, would slash mortgage payments by hundreds of dollars, and had a bevy of attorneys working on consumers' behalf. Facts ¶¶ 164-201 . The facts, however, seriously belie these statements. FedMod did not have a success rate in the high nineties, but, rather, at best, based on a comprehensive survey of FedMod records, the company only obtained loan concessions for a small minority of its customers. Facts ¶¶ 272-73. In fact, the company did little, or absolutely nothing, for its customers and did not, or could not, deliver on its persistent promises. For example, consumer declarants report that months passed

and FedMod did not even contact their lenders. Facts ¶¶ 238-39 . This is not surprising because, throughout its operation, FedMod woefully lacked enough personnel to work on the files of those consumers from whom it took advance fees. Facts ¶¶ 241-255. FedMod employees typically carried a caseload of 150 files. Facts ¶ 256. Further, despite FedMod's claims to the contrary, consumers did not receive legal assistance. Facts ¶ 271. It would not have been possible for FedMod to provide legal services given that at any one time the company at most had six attorneys to service over 10,000 clients. Facts ¶¶ 67, 274. Moreover, the California Bar took disciplinary action against Defendant Anz for his failure to provide legal services to his clients, in response to which Anz surrendered his law license. Facts ¶¶ 68.

1. FedMod represented that it would obtain mortgage loan modifications for consumers in all or virtually all cases.

FedMod made countless statements concerning the effectiveness of its services that, as a whole, misled consumers into believing that they would receive a mortgage loan modification. The core message of FedMod ads and sales calls was that consumers should buy its services to "save their homes." An early version of its website stated, "We have an extremely high success rate in modifying loans and keeping people in their homes. We will only take on cases that have a very high probability of approval so the time to act is NOW, before it's too late." Facts ¶ 164. Similarly, in a newspaper ad, Ralph Roberts, the company spokesperson, claimed, "I am confident that they will get your loan modified or

you pay nothing." Facts ¶ 177. Further, as demonstrated by company documents, consumer and former employee declarations, undercover calls, and sales scripts, FedMod sales staff routinely touted extraordinary success rates such as "97%", "over 90%", or other such "extremely high" success rates. Facts ¶¶ 165-66,171-73; *Cf.* Facts ¶ 292 (Defendant Minitzer represented to outside vendor that FedMod had a 95% success rate). FedMod's principals even acknowledged telemarketers promised "big results" and "did anything to sell" FedMod's services. Facts ¶ 169.

FedMod also commonly represented to consumers that it could achieve, or had achieved, specific loan concessions from lenders. Facts ¶¶ 169, 178-92. During their interactions with potential customers, as demonstrated by consumer declarations, undercover calls, FedMod sales aids, chat sessions, and emails to consumers, staff frequently quoted specific interest rate or principal reductions. Facts ¶¶ 178-90. (consumer declarations, undercover calls, sales aids, chat sessions, emails to consumers, testimony regarding consumer complaints). FedMod also disseminated testimonials purportedly from satisfied customers who recounted dramatic interest rate and payment reductions. Facts ¶¶ 187. For instance, in testimonials sent to an FTC undercover investigator, a FedMod customer represents that she received an interest rate reduction from 10.25% to 5.5% and her mortgage payments decreased to $961 from $1500. Facts ¶ 179 . Another such testimonial claimed that FedMod was responsible for $400 to $500 in savings. Facts ¶ 179.

FedMod made several other claims about its services to bolster the

guarantees that it made to consumers. Its sales people assured consumers that FedMod could deliver modifications within 30 to 90 days. Facts ¶¶ 191-92(consumer declarations and sales scripts). Sales staff also told consumers that FedMod pre-screened potential clients to ensure that it only accepted clients whom they could help, Facts ¶ 173, and that FedMod had "special expertise" in loan modifications. Facts ¶ 168. Throughout its operations, even before adopting the law firm model, FedMod inflated its perceived effectiveness with claims that attorneys would advocate on clients' behalf. Facts ¶ 193. Such claims consistently appeared on FedMod's website, its blog, and in print advertisements, Facts ¶¶ 193, 195-96, and in telemarketing sales pitches. Facts ¶ 197. In fact, A FedMod sales script used in its Woodland Hills Office, one of the largest sales offices, listed as a key selling point: "Being represented by an attorney is more effective than representing yourself." Facts ¶ 199. In making these claims, FedMod convinced potential clients to pay the advance fee for its purported services because, unlike doing it on their own, FedMod would obtain the promised results.

FedMod's myriad representations regarding its high success rates and effectiveness in obtaining loan modifications, as a whole, conveyed the unmistakable impression that, the vast majority of the time, consumers who purchased its services would receive a loan modification. Courts have interpreted similar types of performance claims as those made by FedMod to communicate the overall message that the stated results are typical. *See FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (noting that where a company made

express claims regarding the benefits of its business opportunity it was "reasonable for consumers to have assumed that the promised rewards were achieved by the typical [consumer]."); *FTC v. Febre*, 1996 WL 396117, *2 (N.D. Ill. July 3, 1996) (holding that where the defendant represented that purchasers "could earn" specific amounts, or that it was "possible" to do so, it was reasonable to presume that a consumer understood the stated amounts were typical or average); *cf. Chrysler Corp. v. FTC,* 561 F.2d 357, 363 (D.C. Cir. 1977) (upholding Commission determination that when company made claims about the fuel-efficiency for its small cars, consumers reasonably would understand the stated benefits to apply to all of small cars, regardless of engine size).

Here, consumers reasonably would ascribe FedMod's commonly touted "extremely high" success rates to themselves, and conclude that they personally would receive the benefit promised, that is, a loan modification. In addition, it would be wholly reasonable for consumers to expect loan modifications on terms similar to those FedMod claimed to have achieved for others or that were recounted in testimonials FedMod disseminated. *See FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 131 (D. Conn. 2008) (holding that "[w]hen an advertisement contains a testimonial reflecting the experience of an individual with a product, there is an implicit representation that such experience reflects the typical or ordinary results anyone may anticipate from use of the product").[4] Even

[4] Although extrinsic evidence is not needed here to determine the claim made, marketing research supports the tendency for consumers to ascribe stated results in testimonials to themselves. *See, e.g.,* Manoj Hastak & Michael Mazis,

absent an express guarantee, the Court is authorized to find that, looking at FedMod's statements as a whole, the impression conveyed was that FedMod would get a loan modification for consumers. *See FTC v. Gill*, 71 F. Supp. 2d at 1044 (finding that "[t]he lack of a guarantee does not negate the misrepresentation[]" that Defendants could remove negative information from consumers' credit history because it is implied).

2. FedMod's representation that it would obtain loan modifications for consumers in all or virtually all cases was false and misleading.

Simply put, FedMod's representations that it would obtain loan modifications in all or virtually all cases were false, and therefore likely to mislead reasonable consumers. Despite its assurances of virtually guaranteed success, FedMod was seldom able to obtain the promised loan modifications. As established by the FTC's expert witness, Dr. Kenneth Kelly, and the Commission's review of a sampling of FedMod's client files, a statistical analysis reveals that FedMod's actual success rate ranged from a low of 8.91% to a high of 17.76% – a far cry from its purported success rates of over 90% or other such "extremely high"

Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements (Sept. 22, 2004), *available at* http://www.ftc.gov/reports/endorsements/study2/report.pdf. (report submitted to the FTC examining testimonials used in weight-loss, dietary supplement, and business opportunity advertising found that consumers believed they generally would achieve results that were representative of testimonialists' experience).

success rates.[5] Facts ¶ 276. Even when FedMod did not quote a specific success rate, its unqualified assertions of specific modification terms and/or time frames signaled to consumers that they too could expect such results. *See, e.g. Bronson Partners,* 564 F. Supp. 2d at 131; *Five-Star Auto Club, Inc.*, 97 F. Supp. 2d at 528. Yet, more than 80% of FedMod's clients did not receive *any* modification at all, much less a modification that matched the glowing terms claimed in its advertising or sales pitches. Thus, these representations that they would receive a mortgage loan modification from FedMod the vast majority of the time were false and likely to mislead reasonable consumers.

Further demonstrating the misleading nature of FedMod's virtual guarantees of success were its inadequate efforts to obtain the results that it promised. FedMod's low success rates are unsurprising given the chaotic and disorganized state of its operations, well-known to those working at the company. Facts ¶¶ 241-267. As noted above, FedMod operated in two iterations, from approximately May 2008 to November 2008 as Federal Loan Modification, LLC, and from approximately November 2008 to July 2009 as FLM Law Center. *Infra* Section III.B. When FedMod operated as Federal Loan Modification, LLC, only a single part-time employee, FedMod's receptionist, was working on processing and submitting client files to lenders. Facts ¶ 241. Moreover, this receptionist had no

---

[5] In an affidavit filed by Defendant Nabile Anz in response to the Court's Order to Show Cause Why A Preliminary Injunction Should Not Issue, Anz asserted that FedMod's success rate was 33%. Thus, even assuming *arguendo* that Anz's bald assertion regarding FedMod's success rate was accurate, which it was not, FedMod grossly misrepresented its success rate.

experience, training, or expertise in negotiating with lenders, and was overwhelmed with the sheer number of client files. Facts ¶ 242. As a result, most consumer files never received service. Facts ¶ 243.

After the nominal transition to FLM Law Center in November 2008, operations scarcely improved. While FedMod increased its back-end processing staff, it multiplied its client base at a significantly larger rate. Facts ¶ 255. Thus, FedMod managers and employees, instead of servicing existing backlog, were overwhelmed with the ever-increasing number of new clients. Facts ¶¶ 253, 258. Rachelle Cochems who was hired as the operations manager in January 2009, testified that, when she started 1000 out of 2500 client files had been lost. Facts ¶ 267. According to her, this was due in part to FedMod's failure to implement a workable system to track client files. Facts ¶¶ 263-66. Cochems further testified that processors were overwhelmed and that there was no point during her tenure when FedMod had a sufficient number of processors to handle the number of client files. Facts ¶ 255. Former employees testified that processors had to handle between 80 and 150 files on average at any given time, and at some points, several hundred files. Facts ¶ 256. Demonstrative of this overwhelming workload were reports from consumers that they could not get status updates, did not receive return calls, and generally were unable to reach anyone at FedMod. Facts ¶ 237. Most disturbingly, consumers reported contacting their lenders on their own, only to find out that FedMod had not even submitted their file to the lender for consideration. Facts ¶ 238. Approximately one month before the FTC filed suit,

FedMod had a backlog of at least 5,000 files, and unsuccessfully attempted to contract with another company (sued by the FTC in a different action) to handle these files. Facts ¶ 260. Nevertheless, FedMod flagrantly continued to make the same bold, unsupported promises that it would obtain loan modifications for consumers.

Additionally belying guarantees of success was that FedMod telemarketers promised consumers results without regard to whether such results were possible given their specific circumstances. Despite Fedmod's claims that it pre-screened all clients for eligibility and only took cases it could win, its sales staff often did not have the capability or incentive to do so. Several former telemarketers stated that they were instructed to accept all clients, received virtually no instruction on eligibility criteria, and had unfettered discretion to accept clients. Facts ¶¶ 143-51. Corroborating these statements, Cochems testified that FedMod processors frequently complained to her that the sales staff should not have signed up a particular client because they did not meet lender guidelines on loan modification eligibility. Facts ¶ 151a. Mr. Harari, who was a principal in FedMod until August 2008, testified that, although he instructed sales staff on guidelines for accepting suitable candidates for loan modifications, some staff simply signed up every client they could, and ignored the guidelines. Facts ¶ 143a. Robert Moskovith, who ran FedMod's Woodland Hills branch office, further testified that it was "not possible" to evaluate whether a consumer was eligible for a loan modification based on the information that FedMod sales staff requested before payment. Facts ¶ 151.

The record indicates that yet another one of FedMod's key selling points – the value of having attorneys negotiating with lenders – was a complete farce. Indeed, Anz testified that lenders did not even engage in negotiations over eligibility for a loan modification. Facts ¶ 270. Also, up until Anz became involved with FedMod in November 2008, not a single attorney worked on FedMod's client files. Facts ¶ 92. Even when FedMod overtly began to operate under the name FLM Law Center, the company at most had only six so-called attorneys, including Defendant Anz, to service its approximately 10,000 clients.[6] Facts ¶¶ 67-67a.. Of those six attorneys, two were not licensed to practice in California (Facts ¶ 67a.). Those attorneys played little to no role in providing FedMod's purported services, except in the rare case. Indeed, Ms. Cochems testified that at most, attorneys performed some work on 5% of the client files. Facts ¶ 271. Given the *de minimis* work that attorneys performed for FedMod clients, FedMod statements suggesting that an attorney would be the one reviewing a client's information or negotiating with a client's lender are blatantly false and misleading. The misrepresentations concerning direct attorney involvement in handling clients' files only served to bolster the overall false impression given to consumers that if they purchased FedMod's services they would receive a loan modification in all or virtually all circumstances.

---

[6] Although Defendant Anz claimed that in February 2009 he paid some attorneys licensed in other states a $1000 per month retainer to be available to work on FedMod client matters. Facts ¶ 107. In total, according to Defendant Anz, only 15 to 25 cases out of the nearly 10,000 ever were referred to one of these out-of-state attorneys. Facts ¶ 108.

3. FedMod's representations were material

As a matter of law, FedMod's false and misleading representations detailed above were material to consumers. Claims that convey information likely to affect consumer's choice or use of a product, or that go to its core characteristics are material. *FTC v. Cyberspace.com, LLC*, 453 F.3d at 1201; *FTC v. Stefanchik,* 2007 WL 1058579 * 5, *aff'd,* 559 F.3d 924; *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965) (court can infer, after finding that a deceptive claim was made, that the claim was material). It is hard to imagine a claim more related to the core characteristics of FedMod's services than a virtual guarantee of efficacy. Claims concerning FedMod's rate of success in achieving this outcome were therefore central to consumers' decision to purchase and rely on its service. *See FTC v. Infinity Group Services*, Case No. SACV 09-977 DOC(MLGx) at 11 (Sept. 9, 2010) (Order granting in part and denying in party summary judgment)(court found that similar representations about success of defendants' loan modification performance were material.); *FTC v. Dinaminca Financiera LLC*, 2010 U.S. Dist. Lexis 8800, *35-36 (C.D. Cal. Aug. 19, 2010) (court found that express and implied assurances that consumers' mortgage payments would be deferred or substantially modified were material). Accordingly, these false representations were material.

B. This Court Should Enter Summary Judgment as to Count II - Defendants Misrepresented To Consumers That They Are Part Of, Affiliated With, Or Endorsed By The United States

Government Or One Or More Federal Government Programs.

There is overwhelming, uncontroverted evidence before the Court that the three radio advertisements attached to the Second Amended Complaint as Exhibits 1 through 3, were deceptive under Section 5 of the FTC Act. As discussed above, to establish that a claim is deceptive, the Commission must demonstrate that the claim was made, that it was likely to mislead, and that it was material. *Infra* Section V; *Stefanchik*, 559 F.3d at 928. Defendants have conceded that FedMod was not part of, affiliated with, or endorsed by the United States Government. Facts ¶ 3. Thus, the Court need only determine whether the advertisements, in fact, made the false government affiliation claim and, if so, whether that claim was material. These questions are well-suited for resolution on summary judgment. *Gill*, 71 F. Supp. 2d 1030 (C.D. Cal. 1999) (granting summary judgment in action alleging advertisements were deceptive under Section 5 of the FTC Act). *See also Bronson Partners, LLC*, 564 F. Supp. 2d 119; *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008) (same).

1. Defendants' advertisements claimed that the company was affiliated with the federal government.

The record demonstrates that some consumers, not unreasonably, specifically stated based on FedMod's name and advertising they believed that the company was associated with the government. Facts ¶ 213. In addition, courts can determine that Defendants' advertisements claimed a government affiliation based on the face of the advertisements. If a claim is express or strongly implied,

extrinsic evidence of how consumers interpreted the advertisement is unnecessary to determine that the claim was made. *Nat'l Urological Group, Inc.*, 645 F. Supp. 2d at 1189 ("If the advertisement explicitly states or conspicuously implies a claim, the court need not look to extrinsic evidence to ascertain whether the advertisement made the claim."); *Thompson Med. Co.*, 104 F.T.C. 648, 788 (1984). *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985) (extrinsic evidence unnecessary when "possibility of deception [is] self-evident" from the face of an advertisement), *quoting Colgate-Palmolive Co.*, 380 U.S. at 391-392; *Kraft v. FTC*, 970 F.2d 311 (7th Cir. 1992) (rejecting assertion that extrinsic evidence must be considered to determine whether implied claim was made).

The use of the name "Federal Loan Modification," combined with other statements in the challenged radio ads create the strong impression that FedMod is affiliated with the government or that it sells government-endorsed services. In the ad that is Exhibit 1, the announcer intones, mimicking a public service announcement, "Please stay tuned for this important public announcement for those in danger of losing their home." Facts ¶ 202. The use of the word "federal," coupled with describing the ad as an "important public announcement," gives the impression that the ad is referring to a government-run or -endorsed program. The other two radio ads appended as Exhibits 2 and 3 to the Second Amended Complaint tell listeners that they "may be eligible for the Federal Loan Modification program," urging them to call a toll-free telephone number to find out if they are "eligible." Again, this word choice strongly implies that the

government sponsors FedMod's services. Facts ¶¶ 204-206. Such terminology is especially potent because there are non-profit, government-endorsed, housing assistance programs for borrowers with distressed mortgages. Indeed, on the continuum, calling FedMod's services a "Federal Loan Modification program" is close to being an explicit representation that FedMod is linked to the government.

In addition, FedMod's intent to make this claim supports a finding that the claim was made. *Novartis Corp.*, 128 F.T.C 233, 664 (1999) ("intent to make a claim need not be established; however, if an advertiser intends to make a claim, it is reasonable to conclude that the ads make that claim"), *aff'd* 223 F.3d 783 (D.C. Cir. 2000). Defendant Minitzer testified that FedMod used the word "federal" in its name to convey a sense of stability. Facts ¶ 74. Company documents also unabashedly labeled the radio ad labeled Exhibit 1 as the "government announcement" ad. Facts ¶ 207. Further, in deciding on a new logo for FedMod, Defendant Minitzer expressed his preference for the logo that he believed "[kept] the 'Federal' concept." Facts ¶ 208. Defendant Anz similarly preferred that logo, stating that it "gives us the greatest legal stature and the somber presence of an authoritative entity while providing the governmental/agency feel which implies a sense of depth." Facts ¶ 209. Moreover, despite several warnings from their marketing vendors that FedMod's name gave the appearance of "federal sponsorship", Defendants continued to use the name, and did not modify their advertising. Facts ¶ 211-212; *see also Kraft*, 970 F.2d at 323 (making claims despite warnings that they may be deceptive supports a finding that advertiser

believed claims influenced purchasing decisions, and were therefore material to consumers). Taken together, these facts show that FedMod fully intended to make a federal affiliation claim, and believed in doing so, it would generate sales.

Moreover, the disclaimer that began appearing in two of the ads (Exhibit 1 and 2 to the Second Amended Complaint), six months after they began to run and shortly after Anz joined the enterprise, does not negate the federal affiliation claims the bodies of the ads convey. The disclaimer states that FedMod is "[n]ot a government program or agency, Legal Services by Bill Anz, Irvine, California through Federal Loan Modification Law Center." Facts ¶ 129. For a disclaimer to be effective, it must be "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989). *See also Thompson Med. Co.*, 104 F.T.C. 648, n.9. The disclaimer is obscured in the ad, and therefore it does not meet this standard. Delivered in a low cadence and at a speech much faster than the rest of the ad, the disclaimer is demonstrably difficult for the normal listener to hear and comprehend. Facts ¶ 130. Additionally, the disclaimer is made at the beginning of the ad before the listener even knows the nature of the service advertised, making it more likely to be overlooked. Facts ¶ 130. Further, adding this disclaimer shortly after Defendant Anz came on board indicates that Defendants themselves recognized the radio ads claimed that FedMod was affiliated with the government. Facts ¶ 129. Thus, adding an ineffective disclaimer not only does not cure the misleading impression once added, but is

evidence that the ads before and after such disclosure was added make the challenged claim.

2. The government affiliation claim is material

As discussed *infra* Section V.A.3, a claim is material if it communicates information that likely would influence consumers' decision to purchase or use the advertised product. *See, e.g., FTC v. Cyberspace.com, LLC*, 453 F.3d 1196 at 1201. By affiliating FedMod's services with the government, Defendants created a patina of legitimacy that likely persuaded many consumers to do business with them. In addition, express claims and deliberately implied claims used to induce the purchase of a product are presumed to be material. *Pantron I Corp.*, 33 F.3d at 1095-96; *FTC v. Figgie*, 994 F.2d 595, 604 (9th Cir. 1993); *Am. Home Prods. Corp. v. FTC*, 95 F.2d 681, 688 n.11. A presumption of materiality is warranted; the uncontroverted evidence demonstrates that FedMod deliberately associated itself with the government. *Infra* Section V.B.2.

C. Subsequent Disclosures Do Not Cure Defendants' Misrepresentations

Defendants' practice of calling existing customers to disabuse them of the notion that the company is a government agency or can guarantee results does not shield them from liability. Marketers do not have a free pass to lure in consumers with deceptive claims even if they later relay truthful information. In *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), the Second Circuit upheld an injunction of an advertisement even though consumers who responded to the ad

immediately received brochures qualifying deceptive claims. *Id.* at 873. The court reasoned that "the law is violated if the first contact is secured by deception, even though the true facts are made known to the buyer before he enters into the contract of purchase." *Id.* (citations and quotations omitted). *See also Gill*, 71 F. Supp. 2d at 1044 (rejecting argument that disclaimers in contract demonstrated that statements were not misleading, on grounds that "each representation must stand on its own merit, even if other representations contain accurate, non-deceptive information.").

The same result should obtain here. Notably, compliance calls did not occur until *after* consumers made at least one payment to FedMod, unlike in *Exposition Press* and *Gill*, where consumers received disclosures *before* paying. Facts ¶ 161. In those cases, courts still found subsequent disclosures inadequate to cure deception even though consumers received the information before remitting payment. Thus, disclosures made after consumers already have paid certainly cannot insulate Defendants from liability. Also, FedMod did not begin conducting compliance calls until December 2008, and failed to conduct calls for all customers enrolled after that point. Facts ¶¶ 158, 162. Defendants' incomplete and after-the-fact compliance efforts are therefore entitled to no weight.

VI. The Court Should Hold Minitzer Individually Liable For The Acts And Practices Of The Corporate Defendants

A. Corporate defendants acted as a common enterprise

Defendant Minitzer is culpable for the deceptive acts and practices of each

of the corporate defendants, which operated as a common enterprise. Conduct of corporate defendants acting as a common enterprise is attributable to all members of the enterprise in determining liability. *See FTC v. J.K. Publ'ns*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000) (citations omitted); *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171 (5th Cir. 1973); *Think Achievement*, 144 F. Supp. 2d at 1011. A host of factors may demonstrate the existence of a common enterprise, including: common control, shared officers, shared office space, commingling of funds, unified advertising and whether business was transacted through a maze of interrelated companies. *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *Think Achievement*, 144 F. Supp. 2d at 1011. No one factor is dispositive, and all factors need not be present to justify a finding of common enterprise. *FTC v. Kennedy*, 574 F. Supp. 2d 714, 722 (S.D. Tex. 2008).

Several of those factors are present here, demonstrating that the corporate defendants operated as a common enterprise. The FedMod enterprise conducted business through all of the interrelated corporate defendants, which shared the same offices. Facts ¶¶ 21, 26, 30, 36,44. The corporate defendants also were under the common control of overlapping officers, who acted as a joint decision-making unit for the business. Facts ¶¶ 7, 49-63, 69, 73, 97, 104. Defendant Minitzer is an owner of Federal Loan Modification, LLC, Federal Loan Modifications, SBSC Corporation, LegalTurn, Inc. and Legal Turn. LLC, and had control over FLM Law Center's bank accounts. Facts ¶ 54-60, 291-94. Defendant Oscherowitz was an officer of SBSC Corporation, LegalTurn, Inc. and Legal Turn.

LLC, and like Minitzer, had control over FLM Law Center bank accounts. Facts ¶¶ 49-52, 291. Defendant Broughton was a partner in the FedMod enterprise, and was a managing member of Legal Turn. LLC. Facts ¶¶ 62-63. Defendant Anz was a principal of Anz & Associates, PLC, Venture Legal Support, PLC, and FLM Law Center, and Legal Turn. LLC. Facts ¶¶ 32, 65-66. Finally, company funds flowed freely between the various corporate defendants, and in several instances, FedMod did not alter its advertisements after it began operating through FLM Law Center and the LegalTurn management entities. Facts ¶ 99.

B. Defendant Minitzer should be subject to both injunctive and monetary relief

Defendant Minitzer controlled, participated in, and knew of the deceptive acts and practices of the FedMod common enterprise. An individual can be held liable for corporate violations of the FTC Act if he directly participated in the deceptive practices or had authority to control the corporate defendants. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006); *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1089-90 (C.D. Cal. 1994). Further, the individual defendant is liable for monetary damages if he had knowledge of the wrongful acts or practices. *Am. Standard*, 874 F. Supp. at 1089. Knowledge can be proven by showing reckless indifference to the truth or falsity of a misrepresentation or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *FTC v. Affordable Media,* 179 F.3d 1228, 1234 (9th Cir. 1999); FTC *v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573-74 (9th Cir. 1989). *See*

Cyberspace.com, 453 F.3d at 1202; *Am. Standard*, 874 F. Supp. at 1089; *J.K. Publ'ns*, 99 F. Supp. 2d at 1204. The FTC, however, is not required to show a defendant intended to defraud consumers. *Affordable Media*, 179 F.3d at 1234; *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997).

The facts overwhelmingly establish Defendant Minitzer's authority to control the FedMod common enterprise. Authority to control can arise from assuming the duties of a corporate officer, especially when the corporate defendants are, as those in this case, small, closely-held corporations. *Amy Travel*, 875 F.2d at 573; *see also Publishing Clearing House*, 104 F.3d at 1170-71; *Am. Standard*, 874 F. Supp. at 1089; *Think Achievement*, 144 F. Supp. 2d at 1011. Minitzer, a founder of the enterprise, was a principal of five of the corporate defendants until at least April 1, 2009. Facts ¶¶ 54-61. He testified that he participated in making decisions and formulating policy for the company, and that he, along with others, hired the company's senior managers and had authority to oversee the sales staff. Facts ¶¶ 104, 288. In addition, he negotiated and entered into agreements on behalf of the enterprise and controlled FedMod's assets, as a signer on the bank accounts of at least four of the corporate defendants. Facts ¶¶ 289-95. He freely used FedMod bank accounts to pay personal expenses such as his car payments and credit card debt. Facts ¶ 309.

Defendant Minitzer also directly participated in the deceptive conduct. He played a central role in creating FedMod's internet, television and radio advertisements, including the three advertisements alleged to falsely represent a

government affiliation. Facts ¶ 287. In addition, he falsely represented to a payment processor that FedMod had a 95% success rate when he arranged for the payment processor to process consumer payments for FedMod's services. Facts ¶ ¶ 172. He further personally decided to use the word "federal" in the company's name to impart a sense of stability to consumers. Facts ¶ 74.

The record further establishes that Minitzer knew of FedMod's deceptive acts and practices, both with respect to FedMod's false government affiliation claims and its guarantees to consumers that they would obtain loan modifications. As early as August 2008, Adi Harari warned Defendant Minitzer that sales staff were making misrepresentations. Facts ¶ 301 . Defendant Minitzer admitted that he decided not to terminate sales staff for making misrepresentations due to the company's need to generate revenue, and that for the first several months of operations, sales employees were never instructed against promising results to consumers. Facts ¶ 218, 222. Moreover, the record demonstrates Defendant Minitzer's awareness that the company was performing little or no work on behalf of its customers. Facts ¶ 249-51. He received regular reports on the volume of consumer complaints, Facts ¶ 282, knew that the Better Business Bureau had assigned FedMod an "F" rating, Facts ¶ 296, and was warned that the company's chargeback rate was too high by at least one payment processor, which ultimately led to the shut down of FedMod's account. Facts ¶ 302-03. Defendant Minitzer therefore cannot assert that he was unaware of the challenged practices. Accordingly, he should be jointly and severally liable for monetary relief.

VII. THE FTC IS ENTITLED AS A MATTER OF LAW TO PERMANENT INJUNCTIVE RELIEF AND CONSUMER REDRESS AGAINST DEFENDANT MINITZER

A. This Court Has the Authority to Grant the Requested Relief

The FTC filed this action under Section 13(b) of the FTC Act to secure permanent injunctive and monetary relief against Defendant Minitzer. Section 13(b) provides that "in proper cases the Commission may seek, and, after proper proof, the court may issue, a permanent injunction" against violations of "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b). The Ninth Circuit has held that any case alleging violations of a law enforced by the FTC constitutes a proper case for which injunctive relief may be sought. *FTC v. Evans Prod. Co.*, 775 F.2d 1084, 1086-87 (9th Cir. 1985); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111-13. Moreover, Section 13(b) preserves the Court's inherent authority not only to grant permanent injunctive relief but any ancillary equitable relief that is necessary to render complete justice. *See Pantron I Corp.*, 33 F. 3d 1088, 1102 (quoting *H.N. Singer* at 1112-13); *see also FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469-70 (11th Cir. 1996); *FTC v. Security Rare Coin & Bullion*, 931 F.2d 1312, 1314-15 (8th Cir. 1991). The Court's broad equitable authority includes the power to order monetary relief in the form of consumer redress, rescissions of contracts, restitution, or disgorgement of unjust enrichment. *Id.* Moreover, the court has authority to grant an order with monetary relief at summary judgment. *See, e.g.*, *Stefanchik*, 559 F.3d 924 (affirming summary

judgment in favor of FTC including monetary relief); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196 (9th Cir. 2006 (same).

B. The Court Should Require Minitzer To Pay Full Redress To Consumers Injured During His Tenure At FedMod

An order of consumer redress is warranted when the relief is necessary to remedy the injury caused by violations of the FTC Act. *FTC v. Figgie*, 994 F.2d 595, 605 (9th Cir. 1993). The proper measure of consumer redress is the total amount paid by consumers to purchase goods or services, less refunds returned to consumers. *Gill*, 265 F.3d at 958; *Stefanchik*, 559 F.3d at 931. Moreover, because the purpose of the FTC Act is to protect consumers from economic injury, the measure of consumer redress is the full amount lost to consumers, *i.e.* to restore consumers to their status quo, not defendants' profits. *Stephanchik* at 931; *see also FTC v. Munoz,* No. 0055319, 2001 WL 970352, at *2 (9th Cir. Aug. 27, 2001)(unpublished op.) ("The district court had the authority to order restitution of the amount lost, not just disgorgement of the amount that was received."). Defendants also are liable for the entire amount spent by consumers regardless of the "value of the thing sold." *FTC v. Figgie Int'l Inc.*, 994 F.2d 595, 605-606, *cert. denied*, 114 S. Ct. 1051 (1993). Thus, here, it is irrelevant to the redress calculation whether a minority of FedMod customers may have received some form of a loan concession from their lenders. *McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (upheld award of gross sales as consumer redress, finding that even if product purchased is useful and competitively priced central question is

"whether seller's misrepresentations tainted the customer's purchasing decisions.").[7] Finally, the Commission need not prove that each purchasing consumer relied on the misrepresentations about FedMod's services. *Figgie*, 994 F.2d at 605-06.

It is sufficient to show that the misrepresentations were material, widely disseminated and consumers in fact purchased FedMod's services. *Id.*; *see also FTC v. Kitco,* 612 F. Supp. 1282, 1293 (D. Minn. 1985).[8] As established above, *infra* Sections V.A.3 and V.B.3, FedMod's misrepresentations were material to purchasing consumers. The record also is replete with evidence of these misrepresentations' widespread nature. Undercover calls, FedMod emails and chat sessions with consumers, sales scripts, and deposition testimony, show that FedMod sales people, located in the headquarters building and across its field offices, commonly told prospective customers that FedMod had a very high success rate in obtaining loan modifications, could achieve specific results, and had attorneys working on clients' behalf. Facts ¶¶ 164-90 In addition, FedMod permeated the airwaves, print media, and the Internet with advertisements claiming

---

[7] To the extent Defendant introduce evidence that some FedMod customers were satisfied or received the promised modification, this does not create a genuine issue of material fact because "the existence of some satisfied customers does not constitute a defense under the FTC Act." *Stephancik*, 559 F.3d at 929 n. 12. Rather such evidence would go to the calculation of net losses.

[8] Once the Commission establishes the misrepresentations were widely disseminated and consumers paid money, the Commission show that its calculations reasonably approximate the amount of net losses. *FTC v. Febre*, 128 F. 3d 530, 535 (7 th Cir. 1997). The burden then shifts to the Defendant to show the calculation is inaccurate. *Id.*

that it would save consumers' homes from foreclosure. Facts ¶¶ 4-6, 174-77, 202, 204, 206. Ultimately, in excess of 10,000 consumers purchased FedMod's services. Facts ¶ 274.

The Court should impose an order of redress in the amount of $10,397,260, a conservative estimate of the total consumer loss. Facts ¶ 22. The FTC calculates that during the period between June 1, 2008 and March 31, 2009, the time period during which Defendant Minitzer participated in the business, FedMod received a total of $12,222,755 from consumers and refunded approximately $1,316,946 of that amount.[9] Facts ¶¶ 304-306. The FTC derives its calculation of net receipts from an analysis of FedMod's bank records, merchant account and payment processor information, and internal accounting records reflecting payments received and refunds issued. Facts ¶¶ 307. Apart from Nabile Anz's surrender of certain corrupted FedMod servers, none of the Defendants have produced information or documents in discovery bearing on the amount of FedMod's gross proceeds or refunds. The redress calculation need only be a reasonable approximation of consumer loss, not an absolute measure. *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); *Five Star Auto*, 97 F. Supp. 2d at 534. Reliance on Defendants' bank records and financial documents, even if incomplete, is sufficient basis for computing damages. *Febre*, 128 F.3d at 535 ("The risk of uncertainty

[9] After April 1, 2010 FedMod received approximately $300,000 in fees from consumers. Facts ¶ 305. The FTC has not included this amount in its estimate because it appears that Defendant Minitzer abandoned the FedMod business sometime after this Court issued a preliminary injunction against him and the other Defendants on April 21, 2010.

should fall on the wrongdoer whose illegal conduct created the uncertainty." (quotations and cited omitted)); *Five Star Auto*, 97 F. Supp. 2d at 534.

C. The Requested Injunctive Relief is Appropriate

As discussed above, *infra* Section VII.A, courts may order injunctive relief to remedy violations of the law. Such relief may be broader in scope than the illegal conduct at issue. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) ("The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. Having been caught violating the [FTC] Act, respondents must expect some reasonable fencing in."). Broader "fencing-in" provisions help to "prevent similar and related violations from occurring in the future." *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 215 (9th Cir. 1979) (citing *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959)); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir. 1984) (court recognized the necessity to "fence in" FTC Act violators given limitless "human inventiveness" in crafting advertising in such a way as to evade orders.); *See also Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992) ("The FTC has discretion to issue multi-product orders, so-called 'fencing-in' orders, that extend beyond violations of the Act to prevent violators from engaging in similar deceptive practices in the future."). Moreover, the Ninth Circuit has approved, as the FTC seeks here, categorical bans as a proper form of injunctive relief, especially given defendants' repeated violations of laws. *See, e.g.*, *FTC v. Gill*, 265 F.3d 944, 957-58 (9th Cir. 2001) (ban on participation in credit-repair business); *FTC v. Inc21.Com Corporation*,

2010 WL 3789103 (N.D.Cal. Sept. 21, 2010), * 29; *FTC v. Dinaminca Financiera*, 2010 U.S. Dist. Lexis 8800, *60 (ban on mortgage assistance and foreclosure relief services); *FTC v. Universal Premium Servs., Inc.*, No. CV06-0849 SJO (OPx), slip op. at 6-7 (C.D. Cal. Feb. 26, 2007) (ban on telemarketing and on the sale or marketing of program memberships); *FTC v. Medicor, LLC*, 2002 U.S. Dist. LEXIS 16220, at *3-4, 2002-2 Trade Cas. (CCH) ¶ 73,759 (C.D. Cal. 2002) (ban on telemarketing and on marketing of work-at-home medical billing opportunities); *FTC v. NCH, Inc.*, 1995 U.S. Dist. LEXIS 21096, at *8-9, 1995-2 Trade Cas. ¶ 71,114 (D. Nev. 1995), *aff'd*, 106 F.3d 407 (9th Cir. 1997) (ban on prize-promotion telemarketing).

The FTC seeks to ban Defendant Minitzer from selling or marketing any mortgage assistance service and any financial-related good or service and to prohibit him from misrepresenting material aspects of any good or service, including a government affiliation.[10] This relief is warranted in light of the egregious and systematic nature of FedMod's conduct, which continued for almost one year under Minitzer's control and caused as many as 10,000 consumers to pay

---

[10] The proposed order contains provisions prohibiting specific misrepresentations in connection with the marketing of any goods and services, which serves mainly to enjoin conduct that would violate Section Five of the FTC Act. It also contains compliance-monitoring and record-keeping requirements, which courts have routinely approved in FTC cases. *See, e.g., FTC v. Capital Choice Consumer Credit*, 2004 WL 5141452, *2 (S.D. Fla. May 5, 2004) ("[i]t is well-settled that 'record-keeping and monitoring provisions . . . are also appropriate to permit the Commission to police the defendants' compliance with the order.'") (quoting *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 737, 753-54 (S.D. Fla. 1999).

large, up-front fees in exchange for results that never materialized. *See Think Achievement*, 144 F. Supp. 2d at 1017 (egregiousness and recurrent nature of conduct should be considered). Strong injunctive relief in the form of bans is further warranted because of Defendant Minitzer's knowing disregard for the law. He collected advance fees from consumers in violation of California law, CAL. CIV. CODE §§ 2945 *et seq.*, and then attempted to fit within an exemption covering attorneys by reinventing FedMod as a law firm, even though it had only four licensed attorneys to service thousands of customers. *Infra* Section V.A.2. Additionally, the California Department of Real Estate issued a cease-and-desist order against FedMod for operating without a license, but he allowed FedMod to continue operations with impunity. Facts ¶ 48a.; *see Five-Star Auto Club*, 97 F. Supp. 2d at 536 (noting defendant's continued operation despite cease-and-desist orders in imposing ban).

Banning Defendant Minitzer from selling or marketing mortgage-related services that could be peddled as means to avoid foreclosure is particularly justified given the substantial harm he caused and his demonstrated disregard for state regulations to protect consumers of foreclosure relief services. Courts have entered similar bans against defendants engaged in the same challenged conduct as Defendant Minitzer. *See, e.g., FTC v. Dinaminca Financiera*, 2010 U.S. Dist. Lexis 8800, *60 (imposing a ban on the sale of mortgage loan modification and foreclosure relief services).

Defendant Minitzer also should be banned from selling or marketing

financial-related goods and services. In addition to operating FedMod on an advance fee basis in violation of California law, Defendant Minitzer, before and after he founded FedMod, engaged in the sale and marketing of other financial-related goods and services frequently characterized by deception, such as debt settlement and tax relief.[11] Prior to FedMod, he operated an advance-fee tax relief business, Facts ¶ 75, which employed the same sales personnel who made misrepresentations to consumers in connection with FedMod. Facts ¶ 76. Immediately upon leaving FedMod, Defendant Minitzer began working in the debt settlement industry, Facts ¶ 61a., and in a pre-paid credit card scheme. Facts ¶ 61a.. The demonstrated potential for fraud in sale of financial-related goods and services for which sellers collect fees in advance of performance,[12] the extent of the harm caused by Defendant Minitzer's blatant law violations, and Defendant's Minitzer's forays into marketing financial-related goods and services militate strongly in favor of the proposed relief. Accordingly, the requested relief is necessary to prevent Minitzer from further victimizing consumers.

---

[11] In promulgating amendments to the Telemarketing Sales Rule prohibiting certain practices in connection with marketing tax relief and debt settlement services, the Commission found that debt relief companies (including tax relief and debt settlement) "engage in widespread deception, frequently fail to produce the results they promise, and have caused injury to a large number of consumers." *TSR; Final Rule*, 75 FR 48458, 48482 (Aug. 10, 2010).

[12] The International Mass-Marketing Fraud Working Group recently issued a report finding that fraudulent mass-marketing operations "invariably depend on persuading victims to transfer money or funds . . . based on promises of valuable goods or services . . then never delivering [them] to the victims." Internat'l Mass-Mktg. Fraud Working Group, *Mass-Marketing Fraud: A Threat Assessment* 4 (June 2010).

V. CONCLUSION

For the foregoing reasons, as set forth in this motion, memorandum, the Uncontroverted Facts, and the overwhelming evidence supporting them, Plaintiff Federal Trade Commission requests that the Court grant summary judgment against the Defendants and enter the requested permanent injunction and order for monetary relief.

Dated: October 6, 2010

Respectfully submitted,

Willard K. Tom
General Counsel

/s/ Laura M. Sullivan
Laura M. Sullivan
Leah E. Frazier
James L. Chen
lsullivan@ftc.gov; lfrazier@ftc.gov;
jchen2@ftc.gov
Federal Trade Commission
600 Pennsylvania Avenue
Mail Drop NJ 3676
Washington, DC 20580
Tel: (202)-326-3327 (Sullivan)
(-3332) Frazier;(-2659) Chen
Fax: (202)-326-3768

John D. Jacobs (Local Counsel)
jjacobs@ftc.gov
California Bar No. 134154
Federal Trade Commission
10877 Wilshire Blvd., Ste. 700
Los Angeles, CA 90024
Tel: (310) 824-4343
Fax: (310) 824-4380

Attorneys for Plaintiff FTC