Nos. 20-10790 (Lead); 20-10859 (Member)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

BURTON KATZ, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida
1:19-cv-25046-RNS (Hon. Robert N. Scola, Jr.)

BRIEF OF THE FEDERAL TRADE COMMISSION

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Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Pursuant to Eleventh Circuit R. 26.1-1, Plaintiff-Appellee, the Federal Trade Commission, certifies that in addition to the names listed in Appellants' opening briefs, the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this appeal.

Abbott, Alden F. – FTC General Counsel

Bergman, Michael D. – FTC Attorney

Damian, Melanie – Court-Appointed Receiver

Damian & Valori LLP – Law Firm for Receiver/Counsel for Receiver

DiFalco, Fernandez & Kaplan – Counsel for Defendants Arlene Mahon and Waltham Technologies LLC

Marcus, Joel – FTC Attorney

McArdle, Pérez & Franco, P.L. – Counsel for Defendants Arlene Mahon and Waltham Technologies LLC

Murena, Kenneth Dante – Counsel for Court-Appointed Receiver

Weil, Bruce – Attorney at Boies Schiller Flexner LLP and Manager for Defendant OnPoint Capital Partners LLC

Wolfe, Douglas – FTC Attorney

The Federal Trade Commission further states that, to the best of its knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

The FTC does not believe that oral argument will materially assist the Court in its consideration of this appeal and does not request it. All of appellants' many arguments are contrary either to binding Circuit precedent or unrebutted record evidence.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331 and 1345. The district court entered its preliminary injunction on January 14, 2020, and appellants filed their notices of appeal on February 26 and February 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF ISSUES

Appellants operated websites that falsely promised to render government services such as license renewals for a fee or in return for sensitive personal data. Instead of delivering the services, they (at most) provided consumers with PDF documents containing generic, publicly available information; they sold the personal data to other scammers. They reaped more than $80 million.

The district court determined that the FTC was likely to show that appellants' websites were "patently misleading" in violation of the FTC Act and entered a preliminary injunction appointing a receiver and freezing appellants' assets to ensure monetary relief to victims after final judgment.

The questions presented for review are:

1. Whether the district court clearly erred in finding that the FTC was likely to prove that

    a. appellants' websites were deceptive;

b. the corporate appellants acted as a common enterprise and can be held jointly and severally liable; and

c. the individual appellants are personally liable because they participated in, had authority to control, and knew of the deceptive practices.

2. Whether the district court properly froze appellants' assets to preserve them for monetary relief where the court-appointed receiver valued the assets at less than a potential restitution award.

3. Whether the Court should overrule 30 years of consistent precedent holding that the FTC Act authorizes equitable monetary relief, including asset freezes, where there has been no intervening Supreme Court holding to the contrary.

STATEMENT OF THE CASE

A. The Government Services Scam

Appellants are five individuals and 53 corporate entities who collectively did business as On Point Global. They operated hundreds of websites falsely offering to perform government services in two categories: (1) state licensing or motor-vehicle services for a fee, and (2) determinations of eligibility for public benefits in return for sensitive personal information.

1. False Offers to Provide Licensing Services

Appellants operated many state-specific websites, such as floridadriverslicenses.org, featuring an image of the state's border and the text,

"Your source for [state] driver's information."[1] Appellants also operated DMV.com, which displayed the headline "The DMV Made Easier" and presented itself as a clearinghouse for auto vehicle services.[2] DMV.com's Facebook page advertised "you can renew you [sic] driver licenses online here!! Skip the lines doing it from you [sic] home."[3]

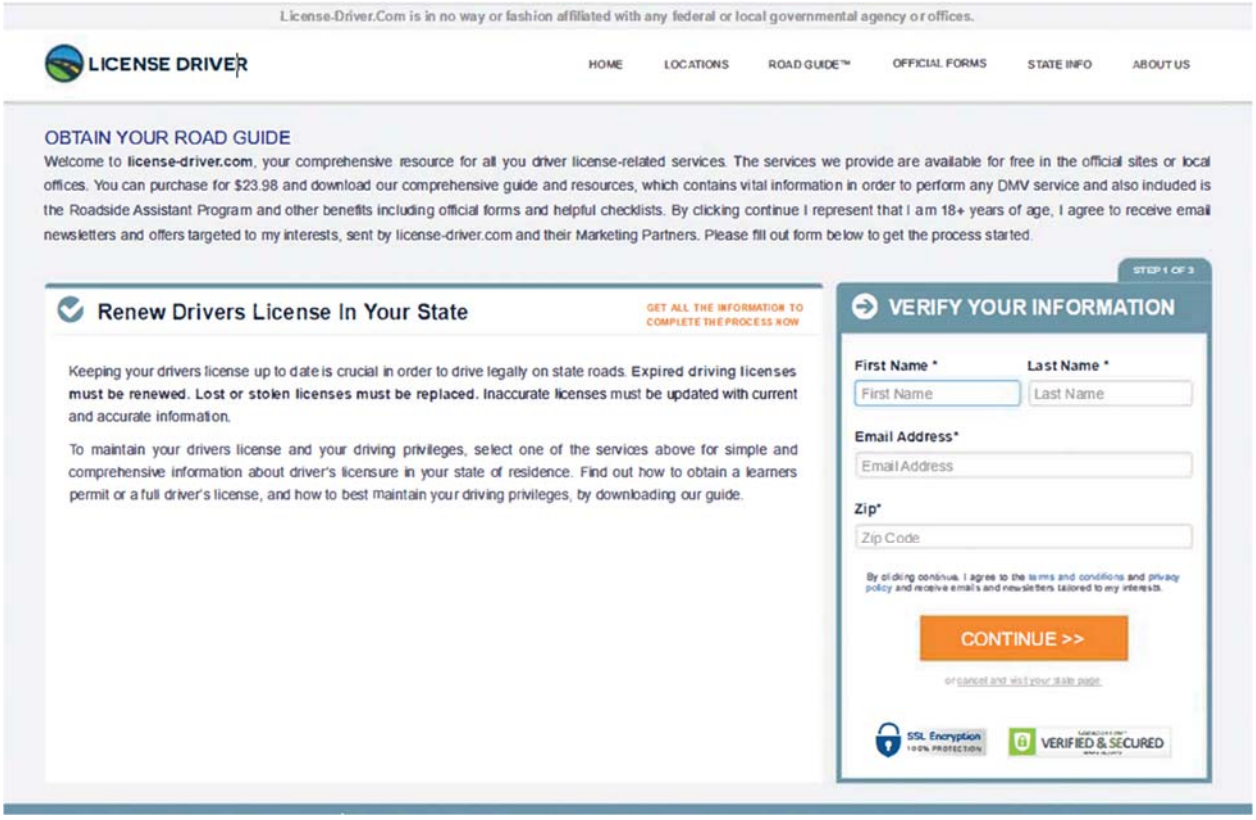
DMV.com and the state-specific sites redirected visitors to other of appellants' sites, which sought to induce consumers to purchase services.[4] These sites, including license-driver.com and driverlicenseonline.org, held themselves out as a "comprehensive resource for all you [sic] driver license-related services" on a landing page like this one:

[1] *E.g.*, FA.132-1 at 136; FA.132-3 at 87. "FA refers to the FTC's Supplemental Appendix, which we cite as: "FA.[Tab #] at [district court ECF page #]."

[2] FA.132-1 at 84.

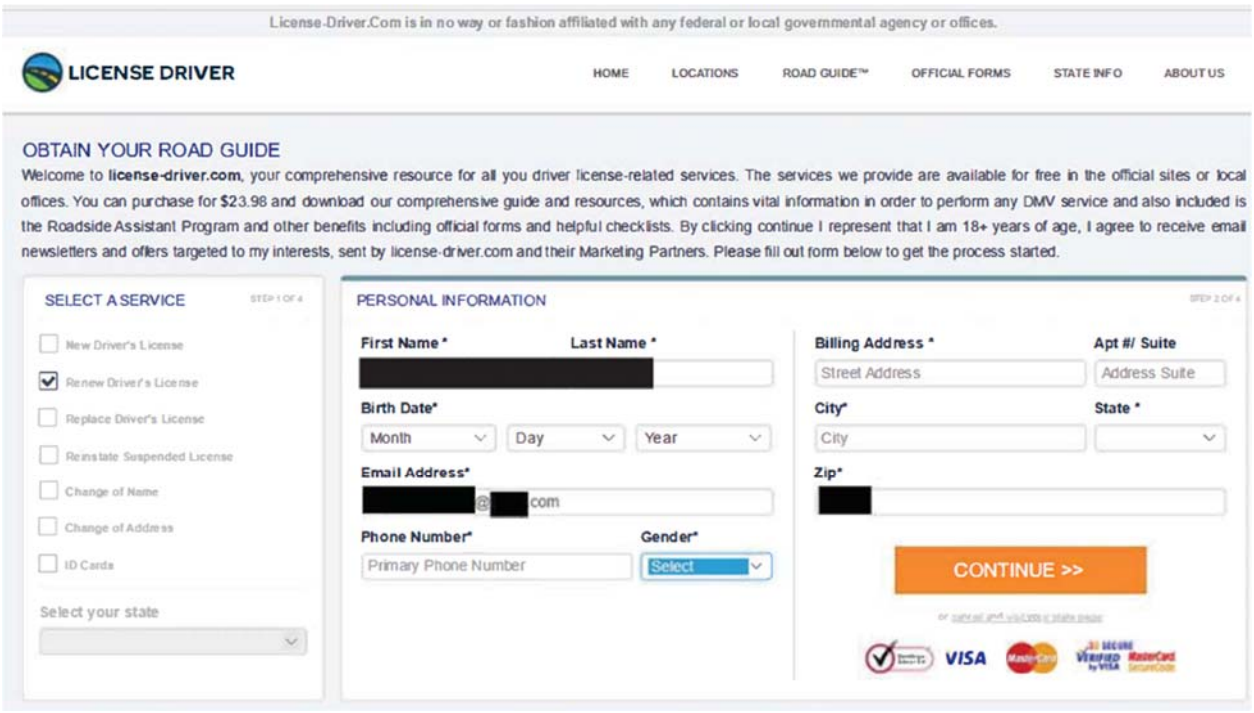
[3] FA.132-2 at 303-04.

[4] FA.132-1 at 4¶18, 7-10¶¶27-37, 121-32, 207-10, 219-22, 264-66.



FA.132-1 at 121, 207, 219. Consumers saw a large, bold headline "**Renew Drivers License In Your State**," next to which these words appeared in orange capital letters: "GET ALL THE INFORMATION TO COMPLETE THE PROCESS NOW."

A consumer who progressed beyond the landing page soon reached a page like this one:



FA132-1 at 123, 208, 220. That page prompted consumers to enter credit card information and then "SELECT A SERVICE," with checkbox options to "Renew Driver's License," "Replace Driver's License," and "Reinstate Suspended License." When a consumer selected "Renew Driver's License," the site requested date of birth, information relevant only to actually renewing a license. But consumers got at most a PDF "guide" containing general information about state vehicle services; some received nothing at all.[5] Appellants charged consumers a

[5] *Id.* at 9-10¶¶35-38, 12-13¶¶47-48, 16¶¶59-61; FA.132-1 at 225-60.

small amount ($3.99 or $4.99) immediately and more ($19.99 or $21.99) a few days later.[6]

Appellants' websites offering hunting and fishing licenses followed a similar template.[7] Those promises were equally false.[8]

Appellants provided some disclaimers, which they knew were ineffective. They acknowledged to a credit card processor in a "Fraud Reduction Plan" that "we still encounter confusion from consumers" despite them.[9]

First, as pictured on p. 4 and 5, above, the sites disclosed in small, light gray letters at the top of each page that they are "in no way or fashion affiliated with any federal or local governmental agency or offices," or used substantially similar language.

Second, as depicted on p. 4 and 5, above, a paragraph promoting the site as a "comprehensive resource for all you[r] driver license-related services" also referred to "guide[s] and resources." The far larger display invited the user to "SELECT A SERVICE," such as "Renew Driver's License."

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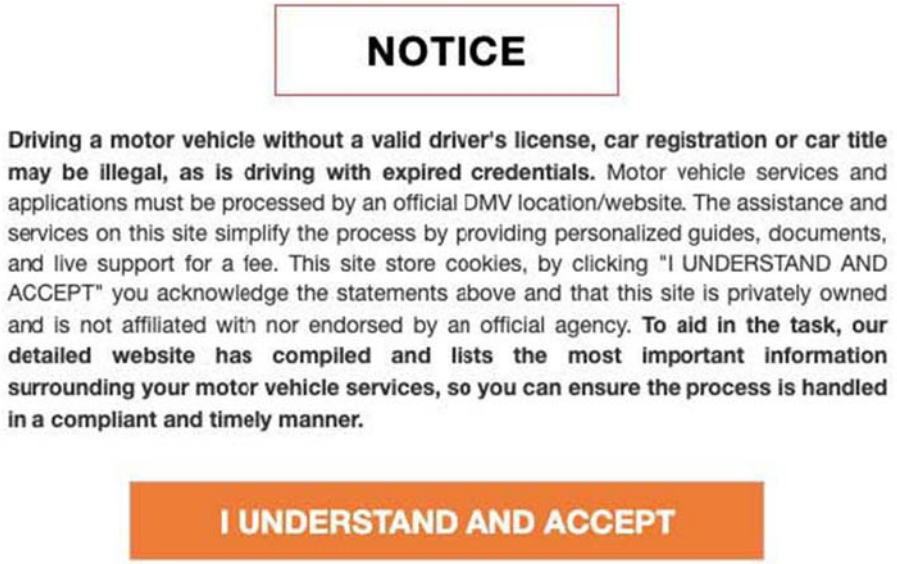
[6] *Id.* at 10¶39, 13¶49, 16¶62; FA.132-18 at 2-3¶¶5 & 9, 20¶9, 36¶7.

[7] FA.132-1 at 20-21¶¶79-81, 340-44.

[8] FA.132-1 at 21-22¶¶82-86; FA.132-18 at 36-37.

[9] FA.132-14 at 20.

Third, the sites mentioned "guides" in a pop-up window, pictured below:



(FA.78-3 at 21.) Among the boldfaced threats about the hazards of driving with an expired license, the "live support for a fee," and the assurance "that the process is handled in a compliant and timely manner," the pop-up never states that consumers will receive *only* a guide, not a motor-vehicle transaction.

Hundreds of consumers complained to the FTC, other law-enforcement organizations, and the Better Business Bureau.[10] They perceived the websites as promising actual state services, not just guides.[11] Appellants also failed to honor their "money back guarantee."[12] When an FTC undercover investigator sought a

[10] FA.132-7 at 7, 58-60; FA.132-23 at 120-34.

[11] FA.132-18 at 2-3, 31.

[12] FA.132-7 at 60.

refund after an investigative purchase, appellants offered to refund the $19.99 charge but not the $4.99 "processing fee," and actually refunded nothing at all.[13]

Appellants experienced persistent credit-card chargebacks, which occur when consumers successfully dispute a transaction.[14] When a merchant exceeds limits set by credit card processors (*e.g.*, Visa's chargeback-to-sales threshold of 0.9%), the processors flag their accounts for monitoring, suspension, and termination.[15] Appellants' chargeback rates consistently exceeded the threshold for increased fraud scrutiny,[16] triggering Visa's thresholds 64 times in three years.[17] Several processors terminated accounts.[18]

To suppress evidence of chargebacks, appellants engaged in "load balancing"—creating companies selling an identical product on numerous websites to reduce the chargebacks on any given site.[19] They also artificially deflated their

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[13] FA.132-1 at 33-35¶¶127-33; FA.132-2 at 162-76.

[14] FA.132-7 at 3-4¶¶15-18; FA.132-9 at 3-6¶¶ 8-12.

[15] FA.132-9 at 4-6¶¶10-13.

[16] FA.132-7 at 11-12, 39-40.

[17] *Id.* at 4¶18, 51, 53-56.

[18] FA.132-13 at 1-3, 43, 176-79; FA.132-14 at 9, 31-32.

[19] FA.132-1 at 5¶19, 121-32; FA.132-3 at 79-87; FA.132-9 at 6-7¶15; FA.132-13 at 3, 171-75; FA.132-14 at 9, 31.

chargeback ratios by dividing charges into two installments and refunding only one (at most) when challenged.[20] Appellants' staff wrote fake reviews, posing "as an objective third party" satisfied with the "PAID GUIDE" they received, in order to "push negative reviews off of the first page in google search listings." FA.132-23 at 169.

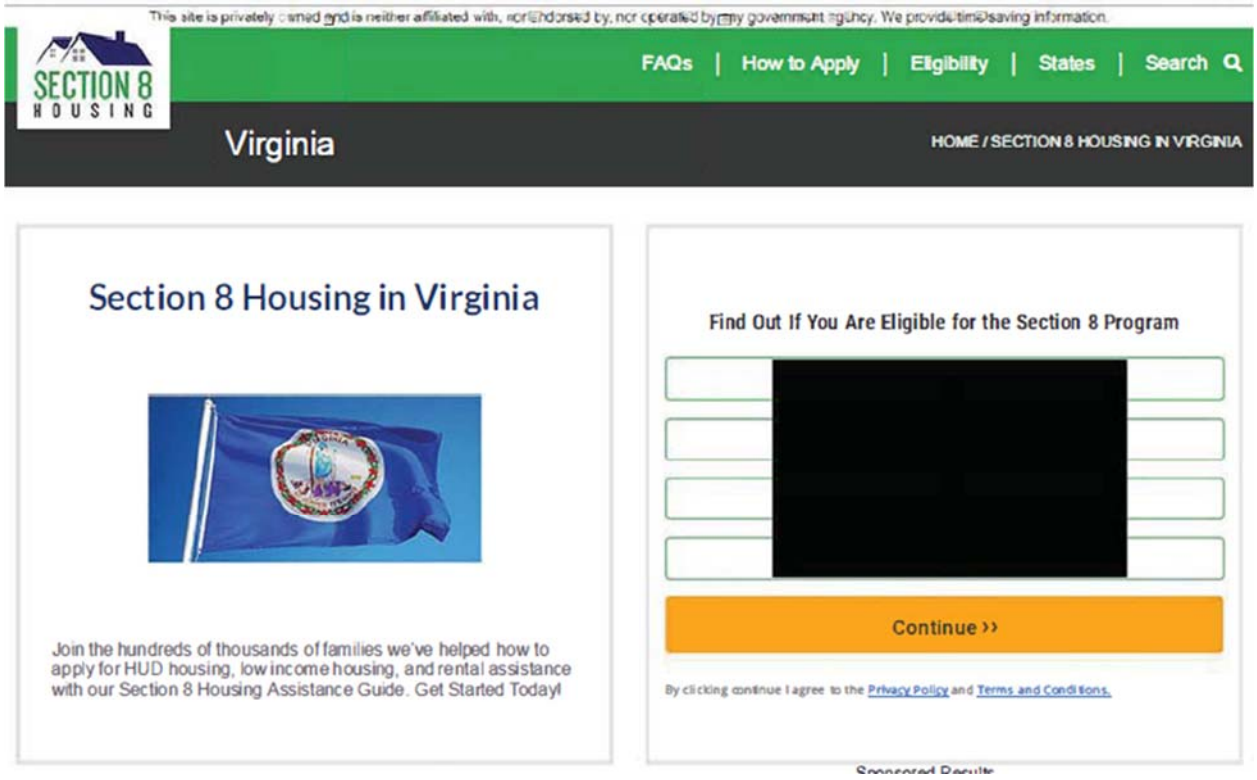
2. False Offers to Determine Eligibility for Benefits

Appellants operated at least 45 sites targeting indigent, sick, and elderly people with fake offers to determine their eligibility for housing assistance, food stamps, Medicaid, or veterans' and unemployment benefits.[21]

For example, Section-8-housing.org invited consumers to "**Find Out If You Are Eligible for the Section 8 Program**" and asked for their names, email addresses, and zip codes.

[20] FA.132-1 at 34-35¶¶128-33; FA.132-7 at 60; FA.132-9 at 7-8¶¶16-18.

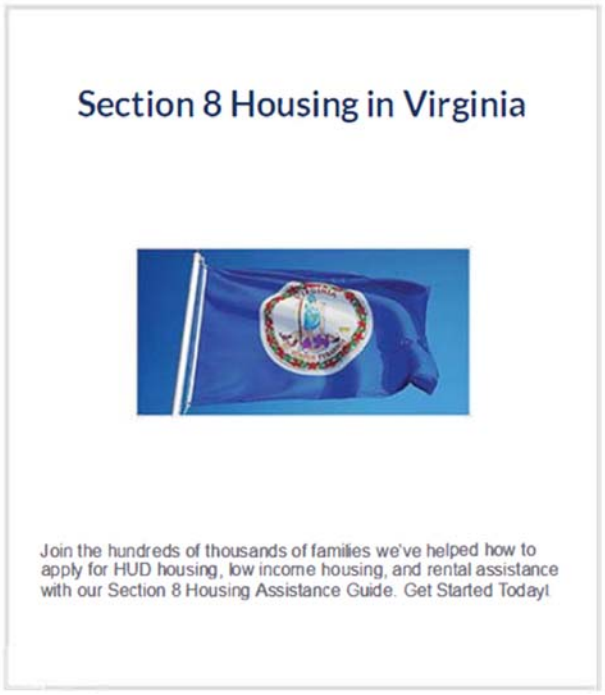
[21] FA.132-1 at 193-204, 287-315; FA.132-2 at 86-96, 100-04, 107-29; FA.132-3 at 85-86.

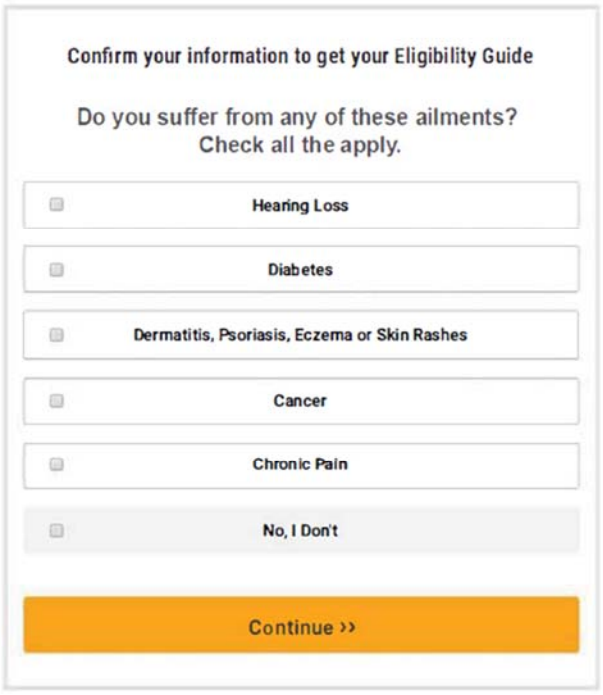


(FA.132-1 at 288.)

If a consumer clicked "Continue," the site solicited the consumer's phone number, birth date, gender, employment status, health insurance coverage status, medical diagnoses, disability status, debt level, and information about the need for low-income medical assistance.[22] For example:

[22] *Id.* at 289-305.





(FA.132-1 at 294.)

Consumers who answered those questions then learned that the sites did not determine eligibility.[23] Consumers received only a PDF document with publicly available information untailored to the sensitive data provided.[24]

Similar to appellants' licensing websites, the government benefit sites stated at the top and bottom of the page that "[t]he site is privately owned and is neither

[23] FA.132-1 at 19¶76, 31¶121.

[24] *Id.* at 18-19¶¶74-75, 30-31¶¶118-20, 319-34.

affiliated with, nor endorsed by, nor operated by any government agency."[25] Many consumers reported to the FTC that they were deceived anyway.[26]

Instead of using consumers' private data to assist them, appellants made millions selling it to third parties, including fraudsters subject to federal-court injunctions against violating the FTC Act.[27] Right after visiting the websites, consumers were bombarded with spam emails and text messages containing offers for psychic counseling, sweepstakes, and government grants.[28]

The sites never told consumers that appellants would be selling their sensitive personal information to third parties. They provided a statement that "I am providing express written consent for [site] and our Marketing Partners to contact me at the number provided* above."[29] But even if consumers saw that language, it did not advise them about the sale of their medical diagnoses, debt levels, and more; and their consent was premised on the expectation that they would receive the benefit offered.

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[25] *Id.* at 288.

[26] *Id.* at 74-77¶¶217-21.

[27] *Id.* at 67-70, 77-78¶¶222-23; FA.132-6 at 5¶10.

[28] FA.132-1 at 19-20¶77, 31-32¶¶122-23, 77¶221, 336-37; FA.132-2 at 153, 156-57.

[29] FA.132-1 at 290.

B. The On Point Global Common Enterprise

The 53 corporate appellants collectively do business under the name On Point Global, LLC ("On Point") and were controlled by the five individual appellants.[30] On Point and several other operating companies ran the websites, raised capital, and sold consumer data. Thirty appellants held merchant accounts. The remaining corporate appellants existed solely to move assets.

The corporate entities shared office space and commingled funds in central operating accounts. They then moved the money to the individual defendants or their holding companies.[31]

Appellant **Burton Katz** was On Point's CEO, one of its two largest shareholders, and one of three "Venture Team" members in its capital-raising arm, appellants Dragon Global Management LLC, Dragon Global Holdings LLC, and Dragon Global LLC (collectively, Dragon Global).[32]

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[30] FA.132-23 at 20, 184-87 (organizational charts depicting corporate relationships); *id.* at 223-24 (letter from Katz describing corporate structure); FA.132-15 at 24, 40, 43, 59, 63, 72, 86-87, 89, 97, 110-11, 116, 119, 125, 127, 132, 137, 142, 149 (bank records detailing individual ownership of corporate appellants).

[31] FA.132-1 at 52-59¶¶191-96; FA.132-6 at 4-7¶¶9-15; FA.132-2 at 286; FA.132-11 at 1; FA.132-12 at 6-7; FA.132-14 at 76.

[32] FA.132-1 at 151, 186, 188; FA.132-15 at 132.

Appellant **Robert Zangrillo** was On Point's Chairman until March 2019, when he was indicted in an unrelated college-entrance bribery matter.[33] He was the other largest shareholder in On Point through his personal holding company, appellant OnPoint Capital Partners LLC (OCP).[34] Zangrillo is also the Chairman, CEO, and a "Venture Team" member of Dragon Global.[35]

Zangrillo and Katz had "special approval rights" over On Point's activities, and they sat on its Board of Managers, which possessed "full, complete and exclusive authority, power, and discretion to manage and control the business."[36] Zangrillo's holding company OCP retained his ownership stake, with control rights and board seat vested in a subsidiary that lists as its "Manager" attorney Bruce Weil of Boies Schiller Flexner LLP, Zangrillo's law firm.[37]

Appellant **Brent Levison** was On Point's chief administrative officer, general counsel, fourth-largest shareholder, and "acting operations manager for OnPoint's Costa Rica office," which housed a call center that received consumer

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[33] FA.132-2 at 273; FA.132-23 at 257-58; Zangrillo Appendix (ZA) at 502-04; *United States v. Sidoo*, 19-cr-10080-NMG (D. Mass.).

[34] Zangrillo Br. (ZBr) 7-8; FA.132-3 at 8-10, 17; FA.132-15 at 132.

[35] FA.132-1 at 186-89.

[36] FA.132-21 at 28-29, 37.

[37] ZA at 624, 633-34, 673, 679.

complaints.[38] Appellants **Elisha Rothman** and **Chris Sherman** were On Point's directors of data processing, as well as co-owners and principals at appellant Direct Market, which sold consumer data from On Point's websites.[39] Rothman was also On Point's third-largest shareholder.[40]

C. Complaint and Request for TRO

The FTC's complaint alleges that "more than 200" of appellants' websites violated Section 5(a) of the FTC Act by falsely promising to provide government services. 15 U.S.C. § 45(a). KA.1 ¶¶112-68.[41] The complaint charges that appellants are jointly and severally liable because the corporate defendants acted as a common enterprise and the individual defendants participated in, controlled, and knew of the deceptive practices. *Id.* ¶¶ 61-107.

The district court granted a TRO with an asset freeze, temporary receivership, and order to show cause why a preliminary injunction should not issue. KA.17. When Zangrillo and Dragon Global moved to dissolve the TRO for lack of evidence tying them to the scheme, the district court found that "the Dragon

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[38] FA.132-1 at 151; FA.132-2 at 223-24, 240-41.

[39] KA.108 at 22; FA.132-2 at 202, 266, 271; FA.132-15 at 63.

[40] FA.132-15 at 132.

[41] We use the following citation form for the Katz Appendix: "KA.[Tab #] at [district court ECF page #]."*

entities were active participants in a common enterprise with the other defendants and that Mr. Zangrillo had sufficient authority, control, and knowledge of the activities to be liable as well." KA.161 at 21:12-21:18.

D. Preliminary Injunction

At a two-day preliminary injunction hearing, the FTC presented documents, expert testimony, surveys, and consumer complaints showing appellants' deception.

Dr. Michelle Mazurek, a University of Maryland computer science professor who specializes in empirical studies of human-computer interaction, testified that her study showed that most consumers who used the websites believed they would actually provide driver's license renewals or benefits-eligibility assessments. FA.132-5 ¶¶ 88-89, 102-03, 106-07, 109-10.

The court heard significant evidence regarding the need to keep defendants' assets frozen pending final judgment. The receiver's report and testimony showed that the frozen assets were collectively worth less than a potential monetary judgment. The frozen assets consisted of approximately $2.9 million in cash from the corporate defendants; $1.5 million owed to defendants from their payment processors; $5.5 million in the individual defendants' bank accounts; $1.2 million in tangible assets possessed by the Dragon Global defendants; internet domain names with a nominal value of $30 million; and other assets of "unknown" value.

KA.108 at 33-34; KA.162 at 122:9-122:11. The receiver reported that the challenged websites had generated over $80 million in revenue in the last two years alone. KA.108 at 20-23.

The receiver took down 57 deceptive government-service websites. *Id.* at 5, 21. She concluded that the benefits-eligibility sites might be run profitably "if … converted to a nondeceptive format." *Id.* at 35-37. She noted that appellants' businesses unrelated to the FTC's action will "[c]ontinue to operate" during the receivership. *Id.* at 6, 20-27.

At the close of the hearing, the district court announced that it would grant a preliminary injunction. The court found the FTC had met its burden to show that the corporate entities acted as a "common enterprise" and that the individuals had sufficient "control and knowledge" to support joint and several liability. KA.162 at 314:8-314:18.

The district court entered a preliminary injunction the following day. KA.126. The court found "good cause" to believe that appellants had violated the FTC Act "by misrepresenting the services they offer, thus inducing consumers to pay money or divulge personal information under false pretenses." *Id.* at 2. Appellants' websites were "patently misleading": they were "cleverly designed so that even though disclosures appeared on many or most of the pages, consumers[']attention would be drawn to links and language in larger, more colorful font that

directed them to the service they were seeking." *Id.* As a result, consumers "would likely ignore the disclosures written in relatively smaller and pale colored font." *Id.* Even if a consumer did read the disclosures, they did not "clearly inform[]" consumers that the sites did not provide government services. *Id.*

The preliminary injunction bars appellants from making similar misrepresentations on their websites or from selling consumer data obtained through deception. *Id.* at 4-5. The court also found "good cause" to continue the asset freeze and receivership, *id.* at 2-3, 5-6, 11-17, which were needed to prevent "immediate and irreparable damage to the Court's ability to grant effective final relief for consumers" in the form of "monetary restitution." *Id.* at 2.

E. Appeals

Two sets of defendants appeal. Appellants in No. 20-10790 are Katz, Levison, Rothman, Sherman, and most of the corporate entities (collectively, "Katz"). Appellants in No. 20-10859 are Zangrillo, his holding company OCP, and Dragon Global (collectively, "Zangrillo").

The district court denied Katz's motion to stay the asset freeze pending appeal, finding that "the Defendants' likely liability for their deceptive activities exceeds the total amount of frozen assets." KA.174 at 1-2. This Court also declined to stay the freeze. Order of April 28, 2020.

STANDARD OF REVIEW

The Court reviews the district court's factual findings for clear error, its legal determinations de novo, and its grant of a preliminary injunction and asset freeze for abuse of discretion. *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1232 (11th Cir. 2014).

SUMMARY OF ARGUMENT

1. The district court correctly found that the FTC was likely to show that appellants' websites were misleading. The motor-vehicle sites offered services such as "Renew Driver's License," "Replace Driver's License," and "Complete the Process" of renewal. But in exchange for payment, appellants delivered generic informational pamphlets at most. The government-benefit sites told consumers they could "Find Out If You Are Eligible For" housing assistance, veteran's benefits, or unemployment payments in exchange for personal information. But appellants never provided the promised eligibility determinations; instead, they sold consumers' data to third parties.

Appellants' disclaimers never clearly informed consumers that the services offered were not available and thus did not remedy the sites' falsity. Appellants' own employees complained of the deception, and credit-card processors put them on fraud alert.

2. The district court correctly found that the FTC is likely to prove that the various corporate appellants acted as a common enterprise, each liable for the activity of the whole. Its oral findings comport fully with Rule 52 of the Federal Rules of Civil Procedure, because they allow this Court to discern the basis for the district court's decision and undertake meaningful appellate review. Rule 52 requires no more.

All of the Katz companies were owned by one or more of the individual appellants, including Katz and Zangrillo. The companies commingled their funds and shared personnel (who almost universally used "onpointglobal.com" email address), offices, operations, and marketing.

Zangrillo's Dragon Global companies were part of the common enterprise. Its three partners—including Zangrillo and Katz—were also On Point's Chairman, CEO, and CFO. Zangrillo himself sat on a board of managers with complete and exclusive power over On Point. The Dragon Global and On Point companies shared personnel, office space, and money. Zangrillo's claim that he was a minority investor "not affiliated with On Point" is fatally undercut by that record. Even if he is a venture capitalist, the FTC Act has no venture capital exception.

3. The district court correctly found that the individual appellants would likely be held liable for the unlawful acts of the business enterprises they owned and ran. Katz was President and CEO, with approval authority over all corporate

decisions. He participated directly in the wrongdoing, overseeing the websites' content and hiring their writers and editors, and thus knew that consumers were misled by the sites. Zangrillo was Chairman, also with approval authority over corporate decisions, and had the power to fire the CEO and CFO. He, too, was directly involved in the company's conduct; indeed, to attract investors to these very websites, he told them that he was "very active" in corporate affairs. Similar considerations apply to the other individual appellants, who also had some control over company activities and knew of and participated in the deception.

4. The district court properly appointed a receiver and froze appellants' assets. This Court's binding precedent clearly permits a freeze of assets approximating a possible final recovery—here, according to the report of the receiver, about $80 million, an amount far exceeding the frozen assets. Appellants are wrong that the district court was required to calculate an exact figure and that they derived most of their income from lawful websites. The receiver reported otherwise, and the district court properly credited that determination. Appellants' professed valuation is artificially inflated because it rests on a revenue stream derived from unlawful activity.

5. Zangrillo's argument that the asset freeze violated his Sixth Amendment rights is premature. After the district court imposed the freeze, Zangrillo asked the

court to release assets for his criminal defense. The court denied the request, and Zangrillo has filed a separate appeal of that decision, pending in No. 20-11615.

6. The district court correctly found that the asset freeze and preliminary injunction serve the public interest. The public interest favors shutting down deceptive websites to protect consumers from further harm, not perpetuating the operation of those websites, as Katz wrongly contends. The asset freeze furthers the public interest because it preserves money that can be made available for future consumer redress. Otherwise, appellants would be free to spend the money, leaving less, or none, for victims.

7. Appellants spend much of their briefs urging the Court to overturn decades of established precedent recognizing the FTC's statutory ability to seek and receive monetary relief on behalf of victims. That attempt is barred by the panel precedent rule, under which a panel of this Court may not overturn precedent unless an intervening Supreme Court decision clearly requires a different outcome. Appellants identify no such decision. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), is neither intervening (it was decided before most of the Court's existing decisions) nor controlling. The case involved a private lawsuit that failed to satisfy a threshold statutory prerequisite to suit under a statute that provided more limited remedies than public enforcement under the FTC Act. The result in *Meghrig* is not inconsistent, let alone "clearly" so, with the Court's existing decisions.

Underscoring that point, appellants' argument has been soundly rejected by other courts of appeals that have considered the effect of *Meghrig* on their analogous precedent.

Similarly, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), is not clearly inconsistent with the Court's controlling precedent. The statute at issue there limited the scope of equitable relief available, while the FTC Act has no such limit, as this Court has explained. Finally, just a few months ago, a panel of this Court rejected the claim that *Kokesh v. SEC*, 137 S. Ct. 1635, 1638 (2017), is clearly inconsistent with binding precedent.

The availability of monetary relief under statutes authorizing injunctions is deeply rooted in the law, going back to the earliest days of the Republic. The Supreme Court has recognized as much repeatedly (and recently), and Congress has ratified its intent that the FTC be able to redress consumer injury through suits in equity.

ARGUMENT

In FTC enforcement cases, a district court may grant a preliminary injunction when the FTC shows that "(1) it is likely to succeed on the merits, and (2) injunctive relief is in the public interest." *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1232 (11th Cir. 2014) (citing *FTC v. Univ. Health, Inc.*, 938 F.2d 1206,

1217-18 (11th Cir. 1991)). The agency met both prongs, and the court acted well within its discretion.

I. THE DISTRICT COURT CORRECTLY RULED THAT THE FTC IS LIKELY TO PROVE THAT APPELLANTS VIOLATED THE FTC ACT

A. The District Court Did Not Clearly Err In Finding Appellants' Websites Deceptive

Section 5 of the FTC Act prohibits a person from (1) making a representation that (2) is likely to mislead customers acting reasonably under the circumstances and (3) is material to a consumer's decision to act. *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). The only question here is whether appellants represented that they would perform government services; they do not dispute that such a promise would be false and material. The district court did not clearly err in finding that the FTC was likely to prove they made that representation.

Misleading claims may be express or implied. *Kraft, Inc. v. FTC*, 970 F.2d 311, 318-22 (7th Cir. 1992). A court must assess whether the "net impression" of the statements would likely lead at least a "significant minority of reasonable consumers" to "take away the misleading claim." *Fanning v. FTC*, 821 F.3d 164, 170-71 (1st Cir. 2016) (cleaned up). Revealing the truth in disclaimers that consumers are unlikely to notice, read, or understand is insufficient to escape liability. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (D.C.

Cir. 1985). As this Court has explained, "*[c]aveat emptor* is not the law in this circuit." *IAB*, 746 F.3d at 1233; *Tashman*, 318 F.3d at 1277.

1. The Websites Were Misleading On Their Face

The Licensing Sites. Appellants clearly promised to render licensing services. The Facebook page for DMV.com exclaimed, "you can renew you[r] driver licenses online here!! Skip the lines doing it from you[r] home." FA.132-2 at 303-04. The sites themselves were nearly as overt. They claimed to be a "comprehensive resource for all you[r] driver license-related services"; featured a bold headline encouraging visitors to "**Renew Drivers License In Your State**"; and urged consumers in orange capital letters to "COMPLETE THE PROCESS NOW." FA.132-1 at 121, 207, 219. The payment page instructed consumers to "SELECT A SERVICE," with checkboxes to "Renew Driver's License" and "Replace Driver's License." *Id.* at 123, 208, 220. Appellants requested the consumer's birth date—necessary to renew a license, but not to provide a how-to guide. *Id* at 208, 220. The district court described these representations as "patently misleading." KA.126 at 2.

Katz (but not Zangrillo) disputes this finding. He first tries to minimize the wrongdoing by claiming that it involved "approximately 6 of more than 200 websites." Katz Brief ("KBr") 2-3, 14, 44. The FTC's complaint charges that "more than 200" of appellants' sites contained deceptive claims, KA.1 ¶112, and

the receiver explained that she "took offline 57 websites that … deceptively charged consumers to obtain guides or 'assistance' for government services." KA.108 at 5; *see also* FA.132-1 at 121-32, 134-43, 193-204 (screenshots from dozens of deceptive sites).

Katz next invokes the fine-print disclosures, but as the district court found, those disclosures never "clearly inform[ed]" consumers "that they could **not** obtain the government service they were misled to believe was available to them." KA.126 at 2. Disclaimers can remediate otherwise false representations only if "they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010) (quotation omitted). Appellants' disclosures do not come close to that standard.

For example, the mention of a "road guide" on which Katz relies, KBr.45, is insufficient because consumers reasonably could have believed that the sites offered *both* license renewal *and* a guide. Indeed, the reference to a "road guide" appears on the same page that describes the site as a "comprehensive resource" for "all … driver license-related services" and directed consumers to "SELECT A SERVICE," including "Renew Driver's License." KA.78-3 at 23; *see also id.* at 9-10 (similar text for hunting sites).

That the sites disclose they are "privately owned," KBr. 46-47, is immaterial. Even if consumers understood that information, the clear message was that they could renew their licenses from that site. Privately owned vendors often represent consumers when dealing with the government.

Moreover, the references to private ownership were likely to evade notice. One (shown at p.7 above) appears in a pop-up window laden with irrelevant, confusing, and threatening information. KA.78-3 at 21.[42] The pop-up distracted consumers with a boldfaced warning that "**[d]riving a motor vehicle without a valid driver's license, car registration or car title may be illegal, as is driving with expired credentials.**" *Id.* Yet it never revealed that appellants could not help consumers renew their licenses. If anything, it suggested the opposite by promising "live support for a fee" to "ensure that the process is handled in a compliant and timely manner." KA.78-3 at 21.

Katz (at KBr.46) also relies on a tiny, light gray banner at the top of the page, KA.78-3 at 10, as well as a "terms and conditions" page containing three paragraphs of small-print legalese in which the consumer, among other things, "agree[s] to comply with all applicable laws and regulations," agrees that

[42] Katz accuses the FTC of "selectively omit[ting]" the pop-up from its presentation to the district court. KBr.44. But the FTC *did* submit the pop-up, FA.132-1 at 277, including an expert report testing consumer reactions to it, *see* FA.132-5 at 24.

appellants are "not a law firm," and agrees to "waiv[e] the right to a trial by jury." *Id.* at 24. Like the others, these disclaimers never clearly stated that license renewals were unavailable. The "terms and conditions" suggest that renewal services *are* available by offering consumers "an automated software solution … to complete the form(s) on our Site using the license-driver.com developed form(s), where applicable." *Id.*

The district court was clearly right to find that even if appellants' disclaimers contained some relevant information, the sites were "cleverly designed" so that consumers' "attention would be drawn to links and language in larger, more colorful font that directed them to the service they were seeking," leading consumers to "ignore the disclosures written in relatively smaller and pale-colored font." KA.126 at 2. *See Brown & Williamson*, 778 F.2d at 42-43 ("inconspicuous" disclaimers ineffective because consumers were unlikely to "pay attention" to them).

The Government Benefit Sites. Appellants' benefit-eligibility sites were even more explicit in promising government services, and Katz barely claims otherwise. In a bold headline, the sites urged consumers to turn over their personal information to "**Find Out if You Are Eligible For the Section 8 Program**," FA.132-1 at 288, the "**Medicaid Program**," *id.* at 197, the "**Food Stamps Program**," FA.132-2 at 107, and so on. The sites then directed consumers to

"**Confirm Your Eligibility**" by providing sensitive personal information, such as household income, debt information, and medical diagnoses. *Id.* at 108-24. Although the sites mentioned "guides," they never said that consumers would *only* receive a guide or tell them that benefits determinations were unavailable.

Katz's only response is that users "consent[ed] to receive" "targeted advertising." KBr.6. But they did *not* consent to appellants' selling information about their debts and chronic illnesses to third parties. *See* FA.132-1 at 290. Any consent that consumers did provide was void, since it was premised on appellants' false promise to assess their eligibility for benefits.

2. Appellants Knew That Consumers Were Misled

The FTC Act does not require deceptive intent, but it is clear that appellants intended to deceive consumers. As early as 2011, an associate told Katz that he "eliminated the questions about child support" on the driver's-license site because "if someone is filling out this info under the auspices or belief of getting his or her license, the child support could cause them to abandon the registration process." FA.132-3 at 59.

Years later, Katz and his staff fielded complaints from On Point employees remorseful about deceiving consumers. Katz's office contained the results of a "company culture survey" in which an employee lamented that On Point did not "add[] value to the users. Guides are sometimes confusing for the people and that

causes problems for us such as suspensions from our main platforms Google & Bing." FA.132-23 at 30-31. Another employee complained that "some of the money we earn comes from a service that has, at least in the past, tried to misrepresent itself as something other than a how-to guide." *Id.* In a "Fraud Reduction Plan," appellants freely acknowledged that their disclaimers did not resolve "confusion from consumers." FA.132-14 at 20.

Appellants also knew of correspondence from multiple state Attorneys General questioning their practices, FA.132-23 at 120-34, as well as frequent consumer complaints and credit-card chargebacks, triggering Visa's fraud-monitoring thresholds 64 times in three years, FA.132-7 at 4¶18, which by itself constitutes "mounting evidence of fraud." *FTC v. WV Univ. Mgmt., LLC*, 877 F.3d 1234, 1237 (11th Cir. 2017). In response, appellants simply tried to suppress the evidence of fraud by creating new front companies with different accounts, artificially deflating their chargeback ratios, and creating fake customer reviews. *See supra* pp. 8-9.

3. Expert Surveys Confirm The Deception

The district court determined that the FTC's expert, Dr. Mazurek, "clearly show[ed] that consumers were misled by the websites." KA.126 at 2; *see supra* p. 16. She showed that 87 to 90 percent of the consumers who completed the licensing transaction believed the sites had actually renewed their licenses.

FA.132-5 ¶88. Most of the participants who viewed the government-benefits sites believed they would receive an eligibility determination; about half believed they were government-owned. *Id.* ¶¶106-07, 109-110. Most consumers did not notice, read, or understand the disclaimers. *Id.* ¶¶93-99, 117-19. Courts have upheld deception findings on surveys showing that "an ad misleads '15% (or 10%) of the buying public.'" *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 610-611 (6th Cir. 2017) (cleaned up) (collecting cases).

In a passing, unelaborated sentence, Katz lists several alleged flaws in the study. *See* KBr.48-49. That is insufficient to preserve an argument, nor may Katz save the claim by incorporating arguments raised below. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989); *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n.4 (11th Cir. 2004). And even if he had preserved his arguments, they are immaterial. The district court ruled that because the websites were facially misleading, liability did not "depend on a consumer survey." KA.126 at 2. For all the reasons stated, that determination is solidly grounded in the record.

4. Katz's Defenses Are Meritless

Katz's remaining objections to the deception findings are unavailing. He argues that consumers could not reasonably have believed the sites offered license renewals because they did not request consumers' license numbers. KBr.45-46.

But the sites asked for name, address, and date of birth, and consumers reasonably could believe they could renew their licenses with that information.

Katz claims that appellants' PDF guides are "valuable" (KBr.47-48), but "liability for deceptive sales practices does not require that the underlying product be worthless." *IAB*, 746 F.3d at 1233. The guides' "utility" is irrelevant; "all that is at issue are the statements made by the defendants." *Tashman*, 318 F.3d at 1277. "The fraud [is] in the selling, not the value of the thing sold." *McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000) (quotation omitted).

Nor does it matter that appellants may have sometimes issued refunds. KBr.6-7, 49. The "existence of a money-back guarantee" is an "insufficient" defense "as a matter of law." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994).

Katz claims the sites had "repeat visitors" (KBr.48), but a defendant cannot defeat deception charges by pointing to some "satisfied customers." *Tashman*, 318 F.3d at 1278; *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1206 n.8 (10th Cir. 2005). Besides, customers may have returned to appellants' sites not because they were satisfied, but because they were trying to understand how they got scammed or to seek a refund.

Katz argues that only a small percentage of visitors purchased a guide; his implication is that few were misled. KBr.48. But whatever the proportion, the

total number of victims is huge. In the last two years, appellants made $63.2 million (KA.108 at 21) from consumers paying about $27 each (KBr.6)—more than 2 million Americans. It is implausible that so many people would knowingly pay for publicly available information on how to renew a driver's or fishing license.

As a last resort, Katz tries to "shift the blame to [his] customers," a tactic this Court has condemned. *IAB*, 746 F.3d at 1233. Katz claims it wasn't his fault that consumers saw appellants' websites high in search results and "projected the user's expectation" that the sites would provide actual services. KBr.49. But appellants paid to have their sites presented when users searched for government services, *see*, *e.g.*, FA.132-1 at 340, FA.132-23 at 236, 295, and they used government-like names such as DMV.com, floridadriverslicenses.org, and food-stamps.org. The FTC's consumer declarants explained that such factors led them to believe the sites provided government services. FA.132-18 at 2-3, 20-21, 26-28, 36-37.

Remarkably, Katz admits that appellants' sites provoked "confusion," but—once again blaming the victims—he chalks it up to "user error in managing internet searching and interpreting results." KBr.50. Of course, the "user error" was induced by Katz himself. He seemingly thinks consumers should have seen through the scam, but "[c]onsumer-protection laws are 'not made for the protection

of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous.'" *Bishop v. Ross Earle & Bonan, P.A.*, 817 F.3d 1268, 1276 (11th Cir. 2016) (quoting *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944)).

B. Appellants Show No Clear Error In The District Court's Factual Finding That The Corporate Appellants Acted As A Common Enterprise

The FTC Act "disregards corporateness" where "the structure, organization, and pattern of a business venture reveal a common enterprise or a maze of integrated business entities." *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 636-37 (6th Cir. 2014) (quotation omitted). This Court recently confirmed that courts may "justly" impose joint-and-several liability against all members of a common enterprise. *WV Univ.*, 877 F.3d at 1239-40. The district court correctly found that the corporate appellants likely operated as a common enterprise. KA.162 at 314:8-314:16.

A common enterprise exists when businesses "exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010). Indications of common enterprise include: (1) common control; (2) shared officers and employees; (3) shared offices; (4) commingled funds; and (5) shared

advertising and marketing. *E.M.A. Nationwide*, 767 F.3d at 636-37; *accord FTC v. Lanier Law, LLC*, 715 F. App'x 970, 979-80 (11th Cir. 2017). The ultimate question is whether the businesses are so integrated that "there is no reasonable basis on which to determine the relative contribution[s]" of each one to the "indivisible harm" suffered by consumers. *See WV Univ.*, 877 F.3d at 1242-43.

The district court found that the FTC was likely to meet the common enterprise standard:

> After considering the written submissions of the parties, the testimony, and all the evidence that was presented, I find that the FTC has met its burden as to both the entities and the individual defendants. I find that there has been a showing that there was a common enterprise based upon shared control[], shared offices, shared payroll, commingled funds, [and] that the individuals, the government has shown that each of them had sufficient control and knowledge to make them responsible.

KA.162 at 314:8-314:16.

1. The District Court Issued Sufficient Findings Of Fact

Katz and Zangrillo complain that the district court erred by announcing its common enterprise findings orally, KBr.38; ZBr.29, but the Federal Rules expressly permit oral findings. Rule 52(a) provides that "[i]n granting or refusing an interlocutory injunction, the court must … state the findings and conclusions that support its action," and may do so "on the record after the close of the evidence." Fed. R. Civ. P. 52(a)(1)-(2). This Court has affirmed oral findings where they are "sufficient to allow [the Court] to discern the basis for the court's

decision." *SME Racks, Inc. v. Sistemas Mecanicos Para, Electronica, S.A.*, 243 F. App'x 502, 504 (11th Cir. 2007).

Katz and Zangrillo claim the findings were not specific enough. KBr.38; ZBr.29. But those findings left no doubt as to the court's basis for freezing the companies' assets on a joint-and-several basis: they were "a common enterprise based upon shared control[], shared offices, shared payroll, [and] commingled funds." KA.162 at 314:11-314:14.

Rule 52 demands nothing more. It requires only "brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts." *Stock Equip. Co. v. Tenn. Valley Auth.*, 906 F.2d 583, 592 (11th Cir. 1990), (quoting Fed. R. Civ. P. 52, Advisory Committee Note (1946)). Findings need only afford a "meaningful" basis for appellate review. *Barber v. Int'l Brotherhood of Boilermakers*, 778 F.2d 750, 755 (11th Cir. 1985).

The findings below enable meaningful review. The district court plainly articulated the common-enterprise factors it determined: shared control, shared offices, shared personnel, and commingled funds. KA.162 at 314:11-314:14. Zangrillo faults the court for not describing specific evidence or explaining why it rejected his arguments. ZBr.29-30. But this Court has explained that Rule 52 requires no such thing, holding instead that "[a]lthough there must be sufficient

record evidence to support the findings," the district court "need not state the evidence or any of the reasoning upon the evidence, nor assert the negative of rejected propositions." *Stock Equip.*, 906 F.2d at 592 (cleaned up).

2. The Record Supports The Finding That The Katz Entities Acted As A Common Enterprise

The Katz appellants bore every hallmark of a common enterprise, and Katz disputes none of the material facts.

Common control. The 49 Katz corporate appellants were all owned by one or more of the five individual appellants (Katz, Levison, Rothman, Sherman, and Zangrillo). *See supra* n. 30 (ownership records and organizational charts). A few front companies listed other nominee "owners," who were actually midlevel On Point employees. For example, Borat Media is "owned" by On Point software engineer Charles Ohana, while Chelsea Media is "owned" by On Point call-center supervisor Gersom Bustos. *See, e.g.*, FA.132-15 at 28, 48; FA.132-2 at 251, 258; FA.132-23 at 117. The true ownership is with Katz and his fellow appellants.

Shared personnel. On Point employees organized the appellant front companies that processed transactions. FA.132-3 at 21-23; FA.132-13 at 1-4; FA.132-23 at 117. On Point VP Arlene Mahon (a defendant below) oversaw nearly all bank accounts across those companies and signed numerous contracts on their behalf identifying herself as "owner." FA.132-15 at 1-3; FA.132-16 at 2-29; FA.132-23 at 141-60. On Point VP Ramiro Baluga was also CEO of appellant G8

Labs, which developed websites, and a member of appellant Direct Market, which sold consumer data. FA.132-1 at 151; FA.132-2 at 202, 204-07, 246-47; KA.108 at 22. On Point's general counsel, Levison, was also acting operations manager for appellant BV Media, which ran On Point's Costa Rican call center. FA.132-2 at 223-24, 240-41.

Shared offices. The corporate appellants shared office space, with most listing their addresses as either On Point's current Miami headquarters (350 NE 60th Street) or its former headquarters (425 NW 26th Street). FA.132-11 at 1; FA.132-12 at 6-7; FA.132-14 at 76. On Point also operated a Boca Raton satellite office, which appellant Issue Based Media administered and "subleased" to many other corporate appellants. FA.132-13 at 35-42.

Commingled funds. The appellant front companies would take consumers' money and transfer it without differentiation to central operating accounts like those of appellant Cambridge Media, which, in turn, would move funds into the individual appellants' personal and holding-company accounts. FA.132-6 at 4-7¶¶9-15; FA.132-1 at 52- 59¶¶191-96; FA.132-10 at 43-195; FA.132-23 at 221-22.

Shared operations and marketing. Even though the websites were nominally owned by distinct entities, appellants described them to investors—and reported their revenues—as all belonging to one company, "On Point." FA.132-23 at 251-52, 259-60, 263-65. Katz explained that On Point has many "operating

entities," each of which "holds a separate group of domains." FA.132-23 at 223-24. Corporate appellants that maintained separate names (such as BV Media) identified themselves as "an On Point Company." FA.132-2 at 198-200, 300. On Point often hired their employees. *Id.* at 194-96. Employees across the companies, whoever their nominal employer, had "onpointglobal.com" email addresses. FA.132-21 at 125.

While appellants' consumer-facing websites typically listed only the names of the 30 front companies, FA.132-3 at 79-87 (*e.g.*, quickdriversinfo.com associated with Borat Media), the sites used identical tactics and templates to sell a single product: the PDF "guides," FA.132-1 at 5-7¶¶19-20, 25. On Point also posted those guides to a single website under its own branding, onpointguides.com. *Id.* at 173-83.

Katz contends in passing that the entities "were run separately and had individual executives, dedicated resources, specific technology platforms, and segmented operational and financial reporting." KBr.38. He provides no appropriate record citations, and as shown above, every assertion in that sentence is false.

3. The Record Supports The Determination That The Zangrillo Entities Participated In The Common Enterprise

The district court correctly found that the Dragon Global entities were part of the On Point common enterprise because they were under common control, had

shared personnel and office space, and commingled funds. KA.162 at 314:8-314:16. Zangrillo's counterarguments misstate the record and do not establish clear error.

Common control. The record fatally undercuts Zangrillo's repeated claim that Dragon Global was only a "minority investor" that was "not affiliated with On Point." ZBr.2-4, 7, 37. Dragon Global had plenary control over On Point. Its three venture partners—Zangrillo, Katz, and Bob Bellack—were On Point's Chairman, CEO, and CFO, respectively. FA.132-1 at 151, 186; FA.132-23 at 257-58. Zangrillo and Katz were the two largest shareholders in On Point, holding a majority stake between them. FA.132-15 at 132; ZBr.7-8. Zangrillo tries to spin On Point as "just one" of Dragon Global's many investments. ZBr.37. But Dragon Global's website described On Point as its *only* "current early-stage control investment," which entailed taking "controlling, majority ownership stakes" in and "[w]orking in close partnership with" On Point. FA.132-1 at 190.

Zangrillo—along with Dragon Global partner Katz—had "special approval rights" requiring signoff on On Point Global's activities, and they sat on the Board of Managers, which possessed "full, complete and exclusive authority, power, and discretion to manage and control the business, property and affairs" of On Point. FA.132-21 at 28-29, 37. Zangrillo denies that he "ever exercised any of these approval rights," but that is patently false. ZBr.42. He and Katz provided physical

signatures authorizing each of On Point's corporate resolutions and activities, including loans, stock distributions, domain name purchases, and the hiring of key executives, such as the chief product officer and corporate secretary. FA.132-19 at 72-143. To this day, Zangrillo's holding company maintains control of On Point, listing his lawyer as its "manager." *See supra* p. 14.

Zangrillo concedes he had authority to "hir[e] and "fir[e]" On Point's "CEO, President, and CFO" and make other "high-level" decisions but claims was he was powerless to affect "day-to-day operations." ZBr.41-42. That is absurd. If Zangrillo objected to any business practice, he could have fired the top executives and replaced them with people sharing his agenda. Indeed, the record shows that Zangrillo involved himself in matters as small as hiring interns and the removal of a freezer from the office. FA.132-23 at 197, 267.

Zangrillo claims that Dragon Global cannot be held accountable because it is it is merely a "venture capital" or "private equity" investor, ZBr.37, but that is irrelevant. The FTC Act has no venture capitalist exemption, and venture capitalists are liable just like anyone else for deceptive activities within their knowledge and control. Zangrillo's purported expert declaration is not to the contrary. It discusses "VC investors" generally but offers no opinion about whether Dragon Global and Zangrillo exercised control in this case. ZA.366-72. Also, Zangrillo's role in this case was nothing like that of a passive investor. For

instance, he used his On Point corporate credit cards to bankroll over $125,000 in expense "reimbursements" over nine months, *see* FA.132-1 at 53¶192, including a four-day trip to New York City that cost On Point $15,000 for hotels and $4,000 for car service alone, FA.132-19at 42, 44, 57 (expense reports).

Shared personnel. Besides its venture partners, Dragon Global had just four full-time employees, FA.108 at 28, two of whom played key roles at On Point. Dede Loftus signed the corporate papers for appellant DG DMV, the owner of DMV.com. FA.132-1 at 186; FA.132-3 at 3-4; FA.132-17 at 2. Megan Black did extensive work for On Point over several months in 2018. FA.108 at 31.

Zangrillo claims that On Point reimbursed Dragon Global for Black's services (ZBr.38-39), but that is immaterial. "[T]he common enterprise analysis is distinct from the alter ego inquiry, such that the entities formally may be separate corporations but operate as a common enterprise." *FTC v. Pointbreak Media, LLC*, 376 F. Supp. 3d 1257, 1283 (S.D. Fla. 2019) (cleaned up).

On Point and Dragon Global also shared an identical roster of "advisors." FA.132-1 at 151, 186. Zangrillo claims these advisors played a "minimal" role, ZBr.39, but he *personally* sought their counsel on important issues for On Point, including locating a security firm to help design products and sites, securing a "senior contact" at Google regarding search engine advertising, and deciding which technology tools to use. FA.132-23 at 319-20.

Shared office space. The LinkedIn page for Dragon Global listed its address as On Point's Miami headquarters (350 NE 60th Street). FA.132-2 at 286. According to company seating charts, all three Dragon Global partners—Katz, Bellack, and Zangrillo—occupied the executive corner office in that building. FA.132-23 at 14-15, 26, 28; *see* FA.132-21¶7 Zangrillo acquired the building through a company called "Magic City Properties," which is Dragon Global's branding for Miami real-estate projects. FA.132-3 at 28-31.

Zangrillo asserts that Dragon Global sometimes listed other addresses, ZBr.37-38, citing ZA.355, but those are only a UPS Store and Loftus's house. FA.132-1 at 72; 132-11 at 26-30. Zangrillo does not claim to have run Dragon Global out of those locations, or anywhere other than On Point's Miami headquarters.

On Point and Dragon Global also shared office space in Los Angeles. Although Dragon Global's name was on the door and Zangrillo personally used the offices, On Point employees (*e.g.*, Levison) also had access, the office contained On Point records, and Katz sought to get On Point's name added to the door. FA.132-20¶5; FA.132-21 at 98-102; FA.132-22 at 4; FA.132-23 at 189. Zangrillo claims that Dragon Global "subleased *the same office space* to other portfolio companies," ZBr.38, but this does not rebut the showing that Dragon Global and On Point also shared the space.

Commingled funds. On Point and Dragon Global commingled funds in their handling of the Los Angeles office lease. Dragon Global was the tenant, but On Point and its subsidiary Issue Based Media often paid the rent, referencing Dragon Global on the check. FA.132-1 at 63-64¶200; FA.132-20¶5. Dragon Global then subleased that space (without a written agreement) to a third party, which paid rent interchangeably to On Point and Dragon Global. FA.132-1 at 59-63¶197-99; KA.162 at 180:15-181:12. Zangrillo maintains that the written sublease agreement between On Point and Dragon Global was "arm's-length" (ZBr.38), but their implementation of the agreement was anything but. Zangrillo's expenditures charged to an On Point credit card also suggests commingling. *See supra* p. 41-42.

Shared marketing. Zangrillo claims that Dragon Global was not part of the On Point common enterprise because it had its own "well-established brand in the venture capital world." ZBr.40. He misses the point. As Zangrillo admits (at ZBr.9-10), Dragon Global lent its name, reputation, and resources to the *On Point* brand. As On Point's Chairman, Zangrillo was the lead recruiter for new investors. Prominently displaying the Dragon Global logo, FA.132-23at 256, 258, Zangrillo's investor presentations promoted On Point's lucrative work with "Free Guides," "Paid Guides," "Services," and acquisition of "Third Party Data." *Id.* at 251-53.

Having joined forces with On Point in promoting the very conduct at issue in this case, Dragon Global and Zangrillo are equally liable for its wrongdoing.

C. The District Court Did Not Clearly Err In Finding The Officers Individually Liable

The district court correctly found that all five individual appellants will likely be held personally liable for the corporate FTC Act violations. Individuals face personal liability if they "participated directly in the practices or acts or had authority to control them." *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (quotation omitted). Authority to control can be shown through "active involvement in business affairs and the making of corporate policy." *IAB*, 746 F.3d at 1233 (quotation omitted).

To obtain monetary relief, the FTC must also show that a defendant had "some knowledge" of the deception. *Gem Merch.*, 87 F.3d at 470. The FTC need not prove "actual knowledge" if the defendant "was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth." *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006); *accord FTC v. Primary Group, Inc.*, 713 F. App'x 805, 807 (11th Cir. 2017).

The Katz appellants present no factual defense to individual liability, complaining only that the district court's findings were insufficiently precise. KBr.39. The court made clear why it froze the individuals' assets: "each of them

had sufficient knowledge and control to make them responsible" for violations by the common enterprise. KA.162 at 314:8-314:18. Those findings satisfied Rule 52 because they enable this Court to "discern the basis for the [district] court's decision." *SME Racks*, 243 F. App'x at 504.

Abundant evidence supports the individual liability of all five individuals.

Katz was On Point's President, CEO, and one of its two largest shareholders. *Supra* pp. 13. Along with Zangrillo, he had "special approval rights" over all On Point decisions, including the hiring of key personnel. *Supra* pp. 14, 40. Bank documents for various On Point subsidiaries list Katz as "Key Executive" or "Owner" with "Control of the Entity." FA.132-16 at 79, 102, 126. Katz obtained three merchant accounts for On Point subsidiaries and was a signatory on 27 bank accounts. FA.132-13 at 2; FA.132-15 at 1-3.

Katz participated directly in the wrongdoing. He knew the websites gave consumers the false "belief of getting his or her license." *Supra* p. 29; FA.132-3 at 59. He provided specific directives to his staff regarding the websites' formatting, advertising, and revenue-building practices. FA.132-23 at 226. He personally oversaw On Point's hiring process for writers and editors. *Id.* at 232.

Katz's pervasive "involvement in [the] fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability." *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1101-02 (9th Cir. 2014) (quotation omitted).

Moreover, he personally received complaints from employees that the sites did not "add[] value to the users" and "misrepresent[ed] [themselves] as something other than a how-to guide." FA.132-23 at 30-31. He also knew of On Point's high chargeback ratios. *Id.* at 200-18.

Levison also had control as On Point's chief administrative officer and general counsel, *supra* pp. 14-15, supervisor of "the e-commerce and product fulfillment teams," FA.132-2 at 241, and fourth-largest shareholder, FA.132-15 at 132. Since 2013, Levison obtained many of the scheme's credit-card processing accounts and was a signatory on approximately 30 bank accounts. FA.132-13 at 1-4; FA.132-15 at 1-3. He also obtained several of the company's mailboxes, frequently signed its corporate filings and office leases, and registered 177 of its domain names. FA.132-1 at 49¶181; FA.132-2 at 320-22; FA.132-3 at 21-23; FA.132-11 at 1; FA.132-15 at 34-39, 52-57. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (corporate officer with authority to sign documents "had the requisite control over the corporation").

Levison also knew of the deception: he managed the call center that fielded On Point's consumer complaints, FA.132-2 at 223-24, 241, and knew of high chargeback ratios, FA.132-23 at 200-18.

Rothman and **Sherman** were On Point's directors of data processing and co-owners of appellant Direct Market, which sold consumer data from On Point's

websites. FA.132-2 at 202, 266, 271; FA.132-3 at 142; FA.132-15 at 63; KA.108 at 22. Rothman was also On Point's third-largest shareholder, after Zangrillo and Katz. FA.132-15 at 132. Rothman and Sherman secured many of On Point's mailbox rentals and merchant accounts and were signatories on numerous bank accounts. FA.132-11 at 1; FA.132-13 at 1-4; FA.132-15 at 1-3. Sherman also registered 85 of On Point's domain names, FA.132-2 at 325-26, and led its efforts to acquire new domains—such as unemploymentoffice.us—creating the false impression of a government service provider. FA.132-23 at 313-14. Both Rothman and Sherman personally received notice of On Point's excessive chargeback ratios. FA.131-23 at 162-66; 200-18.

Finally, **Zangrillo** exercised ultimate control, as outlined above. As On Point's Chairman and a top shareholder, he wielded "special approval rights" over all company decisions, sat on the Board of Managers, and admittedly could have fired the CEO and CFO. FA.132-21 at 28-29. As Zangrillo concedes, courts have found authority to control when a defendant "admitted to having the power to hire and reprimand employees." ZBr.47 (quoting *FTC v. Moses*, 913 F.3d 297, 307-08

(2d Cir. 2019)).[43] Bank records listed Zangrillo as an "Owner with Control of the Entity" for at least one On Point subsidiary. FA.132-16 at 102.

Zangrillo claims these supervisory powers are insufficient because "the majority of On Point's business was legal," ZBr.48, but he does not explain why that matters. Besides, the business was overwhelmingly *unlawful*. The receiver reported that On Point reaped over $80 million from the deceptive sale of paid guides and from using or selling personal information harvested from consumers who visited the public-benefit sites; in contrast, defendants received only $17.1 million from separate websites (not challenged in the FTC's complaint), which ostensibly provided other services. FA.108 at 20-23.

Zangrillo also claims he lacked authority to control because he was "uninvolved in the deceptive conduct." ZBr.47. But a defendant is personally liable when he *either* directly participates in "or" has authority to control the conduct. *Gem Merch.* 87 F.3d at 470; *IAB*, 746 F.3d at 1233. The "dispositive issue" is not whether Zangrillo "*exercised* authority to control the Corporate Defendants' conduct," but whether he "*possessed*" that authority, *Moses*, 913 F.3d at 308, which he undisputedly did.

[43] This case has nothing in common with *FTC v. Vylah Tec LLC*, 328 F. Supp. 3d 1326 (M.D. Fla 2018), where the individual defendant "never owned" most of the entities and was "rarely, if ever, involved in … business affairs and corporate policy." *Id.* at 1334.

Regardless, Zangrillo *did* directly participate in the deceptive scheme. He purchased and registered the domain name onpointguides.com, which housed all of On Point's guides. FA.132-1 at 49¶180, 173-83; FA.132-2 at 329; FA.132-23 at 279-80; ZA.255-56¶33. Zangrillo admits that On Point's websites "redirected consumers" to onpointguides.com when sending them links to the PDF documents that they provided instead of the advertised services. ZBr.45. Zangrillo claims that the site was dormant when he purchased it, *id.*, but that is both unsurprising and irrelevant. On Point then developed the site to carry out its scheme.

Zangrillo assured investors that he was closely involved in On Point's activities, explaining that "I have recently joined as Chairman and have been very active in my role." FA.132-23 at 327. As the receiver reported, Zangrillo "reviewed and approved the slide deck for the investors, coordinated [and] … sat in on investor meetings, and updated the investors after the investments had been made." FA.108 at 31. Promoting the lucrative potential of the very websites at issue in this case, Zangrillo garnered over $19 million in investments and personally took a $400,000 cut of that money in fees. *Id.* at 30. Zangrillo admits these activities but calls them "normal activities of venture investors." ZBr.46. He falsely presumes that "venture investors" are immune from the FTC Act.

Nor does it matter whether Zangrillo personally "design[ed], maint[ained], or operat[ed]" the websites or authored the misleading claims. *See* ZBr.43-44, 46,

48-49. Any "gaps" in Zangrillo's "responsibilities" are "simply irrelevant," since as Chairman and lead financier with final say over corporate affairs, he indisputably "could have nipped the offending [representations] in the bud." *Direct Mktg. Concepts*, 624 F.3d at 12-13. That is enough to show individual liability.

These facts also establish Zangrillo's awareness of wrongdoing. As discussed, Zangrillo had actual knowledge that On Point's websites made money by distributing PDF "guides" and selling personal information extracted from consumers. Indeed, he does not deny familiarity with the content of On Point's websites. *See* ZBr.50-51. Nor could he, since his investor presentations referenced those websites by name and even included small screenshots of them. FA.132-23 at 251-52, 263.

Zangrillo claims this showing was insufficient. His argument is that corporate officers have been personally liable when they knew telemarketers were making deceptive statements in phone calls with consumers, whereas here the deception took place on websites. ZBr.50. That is a distinction without a difference, since the question is whether the officer knew of the deception, and there is no doubt that Zangrillo knew what claims On Point was making on its websites.

II. THE DISTRICT COURT PROPERLY IMPOSED THE ASSET FREEZE AND RECEIVERSHIP

The district court's receivership and asset freeze were consistent with longstanding circuit precedent, amply supported by the factual record, and well within its discretion.

A. Circuit Precedent Permits Asset Freezes

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers the FTC to seek and the district court to grant "a permanent injunction." This Court has explained that "the unqualified grant of statutory authority to issue an injunction under section 13(b) carries with it the full range of equitable remedies," including an order that a defendant "disgorge illegally obtained funds" to prevent "unjust enrichment." *Gem Merch.*, 87 F.3d at 468-70;[44] *accord WV Univ.*, 877 F.3d at 1239; *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013). When a court has entered a preliminary injunction in an action under Section 13(b), "[a]n asset freeze is within the district court's equitable powers." *IAB*, 746 F.3d at 1234; *accord FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984). The freeze must reflect a "reasonable approximation of a defendant's ill-gotten gains." *IAB*, 746 F.3d at 1234 (citation omitted).

[44] Similar language in other statutes likewise authorizes monetary relief. *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1344 (11th Cir. 2008); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734-35 (11th Cir. 2005).

Katz and Zangrillo do not dispute that the district court had authority under existing law to freeze assets and appoint a receiver. They devote much of their briefs to the argument that the Court should simply overturn that law. We address the merits of their claims in Argument III; for present purposes, however, a panel of this Court is "duty-bound to apply this Court's precedent." *Gissendaner v. Comm'r, Ga. Dep't of Corrs.*, 779 F.3d 1275, 1284 (11th Cir. 2015). The Court applied the panel precedent rule to reject an effectively identical argument a few months ago. *FTC v. Simple Health*, 801 F. App'x 685 (11th Cir. 2020).

The panel precedent rule also forecloses appellants' argument that monetary relief under the FTC Act is limited to "net profits," such that they can deduct the costs they incurred in defrauding consumers. KBr.27-28, 30, 33; ZBr.34. This Court has rejected that argument, holding that "net revenue (gross receipts minus refunds), rather than the amount of profit (net revenue minus expenses), is the correct measure of unjust gains under Section 13(b)." *Wash. Data*, 704 F.3d at 1327; *accord WV Univ.*, 877 F.3d at 1244 n.9.

Net revenue is the proper measure *regardless* of whether the assets are "traceable" to the wrongdoing. *See* KBr.17, 27, 34, 37-38. Limiting monetary relief to "the actual assets unjustly received would lead to absurd results" because "a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of

disgorgement." *FTC v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013) (cleaned up). Tracing "would perpetuate rather than correct an inequity." *Id.* (citation omitted).[45]

This Court has also foreclosed appellants' claim that Section 13(b) does not permit joint-and-several liability. KBr.28-29, 34; ZBr.27, 34-35. As discussed above, corporate defendants can be held jointly-and-severally liable for all misdeeds of a common enterprise, *WV Univ.*, 877 F.3d at 1239-40, 1242-43; *Lanier Law*, 715 F. App'x at 979-80; and individual defendants can be personally liable for corporate wrongdoing, *Gem Merch.* 87 F.3d at 470; *IAB*, 746 F.3d at 1233. Individuals therefore can bear responsibility for "the total amount of unjust gains *to all the defendants*." *W.V. Univ.*, 877 F.3d at 1243.

B. The Asset Freeze Relies On A Reasonable Approximation Of Ill-Gotten Gains

To obtain an asset freeze, "the FTC's burden of proof … is relatively light." *IAB*, 746 F.3d at 1234. The Commission need only provide a "reasonable approximation of a defendant's ill-gotten gains"; "[e]xactitude is not a requirement." *Id.* (quotation omitted). In *IAB*, this Court affirmed an asset freeze

[45] *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) and *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016), are not to the contrary. They and other cases decided under ERISA rest "on the fiction that the victim at all times retained title to the property in question, which the defendant merely holds in trust for him." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011).

where the receiver determined that the defendants' "gross income" from the challenged practices dwarfed the value of the frozen assets. *Id.*

This case presents the same scenario as *IAB*. The receiver determined that appellants' net revenue from the deceptive practices exceeded $80.5 million in just the last two years, far more than the frozen assets. Specifically, appellants made

- $63.2 million—after chargebacks and refunds—from the deceptive sale of paid guides between January 2018 and November 2019;
- $9.1 million (in 2019 alone) from selling personal information they harvested from consumers who visited the public-benefit sites; and
- $8.2 million (in 2019 alone) from sending spam "email, text, and push notifications" directing customers of the public-benefits sites to sites that generated advertising money for each link clicked.

KA.108 at 20-23; FA.108-5.

The frozen assets were worth far less. *At most* their nominal value was approximately $41 million: $2.9 million in cash from the corporate defendants; $1.5 million owed to defendants from their payment processors; $1.2 million in tangible assets possessed by the Dragon Global defendants; $5.5 million in the individual defendants' bank accounts; and $30 million for domain names (which have a lower liquidation value due to long-term debt of $13.7 million). KA.108 at 25, 33-34; KA.162 at 122:9-122:11.

The district court correctly found that "the Defendants' likely liability for their deceptive activities exceeds the total amount of frozen assets." KA.174 at 1-2.[46] Because appellants' combined assets are less than a likely final judgment, the district court found "good cause to believe" that the asset freeze was necessary to prevent "immediate and irreparable damage to the Court's ability to grant effective final relief for consumers." KA.126 at 2.

Appellants' counterarguments are all obfuscation. They do not even *mention*—much less contest—the receiver's calculation of ill-gotten gains.

1. ***Precise arithmetic was not required.*** Appellants fault the district court for failing to specify a "figure" in its order reflecting the "likely amount of future restitution." KBr.36; ZBr.30-31. But the accounting was manifest from the receiver's report, which appellants did not dispute. A district court is only required to render findings on "contested matters." *Stock Equip.*, 906 F.2d at 592. This Court in *IAB* rejected appellants' exact argument, holding that because a receiver's report was sufficient evidence of ill-gotten gains, the court was not required to itself "calculat[e] the amount of [defendant's] ill-gotten gains before freezing any assets." *IAB*, 746 F.3d at 1234. Appellants rely on *FTC v. Bishop*, 425 F. Appx.

[46] The district court did *not* conclude that "Section 13(b) authorizes a freeze of each Defendant's assets up to the entire liability amount." ZBr.34 n.6. The court found that the *total* value of the frozen assets was worth less than the probable liability amount.

796, 798 (11th Cir. 2011), but the Court's published decision in *IAB* expressly repudiated the reasoning of that unpublished, nonbinding decision, which "contains almost no analysis." 746 F.3d at 1234.

2. ***The frozen assets reflect only ill-gotten gains.*** Katz asserts that the FTC's restitution figure covers all websites appellants maintained, rather than just "the six e-guide sites listed in the FTC's complaint." KBr.37. Zangrillo likewise argues that the restitution figure does not "link[] the funds to the alleged scheme." ZBr.33. They misrepresent the facts.

The FTC charged that *over 200* websites were deceptive, *supra* p. 25-26, and of those most active, the receiver shut down 57 as deceptive. KA.108 at 5. As outlined above, the $80.5 million figure only covers illicit gains from appellants' government licensing and public-benefits websites in the last two years. That figure does *not* include $17.1 million in additional revenue flowing from appellants' separate websites (not challenged in the FTC's complaint allegations), which purportedly provided other services to consumers. *Id.* at 21-22. The FTC has not sought disgorgement of those proceeds.

3. ***The order's temporal scope was correct.*** Appellants claim that the ill-gotten gains figure was "calculated back to the beginning of 2016." KBr.37; ZBr.31. Again, the receiver made clear in undisputed findings that appellants' $63.2 million in "guide" sales covered "January 2018 through November 2019,"

while the $17.3 million in revenue from the public-benefit sites was "for the year 2019." KA.108 at 20-23.[47] The $80.5 million figure may be the tip of the iceberg, given the evidence that consumers started complaining to the FTC about the sites in 2013 and credit-card processors started terminating appellants for excessive chargebacks in 2015. FA.132-1 at 74-78¶¶217-224; FA.132-3 at 58-59; FA.132-7 at 58-60; FA.132-14 at 9, 14.

4. ***The court had no duty to analyze profits.*** Zangrillo argues that his assets should not have been frozen because the district court failed to find that he "profited from the allegedly unlawful practices." ZBr.30. Again, the measure of relief is *net revenue of the entire scheme*, jointly and severally. *See supra* p. 53-54. Unlike *FTC v. Vylah Tec LLC*, 727 F App'x 998, 1002 (11th Cir. 2018), it is undisputed that Zangrillo and his companies *did* receive gains: cash payments from On Point exceeding $2.7 million, and reimbursements of more than $125,000 for nine months of expenses. FA.132-1 at 53-54¶192; *see also* ZBr.11, 32, 34 (Zangrillo admits receiving these payments). Zangrillo also gained in $401,250 "operational fee[s]" from On Point's third-party investors. KA.108 at 30.

[47] The FTC also provided the district court with a forensic accountant's report showing at least $85 million over three-and-a-half years. KA.161 at 226:9-227:1; FA.132-6¶¶9-10.

Zangrillo claims he is "in the red" on his On Point investment, but that is beside the point. *See* ZBr.31. Fraud can be a losing proposition, especially when the government catches malefactors in the act, but consumers are still out the money.

5. ***The court appropriately valued the frozen assets.*** Katz proclaims that the district court erred because "the corporate entities alone are valued at over $150 million." KBr.36. The district court was entitled to credit the receiver's far lower valuation (which Katz does not challenge) over Katz's unsubstantiated, self-serving one.

Katz falsely represents that the receiver "endorsed" a $154 million valuation. KBr.9 (citing KA.169 at 2 n.2). She did not. In a court filing two months after the preliminary injunction, she explained that appellants had valued their own assets at $154 million "[i]n early 2019," prior to the TRO. *Id.* She never suggested that this was the actual current value of the assets. Even if appellants' $154 million self-valuation was once accurate, it was premised on revenue streams generated from illegal practices. It is highly implausible that the businesses would have anywhere near that value if operated lawfully. Instead, the receiver's report emphasized that the value of appellants' illiquid business assets is "unknown at this time." KA.108 at 5, 33-34. The district court did not err in finding that the frozen assets were worth less than the amount subject to restitution.

C. Zangrillo's Sixth Amendment Argument Is Premature

Zangrillo claims that the Sixth Amendment required the district court to release "untainted frozen assets" to allow him to pay his legal fees in his criminal case. ZBr.53-56. He did not properly preserve the argument, which is currently before the Court in No. 20-11615, which is on a separate briefing schedule. The matter is not appropriate to decide here.

Zangrillo's counsel mentioned the Sixth Amendment in passing at the preliminary injunction hearing, KA.162 at 302:23-303:4, but he did not raise it in his memorandum opposing the injunction, ECF No. 69. The passing mention is insufficient to preserve the argument. In any event, the Sixth Amendment provides no ground for overturning the entire asset freeze; at most, it would justify the release of some assets. In fact, after bringing this appeal, Zangrillo asked the district court to release assets to pay for his criminal defense. The court declined, FA.191, and Zangrillo has appealed. The matter will be fully litigated in that case, so the Court need not take it up here.

D. The Asset Freeze And Preliminary Injunction Serve The Public Interest

When, as here, the FTC shows that it is "likely to succeed on the merits," the district court may impose equitable relief when it "is in the public interest." *IAB*, 746 F.3d at 1232. "Unlike private litigants, the FTC need not demonstrate irreparable injury." *Id.* Even so, the district court found that the preliminary

injunction and receivership were necessary to prevent "immediate and irreparable harm [that] will result from Defendants' ongoing violations of the FTC Act." KA.126 at 2-3. Likewise, the asset freeze was necessary to protect consumer victims from "immediate and irreparable damage" through the "sale, transfer, destruction or other disposition or concealment by Defendants of their assets." *Id.* at 2.

Katz claims that injunctive relief was improper because "the public's interest is in seeing" appellants' government-services websites "operate as normal." KBr.43. Those websites were a scam operation, and the public has an interest in terminating scams, not prolonging them.

Katz claims the asset freeze does not serve the public interest because appellants are not "likely" to dissipate their assets. KBr.42. But "[d]issipation does not necessarily mean that assets will be spirited away in secret; rather, it means that less money will be available for consumer redress." *FTC v. Simple Health Plans LLC*, 379 F. Supp. 3d 1346, 1365 (S.D. Fla. 2019), *aff'd*, 801 F. App'x 685. Here, appellants *admit* that they want to spend the frozen assets, KBr. 41, ZBr.52-53, thereby leaving less money for consumers.

Katz posits that freezing the individual appellants' assets is unnecessary because the "corporate assets" would be enough to satisfy a restitution award.

KBr.42-43. For all the reasons discussed above, the claim fails. *See supra* p. 54-56.

Katz charges that the district court "could have required Defendants to post security" in lieu of the asset freeze, KBr.42, but appellants never offered to the court to post security before the court imposed the freeze. Even if they had not waived the issue, appellants have shown no ability to post security worth $80 million or more.

Appellants next claim, without supporting evidence or affidavits, that the receivership and asset freeze are causing hardship to themselves and their businesses. KBr.40-41, ZBr.52-53. But "private equities" are entitled to "little weight" in deciding whether to issue a preliminary injunction, "lest we undermine section 13(b)'s purpose of protecting the public-at-large." *Univ. Health*, 938 F.2d at 1225 (cleaned up). Any subject of an asset freeze could make the same claim.

In any case, appellants have no standing to complain about lost "customers," "[e]mployees," or "goodwill" from the receiver's decision to shut down the illegitimate websites. KBr.40-41. Appellants "have no vested interest in a business activity found to be illegal." *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972). As for appellants' other websites, Katz concedes that the receiver is allowing them to "continue operation[]," KBr.8, 40, and even boasts

that under the receiver's control, those businesses will remain "profitable," *id.* at 42.

Zangrillo likewise complains about the receivership's effects on Dragon Global. ZBr. 52. But the district court's order specifically excludes Dragon Global's "employees and operations" from the receivership, while maintaining the freeze on its assets. KA.126 at 4; KA.162 at 204:14-205:7, 314:25-315:7.

Finally, appellants claim that the asset freeze is preventing them from meeting personal expenses (KBr.41; ZBr.53), but the preliminary injunction expressly excludes assets obtained after entry of the TRO that are unrelated to the allegations. KA.126 at 6. Appellants are free to obtain other income sources and may ask the district court to exercise its discretion to release frozen assets. In fact, the court has *already* released funds to three appellants. ECF No. 146.

III. APPELLANTS PROVIDE NO REASON TO DEPART FROM BINDING PRECEDENT ALLOWING MONETARY RELIEF UNDER THE FTC ACT

Appellants spend the bulk of their briefs urging the Court to overturn its decades of consistent decisions holding that Section 13(b) allows monetary relief, but the arguments merit the least response.

Under the panel precedent rule, "a later panel may depart from an earlier panel's decision only when" an "intervening Supreme Court decision is clearly on point"; no departure is allowed where "the cases dealt with different issues and were not clearly inconsistent" with existing precedent. *Atlantic Sounding Co. v*

Townsend, 496 F.3d 1282, 1284 (11th Cir. 2007) (cleaned up). Katz and Zangrillo urge the Court to overturn its longstanding precedent holding that district courts can order monetary relief and asset freezes under Section 13(b), but the Supreme Court cases on which they rely are neither "intervening" nor "clearly inconsistent" with this Court's existing law. And even if the panel precedent rule were not fatal to their position, the Court's precedent was correctly decided.

A. No Intervening Supreme Court Decision Has Changed The Law.

In *U.S. Oil & Gas*, this Court first held that Section 13(b) permits monetary relief. 748 F.2d at 1434. The holding rested on the Supreme Court's decision in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), which established that, unless limited by statutory command, a statute authorizing a district court to issue an "injunction" or its equivalent also enables "all the inherent equitable powers of the District Court" "to award complete relief," including "the recovery of that which has been illegally acquired." *Id*. at 398-400; *accord Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). And in a government enforcement context, where "the public interest is involved," the court's "equitable powers assume an even broader and more flexible character" than in private litigation. *Porter*, 328 U.S. at 398. Thus, "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted

cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell*, 361 U.S. at 291-292.

Appellants contend mainly that *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), gutted those decisions, but that decision is neither "intervening" nor controlling here. For starters, *Meghrig* was decided before this Court's leading *Gem Merchandising* decision and a large number of other Section 13(b) decisions, and for that reason alone cannot be the basis for overturning precedent.

Nor did *Meghrig* undermine *Porter* and *Mitchell*. It involved a private landowner's lawsuit to recover from a prior owner the cost of environmental cleanup under a statute that permits a "citizen suit" to "restrain" other polluting parties if contamination presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). When the case was filed, however, the landowner had already cleaned up the land, and there was no longer a danger of environmental contamination. The Court held that, on those facts, the statute "does not contemplate the award of past cleanup costs" and "quite clearly excludes waste that no longer presents such a danger." *Id.* at 485-486, 488.

Meghrig is not inconsistent, let alone "clearly" so, with *Porter* and *Mitchell*. First, unlike statutes that authorize injunctions without qualification (like Section 13(b) and the statutes in *Porter* and *Mitchell*), RCRA limits a court's remedial authority to cases of imminent and substantial danger. The lawsuit in *Meghrig*

failed that statutory criterion because the land had already been decontaminated. *Id.* at 486. Indeed, *Meghrig* expressly declined to rule that an injunctive relief order under RCRA could never require monetary remedies. *See id.* at 488 (reserving question of payment of cleanup costs arising after lawsuit is properly commenced).

Also significantly, *Meghrig* involved a private lawsuit, not (as in *Porter*, *Mitchell*, and here) a government enforcement action. As discussed, *Porter* recognizes the breadth and flexibility of equity when the public interest is involved. When purely private compensatory interests are at stake, a money judgment "resembles traditional damages far more than … restitution," as the Third Circuit noted in rejecting the claim that *Meghrig* limits remedies in government enforcement cases. *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 231 (3d Cir. 2005).

Finally, nothing in *Meghrig* purports to undermine the traditional principles of equitable remedies articulated in *Porter*. Although the Court did not accept an argument that relied partly on *Porter*, it did not suggest in so doing that it was overruling or limiting the earlier decision. *See Meghrig*, 516 U.S. at 487. Indeed, since *Meghrig*, the Court has invoked *Porter* without qualification multiple times. In particular, in *Kansas v. Nebraska*, 574 U.S. 445 (2015), the Court relied on *Porter* in support of its authority to impose a monetary remedy under its equitable

authority to apportion interstate water rights. *Id.* at 454-56, 463-64. The Court endorsed *Porter*'s teaching about the breadth of equity power where the public interest is involved. *Id.* at 456. *See also United States v. Oakland Cannabis Buyers' Co-Op.*, 532 U.S. 483, 496-497 (2001); *Miller v. French*, 530 U.S. 327, 340 (2000). It is hardly surprising that other courts of appeals have held that "*Meghrig* did not overrule or limit *Porter* and *Mitchell*." *United States* v. *Rx Depot, Inc.*, 438 F.3d 1052, 1057 n.3 (10th Cir. 2006); *accord Lane Labs*, 427 F.3d at 232.

Nor does *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), undermine this Court's precedent, as Katz contends. KBr.18-19. The case involved a private health plan seeking reimbursement from plan participants under a section of ERISA that authorized suits for "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). The Supreme Court held that the plan sought legal rather than equitable relief, and although courts of equity can grant legal relief, the phrase "other appropriate equitable relief" did not vest the court with full equitable authority. Rather, as the Supreme Court had already determined, that phrase gave the district court "*something* less than *all* relief" that could be granted by a court of equity. *Mertens v. Hewitt Assocs*, 508 U.S. 248, 258, n.8 (1993). Because the district court's equitable power was so restricted, it could not grant relief. *Great-West*, 534 U.S. at 212-14.

Great-West has no bearing here because Section 13(b), unlike the statute at issue there, does not limit the kind of relief available. In *Great-West*, Congress had "in so many words, or by a necessary and inescapable inference, restrict[ed] the court's jurisdiction in equity." *Porter*, 328 U.S. at 398. Section 13(b) contains no such limitation; under its grant of equitable jurisdiction, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Gem Merch.*, 87 F.3d at 469 (quoting *Porter*, 328 U.S. at 398). As this Court has long held (and the Supreme Court at least implicitly recognized in *Great-West*), those powers include the authority to enter an injunction that orders defendants to return the money they illegally took from consumers.

Finally, *Kokesh v. SEC*, 137 S. Ct. 1635, 1638 (2017), is not clearly inconsistent with this Court's precedent interpreting Section 13(b). The claim is that *Kokesh* ruled that a monetary remedy is a penalty, not equitable relief, and therefore cannot be awarded in equity. K.Br.29-30. ZBr.34-35.

A panel of this Court has already rejected such a claim, and there is no reason to reach a contrary determination. *Simple Health Plans*, 801 F. App'x at 688. *Kokesh* "involved a question about the applicability of a statute of limitations to disgorgement claims in an enforcement action brought by" the SEC. *Id*. It contained "no express rulings about the FTC Act or about the remedies authorized under section 13(b)." *Id*. Indeed, the Court expressly declined to rule "whether

courts possess authority to order disgorgement in SEC enforcement proceedings." *Kokesh*, 137 S. Ct. at 1642 n.3. Furthermore, *Kokesh* involved disgorgement of money to the Treasury, not payment of compensation to victims. Here, the FTC seeks relief "necessary to redress injury to consumers," KA.1 at 46 (Prayer for Relief ¶C), and the district court froze assets to preserve "the Court's ability to grant effective final relief for consumers." KA.126 at 2¶E. A "public remedy" granting monetary relief in equity is not "punitive" when it is compensatory. *Mitchell*, 361 U.S. at 293; *Kokesh*, 137 S. Ct. at 1642.

B. This Court's Section 13(b) Precedent Was Decided Correctly

Even if the panel precedent rule did not bar appellants' challenges to this Court's decisions interpreting Section 13(b), those cases were decided correctly.

Appellants' principal contention is that the Supreme Court no longer recognizes implied remedies—and monetary remedies under Section 13(b), they assert, are implied remedies. That claim rests on a basic misunderstanding of injunctions, which have always included monetary remedies. Congress knew as much when it passed Section 13(b), and it has ratified judicial interpretation of the statute since then.

Section 13(b) authorizes courts to issue a "permanent injunction." 15 U.S.C. § 53(b).[48] The remedy of injunction has always been understood to include the possibility of monetary relief. That relief is part of the express remedy, not an implied one. Thus, in *Porter*, the Supreme Court held that "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired." 328 U.S. at 399. Similarly, in *California v. American Stores Co.*, 495 U.S. 271, 281 (1990), the Court held that "on its face," a statute authorizing "injunctive relief" permitted an order requiring a company to divest itself of illegally acquired assets, a remedy functionally identical to monetary redress under Section 13(b).

That understanding is deeply rooted in the law. Two centuries ago, the Supreme Court affirmed an injunction that forbade enforcement of a state tax law against the national bank and required the return of money improperly taken from the bank. *Osborn v. Bank of the United States*, 22 U.S. 738, 870-71 (1824). Early treatises similarly recognized that an injunction may "be used to reinstate the rights of persons to property of which they have been deprived." Howard C. Joyce, *A Treatise on the Law Relating to Injunctions* §§ 1, at 2; 2a, at 5, 7 (1909).

[48] Appellants misstate that the source of the district court's injunction authority at issue here derives from the first part of Section 13(b) empowering courts "to enjoin any [illegal] act or practice" pending administrative proceedings.

Contemporaneous scholars have recognized that injunctions "may attempt to prevent harm, or to compel some form of reparation for harm already done." 1 Dan B. Dobbs, *Law of Remedies* §§ 1.1, at 7; 2.9, at 225 (2d ed. 1993); *see Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343, 1355-56 (11th Cir. 2019) (citations omitted) (disgorgement of ill-gotten gains is a long-established equitable remedy).

Appellants complain that by its nature an injunction can be only forward-facing, whereas monetary remedies are necessarily backward facing. That is not true. Courts have considered monetary remedies to serve a "forward facing" deterrent purpose, since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter*, 328 U.S. at 400; *accord Kansas*, 574 U.S. at 463 (courts may "order disgorgement of gains" in order to "deter future breaches").[49]

Given that history, when Congress adopted Section 13(b) in 1973, it would have understood that authorizing a permanent injunction meant authorizing monetary remedies. *See Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). *Porter* and *Mitchell* were settled law, and courts had recently applied their principles to

[49] For all these reasons, the Seventh Circuit wrongly decided in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 771 (7th Cir.2019), that "[r]estitution isn't an injunction."

hold that injunction provisions in the securities laws authorized the return of ill-gotten gains. *See, e.g.*, *SEC v. Texas Gulf Sulphur*, 446 F.2d 1301, 1307-1308 (2d Cir. 1971).

Since then, Congress has ratified that interpretation. *See Texas Dept. of Housing & Community* Affairs *v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (Congress' decision to amend a statute without changing operative language which has been given a uniform judicial interpretation "is convincing support for the conclusion that Congress accepted and ratified [those] unanimous holdings"). In 1994, it amended Section 13(b) to expand its venue provisions and authorize nationwide service of process, but did not alter the permanent injunction clause even though by then multiple courts of appeals (including this one) had recognized that the provision authorized orders to return ill-gotten gains.[50] The relevant Senate Report notes that Section 13(b) "authorizes the FTC to … obtain consumer redress." S. Rep. No. 103-130, at 15-16 (1993). In 2006, by which time additional courts had recognized the availability of monetary remedies under Section 13(b), Congress amended Section 5 to give the FTC

[50] See *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-1113 (9th Cir. 1982); *U.S. Oil & Gas*, 748 F.2d at 1432, 1434; *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991).

authority over aspects of foreign commerce, and it expressly stated that the new authority would include "[a]ll remedies available to the Commission … including restitution to domestic or foreign victims." Pub. L. 109-455, § 3, 120 Stat. 3372 (2006) (codified at 15 U.S.C. 45(a)(4)).[51]

Finally, appellants contend Section 13(b) cannot provide a monetary remedy because other enforcement provisions of the FTC Act provide more explicit forms of relief than Section 13(b). KBr.20-22; ZBr.22-24. They are wrong.

Congress provided the Commission multiple ways to enforce the FTC Act: rulemaking (15 U.S.C. § 57a); administrative proceedings (*id*. § 45(b)); and direct federal court litigation (*id*. §§ 53(b) & 57b). Which path to choose lies "in the informed discretion of the administrative agency," *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), but each approach reflects Congress's balancing of power between the Commission and the federal courts.

Section 19 authorizes courts to order relief "necessary to redress injury" against persons who either violate a Commission rule or have engaged in conduct

[51] Katz gets no help from a Senate report stating that a key purpose of Section 13(b) was to authorize preliminary injunctions in aid of administrative proceedings. KBr.22-23. True, but the provision also authorized permanent injunctions, and the same report explained that the FTC could use that authority when it "does not desire to expand upon the prohibitions of the [FTC] Act" through administrative adjudication. Proceeding directly to court will better utilize "Commission resources" and enable cases to "be disposed of more efficiently." S. Rep. No. 93-151, at 30-31 (1973).

as to which a Commission cease-and-desist order "is applicable." 15 U.S.C. § 57b. Appellants wrongly contend that Section 19's "redress" provision means that Section 13(b) cannot be read to provide the same type of relief. KBr.20-22; ZBr.23, 25. Congress said otherwise, including a savings clause in Section 19 stating that the "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. § 57b(e). Section 19 therefore does not restrict remedies available under Section 13(b) or any other provision of the Act. *See FTC v. Commerce Planet*, 815 F.3d 593, 599 (9th Cir. 2016); *Bronson Partners*, 654 F.3d at 366-367; *Sec. Rare Coin*, 931 F.2d at 1314-15. This Court likewise held that Section 19 does not represent "a clear … legislative command" to limit the "full range of equitable powers under section 13(b)." *Gem Merch.*, 87 F.3d at 469-70.

Section 5(*l*) allows the Commission to seek civil penalties against parties that violate an administrative cease-and-desist order and also permits courts to award "mandatory injunctions and such other and further equitable relief as they deem appropriate" to enforce an order. 15 U.S.C. 45(*l*). Katz is wrong that the inclusion of "other and further equitable relief" in Section 5(*l*) but not Section 13(b) means that Congress did not intend Section 13(b) to authorize returning money to consumers. KBr.21; *see also* ZBr.23, 25. The section's primary remedy is a civil penalty for violation of a cease-and-desist order; additional language was

thus necessary to authorize equitable relief appropriate to enforce the order. No such additional language was necessary in Section 13(b) because the provision already authorized a permanent injunction.

Reading Section 13(b) to allow monetary remedies does not render the remedies in Section 19 and Section 5(*l*) "superfluous." KBr.22; ZBr.25. Section 5(*l*) is not superfluous because it is the only provision that allows the FTC to sue for violations of a cease-and-desist order, and it does not provide for the return of gains from the misconduct that led to the order as Section 13(b) does. Section 19 allows remedies, such as "damages," that Section 13(b) does not.

Moreover, all three sections support the Commission's discretion to choose among the different enforcement paths Congress has provided. When the Commission sues under Section 13(b) to end illegal practices and return money to consumers, it cedes to the court the determination whether there has been a violation. By contrast, when the Commission chooses to proceed under Sections 5(*l*) or 19, it retains its full power to determine that particular conduct is illegal through its administrative process, but checks that power by providing procedural safeguards to judicial enforcement of the Commission's decrees, such as the statute of limitations in Section 19. 15 U.S.C. § 57b(d). Each enforcement provision thus serves an independent purpose whether or not similar relief can be directed under them.

CONCLUSION

For the foregoing reasons, the district court's order granting a preliminary injunction should be affirmed.

Respectfully submitted,

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June 8, 2020

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the Court's April 24, 2020 Order permitting the Federal Trade Commission to file a response brief containing no more than 16,000 words, because it contains 15,699 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it 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 it was prepared using Microsoft Word 2010 in 14 point Times New Roman type.

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CERTIFICATE OF SERVICE

I certify that on June 8, 2020, I served the foregoing brief on counsel of record using the Court's electronic case filing system. All counsel of record are registered ECF filers.

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