11-13569

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

STEPHEN LALONDE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (Case 0:09-cv-61840-JJO)

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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December 13, 2012

Federal Trade Commission v. Stephen Lalonde, No. 11-13569

PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1 and 28-1(b), the Federal Trade Commission ("FTC" or "Commission") certifies that the following is a complete list of all persons or entities known to have an interest in the outcome of this case or appeal:

Bergman, Michael, D. – Attorney, Federal Trade Commission

Broad and Cassel – Attorneys for Receiver

Capsouth Fund VII, LLC – Intervenor

Crossland Credit Consulting Corp. d/b/a Crossland Credit Consultants Corp. – Defendant

Daly, John F. – Deputy General Counsel, Federal Trade Commission

Jove Sevens, LLC – Intervenor

The Kopelowitz & Ostrow Firm PA – Attorneys for Intervenor Capsouth Fund VII, LLC and Intervenor Jove Sevens, LLC

Lalonde, Amy – Defendant

Lalonde, Stephen – Appellant/Defendant

Melman, Leslie Rice – Assistant General Counsel, Federal Trade Commission

Ostrow, Jeffrey Miles – Attorney for Intervenor Capsouth Fund VII, LLC and Intervenor Jove Sevens, LLC

O'Sullivan, John J. – United States Magistrate Judge

Federal Trade Commission v. Stephen Lalonde, No. 11-13569-DD

Petroski, Michael – Defendant

Raymond, Mark F., P.A. – Receiver

Rodriguez, Edwin – Attorney, Federal Trade Commission

Scoreleaper, LLC – Defendant

Shonka, David C. – Acting General Counsel, Federal Trade Commission

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Spectrum Title, Inc. – Defendant

Spiegel, David – Attorney, Federal Trade Commission

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1st Guaranty Mortgage Corp. – Defendant

STATEMENT REGARDING ORAL ARGUMENT

No material facts are in dispute and the legal issues are adequately briefed. Oral argument, therefore, is not required.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The Federal Trade Commission ("Commission" or "FTC") initiated this action pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, Section 410(b) of the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679h(b), and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101 *et seq*. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b).

The district court issued summary judgment against defendant-appellant Stephen Lalonde on March 30, 2011. D.204.[1] Lalonde filed on August 1, 2011, an appeal of the court's summary judgment order, D.224, but that filing was premature because claims were still pending against other defendants, and the court did not certify the order against Lalonde as a final judgment pursuant to Fed. R. Civ. P. 54(b). D.224. The court entered a judgment as to the last remaining defendant on September 26, 2011, D.237, and that judgment resolved all claims and constituted the "final decision" for purposes of this court's jurisdiction under 28 U.S.C. § 1291. Pursuant to Fed. R. App. P. 4(a)(2), Lalonde's premature notice of appeal is deemed filed as of September 26, 2011, the date final judgment was

[1] "D.#" refers to the district court document number.

entered in this case because the summary judgment order would have been "appealable if immediately followed by the entry of judgment." *See Outlaw v. Airtech Air Conditioning and Heating, Inc*., 412 F.3d 156, 158, 159-63 (D.C. Cir. 2005) (*quoting FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991)); *see also Nat'l Assoc. of Bds. of Pharmacy v. Bd .of Regents Univ. of Georgia*, 633 F.3d 1297, 1306-07 (11th Cir. 2011) (citing *Wilson v. Navistar Int'l Transp. Corp*., 193 F.3d 1212, 1213 (11th Cir. 1999) ("[W]hen a notice of appeal is filed between the time of a decision or order and the time that the order is rendered appealable by the entry of judgment, the otherwise premature notice of appeal is treated as if filed on the date of and after entry of judgment."), *overruled on other grounds by Saxton v. ACF Inds., Inc*., 254 F.3d 959 (11th Cir. 2001 (en banc)).

STATEMENT OF THE ISSUES

1) Whether the district court properly granted summary judgment on the FTC's claims that defendants violated provisions of the FTC Act, the Credit Repair Organizations Act, and the Telemarketing Sales Rule, and that defendant Lalonde may be held personally liable for those violations.

2) Whether the district court abused its discretion in ordering permanent injunctive and monetary relief where the uncontested evidence showed the need for

a permanent ban and the amount of consumer injury caused by Lalonde's law violations.

3) Whether the district court abused its discretion or deprived Lalonde of due process by its rulings on a variety of procedural and preliminary matters, including a freeze on assets controlled by Lalonde, his request for appointment of counsel in this civil action, the terms of his access to documents, and case management issues including the rejection of untimely submissions.

STATEMENT OF THE CASE[2]

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

This is a civil enforcement action brought by the FTC in November 2009 to halt defendants' deceptive mortgage loan refinancing, credit repair, and mortgage loan modification schemes and to provide redress to injured consumers. The FTC sued three individual defendants (appellant Stephen Lalonde ("Lalonde"), his wife Amy Lalonde, and Michael Petroski), and four corporate defendants over which they exercised control, alleging deceptive practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the CROA, 15 U.S.C. §§ 1679-1679j, and the

[2] Although the issues in this case are straightforward, the FTC is providing a full description of the relevant facts, procedural background, and legal authorities to assist the Court in assessing the *pro se* appellant's brief.

FTC's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310 (2009). D.1. On the same day, the court granted the FTC's request for a temporary restraining order ("TRO") D.15, followed by stipulated preliminary injunctions against the defendants. D.34, D.37.

On August 26, 2010, the FTC moved for summary judgment against each of the individual defendants. D.113. On March 30, 2011, the court granted summary judgment against Lalonde and Petroski, but denied summary judgment as to Amy Lalonde. D.203, D.204. D.205. The court concluded that Lalonde violated the CROA, the TSR, and the FTC Act, ordered Lalonde to pay $2,663,515 in monetary relief, and permanently banned Lalonde from the mortgage, credit repair and loan modification businesses.

On May 10, 2011, Stephen Lalonde filed his motion for reconsideration, D.209, which was denied by the court on July 20, 2011. D.222. Lalonde filed on August 1, 2011, a premature appeal of the court's summary judgment order. D.224. On September 26, 2011, the court entered final judgment against the last remaining defendant (Amy Lalonde), D.237, that resolved all remaining claims pending in this case. Lalonde's notice of appeal was deemed filed as of September 26, 2011, pursuant to Fed. R. App. P. 4(a)(2).

B. Statement of the Facts

1. Defendants' deceptive schemes

Stephen Lalonde was the mastermind of three mortgage-related schemes involving the four corporate defendants which he owned or controlled.

A. First scam: defendants' deceptive practices involving the failure to disburse new mortgage monies as promised

In defendants' first scheme, sales employees of defendants 1st Guaranty Mortgage, Inc. ("1st Guaranty") and Spectrum Title, Inc. ("Spectrum") misrepresented to consumers, through telemarketing, that they would obtain for consumers 1st Guaranty-brokered loans the proceeds of which could be used to pay off existing mortgages and, in some instances, provide additional funds to the consumer. D.113-2 ¶¶52, 54; D.203 at 8-9. As title and settlement agent for these loans, Spectrum prepared loan closing materials including, among other things, U.S. Department of Housing and Urban Development Settlement Statements (HUD-1 forms) that repeated defendants' earlier representations as to how proceeds of the new loans would be disbursed. D.113-2 ¶¶3, 52, 54; D.203 at 8.

In fact, contrary to these express representations, beginning in at least February 2007, Spectrum failed to make the promised disbursements. D.113-2 ¶¶55-56; D.203 at 9. In fact, many consumers who had arranged for new home mortgages through Spectrum received foreclosure notices from "former" lenders

who had not been paid off and were no longer receiving the consumer's monthly mortgage payments. D.113-2 ¶¶56, 67; D.203 at 9. Likewise, many consumers who also applied for "cash out" refinancing failed to receive the proceeds as promised. D.113-2 ¶55; D.203 at 9.

Not surprisingly, many consumers complained to 1st Guaranty and Spectrum representatives that they never received the promised loan proceeds. D.113-2 ¶¶56, 59-60; D.203 at 9. Many of these customers spoke directly to either or both of the Lalondes about the failed payoffs, while others complained to 1st Guaranty managers who relayed those complaints to Stephen Lalonde. D.113-2 ¶¶56-59; D.203 at 9. Although Lalonde repeatedly promised consumers that he would address their complaints, he did not do so. D.113-2 ¶58; D.203 at 10.[3]

On July 10, 2009, Stephen Lalonde pled guilty to criminal counts of mail fraud and misrepresentation to HUD relating to Spectrum's failure to disburse mortgage monies as promised. D.203 at 12; D.113-2 ¶68. Lalonde submitted a factual proffer in September 2009, in which he stipulated that he engaged in a criminal scheme by promising to homeowners seeking to refinance loans that he would provide to them proceeds of a new loan through 1st Guaranty and Spectrum,

[3] Consumers also complained to Spectrum's underwriter, Stewart Title Guaranty Company ("Stewart Title"). After multiple attempts to resolve these problems with the Lalondes, Stewart Title filed a state civil suit against Spectrum in June 2008. D.113-2 ¶¶61-66; D.203 at 9-12.

stating in the HUD-1 forms that the original mortgage was being paid off, receiving the payoff amount, and failing to make the promised pay-offs. D.203 at 12-13; D.113-2 ¶68, 71. Based on this scheme, Lalonde was sentenced in December 2009 to 60 months in prison, a sentence he is still serving. D.203 at 13; D.13-2 ¶73. For several months after his guilty plea, Lalonde continued to operate his credit repair and loan modifications scams, as described below.

B. Second scam: defendants' deceptive credit repair activities

After Stewart Title refused to work with Spectrum, Lalonde moved onto a new scam: promising but failing to provide credit repair assistance to credit-impaired consumers seeking mortgages. By no later than June 2008, using a new company, Crossland, along with 1st Guaranty, Lalonde's sales representatives began purporting to assist consumers with poor credit to obtain mortgages. D.203 at 13; D.113-2 ¶74. Lalonde transitioned the 1st Guaranty-Crossland credit repair scheme to a new company, Scoreleaper, in May 2009. D.203 at 13; D.113-2 ¶¶5,74.

Crossland-1st Guaranty, and then Scoreleaper, through advertising on the internet, invited consumers to fill out forms on-line and then called them regarding purported credit repair and mortgage assistance services. D.203 at 13; D.113-2 ¶78. Defendants charged either $695 or $698 for these services, but required the

consumer to pay all or a substantial part of that fee before they began to do any work on the application. D.203 at 14; D.113-2 ¶¶88-89. Defendants' sales pitch (as reflected in recorded sales calls and in consumer and employee declarations) typically asserted that, irrespective of consumers' credit histories, there was a very high likelihood, if not a guarantee, that the customer's score would improve to a mortgage-worthy level. D.203 at 14; D.113-2 ¶¶82, 87.

Numerous consumers complained that defendants' sales agents represented that they could delete all negative items in the consumers' credit reports, including accurate items, such as recent bankruptcies, in a short period of time (as little as thirty and no more than ninety days). D.203 at 14-15; D.113-2 ¶¶83-85. By deleting all such negative items, defendants claimed they would raise the consumers' credit score significantly. D.203 at 16; D.113-2 ¶83. Defendants made their representations based on discussions with customers during the sales calls, but they rarely obtained the customer's credit reports and, when they did, they failed to obtain the underlying materials documenting the negative items in the report. D.203 at 16; D.113-2 ¶86.

In fact, negative information can be removed from a consumer's credit history only if it is incorrect. D.203 at 16; D.113-6 (Ex. 29 at 9-10, 12). Further, credit history challenges can take far longer than the short periods of time

promised by the defendants as they are very complex and variable and are based on each person's unique circumstances. D.113-6 (Ex. 29 at 10-11). Defendants also could not predict the effect a particular challenge will have on a credit score because the analytics for credit scoring are proprietary to each consumer reporting agency. D.113-6 (Ex. 29 at 12).

Not surprisingly, numerous consumers complained about the companies' failed promises to repair their credit and obtain mortgages. D.203 at 17; D.113-2 ¶94. Defendants' employees, including 1st Guaranty's loan processing managers, knew they were unable to improve their customers' credit scores or to obtain a mortgage as they had promised. D.203 at 17-18; D.113-2 ¶¶91-92. Indeed, defendants' own computer records confirm that they were unable to obtain a *single* mortgage for any of their hundreds of Crossland and Scoreleaper customers for whom they performed credit-repair services. D.203 at 18; D.113-2 ¶91.[4]

C. Third scam: defendants' deceptive practices relating to loan modification services

Starting by June 2008, Lalonde – through 1st Guaranty, Crossland, and, later,

[4] Indeed, 1st Guaranty's last loan closing occurred on October 20, 2008 – 13 months before the court's TRO in this case. During the 4 ½ months prior to October 2008 – during the initial period of Crossland's operation – 1st Guaranty's computer records showed closings for just four customers, but none of these customers were Crossland customers, and it is unclear if any of the four were credit-impaired. D.203 at 18; D.113-2 at ¶91.

Scoreleaper – engaged in yet another scam: the marketing of a loan modification program to consumers, called "loss mitigation." D.203 at 18; D.113-2 ¶95. In this program, defendants' telemarketers represented that they were highly likely to obtain modified loans for consumers that, by lowering their interest rates and monthly payments, would make the consumers' mortgage payments substantially more affordable. D.203 at 18-19; D.113-2 ¶¶99-100. They charged consumers one-month's mortgage payment in advance for these services. D.203 at 19; D.113-2 ¶101. In fact, defendants' own computer files failed to show a single loan modification. D.203 at 19; D.113-2 ¶103. Not surprisingly, numerous consumers complained to 1st Guaranty, Crossland, and Scoreleaper employees that they had not received the promised loan modifications. D.203 at 19; D.113-2 ¶102.

D. Consumer injury and defendants' ill-gotten gains

As for defendants' first scam, Spectrum's failure to disburse loan proceeds to pay off refinanced mortgages resulted in $1,773,720.78 in consumer claims. D.203 at 20; D.113-2 ¶108.[5] With respect to defendants' credit repair and loan modification schemes, based on the defendants' total revenues during the 17½ months Crossland and Scoreleaper were operational, consumer injury was at least

[5] Another $407,773 in consumer claims involved failed payoffs on new mortgages which were not the subject of Count 5. D.113-2 ¶108.

$889,794. D.203 at 21; D.113-2 ¶¶110-113.[6] Consumers thus paid at least $2,663,515 based on defendants' failed promises resulting from all three scams. D.203 at 21.

E. Role of Stephen Lalonde

Lalonde owned and controlled corporate defendants 1st Guaranty, Crossland, and Scoreleaper, and assisted in the management of Spectrum. D.203 at 5; D.113-2 ¶¶6-7; Appellant's Brief ("App. Br.") at 11 (admitting officer role at defendant corporations). In addition, he was the principal of at least 22 other entities, the majority of which operated from the same business address as the four corporate defendants and regularly transferred funds among themselves. D.203 at 5; D.113-2 ¶34.[7] Lalonde monitored his businesses from an office on his business premises,

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[6] Crossland's total revenue was $518,903, Scoreleaper's total revenue was $116,010, and 1st Guaranty's total revenue was $279,168 during this period. D.113-2 ¶¶110-113.

[7] Lalonde stated in his asset deposition that his companies made at least $600,000 - $700,000 in paperless loans to one another. D.113-2 ¶¶ 36-37 (citing D.113-9 (Ex. 35f at 42:5-42:8, 44:13-46:8)). The financial reports of these other Lalonde companies indicate that they earned substantial revenues during the time period 1st Guaranty-Crossland and Scoreleaper were offering their credit repair and loan modification services. For instance, Lalonde's company, Capsouth, LLC, earned $1.6 million during this period. D.113-7 (Ex. 34 at ¶28). As the district court stated, "in view of the close nexus between Lalonde entities and the intertwined nature of their financial affairs, it is likely that at least a part of the revenues attributed to unnamed entities [like Capsouth] involve earnings from the scams at issue in this proceeding." D.203 at 21 n.102.

through the use of audio and video equipment, which he utilized, among other things, to listen in on and record calls of his sales personnel. D.203 at 5-6; D.113-2 ¶¶ 8, 42, 46.

2. Proceedings below

The FTC filed a six-count complaint on November 17, 2009 against individual defendants Stephen Lalonde, Amy Lalonde, and Michael Petroski, and corporate defendants 1st Guaranty, Spectrum, Crossland, and Scoreleaper. D.1. Count One alleged that 1st Guaranty, Crossland, Scoreleaper, Stephen Lalonde and Petroski ("Credit Repair Defendants") made misrepresentations to consumers to induce them to purchase their credit repair services, including that they could remove truthful, negative items from consumers' credit reports to improve their credit scores and thereby obtain home mortgages for the consumers, in violation of Section 404(a)(3) of the CROA, 15 U.S.C. § 1679a(3). Count Two alleged that the Credit Repair Defendants charged or received money for the performance of credit repair services before such services were fully performed, in violation of Section 404(b) of the CROA, 15 U.S.C. § 1679b(b). Count Three alleged essentially the same facts as Count 2 as a violation of Section 310.4(a)(4) of the TSR, 16 C.F.R. § 310.4(a)(4). Count 4 alleged essentially that the same facts as Count 1 as a violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Count 5 alleged that

1st Guaranty, Spectrum, Stephen Lalonde, and Amy Lalonde ("Mortgage Refinance Defendants") misrepresented to consumers that they would obtain refinanced home mortgage loans for consumers and use the proceeds of those loans to pay off consumers' existing mortgage loans fully and promptly, in violation of FTC Act Section 5(a). Count Six alleged that 1st Guaranty, Crossland, Scoreleaper, Stephen Lalonde and Petroski misrepresented to consumers that they would obtain mortgage loan modifications that would make consumers' mortgage payments substantially more affordable, in violation of FTC Act § 5(a). The Commission sought preliminary and permanent injunctive relief and consumer redress. D.1.

On the same day, the FTC sought and was granted a TRO halting defendants' deceptive schemes and imposing an asset freeze. D.4, D.15.[8] On December 1 and 15, 2009, the court entered stipulated preliminary injunctions against several defendants that continued the asset freeze and extended it to certain nonparties. D.34, D.37.

Lalonde subsequently filed a plethora of motions that were (in large part) denied by the court, including motions to: partially release frozen funds (D.64, D.77 (order)); compel the Receiver to produce materials (D.82, D.84 (order)); stay

[8] Following entry of the TRO, the parties consented to have a magistrate judge conduct all further proceedings in this case, *see* D.33, including the entry of a final judgment which could be appealed directly to the court of appeals, in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

the proceedings (D.94, D.105 (order)); extend the time for discovery (D.110, D.115 (order)); proceed *in forma pauperis* or to appoint counsel (D.117, D.132 (order)); and dismiss Count 5 of the Complaint (D.161, D.202 (order)). Defaults were entered against the four corporate defendants on February 4, 2010, D.56, and default judgments were entered against them on July 6, 2011. D.215.

On August 26, 2010, the FTC moved for summary judgment against each of the individual defendants. D.113. On March 30, 2011, the court granted summary judgment against defendants Stephen Lalonde and Petroski on all counts but denied summary judgment against Amy Lalonde. D.203. The court entered a final judgment and permanent injunction against Lalonde and Petroski. D.204, 205.

In its summary judgment order, the court first extensively reviewed the compiled factual record. D.203 at 4-21. The Court concluded that there were no genuine issues of material fact that Lalonde (and Petroski) – acting through the corporate defendants – violated the CROA, the TSR, and the FTC Act, and were therefore liable for each count charged.

The court first concluded that the FTC was entitled to summary judgment on Count 1 because Lalonde and Petroski – acting through 1st Guaranty, Crossland, and Scoreleaper – made "unquestionably untrue or misleading" representations regarding their credit repair services by falsely promising that they could remove

truthful negative information from consumers' credit reports, thereby substantially improving consumers' credit scores, and then use those improved scores to obtain home mortgages for the consumer. *Id.* at 24-27. The court next held that summary judgment was appropriate as to Count 2 because Lalonde and Petroski – acting through the same corporations – charged and received payment for credit repair services before they were fully performed. *Id*. at 28. The court concluded that summary judgment should be awarded on Count 3, because Lalonde and Petroski – acting through the same defendants – violated the TSR by demanding advance payment through telemarketing for their deceptive credit repair and loan modification services. *Id*. at 28-31.

The court then held that summary judgment was appropriate on Count 4 because Lalonde and Petroski violated the FTC Act by misrepresenting to consumers – through the corporate defendants – that they could substantially improve consumers' credit scores by removing truthful negative items and thereby obtain mortgage loans for them. Id. at 31-32. The court also held that summary judgment should be awarded against Lalonde on Count 5 for violations of the FTC Act, because by – acting through 1st Guaranty and Spectrum – he misrepresented that disbursements from new loans would be made fully and promptly to

specifically named parties. *Id.* at 32-33.[9] Finally, the FTC was awarded summary judgment as to Count 6 against Lalonde and Petroski, because they violated FTC Act by – acting through the corporate defendants – misrepresenting that they would obtain modifications of consumers' existing mortgages to make them more affordable. *Id.* at 33-35.

The court next held that Lalonde and Petroski were individually liable for the corporate violations and were subject to injunctive and monetary relief. *Id*. at 36-39, 41-44. The court held that, based on admissions Lalonde made in the criminal case, he was collaterally estopped from relitigating Spectrum's failure to honor promises to disburse monies, and that as owner of 1st Guaranty and co-manager of Spectrum, he had the authority to make the promised disbursements and participated in the fraud knowingly. *Id*. at 36-38. The court also concluded that Lalonde had the authority to control the deceptive credit repair and loan modification schemes "as he was the hands-on owner of each of the corporations that perpetrated the fraud," and had the requisite knowledge of those frauds. *Id.* at 38-39.

Based on their individual liability, and the ongoing nature of their deceptive

[9] The court, however, denied summary judgment on this claim as to Amy Lalonde, concluding that disputed fact issues existed regarding her direct participation in, and knowledge of, the deceptive loan proceeds scam. *Id.* at 32-33.

conduct, the court permanently banned Lalonde and Petroski from engaging in mortgage, credit repair, and loan modification services, and from telemarketing. *Id.* at 44-49. The court also ordered restitution against Lalonde and Petroski (resulting from their violations alleged in Counts 1-4 and 6), and disgorgement against Lalonde (relating to his violation alleged in Count 5), that resulted in a monetary award of $2,663,515 against Lalonde and $533,165 against Petroski. *Id.* at 49-51. Judgments were entered against Lalonde (D.204) and Petroski (D.205).

On May 10, 2011, Lalonde moved for reconsideration of the summary judgment order (and numerous other prejudgment orders), and to alter or amend the final judgment. D.209. On July 20, 2011, the court denied Lalonde's motions regarding summary judgment, concluding that he had failed to show there was newly discovered evidence that was unavailable previously or that the FTC had engaged in fraud in certain filings made in support of its summary judgment motion. D.222 at 3-5. The court also denied Lalonde's request for reconsideration of the other orders, concluding that he was simply relitigating arguments made previously, *id*. at 5, and it struck Lalonde's tardy filing of an exhibit made in support of his opposition to the FTC's summary judgment motion. *Id.* at 1-2.

On August 1, 2011, Lalonde filed an appeal of the court's final judgment against him "and from all orders leading up to final judgment entered in this

action." D.224. On September 26, 2011, the last remaining defendant, Amy Lalonde, entered into a stipulated settlement with the FTC as to which a final judgment was entered. D.237. On February 22, 2012 and May 14, 2012, the court denied various other postjudgment motions filed by Lalonde and Petroski, D.255, D.256,[10] and closed the case on July 11, 2012. D.257.

C. Statement of the Standard of Review

This Court reviews the lower court's grant of summary judgment *de novo*. *Rine v. Imagitas*, 590 F.3d 1215, 1222 (11th Cir. 2009). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). While the Court is to view the evidence and all reasonable inferences in the light most favorable to the non-moving party, *Rine*, 590 F.3d at 1222, the non-moving party cannot rest upon mere assertions or conclusory allegations. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If the non-moving party fails to submit sworn affidavits or a concise statement of material fact, the court may accept all material facts set forth in the motion, pursuant to S.D. Fla. R. 7.5D.

This Court reviews the district court's order granting equitable relief for an

[10] Lalonde had filed numerous other postjudgment motions and other submissions, including to stay the execution of the judgment and an additional exhibit in support of his opposition to the FTC's summary judgment motion. *See, e.g.*, D.213, D.226, D.232, D.233, D.239, D.240, D.241, D.246, D.247, D.249, D.250, D.251.

abuse of discretion, underlying questions of law *de novo*, and supporting factual findings under the clearly erroneous standard. *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1221 (11th Cir. 2002). The Court also reviews for abuse of discretion the district court's discovery rulings and orders regarding scheduling and case management, *see, e.g.*, *Smith v. School Bd. of Orange County*, 487 F.3d 1361, 1365 (11th Cir. 2007); *Maynard v. Bd. of Regents of Div. of Univ. of the Fla. Dept. of Education*, 342 F.3d 1281, 1286-87 (11th Cir. 2003), including orders denying motions to stay or for a continuance, *Fowler v. Jones*, 899 F.2d 1088, 1093-94 (11th Cir. 1990), and orders denying motions to appoint counsel in a civil case. *Bass v. Perrin*, 170 F.3d 1312, 1319 (11th Cir. 1999).

SUMMARY OF THE ARGUMENT

The uncontested evidence shows that Stephen Lalonde was the mastermind behind three egregious mortgage-related frauds operated by four interrelated companies that bilked distressed homeowners out of more than $2,600,000. In the first, he (and his wife Amy) deceptively represented that they would provide the proceeds from new mortgages to certain parties (typically the lenders of previous mortgages) but failed to do so. In the second, Lalonde (along with co-defendant Petroski) misrepresented to consumers that they could delete truthful, negative and non-obsolete items from consumers' credit reports that would increase their credit

score and make it more likely to obtain a home mortgage, but they failed to deliver on those promises. In the third, Lalonde (and Petroski) fraudulently promised that they could obtain home mortgage refinancing for consumers but failed to do so. Based on undisputed evidence of these three scams, the district court properly concluded that Lalonde committed various law violations, and properly ordered summary judgment and injunctive and monetary relief against him.

First, the court properly held that Lalonde violated the Credit Repair Organizations Act by falsely promising that he could remove truthful negative information from the consumers' credit reports (as alleged in Count 1), and by charging or receiving money before such services were performed (as alleged in Count 2). (Part I) The court also correctly held that Lalonde violated the Telemarketing Sales Rule by demanding and receiving payment via telemarketing before defendants performed their credit repair and loan modification services (as alleged in Count 3). (Part II) The court was amply justified in holding that Lalonde violated the FTC Act by engaging in defendants' credit-repair scheme (as alleged in Count 4), by falsely promising he would obtain refinanced mortgages and use those proceeds to pay off existing mortgage loans (as alleged in Count 5), and by misrepresenting he would obtain mortgage loan modifications for homeowners (as alleged in Count 6). (Part III) Finally, the court also correctly concluded that

Lalonde was individually liable for the corporate violations (Part IV), and that he is properly subject to both injunctive and monetary relief. (Part V) Lalonde's arguments consist largely of unsupported or conclusory denials that do not create a genuine issue of material fact to defeat summary judgment either as to the defendants' law violations or Lalonde's individual liability.

The district court properly denied numerous procedural motions filed by Lalonde. (Part VI). For example, the court properly froze the assets of nonparties controlled by Lalonde that had a connection to the corporate defendants (Part VI.A); properly denied Lalonde's requests to stay the proceedings or for further discovery extensions (Part VI.B); properly denied Lalonde's request that the Receiver produce materials to him in prison (Part VI.C); properly denied Lalonde's motion to appoint counsel (Part VI.D); and properly struck Lalonde's supplemental exhibits filed many months after the discovery and briefing deadlines. (Part VI.E)

ARGUMENT

I. DEFENDANTS VIOLATED THE CREDIT REPAIR ORGANIZATIONS ACT (COUNTS 1 AND 2)

The CROA prohibits unfair or deceptive advertising and business practices by credit repair organizations. 15 U.S.C. § 1679(b). Violations of CROA constitute violations of Section 5 of the FTC Act. 15 U.S.C. § 1679h(b)(1). The CROA defines a "credit repair organization" as:

> [A]ny person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of . . . improving any consumer's credit record, credit history, or credit rating[.]

15 U.S.C. § 1679a(3)(A).

The Credit Repair Defendants met this definition and are subject to the CROA because they used the internet and telephones to purportedly provide credit repair services to improve their customers' credit records, credit histories, or credit ratings. D.203 at 23; D.113-2 ¶¶78-79; *see, e.g., Rannis v. Recchia*, 380 F. App'x 646, 649-50 (9th Cir. 2010) (individual attorney met definition of "credit repair organization").[11]

A. Defendants violated the CROA by misrepresenting that they could remove truthful, negative information from consumers' credit reports in order to improve their credit scores and obtain a mortgage (Count 1)

The CROA prohibits credit repair organizations from making any false or misleading representations of their services. 15 U.S.C. § 1679b(a)(3). Lalonde violated the CROA by, acting through the corporate defendants, making untrue or misleading statements concerning the defendants' credit repair services. *See FTC v.*

[11] As the district court correctly concluded, Lalonde meets the definition of a credit repair organization individually, as well as being liable for the actions of the companies he controlled. D.203 at 23-28.

Gill, 265 F.3d 944, 955-56 (9th Cir. 2001) (affirming summary judgment that defendants violated the CROA, 15 U.S.C. § 1679b(a)(3) by making false representations).

As shown above, *supra* at 7-9, Lalonde, acting through defendants 1st Guaranty, Crossland, and Scoreleaper, misrepresented to consumers that 1st Guaranty would obtain mortgage loans for them if they paid Crossland or Scoreleaper to improve their credit scores by removing negative but accurate information from their credit reports, including recent bankruptcies. D.203 at 24-25; D.113-2 ¶¶83-84.[12] In many cases, defendants' sales personnel either guaranteed or stated there was a high likelihood that they would obtain new mortgages for consumers once their credit was repaired. D.203 at 25; D.113-2 ¶87.

However, the uncontested evidence showed that defendants did not – indeed, could not – remove truthful, negative information, including bankruptcies, from consumers' credit reports to improve their credit scores so that consumers could

[12] Lalonde appears to assert (in his "Summary of the Argument Issue Fourteen") that the district court erred in concluding that 1st Guaranty was liable for defendants' credit repair and loan modification schemes because it only derived income from "loan origination." *See* App. Br. at 59-61. Even if 1st Guaranty's role was to purportedly obtain loans, Lalonde fails to rebut any of the FTC's substantial evidence showing that 1st Guaranty was an integral part of defendants' credit repair service scam starting from at least June 1, 2008, and thus was liable for all consumer injuries arising from that scheme. D.113-2 at ¶¶2, 74-94. For the same reasons, Lalonde's argument that disgorgement of amounts derived from 1st Guaranty's fraud were improper, App. Br. at 97, should be rejected.

obtain mortgage loans. D.203 at 25; D.113-2 ¶¶93-94. This is because accurate non-obsolete information, including recent bankruptcies, cannot be deleted from a credit report. D.203 at 25; D.113-6 at 12-16 (Ex. 29 at 7-11). Thus, defendants' claims that they could do so were false. D.203 at 25.[13]

Defendants' credit repair claims were false for the additional reason that, at the time they made their claims, they did not possess documentation regarding the nature of the negative items on their customers' credit report to determine if they could be deleted. D.203 at 26; D.113-2 ¶86; D.113-6 at 15-16 (Ex. 29 at 10-11). Further, defendants had no way of predicting the effect their credit repair efforts would have on their ability to obtain loans because the standards for deriving credit scores are proprietary to the credit reporting agencies and were unknown to the defendants. D.203 at 26; D.113-6 at 15-17 (Ex. 29 at 10-12). Finally, defendants' credit repair claims were false because, by the end of 2007, 1st Guaranty was simply

[13] The vast majority of defendants' customers had credit scores in the 400s and 500s – well below a score of 620 that defendants asserted would make the consumers eligible for a mortgage. D.203 at 13-14; D.113-2 ¶81. According to the FTC's expert testimony, lenders will frequently require a consumer with significant credit issues to have a score higher than 620. D.113-6 at 11-12 (Ex. 29 at 6-7). Lalonde disagrees and relies on a January 2010 HUD newsletter that purports to show that a "FICO score" lower than 620 was available for certain FHA-insured loans later in 2010. App. Br. at 39-40 (citing D.160, Ex. 5). This exhibit, even if it had been properly authenticated, does not create a genuine issue of material fact to question Lalonde's liability as it only shows that certain (FHA-insured) loans covered homeowners with credit scores under 620 beginning later in 2010, far after the unlawful activities engaged in by the defendants here.

not obtaining loans for any customers, including any of defendants' credit repair customers. D.203 at 27; D.113-2 ¶¶91, 92. Lalonde was made aware of the lack of lenders for defendants' credit repair customers. D.203 at 27; D.113-2 ¶¶49, 91, 92. In sum, this Court should affirm the grant of summary judgment on the FTC's claim that defendants violated Count 1, based on the uncontested evidence of defendants' false credit repair claims.

B. Defendants violated the CROA by charging or receiving money for credit repair services before such services were performed (Count 2)

Lalonde, acting through 1st Guaranty, Crossland, and Scoreleaper, also violated the CROA by charging and receiving payment for credit repair services before such services were fully performed. The CROA prohibits charging or receiving money or other valuable consideration for the performance of credit repair services before full performance. *See* 15 U.S.C. § 1679b(b). The undisputed evidence shows that defendants did not start their credit repair services (indeed, if they even performed such services) until consumers paid in full. D.203 at 28; D.113-2 ¶89. Thus, in charging and receiving these advance payments, the defendants violated the CROA. *See Gill*, 265 F.3d at 956 (affirming finding that defendant violated the CROA by accepting payment before full performance of credit repair services). This Court should affirm the district court's holding that

Lalonde violated Count 2.

II. DEFENDANTS VIOLATED THE TELEMARKETING SALES RULE (COUNT 3)

Defendants' actions also violated Section 310.4(a)(4) of the TSR, 16 C.F.R. § 310.4(a)(4).[14] Lalonde – acting through the corporate defendants 1st Guaranty, Crossland, and Scoreleaper – was a "seller" or "telemarketer" engaged in "telemarketing," as those terms are defined in the TSR, 16 C.F.R. §§ 310.2(z), (bb), and (cc), because he received telephone calls from customers as part of a telemarketing program to sell defendants' credit repair services. D.203 at 29; D.113-2 at ¶79; *see, e.g.*, *FTC v. MacGregor*, 360 F. App'x. 891, 893-94 (9th Cir. 2009) (defendants were sellers subject to the TSR).

Under Section 310.4(a)(4) of the TSR, sellers and telemarketers are prohibited from requesting or receiving an advance payment for a loan or other extension of credit, which they have guaranteed or represented they can obtain with a high likelihood of success. As shown above in connection with defendants' CROA violation, *supra* at 25, the uncontested evidence shows that defendants

[14] The TSR was issued by the FTC pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108, to prohibit abusive and deceptive telemarketing acts or practices. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

demanded and received payment via telemarketing advance payment before they ostensibly performed the credit repair or loan modifications services that they represented to consumers would either guarantee or would result in a high likelihood of obtaining a mortgage loan or a modified loan. D.203 at 29-30; D.113-2 at ¶¶87, 89, 99-101.

Under the TSR, inbound telephone calls initiated by a customer in response to an advertisement, other than through direct mail solicitations, are ordinarily exempt from the TSR. *See* 16 C.F.R. § 310.6(b)(5). The TSR, however, covers inbound telemarketing in various instances, including when the calls are made, as here, in connection with requesting advance payment for a loan or other extension of credit. *See* 16 C.F.R. §§ 310.4(a)(4), 310.6(b)(5). Lalonde's argument, therefore, that the defendants did not violate the TSR because all calls from customers were inbound calls and therefore exempt from the TSR, *e.g.*, App. Br. at 50-51, fails. This is because, as the FTC provided through undisputed evidence, *see, e.g.*, D.113-3 at 45-49 (Ex.11); D.9 at 3-16 (Ex.15), defendants either initiated the outbound telemarketing calls or consumers called defendants in response to their advertisements that requested an advance fee payment when the defendants had guaranteed or represented a high likelihood of success in obtaining a loan.

This Court should therefore affirm the district court's determination that

Lalonde violated the TSR (as alleged in Count 3) by requesting advance payment via telemarketing for loans defendants promised consumers they were assured to receive. *See, e.g., FTC v. USA Financial, LLC*, 415 F. App'x. 970, 974 (11th Cir. 2011) (defendants liable under Section 310.4(a)(4) for requesting and obtaining advance fee for purported credit card).

III. DEFENDANTS VIOLATED THE FEDERAL TRADE COMMISSION ACT (COUNTS 4, 5, 6)

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce." To establish a violation of Section 5(a), the FTC must demonstrate that a defendant made material misrepresentations or omissions that were likely to mislead consumers acting reasonably under the circumstances. *USA Financial*, 415 F. App'x. at 973 (citing *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)).

A. Defendants violated the FTC Act by misrepresenting that they could remove truthful, negative information from consumers' credit reports, thereby improving their credit score and obtaining for them home mortgages (Count 4)

As discussed *supra* at 22-25, in connection with Count 1, defendants represented that they could substantially improve consumers' credit scores by removing non-obsolete truthful negative items and then obtaining mortgage loans for them. In fact, as shown by uncontested evidence, including numerous consumer

and employee declarations, and the defendants' own records, defendants' promises were utterly false and misled reasonable consumers in violation of Section 5(a). As described more fully, *infra* at 33-42, Lalonde's arguments that he is not liable under this count because he did not participate in, or allow, such deceptions by his companies, *see* App. Br. at 54-55, is conclusory and belied by overwhelming unrebutted evidence showing the widespread nature of this fraud over many months and Lalonde's control over the defendant companies. This Court should affirm the district court's holding that the FTC was entitled to summary judgment on Count 4.

B. Defendants violated the FTC Act by misrepresenting that they would obtain refinanced mortgage loans and use the proceeds of those loans to pay off consumers' existing mortgage loans (Count 5)

The uncontested evidence also shows that defendants violated Section 5(a) of the FTC Act by representing to consumers, orally as well as in loan closing documents such as the HUD-1 forms, that payments from their new loans would be made to specifically named parties, such as former lenders, fully and promptly. D.203 at 32; D.113-2 at ¶52. However, as shown by numerous employee and consumer declarations, and in the stipulated factual proffer in Lalonde's criminal action, the homeowners' loan proceeds were not disbursed as represented, but rather were essentially stolen by the Lalondes. D.203 at 32; D.113-2 at ¶¶56, 71, 92.

The representations misled consumers, who stopped paying their old

mortgages and were threatened with foreclosure, and were clearly material to them as they would not have paid for the new loans from 1st Guaranty unless they expected proceeds from the new loans to pay off their old mortgages. D.203 at 33; D.113-2 at ¶56, D.113-6 at 18 (Ex. 29 at 13). This Court should affirm the summary judgment as to Count 5 against Lalonde.

Lalonde did not rebut the FTC's evidence that his misrepresentations as to the loan disbursements were deceptive, D.203 at 33, nor does he contest his liability under this count on appeal as a factual matter. He does, however, contend (as his "Issue Thirteen") that the district court erred in denying his motion to dismiss this count. *See* D.161 (motion), D.202 (order). Lalonde argues that the court lacked jurisdiction to adjudicate this claim, because the same allegations were already resolved through settlement in a Florida administrative proceeding. He also asserts that by relitigating the same claim in this proceeding, the FTC is "double dipping in seeking restitution twice." App. Br. at 57-59, 93-94. This argument lacks merit.

The district court properly had jurisdiction to adjudicate this claim that the alleged deceptive practices violated the FTC Act, and to award equitable relief to remedy those violations. *See* 28 U.S.C. §§ 1331, 1337(a), 1345; 15 U.S.C. §§ 45(a), 53(b), 57b. In the Florida administrative proceeding, Stephen and Amy Lalonde entered into a "Stipulation and Consent Agreement" with the Florida State

Office of Financial Regulation, in which they agreed to: 1) cease and desist from violating Chapter 494, Florida Statutes, which regulates mortgage brokerage and lending; 2) the revocation of 1st Guaranty's mortgage lender license; and 3) abstain from seeking licensing with the Florida Office of Financial Regulation in the future. D.161 at 9-14. That agreement does not address the FTC Act violations (as alleged in Count 5) of Lalonde's deceptive practices and the resulting consumer injury caused by Lalonde's failure to disburse the loan proceeds from loan refinances to pay off prior mortgages, and did not bind the FTC or preempt action in this case.

Further, the FTC did not engage in any "double dipping" by seeking monetary relief in this case nor was it barred from seeking relief due to Lalonde's criminal restitution judgment.[15] The court below specifically ordered that any restitution payments made by Lalonde pursuant to his criminal conviction offset his monetary obligation in this case. D.203 at 51; D.204 at 8 (¶IV.B.) Such offset provisions have been regularly upheld by the courts. *See, e.g., SEC v Palmisano*, 135 F.3d 860, 864 (2d Cir. 1998). This Court should affirm the district court's conclusion that Lalonde's prior administrative and criminal proceedings do not

[15] Lalonde's agreement with the Florida Office of Financial Regulation did not contain any monetary penalties. Lalonde is likely referring to payments he might make pursuant to the criminal monetary penalties provisions in the judgment entered against him pursuant to his guilty plea in *U.S. v. Stephen Lalonde*, No. 0:09CR60181-COHN-1 (S.D. Fla. Dec. 23, 2009).

preempt the FTC's claims or the court's ability to grant relief here. D.202 at 4.[16]

C. Defendants violated the FTC Act by misrepresenting that they would obtain mortgage loan modifications for consumers (Count 6)

Finally, defendants also violated Section 5(a) of the FTC Act by falsely representing that they could modify consumers' existing mortgages to make them more affordable by reducing their interest rates and lowering their monthly payments, and could do so quickly. D.203 at 34; D.113-2 ¶99.[17] To the contrary, defendants' own records establish that they failed to modify a single mortgage – undisputed evidence supported by consumer and employee declarations. D.203 at 34; D.113-2 ¶¶102-103. Moreover, when they made their sales pitch, defendants lacked the necessary documentation from borrowers, and the necessary information from lenders and servicers, on which to base their promises of lowered mortgage payments and quick turn-around times. D.203 at 34-35, D.113-6 at 21 (Ex. 29 at

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[16] Lalonde obliquely asserts (as his "Issue Fourteen") that "the FTC does not have jurisdiction" over him and 1st Guaranty "for all the same reasons cited in issue thirteen." App. Br. at 95. Whatever Lalonde might mean by this statement, it is clear that nothing in the Florida administrative proceeding or the criminal case bars any of the FTC's allegations in this case relating to defendants' failure to disburse loan proceeds or their credit repair or loan modification schemes.

[17] Lalonde appears to assert (in his "Summary of the Argument Issue Fourteen") that the district court erred in concluding that 1st Guaranty was liable with respect to the loan modification scheme because it only derived income from "loan origination." App. Br. at 59-61. Lalonde fails to rebut, however, any of the FTC's substantial evidence showing that 1st Guaranty was an integral part of defendants' loan modification scheme. *See* D.113-2 at ¶¶95-104.

16); D.113-2 ¶99.

Lalonde fails to support his contention that he is not liable under Count 6, App. Br. at 55-56, with any substantial evidence. Indeed, his bald claims that "many consumers received loan modifications," App. Br. at 49, is belied by the complete absence of evidence showing a single loan modification in the record materials he relies upon. *Id*. (citing D.159 at ¶¶95 -103 (citing D.160 at 25-52, 68-75; D.160-1 at 1-33, 39-40; D.160-2 at 1-13) (Exs. 5, 6, 7, 10, 12). The district court properly concluded that the undisputed evidence shows that defendants falsely represented their loan modification program as alleged in Count 6. D.203 at 35.

IV. LALONDE IS INDIVIDUALLY LIABLE FOR THE DECEPTIVE ACTIVITIES OF THE CORPORATE DEFENDANTS

Once the FTC has established corporate liability, which it has demonstrated above, the FTC can prove individual liability for the corporate misconduct by showing that "the individual defendants participated directly in the [unlawful] practices or acts or had authority to control them [and] had some knowledge of the practices." *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)). The Court may order monetary relief against individual defendants by showing "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an

intentional avoidance of the truth." *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 636 (7th Cir. 2005) (quoting *Amy Travel*, 875 F.2d at 574); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006). Significantly, the degree of participation in business affairs is probative as to knowledge, *Amy Travel*, 875 F.2d at 574, and the FTC need not prove a subjective intent to defraud. *Bay Area Bus. Council*, 423 F.3d at 636, *Amy Travel*, 875 F.2d at 573-74.

As the district court held, the FTC provided overwhelming and uncontroverted evidence firmly establishing Lalonde's individual liability for the corporate defendants' law violations, as he had the requisite control over the defendant companies and knowledge of their deceptive activities. D.203 at 7-20, 35-39. Lalonde argues (as his Issues Nine, Ten and Eleven), however, that he submitted evidence that created genuine issues of material fact that he was not individually liable, App. Br. at 38-56, 83-91, and that (as his "Issue Twelve") the court failed to consider the materials he submitted. App. Br. at 56-57, 92. He makes similar arguments (as his "Issue Fifteen") that he is not be "personally liable" for "individual damages." App. Br. at 62-64, 96-97. None of Lalonde's contentions have merit.

Lalonde's assertions consist mainly of unsubstantiated self-serving denials

of liability lacking any record support.[18] *See FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997) (general denials insufficient to create a genuine issue of material fact). Contrary to his argument, App. Br. at 56-57, 92, the district *did* consider all his timely summary judgment filings – including his supporting exhibits (D.158, D.160), and his "Statement of Controverted Material Facts" (D.159), *see* D.203 at 2 – but found that Lalonde had not shown a genuine issue for trial and that the uncontested evidence supported summary judgment against him.[19] Indeed, Lalonde failed to properly submit *any* affidavit or declaration to defeat his liability on summary judgment.[20]

In any event, the FTC submitted uncontested evidence supporting summary judgment against Lalonde as to each count in the complaint. For example, as to

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[18] Throughout his brief, Lalonde seeks to cite evidence supporting his arguments without citing to the document number and page number of the district court record as required by 11th Cir. R. 28-1(i) and 28-5.

[19] For example, Lalonde's numerous exhibits of news articles and HUD news bulletins, *see* D.160 at 25-30, 68-75; D.160-1 at 1-33, 39-40; D.160-2, merely show the ongoing problems in the mortgage industry and the difficulties of consumers in obtaining mortgages. Rather than establishing a triable issue of material fact, they merely highlight his companies' deceptions that they could easily obtain mortgages or modified loans for credit-impaired customers.

[20] As shown below, *infra* at 56-57, Lalonde many not rely on a purported affidavit from Michael Ammundsen that was properly struck by the district court as it was filed many months after the discovery and summary judgment deadlines in this case, and after the court's summary judgment order.

Spectrum's failure to honor promises to disburse monies from consumers' refinanced mortgages (as alleged in Count 5), Lalonde is estopped from denying his personal involvement. In his plea agreement and subsequent stipulated factual proffer provided when he entered his criminal guilty plea, Lalonde acknowledged that he falsely represented on the HUD-1 forms of six consumers that their prior mortgages would be paid off, thereby causing more than one million dollars in damages. D.113-2 ¶¶70-71. Lalonde is collaterally estopped from relitigating these critical elements involving his participation in Spectrum's misdeeds. *See Emich Motors Corp. v. Gen. Motors Corp*., 340 U.S. 558, 568 (1951); *Blohm v. Comm'r of Internal Revenue*, 994 F.2d 1542, 1553 (11th Cir. 1993). Further, uncontroverted material facts establish that, as the sole owner of 1st Guaranty and a co-manager of Spectrum, along with his wife, Lalonde had authority to make the disbursements his companies had promised to consumers on the HUD-1 forms and in prior sales representations. D.113-2 ¶¶6-7, 54, but that, after reiterating the promises in numerous one-on-one conversations with consumers, he repeatedly failed to honor them. D.113-2 ¶¶56, 65, 92.

With respect to the credit repair and loan modification frauds (Counts One through Four, and Six), the uncontested evidence shows that Lalonde exercised significant control over, and participation in, the deceptive activities of all the

defendant companies. His unsupported assertion that he is not liable because had only had "potential ownership" of the defendant companies (while at the same time admitting he was the companies' President), App. Br. at 97, is belied by substantial evidence showing that Lalonde owned and controlled 1st Guaranty, Crossland, and Scoreleaper as their principal, and was the sole or joint signatory on all of their bank accounts. D.113-2 ¶¶6-7. Further, Lalonde was present at substantially all times on the business premises of his companies, and monitored the activities of his salesmen and managers, using a video and audio system, as well as company-wide instant message and email systems. D.113-2 ¶¶ 8, 42, 46.

With respect to knowledge, testimony of Lalonde's managers and employees, and his companies' own records, indicate he was fully apprised of customer complaints and was fully aware of the deceptive practices of his companies. His audio system provided him with records of the sales calls of his employees which revealed all of the fraudulent practices engaged in by his credit repair and loan modification businesses. D.113-2 ¶42. Further, through an office-wide computer network, he had day-to-day access to performance records of his companies, including information as to whether they were, in fact, honoring promises they made to consumers. D.113-2 ¶¶43-46.

Lalonde, however, repeatedly attempts to portray the violative acts of his

corporations as the fault of a succession of "rogue" middle managers who contrived to cheat customers without his knowledge. *See, e.g.*, App. Br. at 38-56, 62-63, 83-91, 97-98. For example, he contends – with little or no record support – that Michael Petroski represented himself as President of the companies and stole consumers' money without Lalonde's knowledge,[21] that managers Frank Cousins and Craig Cohen stole company equipment and started a rival company together,[22] and that manager Anthony Whiting stole customer data and smoked marijuana with employees.[23] He claims that any illicit activities were conducted by these other employees in defiance of corporate policy. *See, e.g.*, App. Br. at 40-44, 49-50, 52, 55. He fails to provide, however, any evidence reflecting such corporate policy, or how it was implemented or enforced.[24]

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[21] Lalonde's reliance on the Declaration of James Vandoren, *see* App. Br. at 42, 55 (citing D.113, Ex. 15) to support this proposition is misplaced as Mr. Vandoren's declaration has nothing to do with Mr. Petroski's role at the company.

[22] Lalonde's only record support consists of Florida Department of State Division of Corporation forms that merely purport to show Cousins's and Cohen's ownership of another company, *see* D.160 at 47-52 (Ex.7), but provide no support for their supposed theft.

[23] Lalonde's only supporting cite for this proposition consists of a late-filed supplemental submission, D.198, that as discussed below was properly struck by the district court.

[24] While he claims that certain unspecified company "contracts" provide such "compliant procedures that employees and customers were required to adhere to," App. Br. at 85, he fails to provide any supporting record citation.

Further, even if there were any merit to Lalonde's contentions, such attacks would be irrelevant as to Lalonde's own control and knowledge. Lalonde's professed – but conclusory and unsupported – ignorance of his managers' repetitive misconduct simply defies credulity, given his admissions that he was present in the business offices during the time when the illegal activities were occurring, D.113-2 ¶8, D.159 ¶8; his use of the email and instant messaging system through which he regularly communicated with his managers, D.113-2 ¶9, D.159 ¶9; and his installation of the audio and video equipment which could be used to monitor the sales activities of his employees (although he claims that he was too busy "as CEO and President" of the companies to listen to all the sales calls). App. Br. at 52-54, D.113-2 ¶¶8, 42, D.159 ¶¶ 8, 42.

Moreover – regardless of whether his managers engaged in any illicit activities or the extent to which he personally monitored his employees' sales calls – Lalonde's admissions regarding what he did know about the operation of his credit repair and loan modification businesses clearly established his individual liability. For example, Lalonde admitted that he directed the advertising of credit repair and loan modification services and that such ads appeared on the internet, D.159 ¶¶74, 78, 95; that the target audience was consumers who were seeking mortgages in order to buy new homes, were seeking to refinance existing

mortgages, or "just wanted to save their homes," D.159 ¶¶77, 98; that consumers responded to the advertising and the defendants' sales representatives called consumers who responded, D.159 ¶¶78-79; that Crossland and Scoreleaper performed credit repair and loan modification services, D.159 ¶¶79, 97; and that those services (which rarely if ever led to a mortgage or loan modification) were performed after the consumer paid. D.159 ¶¶89, 101.

Lalonde also repeatedly relies on isolated statements in a deposition of a company employee, Ruben Young, who claimed he was told by an unidentified person to "never guarantee or make promises," and that doing so could lead to "immediate termination." *See, e.g.,* App. Br. at 41, 54-55 (citing D.160-1 at 36). This statement, however, is unsubstantiated and conclusory and fails to create a triable issue. *See Publ'g Clearing House*, 104 F.3d at 1171. Indeed, Mr. Young also stated that he was unaware of any customers who actually received a mortgage or loan modification from the defendants, and that he was aware of many customer complaints about the defendants' practices. D.8 at 47-49 (Ex. 14 at ¶¶ 9, 15). This statement confirms other overwhelming evidence (from both other company employees and from consumer victims) that defendants' sales representatives regularly promised consumers that there was a high likelihood they would obtain a mortgage or mortgage modification and failed to deliver on those promises.

Nothing in Mr. Young's deposition testimony rebuts the FTC's evidence that numerous consumers were in fact deceived by defendants' schemes, or that defendants' sales agents repeatedly engaged in numerous violations of the FTC Act, CROA and the TSR, and fails to create a genuine issue of material fact to defeat summary judgment. *See MacGregor*, 360 F. App'x. at 893.

Furthermore, Lalonde's argument that he did not mislead consumers by marketing loan products when he knew no loans were available (and thus presumably lacked knowledge of wrongdoing), App. Br. at 47-48, is entirely conjectural. He relies solely on HUD news releases from 2008 that discuss new FHA programs to help distressed homeowners, *see* D.160 at 68-75, D.160-1 at 1-33 (Exh. 10), but provides no evidence that his companies adopted these procedures. Likewise, he relies on a January 2010 HUD news bulletin regarding FHA policy changes, *see* D.160 at 25-30 (Exh. 5), implemented *after* the deceptive practices at issue.

Lalonde's other assertions in his quest to avoid individual liability likewise fail. His claims, for example, that the FTC is basing its case on simply "a few instances" of fraud, App. Br. at 48, is belied by the hundreds of consumers who failed to receive the loans, loan modifications, or refinancing proceeds promised by defendants. Similarly, he fails to provide any record support of asserted "sworn

testimony that company loans were legitimate." App. Br. at 90. At bottom, the overwhelming and uncontested evidence shows that Lalonde had substantial control over the defendant corporations, and knew about – or at the very least was recklessly indifferent to – the frauds perpetuated by his companies, and thus is individually liable for the wrongdoing.

V. LALONDE IS PROPERLY SUBJECT TO BOTH INJUNCTIVE AND MONETARY RELIEF

Section 13(b) of the FTC Act provides that "in proper cases, the Commission may seek, and after proper proof, the court may issue a permanent injunction." 15 U.S.C. § 53(b); *see also Gem Merch.*, 87 F.3d at 468; *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433 (11th Cir. 1984). Such an injunction is appropriate if "the defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future." *SEC v. Caterinicchia*, 613 F.2d 102, 105 (5th Cir. 1980). This Court should affirm the injunctive and monetary relief imposed on Lalonde.

A. The district court properly imposed permanent injunctive relief against Lalonde

The district court properly banned Lalonde permanently from engaging in the sale and provision of mortgage, credit repair, and loan modification services, and from telemarketing. D.203 at 46-48. Lalonde's arguments that the court's bans are "overreaching and improper," App. Br. at 63-64, 98-102, should be rejected.

Lalonde's on-going deceptive conduct, occurring over the course of many months and involving multiple corporations engaged in three separate mortgage-related schemes, shows that the district court properly enjoined him from ever again engaging in these activities. The court was similarly justified in imposing a permanent ban against telemarketing given that each of his scams made use of telemarketing, and the ease with which Lalonde could transfer his deceptive telemarketing services to a new product. Courts (including this one) have imposed similar permanent bans in response to a pattern of deceptive telemarketing. *See, e.g.*, *USA Fin.*, 415 F. App'x. at 975 (affirming future telemarketing injunction).

While Lalonde argues that the bans against selling mortgage products or telemarketing were improper, App. Br. at 98-102, he does not contend that the bans constitute improper fencing-in relief to protect consumers against future wrongdoing. Instead, he essentially regurgitates his previous arguments that he is not individually liable or that the Florida administrative proceeding bars this case – contentions which the FTC has already rebutted.[25] This Court should affirm the

[25] Lalonde also argues that the ban on selling mortgage-related products is improper because the loans that were the subject of Count 5 originated not by 1st Guaranty, but by non-defendant Delta Financial Corporation owned by his wife Amy. App. Br. at 102. In fact, and as the district court recognized, the uncontested evidence (including the stipulated factual proffer in his criminal proceeding) shows that the Lalondes deceived consumers by failing to provide mortgage monies to prior lenders – the activity that provided the basis for their liability under Count 5 – through corporate defendants 1st Guaranty and Spectrum. D.113-2 ¶¶50-73. Lalonde's

injunctive relief ordered by the district court.

B. The court properly imposed monetary relief against Lalonde

The district court also had the authority under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to order monetary relief as an adjunct to its broad equitable powers. *McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000). Such relief includes restitution equal to total consumer loss resulting from defendant's deceptive practices, *see id.*; *FTC v. Freecom Commc'ns. Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005), as well as disgorgement to deprive the defendants of their ill-gotten gains. *Gem Merch.*, 87 F.3d at 470. An individual is liable for monetary equitable relief if he has the requisite knowledge of the material misrepresentations. *Amy Travel.*, 875 F.2d at 573-74.

The district court properly found Lalonde (along with Petroski) liable for restitution in connection with Counts 1-4, and 6, to compensate consumers for the money they paid for the credit repair and loan modification services they did not receive. D.203 at 50. The court also properly found Lalonde liable for disgorgement in connection with Count 5, because Stewart Title, Spectrum's title insurance company, paid title claims to borrowers and lenders resulting from the

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further contention that the ban against telemarketing was improper because the defendant companies did not engage in outbound telemarketing, App. Br. at 98, has already been rebutted above. *See supra* at 27.

Lalondes' failure to make the promised disbursements, and disgorgement deprived Lalonde of his unjust enrichment. *Id.*

Gross revenues are a proper baseline on which to calculate monetary relief. *Freecom Commc'ns.*, 401 F.3d at 1206. The FTC submitted defendants' undisputed sworn financial statements that showed that the total amount that consumers lost through the three scams was at least $2,663,515, consisting of $889,794 relating to defendants' credit repair and loan modification scams (Counts 1-4, and 6), and $1,773,721 relating to the undistributed mortgage monies (Count 5). Once the FTC shows that its calculations of restitution and disgorgement reasonably approximate the amount of consumers' net losses or defendants' unjust enrichment, the burden shifts to the defendants to show that the FTC's figures are inaccurate. *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997). Defendants did not rebut the FTC's revenue figures. Lalonde was properly found jointly and severally liable for the full $2,663,515 resulting from all three scams.

Lalonde's argument, therefore, that the district court improperly "combined" the revenues from all the corporate defendants to calculate the amount of monetary relief awarded against him, App. Br. at 62, is meritless as he is liable to redress the full amount of consumer injury. To the extent he asserts he should not be liable for monies paid relating to Spectrum's theft of the refinancing proceeds, App. Br. 62-

63, as shown *supra* at 31,the court's order provided an offset for any restitution payments he made pursuant to his criminal conviction.

VI. LALONDE'S MYRIAD PROCEDURAL ARGUMENTS ARE WITHOUT MERIT

A. The court properly froze the assets of nonparties controlled by Lalonde

Lalonde argues (as his "Issue One") that the district court abused its discretion by freezing the assets and accounts of nonparties Capsouth LLC ("Capsouth") and Crossland Property Management Inc. ("CPM"), App. Br. at 28, 65-66. He relatedly asserts (as his "Issue Two") that the court erred in denying his motion for a partial release of those assets to use in his defense. App. Br. at 29, 66-68. This is because, according to Lalonde, Capsouth and CPM did not receive any proceeds from the defendants, and because the Sabaac Family Trust (for which Lalonde contends he is the trustee for his minor children) was the "sole owner" of Capsouth and CPM. Lalonde's arguments are without merit.[26]

The district court properly exercised its discretion in imposing the initial

[26] The district court initially froze in the TRO all assets "owned or controlled" by the defendants, including those of Capsouth. D.15. Lalonde subsequently stipulated to the entry of the preliminary injunction that continued the asset freeze, and expanded it to include both Capsouth and CPM, which Lalonde agreed were "owned" or "controlled" by him. D.37 at 9. The court subsequently denied his motion for a partial release of funds (D.77) and his later motion to release nonparty assets. (D.255).

asset freeze and in denying Lalonde's later request to release those assets. As an incident to its express authority under Section 13(b), the district court had the inherent authority to grant ancillary relief, including freezing assets, to assure the the availability of effective final relief. *See Gem Merch.*, 87 F.3d at 469; *U.S. Oil & Gas*, 748 F.2d at 1432. In its order, the district court properly recognized its "obligation to 'ensure that the assets of the . . defendants [are] available to make restitution to the injured customers." D.77 at 2-3 (citation omitted).

As the district court held, the record shows that Lalonde controlled the various nonparties, including Capsouth and CPM, that were involved in or connected to defendants' mortgage-related activities, and that the assets of all these entities were effectively his personal assets. D.203 at 51 n.164 (citing D.113-2 ¶34). The court found that Lalonde's control extended to the management of their financial affairs, including their making of loans to one another. D.203 at 5. The court recognized that there had been "substantial asset commingling between the corporate Defendants and these other Lalonde entities," *id.* at 5 n.11, and that "[i]n view of the close nexus between Lalonde entities and the intertwined nature of their financial affairs, it is likely that at least a part of revenues attributed to unnamed entities [like Capsouth and CPM] involve earnings from the scams at issue in this proceeding." *Id.* at 21 n.102. Lalonde testified that these various entities had a

blanket loan agreement that enabled them to borrow monies from one another, that they in fact loaned between $600,000 and $700,000 to one another, and that Capsouth made loans to the corporate defendants here. D.113-2 ¶¶36-37.

Other record materials confirm that Lalonde effectively controlled Capsouth and CPM. For example, Florida public records for CPM – the company with the vast majority of the frozen assets at issue – lists Lalonde as the company's sole incorporator, officer, and director, and make no mention of Sabaac. *See* D.227-2. As for Capsouth, although the company's 2008 annual report indicates that Sabaac was substituted for Lalonde as the company's registered agent, the "managing member" of the company has been Closed First Software Developers, Inc., – another company owned solely by Lalonde. *See* D.227-3. Lalonde, in his sworn financial statement, in fact characterized himself as the "President" of both CPM and Capsouth, and failed to make any mention of Sabaac, *see* D.227-4 at 20, and he even admitted in his brief that he is "CEO and President" of both CPM and Capsouth. App. Br. at 11.

Thus, even if the Sabaac Trust had some ownership of Capsouth and CPM, the evidence shows that, by exercising control over the trust's assets, Sabaac is simply an alter ego for Lalonde such that the asset freeze was proper. *See, e.g,, In re Alexis Hill Schwarzkopf,* 626 F.3d 1032, 1039-1040 (9th Cir. 2010); *Shades*

Ridge Holding Co. v. U.S., 888 F.2d 725, 729 (11th Cir. 1989). Indeed, Lalonde has provided no evidence that the Sabaac Trust's beneficiaries are his children rather than himself, or that the trust is an irrevocable trust, instead of a revocable one that Lalonde can change for his own benefit.

Because there is uncontested evidence that Lalonde controlled CPM and Capsouth, and that their assets have become commingled with those of the corporate defendants, Lalonde cannot argue that he had a right to use their frozen assets to defend this case. App. Br. at 67-68.[27] A civil defendant has no right, constitutional or otherwise, to properly frozen assets in order to defend himself. *See, e.g.*, *Bass*, 170 F.3d at 1319-20; *CFTC v. Noble Metals Int'l Inc.*, 67 F.3d 766, 775 (9th Cir. 1995).[28] For the above reasons, the district court properly froze the assets of CPM and Capsouth to be used for final redress.

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[27] While Lalonde claims he provided authority below showing "many instances" in which courts have released frozen assets for a party's defense, App. Br. at 67, the cases he relied upon are inapposite. *See* D.64 at 4-5. For example, in *FTC v. Atlantex Assoc.*, 872 F.2d 966, 970-71 (11th Cir. 1989), this Court merely held that the district court's failure to exempt from its prejudgment asset freeze funds to permit defendants to hire experts did not deny them due process where defendants never requested release of the frozen funds in the first place.

[28] For this reason, the only case cited by Lalonde, *United States v. Chase*, 499 F.3d 1061, 1065-68 (9th Cir. 2007), *see* App. Br. at 68 (miscited as "*United States v. Toro*"), is inapposite as it only held that the lower court erred in denying a *criminal* defendant's motion to appoint an expert in a case subject to the Criminal Justice Act, 18 U.S.C. § 3006A(e).

B. The district court did not abuse its discretion in denying Lalonde's requests to stay the proceedings or for additional extensions to the discovery or briefing schedule

Lalonde argues (as his "Issue Three") that the district court abused its discretion (and violated his due process and equal protection rights) when it ordered an expedited scheduling order, and denied his requests for extensions or for a stay, due to his transfer between prisons, the delays in receiving mail in prison, and his inability to depose certain witnesses whose affidavits the FTC submitted. App. Br. at 30-31, 69-70. For many of these same reasons, and due to his purported lack of access to a law library, he argues (as his "Issue Four") that the district court improperly denied his requests to extend the discovery schedule, App. Br. at 31-32, 71-75, and (as his "Issue Six") by denying his requests to stay the proceedings. App. Br. at 34, 77-78. These arguments have no merit.

The district court issued a case management scheduling order in this case pursuant to Fed. R. Civ. P. 16(b). Parties must comply with the court's scheduling order unless there is "good cause" for the order to be modified. Fed. R. Civ. P. 16(b)(4). "Good cause" requires that the schedule cannot "be met despite the diligence of the party seeking the extension." *Sosa v. Airprint Sys., Inc*., 133 F.3d 1417, 1418 (11th Cir. 1998). The district court properly exercised its discretion in managing discovery and scheduling issues in this case.

First, Lalonde cannot argue that the court imposed an expedited case schedule because he *agreed* to the initial scheduling order that set the case on the expedited case management track. *See* D.58; D.59. Further, the court showed great flexibility by amending the scheduling order several times and extending deadlines for discovery and briefing in response to Lalonde's circumstances and to accommodate his incarceration. The court set the original scheduling order pursuant to a joint conference report filed by all parties including Lalonde. D.59. It then modified the scheduling order *twice* which extended discovery and briefing deadlines in response partly to Lalonde's requests and difficulties arising from his incarceration. D.69, D.89.

The court, however, refused to extend the discovery for an additional 90 days based on Lalonde's request to depose the FTC's affiants. D.115. The court properly concluded that Lalonde had failed to show good cause for another extension, that it had already taken into account his incarceration in granting previous extensions, and that Lalonde was fully capable of deposing those witnesses telephonically. *Id*. at 2.

Indeed, the district court granted a subsequent extension request by Lalonde, and afforded him nearly *three additional months* to respond to the FTC's summary judgment motion in light of Lalonde's complaints about the circumstances of his

incarceration and his false claim that the FTC had not provided to him materials supporting its summary judgment motion. D.118, D.137.[29] Lalonde's reliance on cases that he claims provided more reasonable discovery terms to other litigants than to him, App. Br. at 73-74, fails as each case raised particular circumstances not present here.[30] For many of the same reasons, the court properly denied Lalonde's stay requests.[31]

Finally, there is no merit to his claim that his due process or equal protection rights were denied by failing to grant a stay due to his asserted lack of access to a law library. App. Br. at 77-78. As the district court found, D.149, Lalonde failed to show that he suffered an "actual injury," and thus lacked standing to assert a claim

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[29] In fact, the FTC had provided all discovery and other materials supporting its summary judgment motion in a series of disclosures to Lalonde during the discovery period beginning in March 2010. D.111 at 2. The FTC also showed that Lalonde's reason for not filing his summary judgment response by an earlier deadline because he assertedly did not have access to his legal materials was untrue. D.139 at 3-4 and Att. A.

[30] For example, in *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 706-08 (7th Cir. 2006), the Seventh Circuit concluded that the district court abused its discretion by granting summary judgment where the court had failed to rule on a pending motion regarding expert discovery that was necessary to the non-movant's response. Here, the district court ruled on pertinent discovery motions by the time it issued summary judgment.

[31] Indeed, the court did grant in part one of Lalonde's stay requests by continuing all pending pretrial deadlines except for his response to the FTC's summary judgment motion. D.128 (motion); D.137 (order).

of a constitutional right of access to courts, because he is a civil defendant. *See Lewis v. Casey*, 518 U.S. 343, 354-55 (1996) (no freestanding right to a law library or legal assistance). While prisoners have a constitutional right to legal resources "to attack their [criminal] sentences, directly or collaterally, and in order to challenge the conditions of their confinement[,]" [i]mpairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Lewis*, 518 U.S. at 355 (emphasis in original). Here, Lalonde is not attacking his criminal sentence or the conditions of his confinement, but is defending against a civil proceeding in which he has no constitutional right of access to the courts. *See Wilson v. Blankenship*, 163 F.3d 1284, 1291 (11th Cir. 1998) (defendant lacked standing for a denial of access to courts claim in civil *in rem* forfeiture action).

C. The Receiver did not withhold relevant materials from Lalonde

There is likewise no merit to Lalonde's contention (as his "Issue Five") that the district court abused its discretion (and denied his constitutional rights) by denying his request that the Receiver produce to him all files in the Receiver's possession. App. Br. at 33, 76-77. In fact, all such files were made available to Lalonde throughout this case.

Lalonde had access to and personally viewed some of the files when he

visited the Receiver's office between the case filing on November 17, 2009 and his sentencing on December 18, 2009. Moreover, pursuant to Lalonde's requests during discovery, the district court ordered in May 2010 that the Receiver make available to Lalonde for his inspection (or to a proxy on his behalf) all documents, records and files seized from the corporate defendants. D.81; D.84.[32] Pursuant to that order, the Receiver provided to Lalonde on May 17, 2010, an inventory of all items retrieved from the defendants companies. D.83. The Receiver then made available all of his files to Lalonde's representatives, including his wife, co-defendant Amy Lalonde, who in fact reviewed them. Since Lalonde's representatives (including his wife) had full access to all materials the Receiver had seized from the defendant companies, and could provide these materials to him in prison, the district court properly denied Lalonde's motion.

D. The court properly denied Lalonde's motion to appoint counsel

Lalonde also challenges (as his "Issue Seven") the district court's denial of his motion to proceed *in forma pauperis* or to appoint counsel. App. Br. at 35-36, 79-80. *See* D.117 (motion); D.132 (order). This argument likewise is meritless.

It is well established that civil litigants have no constitutional right to the appointment of counsel. *Lassiter v. Dept. of Social Serv.*, 452 U.S. 18, 26-27

[32] The Receiver was not, however, required to copy and mail these materials to Lalonde in prison.

(1981); *Bass*, 170 F.3d at 1319-20. This is true even where the litigant is a prison inmate. *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987). Rather, a court may appoint counsel for an indigent civil defendant under 28 U.S.C. § 1915(e)(1) in "exceptional circumstances," such as "where the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner." *Poole*, 819 F.2d at 1028. In the present case, there were no such exceptional circumstances where this case implicated well-established legal principles, Lalonde knew all the factual details given his central role in the scheme, his circumstances were caused entirely by his own fraudulent conduct, and where he had more than adequate time to respond to the FTC's summary judgment motion. As the district court held, Lalonde (and his co-defendant Petroski) "have an intimate familiarity with the underlying facts and have demonstrated . . . that they understand the claims [the FTC] has brought against them such that they can present their defenses to this Court." D.132 at 1-2. The court properly exercised its discretion in denying Lalonde's motion.[33]

[33] For these reasons, Lalonde may not rely on *German v. Broward County Sheriff's Office*, 315 F. App'x. 773 (11th Cir. 2009), App. Br. at 79, which found such "exceptional circumstances" where a *pro se* plaintiff's claim necessitating discovery was "based on very detailed factual allegations" concerning a defendant's job responsibilities and mental state as to which the plaintiff had no previous knowledge. Lalonde also may not rely on *Hammer v. Ashcroft*, 512 F.3d 961 (7th Cir. 2008) which was vacated by an order granting the defendants' petition for rehearing *en banc*. *See Hammer v. Ashcroft*, 570 F.3d 798, 800 (7th Cir. 2009).

E. The district court properly struck Lalonde's supplemental filings in support of his opposition to the FTC's summary judgment motion filed months after the discovery and motion deadlines

Lalonde also asserts (as his "Issue Eight") that the court abused its discretion (and denied his due process and equal protection rights) by striking certain supplemental filings containing exhibits that he claims supports his opposition to the FTC's summary judgment motion. D.198; D.213.[34] Lalonde blames the prison for the tardy delivery of mail, including an alleged affidavit from Michael Ammundsen that he claims supports his case. App. Br. at 36-37, 81-82.

To the contrary, the district court properly struck these supplemental pleadings that were improperly filed without leave of court many months after the deadlines for discovery and for his response to the Commission's summary judgment motion. D.202; D.203 at 2; D.222. Lalonde submitted his first "supplemental" filing – allegedly consisting of an interrogatory response from Mr. Ammundsen – on March 21, 2011, D.198, more than three months after responses to the FTC summary judgment filing were due, and nearly nine months after the close of discovery. *See* D.137 at 2, ¶3; D.89. He filed his second exhibit – allegedly consisting of an affidavit from Mr. Ammundsen – nearly three months

[34] Throughout his brief, he cites to "D.198"or "RE 198" as the record cite for an alleged affidavit from Michael Ammundsen. In fact, D.198 refers to his supplemental filing in which he attempted to file a purported interrogatory response from Mr. Ammundsen.

later on June 23, 2011, D.213, and nearly three months after the court issued its summary judgment order. Even assuming some delay in receiving mail in prison, Lalonde entirely failed to make the required showing that he could not have obtained either exhibit more timely through due diligence. *See Williams v. North Florida Reg'l Med. Ctr.*, 164 F. App'x 896, 899 (11th Cir. 2006); *see also Eckert v. United States*, 232 F.Supp. 2d 1312, 1314 n.1 (S.D. Fla. 2002) (relying on S.D. Fla. R. 7.1(c), court refused to consider filings made without leave of court in deciding summary judgment motion). This is particularly true where, as shown above, the court extended the discovery and briefing schedules several times to accommodate Lalonde's circumstances.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's judgment below as to Stephen Lalonde.

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December 13, 2012

CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 13,592 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4 as determined by the word count of the Corel WordPerfect word-processing system used to prepare the Brief. I further certify that Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of December, 2012, I filed the foregoing Brief of Plaintiff-Appellee Federal Trade Commission electronically through this Court's Electronic Case Files (ECF) system. On the same day, I sent seven paper copies of the Brief to the Court Clerk by dispatching the copies to a third-party commercial carrier for overnight delivery to the Clerk.

I also certify that on the same day, I served a copy of the foregoing Brief of Plaintiff-Appellee Federal Trade Commission to the Appellant at the following addresses:

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