Nos. 09-11679-DD and 09-12003-DD (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION, ***Plaintiff/Appellee*****,**

v.

RANDALL L. LESHIN, et. al., ***Defendants/Appellants*****.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

INITIAL BRIEF FOR PLAINTIFF/APPELLEE FEDERAL TRADE COMMISSION

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October 9, 2009

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. Rule 26.1-1, Appellee the Federal Trade Commission certifies that the list of persons and entities with an interest in this case supplied in the Appellants' initial brief, filed on Aug. 18, 2009, appears to be complete to the best of our knowledge, except that the following attorney should be added to the list:

Tom, Willard K. – General Counsel, Federal Trade Commission.

STATEMENT REGARDING ORAL ARGUMENT

Appellee the Federal Trade Commission respectfully submits that an oral argument may not be necessary for the Court to resolve the issues presented in this case, because the facts and legal issues are adequately presented in the briefs and the record, and the decisional process would not be significantly aided by oral argument. Fed. R. App. P. 34(a)(2)(C).

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JURISDICTIONAL STATEMENT

1. The District Court had subject-matter jurisdiction over the case below. The case was a civil law enforcement action brought by the Federal Trade Commission ("FTC" or "the Commission") to enforce provisions of the Federal Trade Commission Act ("FTC Act") (15 U.S.C. §§ 41-58), the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") (15 U.S.C. §§ 6101-6108), and the Telemarketing Sales Rule (16 C.F.R. Part 310). Accordingly, the District Court had jurisdiction pursuant to 15 U.S.C. §§ 45(a), 53(b), 57b, and 6105(b). The District Court also had jurisdiction because the case presented a federal question, 28 U.S.C. § 1331, relating to an Act of Congress regulating commerce, *id.* § 1337(a), in which an agency of the United States government was the plaintiff, *id.* § 1345.

2. This Court has jurisdiction over some of the matters presented in these two consolidated appellate dockets, and lacks jurisdiction over others. The District Court orders that are the subject of the appellants' initial and amended Notices of Appeal[1] addressed both (i) the appellants' civil contempt liability for violating the

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[1] The appellants' initial Notice of Appeal, filed April 1, 2009 [DE 391], and their Amended Notice of Appeal, filed April 13, 2009 [DE 400], both docketed as Case No. 09-11679-DD, sought review, respectively, of the District Court's initial Findings of Fact and Conclusions of Law addressing the contempt and other matters at issue here, entered March 27, 2009 [DE 390], and the District Court's corrected version of that order, entered April 7, 2009 ("April 7 Order") [DE 395].

May 5, 2008 Stipulated Injunction and Order [DE 320]; and (ii) modifications to that Stipulated Injunction and Order in light of those violations.

a. This Court lacks jurisdiction to review the portions of the District Court's April 7 Order [DE 395] finding the appellants in civil contempt for violating the Stipulated Injunction and Order and determining the appropriate civil contempt sanction to be disgorgement of fees collected in violation of that preexisting Order. *Id.*, ¶¶ 20-122, 129. As discussed in Section I of the Argument below (*infra* at 24-29), the District Court's conclusions on the contempt issues are interlocutory and non-appealable, because the District Court has not yet resolved all the issues in dispute between the parties regarding the amount of the disgorgement, and has not yet issued a final order specifying the amount to be disgorged.[2]

b. This Court does have jurisdiction, pursuant to 28 U.S.C. § 1292(a)(1), to review (i) the District Court's Order Modifying the Stipulated Injunction and Order (entered April 15, 2009) [DE 406]; and (ii) the portions of the

[2] This Court, in its Order in Case No. 09-11679-DD (June 26, 2009) ("Jurisdictional Order"), held that the portion of the appeal seeking review of the contempt sanctions "should be allowed to proceed," Jurisdictional Order at 2, but did not address whether it had jurisdiction over that issue.

District Court's April 7 Order that relate to the modification of the injunction [DE 395, ¶¶ 123-28, 131].[3]

c. This Court lacks jurisdiction to review the original version of the District Court's findings of fact and conclusions of law regarding the appellants' liability for contempt (entered March 27, 2009) [DE 390], because that order is moot. In its Order Granting Plaintiff's Emergency Rule 60(a) Motion to Correct Clerical Mistakes or Omissions in the Findings of Fact and Conclusions of Law (entered April 7, 2009) [DE 394], the District Court specified that the corrected April 7 Order would "stand in lieu of the previously issued order." *Id.* at 1.

d. This Court lacks jurisdiction to review the District Court's order approving the proposed text of the notices to be sent to consumers affected by the

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[3] This Court, in its Jurisdictional Order, stated, "To the extent appellants seek to appeal that portion of the district court order providing for future modification of the stipulated injunction and order, because the modification order was not in existence at the time the notice of appeal was filed, this Court lacks jurisdiction over the appeal and that portion of the appeal should be dismissed." Jurisdictional Order at 2. The District Court had concluded that the Stipulated Injunction and Order *ought* to be modified but did not actually *adopt* modifications, but instead directed the FTC to submit a proposed modified order within 10 days. [DE 390 at 43, ¶ 125; DE 395 at 43, ¶ 125.] The FTC did so on April 3. [DE 393.]

The District Court issued the Order Modifying Stipulated Injunction and Order on April 15, 2009. [DE 406.] The Appellants' Second Amended Notice of Appeal [DE 407], docketed as Case No. 09-12007-DD, seeks review, *inter alia*, of that "[i]nterlocutory order[] of the District Court[] … modifying… injunctions…." 28 U.S.C. § 1292(a)(1).

appellants' misconduct regarding their rights under the modified injunction (entered April 15, 2009) [DE 404]. While the appellants' Second Amended Notice of Appeal [DE 407] lists this as one of the orders they sought to appeal, the Argument section of their initial brief does not address this order or the issues discussed therein. Accordingly, the appellants have waived their appeal of this order (which in any event, is essentially ministerial in nature).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction to review an interlocutory, non-final order, in which the District Court found the appellants to be in contempt of the Stipulated Injunction and Order, and concluded that the appropriate civil contempt sanction should be disgorgement of fees improperly collected from consumers, but did not determine the amount to be disgorged or resolve other disputed issues relating to the contempt sanction.

2. Whether (in the alternative, if jurisdiction does exist) the District Court erred in holding the appellants in contempt on the basis of their having engaged in practices that violated the specific prohibitions in the Stipulated Injunction and Order – *i.e.*, (i) collecting fees from consumers even after those consumers had opted to cancel their contracts, and (ii) offering services in states where they failed to comply with applicable consumer protection requirements.

3. Whether the contempt sanction adopted by the District Court – requiring the appellants to remedy their contempt by disgorging fees that they had collected in violation of the Stipulated Injunction and Order and returning such funds to consumers – constituted a proper civil, rather than criminal, contempt sanction.

4. Whether the District Court reasonably exercised its discretion to adopt a modified injunction in light of the appellants' violations of the original Stipulated Injunction and Order.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This case primarily concerns two District Court orders. The first order under review is the April 7, 2009 Order[4] [DE 395] in which the District Court:

(1) adopted findings of fact and conclusions of law determining that the Contempt Defendants[5] had committed serious violations of a Stipulated Injunction and Order [DE 321] that they had entered nearly

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[4] The appellants confusingly refer to this Order as the "Modified Injunction." This is plainly incorrect because, as this Court noted in its June 26, 2009 Jurisdictional Order, the District Court did not modify the injunction in the April 7 Order, but merely stated that the injunction ought to be modified in the future. *See* DE 395, ¶ 125 ("Within 10 days hereof, the FTC shall submit a proposed Modified Stipulated Injunction and Order that includes the following provisions:…").

[5] The appellants (collectively referred to here, as in the District Court orders under review, as the "<u>Contempt Defendants</u>") include two individuals – Randall L. Leshin ("<u>Leshin</u>") and Charles Ferdon ("<u>Ferdon</u>") – and three business entities that Leshin owned or controlled and in which Ferdon played significant management roles: (i) Randall L. Leshin, P.A. d/b/a Express Consolidation, also d/b/a RLL Corp. ("<u>RLL</u>"); (ii) Express Consolidation, Inc. ("<u>ECI</u>"); and (iii) Debt Management Counseling Center, Inc. ("<u>DMCCI</u>"). Leshin, Ferdon, RLL, and ECI were the named defendants in the underlying action and are referred to as "<u>Defendants</u>." Appellant DMCCI was not named as a defendant in the underlying action, but acted in active concert or participation with the other Defendants (and is essentially an *alter ego* of Leshin), was explicitly subject to the District Court's May 5, 2008 Stipulated Injunction and Order, and is subject to the rulings and orders before this Court in the present appeal. *See infra* at 42-44. Two other parties named as defendants in the Complaint, Maureen A. Gaviola and Consumer Credit Consolidation, Inc., were not parties to the Stipulated Injunction and Order or the rulings under review here, and are not among the appellants.

a year earlier to settle a law enforcement action brought by the FTC, and therefore should be held in civil contempt [DE 395, ¶¶ 20-101];

(2) determined that an appropriate civil contempt remedy would be to require the Contempt Defendants to disgorge fees that they collected in violation of the Stipulated Injunction and Order, and to return those funds to consumers (*id.*, ¶¶ 102-122);

(3) determined that a modified injunction should be adopted to address the Contempt Defendants' failure to comply with the original Stipulated Injunction and Order, and directed the FTC to submit a draft of such a modified injunction order (*id.*, ¶¶ 123-128); and

(4) extended the term of the Court-appointed Monitor's appointment and directed the Monitor to determine the specific amounts to be disgorged (*id.*, ¶¶ 129-131).

The second principal Order under review here is the District Court's Order Modifying Stipulated Injunction and Order (entered April 15, 2009) [DE 406].

As noted above, the April 7 Order concerned violations of the May 5, 2008 Stipulated Injunction and Order [DE 321], a consent decree negotiated by the Defendants and the FTC to settle a civil law enforcement action that the FTC had brought against the Defendants. The FTC had commenced the underlying action in December 2006, to halt and remedy the Defendants' unlawful practices, including

deceptive misrepresentations to consumers in marketing a financial service known as "debt consolidation;" abusive mass telemarketing campaigns to sell the service; and violations of state consumer protection laws governing this type of service.

B. Statement of the Facts

1. The Contempt Defendants' Debt Consolidation Services and the FTC's Civil Law Enforcement Suit

Providers of "debt consolidation" or "debt management" services receive funds from customers who have high credit card debt or other consumer debts, for the purpose of distributing payments to the customers' creditors. Debt consolidation service providers often claim that they will act as intermediaries between customers and their creditors for the purpose of obtaining more favorable terms of payment.

Debt consolidation services can be valuable and beneficial for indebted consumers. However, they also present significant opportunities to perpetrate deception and abuse on the most vulnerable consumers. Over the years, the FTC and state authorities have found that many organizations offering debt management plans do not manage the funds entrusted to them pursuant to appropriate fiduciary safeguards, solicit customers by misrepresenting or deceptively omitting key information about their services, and misrepresent their status as charitable non-profit organizations, when in fact their net earnings inure to the benefit of the parties who control them. The FTC, as the principal federal consumer protection

law enforcement agency, has an extensive track record of enforcement actions targeting deceptive practices in the debt consolidation field, and also provides information warning consumers of how to detect and avoid potential abuses. In addition, many states have adopted a variety of laws and regulations governing providers of debt consolidation and debt management services.

Since at least August 2003, Leshin, a Florida attorney who controls RLL and ECI, has used these entities to secure tens of thousands of debt consolidation contracts. Ferdon was the vice-president, secretary and general manager of ECI. In early 2007, Leshin and Ferdon incorporated DMCCI and directed ECI employees to begin securing debt consolidation contracts in DMCCI's name. Leshin owns both RLL and DMCCI, and he controls ECI, which is nominally a non-profit entity, as ECI's president.

The FTC brought a civil law enforcement action pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to halt the deceptive and abusive practices used to secure debt consolidation contracts for Leshin. The Commission, in its initial Complaint against Leshin, RLL, and ECI (filed December 12, 2006) [DE 1] and its Amended Complaint adding Ferdon as a defendant (filed March 31, 2007) [DE 68], requested injunctive relief, imposition of a constructive trust on consumer fees, and the equitable remedies of disgorgement of profits, restitution, and rescission of the illicit debt consolidation contracts, in order to ensure that these

defendants would not be rewarded for their exploitation of consumers and their violations of federal laws.

In the Complaints, the FTC alleged that the Defendants were engaged in the following unlawful and abusive practices. The Defendants engaged telemarketers to conduct massive illegal telemarketing campaigns, blasting out 6.4 million prerecorded solicitation messages to prospective customers nationwide announcing that "Express Consolidation," a certified non-profit organization, was offering to dramatically reduce their credit card payments. These telemarketing campaigns violated provisions of the Telemarketing Sales Rule that protect consumers from abusive telemarketing tactics. These recorded message campaigns ignored the restrictions on automated telemarketing such as enabling consumers who answer the phone to connect to a live sales representative; delivered messages to thousands of consumers who had placed their numbers on the National "Do Not Call" Registry to block such telemarketing calls; and placed repeat calls to consumers who had specifically asked not to be called by ECI or telemarketers working on its behalf.

The Defendants misrepresented critical terms of the contracts by making false claims about the program fees, the effects on interest rates and credit reports, and the total savings resulting from the program. For example, they represented that the only fee for their debt management plans was an administrative fee of $49

per month that was included in the consumer's monthly payment. However, in addition to this monthly administrative fee, Defendants also collected a set-up fee equal to each client's entire monthly payment to creditors, and made no payments to creditors the first month after a client enrolled. They also misled consumers by overstating the amount of savings customers would achieve, and by advertising that fees would be refunded at the end of the program without disclosing that Defendants imposed conditions on such refunds that precluded most clients from receiving any refund of fees.

They also misled consumers by mischaracterizing ECI's status as a non-profit entity. Their advertisements and sales agents deceptively brandished ECI's nonprofit charter to entice consumers. However, Defendants actually gave customers contracts that awarded all fees to Leshin or to his for-profit *alter ego*, RLL – not to ECI. Moreover, Leshin did not operate ECI as a non-profit. Instead, he used its staff and resources to promote, sell, and service debt consolidation contracts with the for-profit entities that he controlled.

Defendants' advertisements and contracts also falsely represented that they were qualified to offer services in every state and that they adjusted clients' fees to conform with state requirements. In reality, they never adjusted fees to comply with state limitations, and were not qualified to offer services in numerous states because they failed to comply with requirements intended to protect consumers

from unqualified service providers, such as independent accreditation, mandatory disclosures or contract provisions, state licensing, requirements for maintaining client funds in separate trust accounts, and state financial responsibility standards that required specified levels of bonding or insurance.

2. The Stipulated Injunction and Order

Following the filing of the Complaint, the FTC, the Contempt Defendants, and other defendants in the case engaged in extensive pre-trial proceedings, including hearings on motions for a temporary restraining order and preliminary injunction that were eventually resolved by stipulation, depositions, document discovery, dispositive and pretrial motions, mediation and submission of trial exhibit and witness lists. One week before the trial was scheduled to begin, Defendants Leshin, Ferdon, RLL, and ECI reached an agreement in principle with the Commission, which was later memorialized in a Stipulated Injunction and Order that the Court adopted and entered on May 5, 2008 [DE 321].

The Stipulated Injunction and Order applied to the named Defendants in the case (Leshin, Ferdon, ECI, and RLL), as well as to their "Representatives" – *i.e.*, successors, assigns, officers, agents, servants, employees, and persons in active concert or participation with Defendants who receive actual notice of the order. *Id.* at 9 (Definitions, ¶ T); Fed. R. Civ. P. 65(d)(2). The order prohibited Defendants and their Representatives from:

- Making certain specified false representations regarding their debt consolidation services, or engaging in certain categories of deceptive and abusive telemarketing practices, as identified in detailed and specific lists, *id.* at 11-15, 17-21;
- Billing customers or debiting their accounts without providing specified disclosures and obtaining consumers' express consent, *id.* at 15-16;
- Failing to deposit funds received for purposes of paying a consumer's creditors into separate trust accounts, with cash balances equal to or greater than the sum of the balances of the unexpended trust money, *id.* at 22;
- Charging fees, or executing a contract providing for fees, that exceed a restriction on such fees imposed by the state in which the consumer resides, *id.* at 21;
- "Failing to comply with a licensing, registration, reporting, audit, insurance, escrow account or trust account requirement for providers of debt consolidation services that has been adopted by a state in which Defendants offer debt consolidation services." *Id.* at 21, ¶ VI.C; or
- "*Offering, entering into, or accepting the transfer of, a contract for debt consolidation services with a person when Defendants are not, at the time of the offer, transfer or execution of the contract, in compliance with legal requirements imposed by the state in which the person resides*, including any

requirements concerning licensing, registration, reporting, audit, insurance, escrow accounts or trust accounts imposed by the state's law regulating debt consolidation services." *Id.* at 21, ¶ VI.D (emphasis added).

The Stipulated Injunction and Order provided that Leshin, RLL, and ECI are liable for a monetary judgment of $40 million, and that Ferdon is liable for a monetary judgment of $380,000, representing the total amounts necessary for restitution to consumers. Based on the Defendants' purported inability to pay, the judgment required that Leshin, RLL, and ECI collectively pay approximately $2 million and that Ferdon pay $2,400, and suspended the remainder of their liability if these amounts were paid promptly. *Id.* at 40-44. These funds were to be deposited into specified trust accounts under the control of a Court-appointed Monitor, primarily for payments to creditors required under existing consumers' debt management plans, with any remaining balance to be paid into a fund administered by the FTC to be used for monetary redress to consumers and for administration of such a fund. *Id.* at 25-28, 44.

The Stipulated Injunction and Order also required that notices be sent to existing clients[6] informing them of the settlement and notifying them of their

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[6] The Order defined "existing clients" as persons who had signed an agreement for debt consolidation services with Leshin, RLL, or DMCCI, had made a payment for such services during the 60 days prior to the date of the Order, and had not already provided notice that they were canceling such services. *Id.* at 8 (Definitions, ¶ M).

rights. In states in which ECI was *not* legally qualified to provide debt management services,[7] the Stipulated Injunction and Order directed the Monitor, within 61 days after the date of entry of the Order, to send notices to existing clients who had signed contracts with Leshin or RLL. *Id.* at 31, ¶ IX.C. These notices were to inform these customers of the settlement and notify them of their right to either (a) cancel their debt management plan immediately, or (b) have their contract transferred to a legally authorized debt consolidation provider to be designated by the FTC. These notices were to include a form on which the customer could indicate his or her preference. If no form was sent by a client within 120 days of the date of the Order, then the client's plan would be transferred to the legally authorized provider. *Id.* "If the Monitor receives a response to a notice in which an existing client states that he or she elects to cancel their contract

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[7] The Order specified that ECI is "qualified to provide debt management services" in a state if: "(1) The state does not issue licenses for entities that offer or provide debt consolidation services and, thirty (30) days after the date this Order is entered, Express Consolidation, Inc. has fulfilled any requirements imposed by state law to provide such services, including any registration, reporting, audit, insurance, escrow account or trust account requirement; or (2) The state issues licenses for entities that offer or provide debt consolidation services and, sixty (60) days after this Order is entered, Express Consolidation, Inc. (a) has a valid, current license from the state authority that issues licenses for entities that offer or provide debt consolidation services; or (b) Express Consolidation, Inc. has a pending application and the state has unambiguously stated in writing that it will permit Express Consolidation, Inc. to offer debt consolidation services to residents of that state who are currently being serviced by Express Consolidation, Inc. for debt consolidation services based on the pending application." *Id.* at 9 (Definitions, ¶ S.)

for debt consolidation services, the Monitor shall promptly notify Defendants and, within three (3) days of receiving such notice, *Defendants shall discontinue all collections from that client*." *Id.* at 34, ¶ X.A (emphasis added).

The Stipulated Injunction and Order provided for a different form of notice and different procedures with respect to customers in states in which ECI *was* legally qualified to provide debt consolidation services. In those states, the Monitor's notices were to give existing clients of Leshin or RLL the option of (a) cancelling their debt management contract immediately, (b) agreeing to have their contract transferred to a legally authorized provider identified by the FTC, or (c) agreeing to have their contract transferred to ECI. If no form were sent by a client within 120 days of the date of the Order, then the client's plan would be transferred from Leshin or RLL to ECI. *Id.* at 31-32, ¶ IX.D.[8]

3. Developments Subsequent to the Entry of the Stipulated Injunction and Order

Following issuance of the Stipulated Injunction and Order, the FTC and the Defendants disagreed about whether or not ECI was legally qualified to provide debt management services in a number of states. The Monitor filed motions on July 1, 2008 [DE 326] and July 14, 2008 [DE 330], asking the District Court to

[8] In New York and Vermont, states that had specifically directed one or more of the Defendants to cease doing business, notices had to be sent within 10 days of the date of the Order notifying customers that their contracts would be transferred to a legally authorized provider and that they had the right to cancel their contracts at any time. *Id*. at 29, § IX.A.

resolve this question, so that the Monitor could determine which form of notice should be sent to customers in each of those states. The Defendants also filed an emergency motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) on June 30, 2008 [DE 324], asking for additional time to obtain licensure or otherwise come into compliance with state law in 12 states, and requesting permission to continue providing debt consolidation services in those states notwithstanding their lack of authority to do so under state law.

The District Court conducted an evidentiary hearing to address these issues on July 21-22, 2008 [DE 339, 340, 341]. Ultimately, the Court determined that ECI was qualified to operate in 4 contested states, and was not qualified in 21 states. *See* Omnibus Order, entered Aug. 5, 2008 [DE 339], at 6-7. The Court denied the Defendants' motion for additional time to come into compliance or obtain licenses, concluding that they should have anticipated the regulatory time frame, and that there was no equitable basis for modifying or extending the deadlines to which the Defendants had previously agreed in the Stipulated Injunction and Order. *Id.* at 6. The Court directed the Monitor to send out the required notices by July 25, 2008, and the Monitor did so.

The Defendants did not file a Notice of Appeal of the District Court's Aug. 5, 2008 Omnibus Order within 60 days after that order was entered. Fed. R. App. P. 4(a)(1)(B).

At virtually the same time that the Monitor sent out the Court-ordered notices, the Contempt Defendants sent out their own notices to clients in eight of the states where the District Court had ruled that ECI was *not* authorized to conduct a debt consolidation business. These notices, authored by Leshin and transmitted by letter or e-mail, encouraged clients to "cancel" their original contracts by checking that option on the Monitor's form, and to immediately sign new contracts with DMCCI or one of the other Contempt Defendants, which supposedly would "continue" the clients' preexisting debt management plans serviced through ECI.

The Contempt Defendants continued to collect payments from these existing clients despite specific provisions of the Stipulated Injunction and Order prohibiting them from doing so. They also continued, subsequent to the entry of the Stipulated Injunction and Order, to solicit and execute new debt consolidation service contracts with hundreds of clients in states where they were prohibited from doing so. [DE 395, at 7-37, ¶¶ 20-37, 43-100.]

4. The Contempt Proceedings

On January 28, 2009, the FTC filed a Motion and Memorandum for Order to Show Cause Why Defendants Should Not be Held in Contempt for Violating the Stipulated Injunction [DE 366]. On February 9, the Contempt Defendants filed a detailed response, including 15 exhibits [DE 373, DE 375]. After providing all

parties with 28 days notice [DE 363 and DE 364], the District Court conducted a two-day evidentiary hearing on February 13 and 17. At this hearing, both Leshin and Ferdon testified, their counsel had opportunities to cross-examine the FTC's witnesses, and over 40 exhibits were introduced [DE 366, DE 380, DE 382, DE 385]. Subsequently, both the FTC and the Defendants submitted proposed Findings of Fact and Conclusions of Law [DE 381, DE 387].

The District Court issued its initial order in response to the FTC's contempt motion – styled "Findings of Fact and Conclusions of Law and Order on Request to Modify Stipulated Injunction and Extending the Monitor's Tenure" – on March 27, 2009 [DE 390]; and subsequently issued a corrected version of this order on April 7 [DE 395]. The Court found that the Contempt Defendants should be held in civil contempt, essentially for the reasons advanced by the FTC. As a remedy for such contempt, the Court ordered consumer redress that included return of fees collected in violation of the Stipulated Injunction and fees collected under contracts that violated the Stipulated Injunction. The Court did not, however, specify the amount of fees the Contempt Defendants must disgorge. Instead, it directed the Monitor to calculate the amount of fees collected since May 5, 2008 from consumers who were parties to certain specified contracts and to file a report with his findings. *Id.* at 45, ¶ 129.

The District Court also determined that the Stipulated Injunction and Order should be modified due to the changed circumstances arising from the Defendants' demonstrated failure to comply with the original order. However, the Court did not adopt a specific Modified Stipulated Injunction and Order at that time. Instead, the Court directed the FTC to submit a proposed draft of a Modified Stipulated Injunction and Order that would include certain specified provisions. *Id.* at 43, ¶ 125.

On April 10, 2009, the Contempt Defendants filed with the District Court an Emergency Motion to Stay [DE 396] the March 27 and April 7, 2009 contempt orders, pending appeal. The District Court denied this motion by Order issued on April 14, 2009 [DE 405]. Also on April 14, 2009, the District Court issued two separate Orders: one order approving in part and modifying in part the text of the notices to consumers that the FTC had proposed [DE 404], and the other an Order Modifying Stipulated Injunction and Order, based largely on the draft that the FTC had submitted [DE 406].

The Contempt Defendants filed an Emergency Motion for Stay with this Court on April 17, which this Court denied summarily on April 21.

5. Continuing Proceedings and Disputes Regarding the Amounts to be Disgorged Pursuant to the Contempt Rulings

In the April 7 Order, the District Court stated, "[t]he Court is unable to compute the exact amounts to be disgorged from the exhibits. Therefore, the Monitor is hereby appointed to determine the amount to be disgorged for each of paragraphs 104 through 121 and to file a report within 30 days [hereof] setting forth the amounts in categories by state." [DE 395 at 45, ¶ 129.] The Monitor's Fourth Report to the Court, filed in response to this directive on May 8, 2009 [DE 411], provided an initial calculation of the amounts to be disgorged, but noted that additional data were needed from the Contempt Defendants to complete the calculation, including information regarding amounts that "the Monitor's staff discovered that Defendants continued to collect… from the subject consumers during the month of April [2009], despite the Court's orders… directing Defendants to cease collecting fees from these consumers." *Id.* at 4, citing DE 390, ¶ 127; DE 395, ¶ 127 and DE 406, § II.

Subsequently, on June 29, 2009 the Monitor filed a Fifth Report [DE 421] with a revised calculation, based in part on corrections to some errors in the Fourth Report that the Contempt Defendants had pointed out, and in part based on additional bank statements and other relevant information that the Contempt Defendants provided subsequent to the Fourth Report. The Monitor again noted

that the calculation was incomplete because additional revised spreadsheets were needed from the Contempt Defendants, and because “the Contempt Defendants continue to collect fees from consumers in Ohio, and possibly Texas and California, when they should not continue collecting fees,” so that additional data regarding these “additional unauthorized fees collected from the subject consumers by the Contempt Defendants after April 24, 2009” were needed to complete the calculation of the disgorgement amount. *Id.* at 7-8.

The Monitor’s Sixth Report, filed on August 28, 2009 [DE 436], provided additional calculations of amounts to be disgorged that the Contempt Defendants had collected from preexisting customers and newly solicited customers after April 24, in violation of the District Court’s orders, as well as revisions to the earlier calculations based on additional data provided by the Contempt Defendants. The Report also listed a number of remaining disputed issues that would affect the final disgorgement computation. *Id.* at 9-13. The Contempt Defendants filed a Response and Objections to the Sixth Report on September 21 [DE 439], asserting that the Monitor had used incorrect calculation methodologies due to what they characterized as unclear or erroneous aspects of the Court’s April 7 Order – including several of the specific issues that they also have raised before this Court in the instant case. The Commission submitted a Reply and Opposition to the Contempt Defendants’ filing on September 28, 2009. [DE 440.]

C. Standard of Review

"Whether a court order is final and appealable is a question of law and hence is subject to independent review before this Court." *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 976 (11th Cir. 1986), citing *Cathbake Inv. Co. v. Fisk Electric Co.,* 700 F.2d 654, 656 (11th Cir.1983).

This Court "review[s] civil contempt orders for abuse of discretion[.]" *Doe v. Bush*, 261 F.3d 1037, 1047 (11th Cir. 2001). In contempt cases involving violations of consent decrees, "construction of [the] consent judgment… is a question of law, and a finding that appellants' actions failed to comply with the standards established by the consent judgment… is a factual inquiry." *Turner v. Orr*, 759 F.2d 817, 820 (11th Cir. 1985). "Construction of a consent judgment is thus a question of law subject to *de novo* review," *id.* at 821, while the Court "review[s] findings of fact arising out of contempt proceedings under the clearly erroneous standard." *Doe v. Bush*, 261 F.3d at 1047.

A District Court's "decision to modify an injunction is subject to an abuse of discretion standard, and it is an abuse of discretion to fail to make modifications required by applicable law." *Wilson v. Minor*, 220 F.3d 1297, 1302 (11th Cir. 2000). In reviewing District Court decisions modifying injunctions, this Court "review[s] the district court's findings of fact for clear error, and… review[s] its conclusions of law de novo." *Id.*

SUMMARY OF ARGUMENT

The Contempt Defendants flagrantly violated the clear terms of the Stipulated Injunction and Order. To be sure, the precise terms of the District Court's contempt sanctions are not yet final, and therefore the contempt rulings are not subject to judicial review. But if this Court were to review the contempt rulings on the merits, it would find that the District Court committed no errors and acted well within the scope of its discretion by holding the appellants in contempt. The District Court also properly exercised its discretion by adopting civil contempt sanctions consisting of remedial requirements that the Contempt Defendants disgorge fees that they improperly collected and return them to consumers. And the District Court's narrowly tailored modifications to the Stipulated Injunction and Order are justified in order to ensure that the original consumer protection purposes of the injunction are fulfilled.

ARGUMENT

I. THE DISTRICT COURT'S INTERLOCUTORY, NON-FINAL CONTEMPT RULINGS ARE NOT SUBJECT TO APPELLATE REVIEW

This Court must reject the Contempt Defendants' appeal of the portions of the District Court's April 7 Order regarding their liability for civil contempt and the proper remedial sanctions [DE 395, ¶¶ 20-122] (referred to as the "Contempt Rulings"). The District Court's Contempt Rulings are non-final and interlocutory,

because the District Court has not yet determined the specific amount to be disgorged, nor has it resolved a number of related disputes over how the amount should be computed. Accordingly, the Contempt Rulings are not appealable and there is no basis for this Court to exercise jurisdiction.[9]

As a threshold matter, the Court must determine whether it has jurisdiction to consider the specific issues presented in this appeal. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.") (citation omitted). There is no statutory basis for this Court to review the District Court's Contempt Rulings. The Contempt Rulings are non-final and thus are not appealable under 28 U.S.C. § 1291; and they fall within none of the categories of interlocutory orders that are reviewable under § 1292(a). With no statutory basis for review, the Court lacks jurisdiction to consider this portion of the instant appeal. *See OFS Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, 1355 (11th Cir. 2008) ("it is clear that for this Court to exercise jurisdiction over an appeal, our jurisdiction must be… authorized by statute"); *Carroll v. United States*, 354 U.S. 394, 399 (1957) ("It is axiomatic… that the existence of appellate

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[9] *See supra* note 2.

jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute.").

The District Court's Contempt Rulings are not final because the District Court has not yet determined the specific amount that the Contempt Defendants will be required to disgorge. The Contempt Defendants themselves make clear in their brief that "there was no finite amount of disgorgement ordered" in the April 7 Order. Br. at 50, citing DE 395, ¶ 129 ("[t]he Court is unable to compute the exact amounts to be disgorged from the exhibits. Therefore, the Monitor is hereby appointed to determine the amount to be disgorged… and to file a report… setting forth the amounts in categories by state.").

Moreover, the District Court has not yet resolved a number of disputed issues regarding the contempt sanction and the disgorgement calculations that have been raised both by the Contempt Defendants and by the Court-appointed Monitor before the District Court. In a recent filing, the Contempt Defendants argued, "The Court must also consider other necessary adjustments to the total amounts of 'fees' collected by Defendants when awarding disgorgement…. [such as] expedite or NSF fees… [and] the refunds already made by Defendants[.]" Defendants' Response and Objections to Monitor's Sixth Report (filed Sept. 21, 2009) [DE 439], at 6, 9; *see also* Plaintiff's Reply and Opposition to the Defendants' Response and Objections to the Monitor's Sixth Report (filed Sept. 28, 2009)

[DE 440]. The Court-appointed Monitor's computation of the fees improperly collected from consumers is not conclusive, and identifies multiple disputed issues that the District Court must resolve before entering a final order that specifies the amount of fees that the Contempt Defendants must disgorge. *See* Monitor's Sixth Report (filed Aug. 28, 2009) [DE 436] at 9-13.

Thus, as in *Combs v. Ryan's Coal Co., Inc.*, the District Court's Contempt Rulings to date "left open several questions to be resolved [later, including] … the determination of costs and fees to be paid by appellants…." 785 F.2d at 976. These District Court rulings were "clearly conditioned on the submission of a substantial quantum of information … before a final finding [regarding the contempt sanction] … would be issued." *Id.* Thus, the District Court's Contempt Rulings cannot be characterized as a final, non-contingent decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

This Court has made it clear that "'a contempt order entered in a post-judgment proceeding that does not terminate that proceeding is ... non-appealable.' There must be both a finding of contempt and a non-contingent order of sanction. Only at that point may the contemnor have his appeal." *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d at 977, citing *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir.1983); 9 J. Moore & B. Ward, *Moore's Federal Practice*, ¶ 110.14[1] at

198 (2d ed. 1985). The effect of allowing premature, interlocutory review of District Court contempt orders "would be to tie the hands of the District Court, diminish compliance with its orders, and augment [this Court's] own workload." *Combs*, 785 F.2d at 977. Accordingly, there can be no appeal of a contempt ruling "[i]n a case such as this, where… the court will be (and here is) engaged in on-going intervention." *Id.*, citing *Sanders v. Monsanto Co.*, 574 F.2d 198 (5th Cir. 1978).

Because the District Court's interlocutory Contempt Rulings are not final (and were not final at the time that the Contempt Defendants filed their Notices of Appeal commencing the instant proceedings)[10] – and "because the district court did not modify the injunctive relief provided for by the consent decree, but only interpreted the decree,"[11] this Court "do[es] not have jurisdiction." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1029 (11th Cir. 2002). Accordingly, the Court should

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[10] Analogously, when a District Court reviews claims presented in a Complaint for ripeness, such review is conducted based on the facts that existed at the time the Complaint was filed. *See Arizonans for Official English v. Ariz.,* 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, [a] ... controversy must be extant at all stages of review."); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 569 n. 4 (1992) (explaining that "[t]he existence of federal jurisdiction ordinarily depends on facts *as they exist when the complaint is filed*"—later fulfillment of the standing requirements does not give plaintiffs standing) (emphasis in original); *Sierra Club v. Dombeck,* 161 F.Supp.2d 1052, 1062 (D.Ariz.2001) ("[r]ipeness is determined at the time of the filing of the complaint").

[11] *See infra* at 30-33.

dismiss this portion of the appeal and should not consider the merits of the District Court's Contempt Rulings.

II. THE DISTRICT COURT'S CONTEMPT RULINGS ARE WELL SUPPORTED

As discussed in the preceding section, the Court lacks jurisdiction over the District Court's non-final determinations holding the appellants in contempt and deciding that disgorgement and restitution would be the appropriate form of civil contempt sanction. Nonetheless, if the Court were to review these rulings on the merits, it should affirm them.

A. The District Court Properly Held Appellants in Contempt for Violating the Stipulated Injunction and Order

The District Court's legal interpretations of the Stipulated Injunction and Order are plainly correct; its factual findings regarding the Contempt Defendants' violations of that order are amply supported by the record and are not clearly erroneous; and its decision to hold those parties in contempt was well within the scope of its discretion.

1. The District Court Did Not Err in Concluding that Appellants Violated the Stipulated Injunction and Order

A civil contempt order will be upheld where there is "clear and convincing" proof that "(1) the allegedly violated order was valid and lawful, (2) the order was clear, definite and unambiguous, and (3) the alleged violator had the ability to comply with the order." *McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir.

2000); *Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir. 1988). "If the interpretation urged by one party is unreasonable in light of the [consent decree's] plain language, the [decree] is not ambiguous." *Frulla v. CRA Holdings, Inc.*, 543 F.3d 1247, 1252 (11th Cir. 2008).[12]

a. The Contempt Defendants contend that the District Court improperly "engraft[ed] new obligations to the parties' Stipulated Injunction and simultaneously [held] Defendants in contempt for violating the newly imposed obligations." Br. at xi; *see also id.* at 17-18. This contention is unfounded. It is clear from the text of the April 7 Order that the District Court's findings are premised upon the Contempt Defendants' violations of the original Stipulated Injunction and Order – not violations of the newly modified order [DE 406], which the District Court did not even issue until a week later. As this Court observed in its June 26, 2009 Jurisdictional Order, "that portion of the district court order providing for *future* modification of the stipulated injunction and order" could not be appealed in Case No. 09-11679-DD because the "modification order was not in existence at the time the notice of appeal was filed." *See* Jurisdictional Order at 2.

To be sure, the Contempt Defendants disagree with the District Court's decision rejecting their artificially circumscribed interpretations of the Stipulated

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[12] It is uncontested that the original Stipulated Injunction and Order was valid and lawful. "The Commission and Defendants waive all rights to … challenge or contest the validity of this [Stipulated Injunction and] Order." [DE 321, at 3.] The Contempt Defendants do not argue otherwise in their brief.

Injunction and Order. *See* Br. at 18. But this does not mean that the District Court's sound interpretations of that Order are "new obligations" that were "engrafted" by the District Court. Nothing in the portion of the April 7 Order addressing the Contempt Defendants' violations of the Stipulated Injunction and Order "changes the legal relationship of the parties" in any way. *Sierra Club v. Meiburg,* 296 F.3d at 1029. "[T]o effect a change in the legal relationship of the parties, the order must 'change the command of the earlier injunction, relax its prohibitions, or release any respondent from its grip.'" *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 280 F.3d 1289, 1293 (11th Cir. 2002), quoting *Sierra Club v. Marsh*, 907 F.2d 210, 213 (1st Cir. 1990).

Here, none of these criteria are met. The Contempt Rulings did not require the Contempt Defendants to do (or not to do) anything that they were not already required to do (or refrain from doing) in the original Stipulated Injunction and Order. Nor did the order relax any of the prohibitions in the Stipulated Injunction and Order or release any of the Contempt Defendants from its constraints. Rather, in the pertinent portions of the April 7 Order, the District Court merely evaluated whether the Contempt Defendants had or had not complied with the earlier ruling, and found that they had not. "The fact that the court was forced to [adopt contempt findings and sanctions here] works no modification but rather is consistent with the original injunction. The … order 'does not change the parties' original

relationship, but'" – at most – "'merely restates that relationship in new terms.'" *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d at 977-78, quoting *Motorola, Inc. v. Computer Displays International*, 739 F.2d 1149, 1155 (7th Cir. 1984).

This Court has made it clear that, when considering whether a subsequent order simply interprets and applies the original consent decree or modifies it, "we do not engage in a fine point analysis of the original decree and the later order. Instead, we take a fairly loose focus and ask whether the district court's reading of the consent decree is 'a gross misinterpretation of the decree's original command,' one that 'leaps from the page.'" *Sierra Club v. Meiburg*, 296 F.3d at 1029, quoting *Birmingham Fire Fighters*, 280 F.3d at 1293. In this case, regardless whether one engages in a "fine point analysis" or takes a "fairly loose focus," it is clear that the District Court's April 7 Order is meticulously faithful to the original Stipulated Injunction and Order. By contrast, it is the Contempt Defendants' "gross misinterpretation" of the decree that "leaps from the page."

The District Court correctly concluded that the Stipulated Injunction and Order "is unambiguous and the reading offered by the Defendants and DMCCI is not reasonable under the terms of the Order." [DE 395 at 17, ¶ 48.] As discussed in greater detail below, the Contempt Defendants failed to comply with their clear obligations under the original Stipulated Injunction and Order – "construed as it is written," and as plainly "discerned within its four corners," *United States v.*

Armour & Co., 402 U.S. 673, 682 (1971) – and their contrary characterization does not withstand scrutiny.

The District Court also correctly rejected the Contempt Defendants' apparent argument that the obligations of the Stipulated Injunction and Order were "exceedingly complicated" and somehow too "confusing" for them to comply with. Br. at 2.[13] "In seeking to prove a latent ambiguity, a party must attempt to resolve an actual ambiguity, not create one." *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1362 (11th Cir. 1988). "Even where a party seeks to prove a latent ambiguity, the interpretation urged by that party must be reasonable. No latent ambiguity exists unless the contract is actually susceptible to the meaning contended for by a party." *Id.* As discussed below, the District Court was correct in concluding that the Contempt Defendants' position is inconsistent with the language of the Stipulated Injunction and Order.

b. The District Court correctly rejected the Contempt Defendants' contention that, even though the Stipulated Injunction and Order explicitly prohibits them from collecting funds from existing clients who elected to cancel their contracts, nevertheless they *can* collect funds from such existing clients who

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[13] It is unclear whether Contempt Defendants dispute the District Court's conclusion that the Stipulated Injunction and Order's requirements were "unambiguous" [DE 395 at 17, ¶ 48], since at some points in their brief they seem characterize the Order as "unambiguous" (*e.g.,* Br. at 18), while elsewhere they call it "confusing" or "conflicting." Br. at 2, 28.

elected to cancel their contracts, by characterizing those individuals as no longer being "existing clients."[14] *Id.* at 16-19, ¶¶ 44-52. The Contempt Defendants take the position here, as they did before the District Court, that "once the client cancelled… then he was no longer an 'existing client' and the Defendants, or DMCCI acting in conjunction with Defendants, were free to continue to collect from such clients pursuant to a new debt consolidation services agreement." DE 395 at 16, ¶ 45; *see* Br. at 18-19, 23-24.

As the District Court cogently reasoned, this sleight-of-hand interpretation makes no sense, either standing on its own or read in the context of the Stipulated Injunction and Order as a whole. *See Paradise v. Prescott*, 767 F.2d 1514, 1526 (11th Cir. 1985) ("Our inquiry… is not confined to isolated provisions of the decrees…. Indeed, we must presume that all parts of the decree have meaning and must be construed together.") (citations omitted). Standing on its own, the

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[14] The Stipulated Injunction and Order provides, "If the Monitor receives a response to a notice in which an existing client states that he or she elects to cancel their contract for debt consolidation services, the Monitor shall promptly notify Defendants and, within three (3) days of receiving such notice, Defendants shall discontinue all collections from that client." [DE 321, at 34, ¶ X.A.] The Order defines "existing clients" as persons who: (i) have signed an agreement for debt consolidation services with Randall L. Leshin, Randall L. Leshin, P.A. (including contracts under the name "Debt Management Counseling Center"), or Debt Management Counseling Center, Inc.; (ii) have not notified Defendants that they are canceling such services; and (iii) have made a payment for such services to Randall L. Leshin, Randall L. Leshin, P.A., or Debt Management Counseling Center, Inc. during the sixty (60) days prior to the date this Order is entered." *Id.* at 8, Definitions ¶ M.

Contempt Defendants' interpretation renders ¶ X.A a nullity and meaningless: if any "existing client" who cancelled his or her contract is no longer an "existing client" and is not subject to ¶ X.A's ban on collecting from "existing clients" who cancelled their contracts, then that paragraph's prohibition effectively would apply to *no one*. [DE 395 at 18, ¶ 49.] Their interpretation also is irrational in the context of the Stipulated Injunction and Order as a whole, which was agreed to by the parties and adopted by the District Court to resolve the FTC's claims regarding the deceptions and misrepresentations practiced by Contempt Defendants, and clearly was designed to put an end to those practices. The District Court held that Contempt Defendants' "construction is inconsistent with whole passages of the Order, including part of paragraphs XII, and most of paragraphs IX and X." *Id.* at 17-18, ¶ 48.

Rather, as the District Court concluded, "The term 'that client' [in ¶ X.A] plainly refers to an existing client who received the Monitor's Notice and responded by selecting the option to cancel his or her contract." *Id.* And "[t]o be consistent with the way the term is used in the order, the definition of 'existing clients' should be construed as clarifying simply that if a client (who fits the other parameters of the definition) had notified the Defendants or DMCCI that he was cancelling *prior* to the entry of the Order, then he would not be an 'existing client.'" *Id.* at 18, ¶ 50 (emphasis added).

The Contempt Defendants disingenuously attempt to bolster their case by quoting out of context from the transcripts of the oral hearings conducted on February 13 and 17, 2009 [DE 380 and DE 385]. Based on the District Judge's Socratic questioning and dialogue with counsel for both parties, they purport to identify the Court's "conclusions," "acknowledgments," "declarations," "concessions," or otherwise supposedly authoritative positions, which the Contempt Defendants imply contradicted one another, "reversed course," or undermined the Court's final rulings. *See* Br. at 18-23, 29. This devious mode of argument unfairly deprives the District Court of its prerogative to play "devil's advocate" in order to elicit counsel's best arguments. The entire transcript makes clear that this was precisely the point of the quoted colloquy with counsel. It makes no sense, and is downright disrespectful, to construe the Judge's statements in the course of such dialogue – as distinct from the Court's formal, written Orders – as representing the Court's position or decision on any issue.

As a factual matter, in the April 7 Order the District Court found that the Contempt Defendants, through letters, e-mails, and telephone calls, encouraged numerous clients to check the box on the Monitor's form electing to "cancel" their existing contracts, but agree to have their debt management plans continue to be serviced by ECI in the same way as they had been prior to receiving the Monitor's notice under "new" contracts. [DE 395 at 7-9, ¶¶ 20-24.] These solicitations were

not known to the FTC or to the Court, and contradicted the formal notices that the Stipulated Injunction and Order required the Monitor to send to these customers. In this way, the Contempt Defendants apparently sought to retain clients whom they had initially obtained through deceptive misrepresentations or abusive telemarketing campaigns. As a result of these efforts, the Contempt Defendants managed to continue collecting from 971 clients who responded to the Monitor's notice by stating that they wished to cancel – in blatant violation of the Stipulated Injunction and Order, as discussed above. These factual findings of the District Court are amply supported by record evidence (*see id.* and sources cited therein), and cannot be characterized as clearly erroneous.

c. The Stipulated Injunction and Order prohibited "the Defendants and their Representatives" from "[o]ffering, entering into, or accepting the transfer of, a contract for debt consolidation services with a person when Defendants are not, at the time of the offer, transfer or execution of the contract, in compliance with legal requirements imposed by the state in which the person resides, including any requirements concerning licensing, registration, reporting, audit, insurance, escrow accounts imposed by the state's law regulating debt consolidation services…" [DE 321 at 21, ¶ VI.D.] Nonetheless, the District Court found that the Contempt Defendants continued soliciting new debt consolidation business in states where they were not qualified to operate, and transferred to ECI contracts that named

DMCCI as the service provider, even though ECI had not complied with the requirements for providing debt consolidation services in the client's state. *See* DE 395 at 5-6, ¶ 15; 19-37, ¶¶ 53-100; in particular, *see id.* at 20 n.1; *contra*, Br. at 25-26.

The Contempt Defendants do not dispute the District Court's factual findings that these transfers of debt management contracts and execution of new contracts occurred. However, the Contempt Defendants take issue with the District Court's determinations regarding their violation of the Stipulated Injunction and Order due to failing to comply with specific state requirements governing debt consolidators. Specifically, they contest the District Court's rulings that they failed to comply with:

(1) Florida, Georgia, Ohio, and Tennessee requirements regarding insurance coverage for employee dishonesty and crime, from May 5 through July 18, 2008 (Br. at 30-34; DE 395 at 20-22, ¶¶ 54-60; 33-34, ¶¶ 92-93);

(2) licensing, registration, or accreditation requirements in California and Nevada (at any time),[15] and in Texas (from May 5 through Aug. 8, 2008) (Br. at 35-36, 37-45; DE 395 at 21, ¶ 58; 26-29, ¶¶ 71-79; 31-33, ¶¶ 84-91); and

(3) Tennessee requirements regarding prominent and specific disclosures about the potential impact of debt management plans on a consumer's credit, from May 5, 2008 through the date of the contempt hearing in February 2009 (Br. at 36-37; DE 395 at 21-22, ¶¶ 59-60).

The District Court, during the course of its hearing in July 21-22, 2008, concluded that ECI failed to comply with these requirements, and memorialized its conclusions in its Aug. 5, 2008 Omnibus Order [DE 339]. The Contempt Defendants never challenged or appealed the Omnibus Order. Nonetheless, they continued to provide debt consolidation services (and collect fees) pursuant to contracts with customers in these states that they had executed during the time

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[15] Contempt Defendants do not dispute the District Court's findings that ECI never fulfilled the registration requirements in Kentucky and Minnesota and, consequently, violated the Stipulated Injunction when it continued to acquire contracts with residents of these states. [DE 395 at 22-25, 31, ¶¶ 62-65, 86, 87.] The Contempt Defendants' sole defense of their conduct with respect to Kentucky and Minnesota is a hollow claim that they should be permitted to avoid responsibility for these violations of the Stipulated Injunction by simply having ECI transfer contracts that it unlawfully acquired to DMCCI. Br. at 35-36. The District Court correctly rejected this argument, because even if DMCCI was named as the contract party, ECI continued to act as the "servicing agent" and "debt management" provider, and therefore was required – but failed – to be registered in those states. [DE 395 at 24-25, 31, ¶¶ 66-67, 87.]

periods when the Stipulated Injunction and Order prohibited them from doing so. The District Court subsequently held them in contempt, not merely for their having unlawfully executed these contracts in the first place, but for their continuing to solicit contracts and offer services in these states notwithstanding the District Court's clear and unmistakable rulings directing them not to do so.

Yet the Contempt Defendants have the temerity to present for the third time – now before this Court – the same implausible arguments that they presented twice before the District Court (the first time during the July 21-22, 2008 hearings on the Monitor's request for clarification; and the second time in their response to the FTC's contempt motion [DE 375] and during the Feb. 17 and 22, 2009 contempt hearings). This Court should reject these contentions for the same cogent reasons as the District Court articulated in the April 7 Order. Indeed, the District Court had already considered and rejected virtually all of those arguments[16] seven months earlier, during the July 21-22, 2008 hearings and in the Aug. 5, 2008 Omnibus Order [DE 339] memorializing the Court's bench rulings issued during

[16] Note that two of the issues raised by the Contempt Defendants were not before the District Court in the July 2008 hearings and the Aug. 2008 Omnibus Order: their arguments regarding (i) Leshin's and RLL's (as distinct from ECI's) authority to conduct a debt consolidation business in California (Br. at 40-45; DE 395 at 27-29, ¶¶ 73-79), or (ii) the Tennessee disclosure requirements referred to above. Their arguments on these two issues were rejected by the District Court in the April 7 Order.

those hearings. The Contempt Defendants failed to appeal that Order. Thus, the Contempt Defendants are now precluded from re-arguing those matters.[17]

Moreover, this Court should accord substantial deference to the District Court's rulings on these detailed and technical matters, most of which were primarily factual in nature (or at most, mixed questions of law and fact), and were decided by the District Court based on an extensive review of documentary evidence and witness testimony. *See Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) ("deferential review of mixed questions of law and fact is warranted when it appears that the district court is better positioned than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine"). Such deference is particularly appropriate in cases like this involving a district court's ongoing oversight of a detailed consent decree. *See, e.g., United States v. Commonwealth of Mass.,* 890 F.2d 507, 509 (1st Cir. 1989) ("[r]ecognizing … that district courts … are responsible for overseeing the execution of consent decrees," appellate review

[17] Unlike the interlocutory, non-final Contempt Rulings at issue here, the District Court's Aug. 5, 2008 Omnibus Order [DE 339] denied the Defendants' request to modify the injunction and rendered a final determination regarding the Defendants' obligations to immediately cease providing debt consolidation services in specified states. It thus could have been appealed pursuant to 28 U.S.C. §§ 1291 or 1292(a). *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 151-52 (1967) (agency's ruling was ripe for judicial review because it was "quite clearly definitive," subjected defendants to "heavy criminal and civil sanctions" for violations, and had an "impact… upon [defendants that was] direct and immediate").

should proceed "with deference to the district court's intimate understanding of the history and circumstances of this litigation."), citing *Twelve John Does v. District of Columbia*, 861 F.2d 295, 298 (D.C. Cir.1988); *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 970 (2d Cir. 1983).

2. DMCCI and the Individual Defendants Are Liable for Contempt

a. The Contempt Defendants' contention that DMCCI, purportedly a "non-party," was not in contempt because it "was not in active concert or participation with the party specifically enjoined," Br. at 45, is baseless. The Stipulated Injunction and Order applied not only to the named Defendants, but also, explicitly, to their "Representatives," defined as "successors, assigns, officers, agents, servants, employees and those persons in active concert or participation with Defendants who receive actual notice of this Order by personal service or otherwise." [DE 321 at 9, Definitions ¶ T.] Leshin received actual notice of the Order, and he controls and is the owner of DMCCI.[18] DMCCI acted "in active concert or participation" with him and the other Contempt Defendants, for example, by sending out letters and notices to "existing customers" to encourage

[18] Because DMCCI was a "Representative" of the named Defendants, DMCCI *was* subject to the Stipulated Injunction and Order resolving the underlying litigation. DMCCI is specifically named at numerous points in that Order and is subject to many specific obligations listed therein. *See, e.g.,* DE 321 at 8, Definitions ¶ M; 23, ¶ VII.C.2; 25, ¶ VII.F; 26, ¶¶ VIII.A.1 & VIII.B.1; 27-28, ¶¶ VIII.B.2, VIII.C.1 & VIII.D; 38, ¶ XII; 50, ¶ XIX.2; 52, ¶ XX.

them to cancel and re-sign debt management contracts, in an effort to evade the Monitor's Notices as provided in the Stipulated Injunction and Order.[19]

DMCCI also is liable for the violations of the Stipulated Injunction and Order as, in effect, Leshin's *alter ego*. As the District Court found, Leshin controls and supervises the actions of DMCCI and its officers. All of DMCCI's shares are held by a holding company that is wholly owned by Leshin; and all of DMCCI's board members are employees of ECI, which Leshin also controls. The correspondence sent to "existing clients" on DMCCI's letterhead to offer continued service from ECI (subject to a DMCCI contract) were authored by Leshin. DMCCI had no employees of its own to distribute these notices or solicit contracts; it is merely the corporate name on the post-Stipulated Injunction and Order contracts serviced by ECI. [DE 395 at 2, ¶ 3.] Thus, DMCCI is legally identifiable with Leshin and is liable as his *alter ego*. *See Combs v. Ryan's Coal Co., Inc.*, 785 F.2d at 982-83 (where individual was president, CEO and majority stockholder of first company, which he shut down to avoid making court-ordered

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[19] The record evidence shows that DMCCI also acted in concert with ECI and the other parties by transferring contracts to and from ECI and otherwise assisting with continuing collections from customers who had cancelled their contracts. *See, e.g.* DE 395 at 24, ¶ 67 ("evidence was presented that the 119 contracts [in Minnesota] that DMCCI transferred to Express were re-transferred to DMCCI after the July 2008 hearing"); *id.* at 31, ¶ 87 ("Defendants' report on DMCCI's post-order contracts shows that … DMCCI entered into 126 contracts with Kentucky residents…. [But] Defendants acknowledge that Express, not DMCCI, provides debt adjusting services under the Kentucky contracts…").

payments and then transferred its account balance and payables to the second company, of which he was the general partner, manager, and majority shareholder, court found the second company liable as the successor and *alter ego* of first), citing *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 674 (1944).

As a general matter, injunctions bind not only the parties, but also their "officers, agents, servants, employees, and attorneys," as well as "other persons who are in active concert or participation" with them. Fed. R. Civ. P. 65(d)(2)(B) and (C). "This is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence [the doctrine] is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). Here, Leshin and the other Defendants may not escape liability by carrying out prohibited acts through DMCCI.

b. The District Court correctly held that Leshin and Ferdon are individually liable for contempt, jointly and severally with their business entities. *Contra,* Br. at 46; *see* DE 395 at 37-38, ¶ 101. First, they directly engaged in conduct that the District Court concluded was prohibited by the Stipulated Injunction and Order. [DE 395, ¶ 101.] The Contempt Defendants concede that Leshin and Ferdon

individually took these actions; they do not take issue with the factual findings that Leshin wrote the scripts of letters soliciting debt consolidation business from "existing clients," and that Ferdon caused the transfers of debt management contracts to ECI in states where ECI failed to comply with state requirements. Br. at 46. They merely disagree with the District Court's conclusion that those were unlawful acts. But if (as the District Court correctly concluded) the actions *were* unlawful and contemptuous, then the individual Contempt Defendants are undeniably liable for such violations.

The District Court also correctly found that Leshin and Ferdon are liable for the contemptuous acts of the business entities (ECI, RLL, and DMCCI) through Leshin's ownership and control of these entities, Leshin's and Ferdon's positions as officers of these entities, and both individuals' active concert and participation with the business entities in their violations of the injunction. Fed. R. Civ. P. 65(d)(2)(B) and (C). "A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt." *Wilson v. United States*, 221 U.S. 361, 376 (1911). *See also Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1353 (5th Cir.

1979) ("findings showing blatantly contumacious conduct on the part of Northside's leaders and policy-makers,…. fully support the Court's findings of contempt on the part of the corporation *and the individual defendants*") (emphasis added); *FTC v. Stefanchik,* 559 F.3d 924, 931 (9th Cir. 2009).[20]

The Contempt Defendants argue that Leshin and Ferdon cannot be treated as "jointly and severally liable for disgorgement" because there is no "evidence that they individually received the payments made by the customers." Br. at 52. This argument is unfounded. Where multiple defendants are held jointly and severally liable for disgorgement of the proceeds of unlawful business activity, neither the plaintiff nor the court has any obligation to separately disentangle the amount of the unlawful proceeds received by each of the defendants, or to apportion the amount of disgorgement to be paid by each.

In analogous cases involving disgorgement of the unlawful proceeds of racketeering activity, this Court has held that, where it is difficult to trace "the amount of ill-gotten gains that was funneled to each defendant," imposition of "joint and several liability in a forfeiture order… is not only permissible but necessary in these circumstances to effectuate the purpose of the forfeiture

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[20] Moreover, Leshin's and Ferdon's supposed good faith or "diligence" does not excuse their continuing violations of the Stipulated Injunction and Order, or their liability for the contemptuous acts of ECI, RLL, and DMCCI through their position as officers; and in any event, their claim to have acted in good faith wholly lacks credibility. *See infra* at 48-50.

provision. To saddle the Government with a requirement to determine the precise allocation of [unlawful] proceeds between defendants would substantially impair the effectiveness of [the] remedy…." *United States v. Browne*, 505 F.3d 1229, 1278 (11th Cir. 2007), citing *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986). In such cases, imposition of joint and several liability properly leaves "the matter of precise apportionment to the defendants themselves." *Caporale*, 806 F.2d at 1508-09.

As a general matter, there is no abuse of discretion in holding multiple defendants jointly and severally liable in contempt. *See, e.g.*, *NLRB v. Laborers' Int'l Union, AFL-CIO*, 882 F.2d 949, 955 (2d Cir. 1989); *Connolly v. J.T. Ventures*, 851 F.2d 930, 934-35 (7th Cir. 1988). Leshin and Ferdon are jointly and severally liable with the corporate Contempt Defendants for that consumer redress.

3. The Appellants' Contempt Is Not Excused By their Assertions That the Violations Were "Technical" or By Their Purported Good Faith

In civil contempt cases, once a *prima facie* case has been made that a party has violated the clear and unambiguous terms of a valid injunction, the "burden of production shift[s] to [the alleged contemnor] to produce evidence explaining his noncompliance. In satisfying this burden, [the alleged contemnor must] offer proof beyond a mere assertion of inability and introduce evidence supporting his claim." *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir.

1991); *McGregor v. Chierico*, 206 F.3d at 1383. Here, the Contempt Defendants clearly had the ability to comply, for example, with the requirement that they desist from collecting fees from clients who had opted to cancel their contracts. They could simply have stopped collecting such fees and cooperated with the Monitor and the FTC to transfer those contracts to a compliant debt management provider.

The Contempt Defendants failed to satisfy their burden of proving that they were unable to comply with the injunction and did not show that they made all reasonable efforts to comply.[21] To be sure, they say that they "attempt[ed] with reasonable diligence to comply" and made "a good-faith effort at compliance." Br. at 28. But they provide no factual evidence to support this assertion, and provide this Court no basis to conclude that the District Court's conclusions to the contrary (*e.g.*, DE 395 at 37-38, ¶ 101) were erroneous.

To the contrary, it is manifest that the Contempt Defendants did *not* act in good faith. For example, it was hardly "good faith" for them to have sent

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[21] The Contempt Defendants mistakenly argue that the District Court should have considered whether they had the ability to comply with the disgorgement sanction adopted in the contempt order and failed to do so. Br. at 50. In adopting contempt remedies, courts must consider whether the alleged violator had the ability to comply with the order that he or she is accused of violating, *McGregor v. Chierico*, 206 F.3d at 1383 – in this case, the original Stipulated Injunction and Order. It is impossible at this point for either the District Court or this Court to evaluate the Contempt Defendants' claim that "[c]ompliance with the disgorgement order will cause the financial destruction of Defendants," Br. at 50, because the District Court has not yet determined the amount to be disgorged, and there is no evidence before the District Court, let alone before this Court, regarding their current financial condition.

solicitation notices to existing clients, urging the recipients of notices to cancel their contracts and sign new contracts with DMCCI or Defendants, who would continue to collect under their existing debt management plans – effectively contradicting and undermining the notices mandated under the Stipulated Injunction and Order (to which they had agreed).

Nor was it "good faith" for them to continue providing service and collecting fees under contracts after the District Court had specifically ruled that such contracts were executed unlawfully, in violation of the Stipulated Injunction and Order. The District Court characterized the Contempt Defendants' solicitation of contracts from Nevada residents, when they knew that they lacked a license or registration, as "a willful and flagrant violation of the Order." [DE 395 at 33, ¶ 90.] The Contempt Defendants' reliance on false testimony that their Minnesota contracts were executed prior to date that Minnesota required registration also demonstrated their lack of good faith. *Id.* at 23-24, ¶ 64. And the Contempt Defendants directly flouted not only the Stipulated Injunction and Order but also a Desist and Refrain Order issued by the State of California on July 15, 2008, specifically commanding ECI, Leshin, and RLL to stop soliciting contracts in that state. They nonetheless continued to do so. *Id.* at 26-28, ¶¶ 72-75. *Cf. Howard Johnson Co., Inc. v. Khimani,* 892 F.2d 1512, 1517-18 (11th Cir. 1990) (affirming contempt order and holding that the District Court "did not abuse its discretion in

rejecting the defendants' contention that… they had made a substantial good faith effort at compliance").

In any event, there was no need for the District Court to have addressed the Contempt Defendants' intent in failing to comply; "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue." *Id.*, 892 F.2d at 1516. "The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance…. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). *See also FTC v. Affordable Media, LLC*, 179 F.3d 1187, 1202 (9th Cir. 1999), citing 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2960, at 382 (2d ed. 1995).

B. The District Court Properly Exercised Its Discretion in Adopting Civil Contempt Sanctions

As discussed in Section I above, the District Court's Contempt Rulings are not reviewable at this time because the District Court has not yet reached a final resolution of the amounts to be disgorged or the calculation methodology. Indeed, the Contempt Defendants have raised before the District Court many issues that are

identical to arguments that they have also presented in the instant appeal to this Court. *Compare* Br. at 50-54 *with* Defendants' Response and Objections to Monitor's Sixth Report [DE 439], at 4-11. If for no other reason, this Court should abstain from addressing issues relating to the contempt remedies until the District Court has completed the process of resolving the same issues, so as to avoid piecemeal litigation, "tie the hands of the District Court, diminish compliance with its orders, and augment [this Court's] own workload." *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d at 977.

1. The Contempt Sanctions Are Civil, Not Criminal, Because They Remedy the Harm to Consumers Caused By Appellants' Contemptuous Misconduct

The Contempt Defendants assert that their rights were violated because the remedial contempt sanction adopted by District Court – *i.e.*, the requirement that they disgorge and repay fees improperly collected from consumers – constituted a punitive "criminal contempt" sanction rather than a compensatory "civil contempt" remedy. Br. at 47-49. This assertion is unfounded. "[A] contempt sanction is considered civil if it is 'remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.'" *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827-28 (1994), citing *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441 (1911).

Here, the contempt payments mandated by the District Court are designed explicitly to "redress consumer injury" due to the Contempt Defendants' violations [DE 395, at 39, ¶ 103]. The amounts are to be calculated by the Monitor based on "fees obtained from consumers" under contracts that violated the Stipulated Injunction and Order. *Id.* at 40-42, 45, ¶¶ 104-22, 129. The District Court supplied a carefully reasoned and persuasive legal analysis in support of its conclusion that the remedial and compensatory remedy it ordered was a civil contempt sanction, not a punitive criminal sanction. *Id.*. at 38-39, ¶¶ 102-03.

The Contempt Defendants contend that they were deprived of their constitutional rights to a jury trial and to the protection of the burden of proof of guilt beyond a reasonable doubt. Br. at 47. Such rights exist in the context of "'serious' criminal contempts involving imprisonment of more than six months…. In contrast, civil contempt sanctions… may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *International Union, United Mine Workers v. Bagwell*, 512 U.S. at 826-27. Here, the Contempt Defendants had ample opportunities to be heard, during the evidentiary hearing on February 13 and 17, 2009, as well as through briefs and other written submissions to the District Court. [DE 395, at 38-39, ¶ 102.]

The Contempt Defendants further contend that they were given no "notice of trial or a reasonable opportunity to conduct discovery or otherwise prepare a

defense" before that February 13 and 17 hearing, and that no "order setting trial" or "order to show cause" were issued. Br. at 9. This allegation is flatly untrue, as the District Court made clear:

> [I]t is perfectly obvious that Defendants came to the hearing fully prepared to make an extensive evidentiary presentation, including with binders of exhibits that included the relevant state laws, correspondence, and other documents. Indeed, Defendants made no objection to the taking of evidence and presented the testimony of Charles Ferdon and Randall Leshin. The reason they came prepared was because the Court had held a telephone conference with the parties in advance of the hearing making it clear that evidence would be taken.

Order Denying Defendants' Motion to Stay Modified Injunction pending appeal (entered April 15, 2009) [DE 405] at 2. The District Court issued its order scheduling the hearing on Jan. 20, 2009 [DE 364], and entered the order to show cause on Feb. 4, 2009 [DE 367].

2. Disgorgement of Improperly Collected Fees Is An Appropriate Civil Contempt Sanction

The remedy adopted by the District Court was eminently appropriate. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb v. Jacksonville Paper Co.*, 336 U.S. at 193. "Courts have broad discretion to fashion contempt remedies and the particular remedy chosen should be 'based on the nature of the harm and the probable effect of alternative sanctions.'" *FTC v. Trudeau*, 2009 WL 2615822 *14 (7th Cir., Aug. 27, 2009) (citation omitted); *accord*, *McGregor v. Chierico*,

206 F.3d at 1388-89. In this case, the District Court effectively directed the Contempt Defendants to reverse the consequences of their misconduct by returning the fees that they had improperly collected from "existing clients," and rescinding the contracts that violated the Stipulated Injunction and Order, including returning the fees obtained under those contracts. In doing so, the District Court properly ordered Contempt Defendants to make redress in the amount equal to their gross fee receipts – a remedial measurement that is commonly used in civil redress designed to make consumers whole.

Civil contempt sanctions are permissible if designed to "compensate the complainant for losses sustained." *United States v. United Mine Workers of Am.,* 330 U.S. 258, 303-04 (1947). The Contempt Defendants complain, however, that the sanctions adopted by the District Court do not "restore a wronged party (as none were ever identified)." Br. at 48. They contend that there was no finding that their alleged wrongdoing had a "causal relationship" to consumer losses, *id.* at 51, and that their ostensibly "purely technical" violations caused no harm to consumers." *Id.* at 48. They also contend that, "[t]hough the consumers paid fees, they received services from Defendants," *id.* at 53, that "consumers were thus in no worse position that if they had accounts with a fully compliant debt management provider," *id.*, and that "customers had already received a valuable service by virtue of ECI timely paying their creditors." *Id.* at 48.

This Court rejected precisely the same arguments in *McGregor v. Chierico*, another contempt case in which a telemarketer continued to engage in deceptive and abusive marketing practices, and thereby violated a consent decree settling an earlier FTC enforcement action. In that case, as here, the defendant argued that the FTC had not proven a causal link between his contemptuous conduct and consumer losses. The Court rejected this argument:

> Liability under the FTC Act is predicated upon certain misrepresentations or misleading statements, coupled with action taken in reliance upon those statements. Proof of individual reliance by each purchasing customer is not a prerequisite to the provision of equitable relief needed to redress fraud. 'A presumption of actual reliance arises once the [FTC] has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product.'….
>
> Given this presumption, the FTC need not prove subjective reliance by each customer, as '[i]t would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action.'"

206 F.3d at 1388, citing *FTC v. Figgie, Int'l Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) and *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). Thus, the FTC need not prove "causality" in the manner apparently demanded by the Contempt Defendants. The fact of their deceptive marketing practices establishes a presumption that consumers who paid for their services did so in reliance on their misrepresentations (*i.e.*, that the Contempt Defendants were legally entitled to offer and enter contracts in the states at issue and could continue

to collect from existing clients who cancelled), and that such consumers were harmed as a consequence of making those payments.

This Court in *McGregor v. Chierico* also rejected the defendant's argument, like the arguments of Contempt Defendants here, that disgorgement of gross proceeds was an improper contempt sanction because there was no proof that the defrauded consumers did not actually receive and use the products he had sold them. The Court held:

> While it may be true that the defrauded businesses received a useful product, and though less likely, they may have even received the product at a competitive price, the central issue here is whether the seller's misrepresentations tainted the customer's purchasing decisions. We agree with the Ninth Circuit in *Figgie* that in cases like this, "[t]he fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds ... for each [product] that is not useful to them." Accordingly, we affirm the district court's assessment of damages in the amount of gross sales.

206 F.3d at 1388-89, citing *FTC v. Figgie*, 994 F.2d at 606. *Accord*, *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (*en banc*) ("the district court need not offset the value of any product the defrauded consumers received. Accordingly, when the FTC has proven a pattern or practice of contemptuous conduct at the liability stage by clear and convincing evidence, a presumption arises that allows

the district court to use all revenue attributable to the contemptuous conduct – the gross receipts from consumers – as a baseline for assessing sanctions.”)[22]

The Contempt Defendants assert that they should be required to disgorge, at most, the amount by which they *profited* from their wrongdoing (*i.e.*, their ill-gotten gains), rather than the gross amount of the fees they received. Br. at 53. But the District Court did not abuse its discretion by requiring disgorgement of the gross fees they received, rather than their net profits. “[W]here a defendant has engaged in a pattern or practice of contemptuously misleading consumers in violation of an FTC Act-authorized injunction, using the defendant's gross receipts is a proper baseline in calculating the amount of sanctions necessary to compensate injured consumers.” *FTC v. Kuykendall*, 371 F.3d at 766. *Accord*, *McGregor v. Chierico*, 206 F.3d at 1387-89; *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997); *FTC v. Trudeau*, 2009 WL 2615822 *14 (“Consumer loss is a common measure for civil sanctions in contempt proceedings and direct FTC actions.”); *FTC v. Stefanchik*, 559 F.3d at 931 (“Equity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment. Moreover, because the FTC Act is designed to protect consumers

[22] In general, defendants have the burden of demonstrating that an “offset is required because certain consumers received refunds or were satisfied with their purchases.” *Id.* 371 F.3d at 767. Here, the Contempt Defendants have not met that burden – and in any event, such issues are properly before the District Court in the ongoing proceedings regarding the contempt sanctions. *See* Section I, *supra* at 24-29.

from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits.").

Moreover, a requirement that contemnors disgorge and restore to consumers the full amount that consumers paid is the monetary equivalent of rescission. *See FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (agreeing with *FTC v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982) that Congress included the power to order rescission). A defendant may be liable for the full amount of the monetary equivalent of rescission, even though it may exceed the amount of the defendant's unjust enrichment. *FTC v. Kitco of Nevada, Inc.,* 612 F.Supp. 1282, 1296 (D. Minn 1982); *FTC v. Security Rare Coin,* 931 F.2d at 1316 (affirming a rescission order even though "[t]he innocent customers' losses exceed Security Coin's gain" in order to achieve the restoration to "the status quo ante").

Finally, the Contempt Defendants incorrectly assert that a finding of fraud is a prerequisite to a civil contempt order requiring disgorgement. Br. at 50. They cite *Commodity Futures Trading Comm'n v. Sidoti,* 178 F.3d 1132 (11th Cir. 1999) in support of their argument that a District Court order requiring disgorgement of profits in the absence of fraud would constitute an abuse of discretion. *Id*. But *Sidoti* does not support this claim. In that case, the disgorgement sanction was ordered as a remedy for fraud (no contempt was alleged); here the disgorgement sanction was ordered as a remedy for contempt (not fraud). The holding of *Sidoti*

is that the defendants could not be required to disgorge amounts during time periods when there was no record evidence of the violation at issue (in that case, fraud). 178 F.3d at 1138. Here, the District Court carefully limited the disgorgement obligation to the time periods and states in which the violations at issue occurred. [DE 395 at 40-42, ¶¶ 104-21.]

Fraud clearly is not required for the District Court to use gross fee receipts as the basis for measurement of compensatory relief in civil contempt. To the contrary, in numerous FTC consumer protection cases, courts have properly required disgorgement of gross receipts as a remedy for civil contempt of injunctions, without relying on any fraud finding. *See, e.g., FTC v. Neiswonger*, 2009 WL 2870512 (8th Cir., Sept. 8, 2009), *aff'g* 494 F.Supp.2d 1067 (E.D. Mo. 2007); *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009); *FTC v. Kuykendall*, 371 F.3d at 764-66.[23] In this matter, the Court has merely ordered Contempt Defendants to pay, for the benefit of consumers, the gross amount of fees they took in violation of the Stipulated Injunction and Order. *See* DE 395 at 40-42 (with section headings for "Consumer Redress" and specific direction to

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[23] As another example, in patent and trademark infringement cases that do not involve fraud, courts have regularly measured civil contempt compensation by defendant's gross receipts. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 457 (1932); *National Drying Machinery Co. v. Ackoff*, 245 F.2d 192, 194 (3d Cir. 1957) (a civil contempt award "by very definition, must be an attempt to compensate plaintiff for the amount he is out-of-pocket or for what defendant by his wrong may be said to have diverted from the plaintiff or gained at plaintiff's expense.")

disgorge "[a]ll fees obtained" or "all fees collected" from consumers in the specified states). Fraud is not required for such an order.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ADOPTING THE MODIFIED INJUNCTION

In the Order Modifying the Stipulated Injunction and Order [DE 406], the District Court adopted only narrow changes to the preexisting injunction. In essence, that Order required the Contempt Defendants: (1) to discontinue collecting fees from customers in several categories addressed by the April 7 Order; (2) to send new notices to such customers notifying them of their rights; (3) not to communicate with such customers other than via the mandated notices; (4) to refund certain funds to customers and/or distribute such funds to customers' creditors within specified time frames; and (5) to compensate the Court-appointed Monitor for his related costs. *See generally id.*

The District Court's Order Modifying the Stipulated Injunction and Order fully complied with all applicable standards governing the Court's exercise of discretion. *See* DE 395 at 43, ¶¶ 123-24. The Contempt Defendants incorrectly cite *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) for the proposition that a modification of a consent decree must be based on a significant change in the facts or law, and that the burden to make this showing is heavy where the proposed modification addresses events that were anticipated at the time the decree was entered. Br. at 15. But the *Rufo* case sets forth the burden that a *defendant* faces in

the context of a motion pursuant to Fed. R. Civ. P. 60(b) to be relieved of its obligations under a consent decree. In that case, the Supreme Court specified that this standard is particularly appropriate "in the context of institutional reform litigation," such as cases intended to remedy a local or state government entity's alleged civil rights violations or other issues that "relate[] to the vindication of a constitutional right[.]" 502 U.S. at 382-83. This is not such a case.

Rather, in this case the consent decree modification enables the FTC – the law enforcement agency that, as *plaintiff*, seeks to vindicate consumers' rights – to enforce the decree more effectively – unlike the *Rufo* case, in which the *defendant* sought to be excused from some of the consent decree's requirements. The rationale set forth by the Supreme Court in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968), to distinguish the standard for modifying a consent decree set forth in an earlier decision, is applicable here. "The present case is the obverse of the situation in [*Rufo*]…. Here, the Government claims that the provisions of the decree were specifically designed to achieve [compliance with laws protecting consumers and competition] by various means and that the decree has failed to accomplish this result. Because time and experience have demonstrated this fact, according to the Government, it seeks modification of the decree…. [By contrast, in *Rufo*], the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their

impact." *United Shoe Machinery*, 391 U.S. at 249, distinguishing *United States v. Swift & Co.*, 286 U.S. 106 (1932).

Thus, "[i]t used to be that only new and unforeseen circumstances could justify the modification of [a consent] order." *Sizzler Family Steak Houses v. Western Sizzlin Steakhouse, Inc.*, 793 F.2d 1529 (11th Cir. 1986). That standard changed, however, with the Supreme Court's decision in *United Shoe Machinery*. As the Fifth Circuit explained,

> [in *United Shoe Machinery*] the Supreme Court rejected the use of the *Swift* test [requiring a "clear showing" of "grievous wrong" evoked by "new and unforeseen conditions] for deciding whether to impose additional restrictions on a defendant. The Supreme Court instead instructed the district court to determine whether the relief originally ordered had produced the intended results. 'If it has not, the District Court should modify the decree so as to achieve the required result with all appropriate expedition.' 391 U.S. at 252. The holding in *United Shoe Machinery* indicates that an injunction may be modified to impose more stringent requirements on the defendant when 'the original purposes of the injunction are not being fulfilled in any material respect.' 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2961 (1973).

Exxon Corp. v. Texas Motor Exchange of Houston, Inc., 628 F.2d 500, 503 (5th Cir. 1980).

In this case, the District Court's modification of the Stipulated Injunction and Order was fully justified by the "Contempt Defendants' demonstrated failure to comply with the [Stipulated Injunction and Order]." [DE 395 at 43, ¶ 123.] The modifications were reasonably tailored to address the need to rectify the Contempt Defendants' violations of the Stipulated Injunction and Order, prohibit further

collection from consumers in states where the District Court had ruled Defendants were not qualified to provide services, and restrict the Contempt Defendants' interactions with clients in light of their past misconduct in contradicting the notices under the Stipulated Injunction and Order.

This Court has held that the same violations of a consent decree that justify imposition of contempt sanctions may also justify simultaneous modification of the decree.[24] *See Sizzler, supra*. In this case, the Contempt Defendants' violations confirm that "the original purposes of the injunction are not being fulfilled," and therefore it is appropriate to "impose more stringent requirements" so as to "achieve the required result with all appropriate expedition." *Sizzler*, 793 F.2d at 1539, quoting *Exxon Corp.*, 628 F.2d at 503. Such modifications are not only permissible; in some cases it may be "an abuse of discretion to *fail* to make modifications required by applicable law." *Wilson v. Minor*, 220 F.3d 1297, 1301 (11th Cir. 2000) (emphasis added), citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1563 (11th Cir.1994); *Godfrey v. BellSouth Telecomm., Inc.,* 89 F.3d 755, 757 (11th Cir.1996).

Moreover, even under the *Rufo* standard, the modification at issue here is justified because the Contempt Defendants' ongoing violations of the Stipulated

[24] Even if the District Court's contempt rulings were characterized as modifications, rather than interpretations, of the original Stipulated Injunction and Order, the same factors discussed herein would justify such purported modifications. *See supra* at 30-33; Br. at 17-18.

Injunction in Order are a “significant change either in factual conditions or in law” and were not “anticipated at the time [the parties] entered into the decree.” *Rufo*, 502 U.S. at 384, 385. And “[i]n light of the likelihood of future violations, the district court did not abuse its discretion in enjoining further violations….” *CFTC v. Sidoti*, 178 F.3d at 1137, citing *SEC v. Carriba Air, Inc.,* 681 F.2d 1318, 1322 (11th Cir.1982); *SEC v. Blatt,* 583 F.2d 1325, 1334 (5th Cir.1978).

CONCLUSION

For the reasons set forth above, this Court should dismiss the Contempt Defendants' appeal, in part, for lack of jurisdiction, and otherwise should affirm the District Court orders under review.

Respectfully submitted,

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Dated: October 9, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2009, I electronically filed the Brief of Appellee the Federal Trade Commission by uploading the brief to the Court's website via the electronic document filing system. On the same day, I also caused an original signed brief and six paper copies to be sent to the Clerk of the Court by express overnight delivery. On the same day, I also transmitted the brief to counsel for the appellants via e-mail, and caused two paper copies to be sent to them by express overnight delivery, at the following address:

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