No. 11-15330

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

INC21.COM CORPORATION, *et al.*
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE FEDERAL TRADE COMMISSION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DeMILLE-WAGMAN
Assistant General Counsel for Litigation

DAVID L. SIERADZKI
Attorney, Office of General Counsel
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
tel: (202) 326-2092
fax: (202) 326-2477
dsieradzki@ftc.gov

Of Counsel:

DOUGLAS V. WOLFE
SANDHYA P. BROWN
KERRY O'BRIEN
Attorneys

Bureau of Consumer Protection
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

August 17, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 5

A. LEC Billing and "Cramming" 5

B. Inc21's Telemarketing and LEC Billing Practices 7

C. Proceedings Below 11

1. The FTC's Complaint 11

2. The Summary Judgment Order 12

3. Modifying the Consumer Redress Remedy 14

STANDARDS OF REVIEW 16

SUMMARY OF ARGUMENT 19

ARGUMENT 25

I. INC21'S APPEAL FAILS FOR LACK OF JURISDICTION 25

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT 28

A. The District Court Did Not Err In Crediting the Testimony of the FTC's Expert 30

B. Unrebutted Evidence Confirms that Inc21's Placement of Unauthorized Charges on Customers' Phone Bills Was a Deceptive Practice that Violated the FTC Act 34

C. Inspector Wong's Purportedly "Tainted" Search is a Red Herring .. 38

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FASHIONING AN EQUITABLE REMEDY 41

A. Inc21's Contention that the District Court Lacked Authority to Award Monetary Equitable Relief is Meritless 41

B. The District Court Reasonably Accepted the FTC's Calculation that Inc21 Swindled Nearly $38 Million From Customers 48

C. The District Court's System for Distributing Restitution Funds to Consumers Was Not an Abuse of Discretion 52

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE AMOUNT OF FROZEN FUNDS THAT IT RELEASED TO PAY INC21'S ATTORNEYS' FEES 54

CONCLUSION 57

STATEMENT OF RELATED CASES 58

CERTIFICATE OF COMPLIANCE 58

CERTIFICATE OF SERVICE 58

TABLE OF AUTHORITIES

Page

Cases

Abney v. United States, 431 U.S. 651 (1977) 28

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 17

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 16

Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257 (1978) 25

Cachil Dehe Band of Wintun Indians v. California,
618 F.3d 1066 (9th Cir. 2010) 18

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 55, 56

Celotex Corp. v. Cattrett, 477 U.S. 317 (1986) 17

Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.,
690 F.2d 1240 (9th Cir. 1982) 25

CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011) 44

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 27

Cunningham v. David Special Commitment Center,
158 F.3d 1035 (9th Cir. 1998) 27

Daimlerchrysler Corp. v. Cuno, 547 U.S. 332 (2006) 17

Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511 (9th Cir. 2011) 17

Englert v. MacDonell, 551 F.3d 1099 (9th Cir. 2009) 28

FSLIC v. Ferm, 909 F.2d 372 (9th Cir. 1990) 55

FTC v. Amy Travel Serv., Inc., 875 F.2d 564 (7th Cir.1989) 38, 43

FTC v. Assail, Inc., 410 F.3d 256 (5th Cir. 2005) 19, 55

FTC v. Cyberspace.com, LLC, 453 F.3d 1196 (9th Cir. 2006) 7, 13, 35

FTC v. Direct Marketing Concepts, Inc., 624 F.3d 1 (1st Cir. 2010) 43

FTC v. Gem Merchandising Corp., 87 F.3d 466 (11th Cir. 1996) 43, 46, 47

**FTC v. Febre*, 128 F.3d 530 (7th Cir. 1997) 51, 53, 54

FTC v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993) 38, 45

FTC v. Freecom Communications, Inc., 401 F.3d 1192 (10th Cir. 2005) 37, 43

FTC v. Gill, 265 F.3d 944 (9th Cir. 2001) 13

**FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982) 43, 44, 45, 46

FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282 (D. Minn. 1985) 38

**FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal. 2010)
(*Preliminary Injunction Order*), *appeal dismissed* .... *passim*

**FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975 (N.D. Cal. 2010)
(*Summary Judgment Order*), *appeal pending* .... *passim*

FTC v. Magazine Solutions, Inc., 2011 WL 2489916 (3d Cir. 2011) 43

**FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) 13, 41, 48, 53

**FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994) 43, 45

FTC v. Publishing Clearing House, Inc., 104 F.3d 1168 (9th Cir. 1996) 17, 51

FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991) . 38, 43

**FTC v. Stefanchik*, 559 F.3d 924 (9th Cir. 2009) .... *passim*

**FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006) .... *passim*

FTC v. World Wide Factors, Ltd., 882 F.2d 344 (9th Cir. 1989) 55

Grimes v. Comm'r of Internal Rev., 82 F.3d 286 (9th Cir. 1996) 41

Horphag Research Ltd. v. Garcia, 475 F.3d 1029 (9th Cir. 2007) 17

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 40

Kemp v. AT&T, 393 F.3d 1354 (11th Cir. 2004) 6, 36

Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (*en banc*) 17

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 18

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 44

Mitchell v. Robert DeMario Jewelry, Inc. 361 U.S. 288 (1960) 44

North Haven Board of Ed. v. Bell, 456 U.S. 512 (1982) 48

NLRB v. South Bay Daily Breeze, 415 F.2d 360 (9th Cir. 1969) 41

Old Chief v. United States, 519 U.S. 172 (1997) 18

Pacificare, Inc. v. Martin, 1 F.3d 963 (9th Cir. 1993) 27

**Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) 44, 45, 46

Public Serv. Co. of Colo. v. Batt, 67 F.3d 234 (9th Cir. 1995) 27

Rivera v. National R.R. Passenger Corp., 331 F.3d 1074 (9th Cir. 2003) 18

Scott v. Younger, 739 F.2d 1464 (9th Cir. 1984) 25

SEC v. Capital Consultants, LLC, 397 F.3d 733 (9th Cir. 2004) (*en banc*) 52

SEC v. First City Financial Corp., 890 F.2d 1215 (D.C. Cir. 1989) 54

SEC v. J.T. Wallenbrock & Assocs., 440 F.3d 1109 (9th Cir. 2006) 48

SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072 (9th Cir. 2010) 19

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940) 46

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 16-17

Stone v. City & County of San Francisco, 968 F.2d 850 (9th Cir. 1992) 19

United States ex rel. Meyer v. Horizon Health Corp.,
565 F.3d 1195 (9th Cir. 2009) 44

United States v. Alisal Water Corp., 431 F.3d 643 (9th Cir. 2005) 19

United States v. Int'l Bhd. of Teamsters, 964 F.2d 181 (2d Cir. 1992) 46

United States v. Janis, 428 U.S. 433 (1976) 40

United States v. Monsanto, 491 U.S. 600 (1989) 55-56

United States v. Payment Processing Ctr., Ltd.,
439 F. Supp. 2d 435 (E.D. Pa.) 56

*United States v. Real Property Located at 13328 and 13324
State Highway 75, North*, 89 F.3d 551 (9th Cir. 1996) 52

**Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002) 18, 36

Constitutional and Statutory Provisions

United States Constitution
Fourth Amendment 22, 40
Sixth Amendment 55-56

Federal Trade Commission Act
Section 5(a), 15 U.S.C. § 45(a) .... *passim*
Section 5(n), 15 U.S.C. § 45(n) 13
Section 13(b) 15 U.S.C. § 53(b) .... *passim*
Section 19, 15 U.S.C. § 57b .... *passim*
Section 19(e), 15 U.S.C. § 57b(e) 47

Telemarketing Fraud and Abuse Prevention Act
15 U.S.C. § 6102(c) 1
15 U.S.C. § 6105(b) 1

Title 28, U.S. Code: Judiciary and Judicial Procedure
28 U.S.C. § 1291 .... 1, 20, 28
28 U.S.C. § 1292(a) 1, 20, 28
28 U.S.C. § 1331 1
28 U.S.C. § 1337(a) 1
28 U.S.C. § 1345 1

Federal Trade Commission Act Amendments of 1994,
Pub. L. No. 103-312 (1994) 47

Rules

Telemarketing Sales Rule, 16 C.F.R. Part 310 .... *passim*
16 C.F.R. § 310.3(a)(1)(vii) 12
16 C.F.R. § 310.4(a)(6)(i) 12
16 C.F.R. § 310.3(b)(3)(ii) 7, 8, 11

Federal Communications Commission Rules
47 C.F.R. § 8.3 31

Federal Rules of Appellate Procedure
Fed. R. App. P. 4(a) 25
Fed. R. App. P. 4(a)(1)(B) 1
Fed. R. App. P. 4(a)(4)(A) 1, 25

Federal Rules of Civil Procedure
Fed. R. Civ. P. 59(e) 4, 14, 25

Other Authorities

S. Rep. No. 103-130 (1993) 47

FCC, Notice of Proposed Rulemaking, *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (Cramming)*, FCC 11-106, Docket Nos. 11-116 *et al.* (July 12, 2011) (available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-11-106A1.pdf) 7

FTC Comments to the FCC, *Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, Docket Nos. 09-158 *et al.*, (October 29, 2009) (available at http://www.ftc.gov/os/2009/10/V100000consumerinfocomments.pdf) 7

FTC Public Forum, "Examining Phone Bill Cramming" (May 11, 2011) (available at http://www.ftc.gov/bcp/workshops/cramming) 7

Abbreviations Used

Br.	Inc21's initial brief (filed June 27, 2011)
Commission	Plaintiff-Appellee Federal Trade Commission
DE.	Docket Entry in the underlying district court case
ER.	Initial Excerpts of Record (filed by appellant Inc21)
ER.Supp.	Supplemental Excerpts of Record (filed by appellee FTC)
FTC	Plaintiff-Appellee Federal Trade Commission
FTC Act	Federal Trade Commission Act, 15 U.S.C. §§ 41-58
Inc21	Defendants-Appellants Inc21.com Corp., JumPage Solutions, Inc., GST USA, Inc., Roy Yu Lin, and John Yu Lin (collectively)
LEC	Local Exchange Carrier (*i.e.*, local telephone company)
Order Implementing Distribution Plan	Order Implementing Distribution Plan (January 25, 2011) [DE.193] [ER.003]
Order Modifying Remedy (or "OMR")	Order on Pending Motions Regarding the Judgment, Permanent Injunction, and Consumer Redress Plan (October 10, 2010) [DE.174] [ER.008-021]
Preliminary Injunction Order (or "PIO")	Memorandum Opinion and Findings in Support of Preliminary Injunction (February 19, 2010) [DE.57] [ER.085-103]; reported, 688 F. Supp. 2d 927 (N.D. Cal. 2010)
Summary Judgment Order (or "SJO")	Order on Cross Motions for Summary Judgment (September 21, 2010) [DE.162] [ER.025-072]; reported, 745 F. Supp. 2d 975 (N.D. Cal. 2010)
Telemarketing Act	Telemarketing Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108
TSR	Telemarketing Sales Rule, 16 C.F.R. Part 310

JURISDICTIONAL STATEMENT

The district court's subject-matter jurisdiction over the civil action below is founded on 28 U.S.C. §§ 1331 and 1337(a), because the case arises under federal statutes regulating commerce. Moreover, 28 U.S.C. § 1345 supplies jurisdiction over this case, in which plaintiff is a federal agency. Also, 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c) and 6105(b) provide jurisdiction over FTC suits to enforce the FTC Act and the Telemarketing Act.

This Court lacks jurisdiction over this appeal, as discussed in Part I of the Argument (*infra* 25-28). Inc21 failed to file a timely notice of appeal with respect to the Summary Judgment Order and the Order Modifying Remedy. Fed. R. App. P. 4(a)(1)(B), 4(a)(4)(A). Moreover, the Court lacks jurisdiction to review the district court's Order Adopting Implementation Plan, because that one-page document is neither an appealable "final decision" under 28 U.S.C. § 1291, nor does it grant, modify, continue, or dissolve an injunction for purposes of an appeal under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Whether this Court has jurisdiction over this appeal.

2. Whether the district court erred in finding no genuine issues of material fact, under correctly articulated legal standards, that Inc21's cramming of unauthorized charges onto consumers' phone bills and its collection of payments for services that those consumers never agreed to purchase were deceptive acts and practices, in violation of the FTC Act and the Telemarketing Sales Rule.

3. Whether the district court had authority to order Inc21 to pay monetary equitable relief to redress the harm it caused, and whether it abused its discretion in determining the amount of such relief.

4. Whether the district court abused its discretion in limiting the amount of frozen assets that it released to pay Inc21's attorneys' fees.

STATEMENT OF THE CASE

The Commission brought the underlying civil law enforcement action to halt defendants'[1] unfair and deceptive commercial practices and to obtain redress for consumers harmed by that misconduct. The Commission alleged that the defendants swindled millions of dollars from tens of thousands of consumers using a practice called "cramming" – *i.e.*, tacking unauthorized charges onto phone bills for services that consumers never actually agreed to order. On January 5, 2010, the FTC filed a Complaint [DE.1] [ER283-295] in the U.S. District Court for the Northern District of California, charging that defendants had committed "unfair" and "deceptive" practices, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and provisions of the Telemarketing Sales Rule, 16 C.F.R. Part 310 ("TSR").

The district court issued a Temporary Restraining Order on January 19, 2010 [DE.28] [ER.104-109], and a Preliminary Injunction on February 19, 2010 [DE.57-58] [ER.081-099] (reported as *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927 (N.D.

---

[1] The defendants are two individuals, brothers Roy Yu Lin and John Yu Lin, and three corporate entities that they jointly operated as a common enterprise: Inc21.com Corp. (owned entirely by Roy Yu Lin), JumPage Solutions, Inc. (owned entirely by John Yu Lin), and GST U.S.A., Inc. (purportedly owned by Sheng Lin, father of the Lin brothers, who was named as a relief defendant below but is not a party to this appeal). The defendants are referred to collectively as "Inc21."

Cal. 2010)). Inc21 filed a timely notice of appeal of the *Preliminary Injunction Order*, but never submitted an opening brief; and this Court dismissed the appeal for failure to prosecute. *FTC v. Inc21.com, et al.*, No. 10-15608, Order (9th Cir., June 1, 2010) [ER.Supp.1-2].

Following discovery and a hearing, the district court granted the FTC's motion for summary judgment on September 21, 2010. Summary Judgment Order [DE.162] [ER.025-072] (reported as *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975 (N.D. Cal. 2010)). The district court concluded that there was no genuine issue of material fact regarding Inc21's violations of the FTC Act and the TSR; held it liable on every count in the Complaint; and adopted a permanent injunction prohibiting further violations and ordering Inc21 to pay nearly $38 million in restitution to consumers, to remedy the harm caused by its unlawful activities.

The FTC timely moved, pursuant to Fed. R. Civ. P. 59(e), to amend the permanent injunction's provisions on distributing redress payments to consumers. FTC Mo. to Amend [DE.172] [ER.Supp.3-32]. The district court granted the FTC's motion and ordered that monetary equitable relief be disbursed on a *pro rata* basis. Order Modifying Remedy [DE.174] [ER.008-021] (October 18, 2010).

As directed by the district court (*id.* 13 [ER.020]), the FTC submitted an implementation plan and an explanation of its details on November 18, 2010. *See*

FTC's Proposed Plan for Distribution of Redress Funds [DE.184] [ER.Supp.33-46]; Declaration in Support [DE.184-1] [ER.Supp.47-52]; Proposed Order [DE.184-2] [ER.004-007]. The district court approved a slightly modified version of the FTC's proposal in its one-page Order Implementing Distribution Plan (January 25, 2011) [DE.193] [ER.003].

Inc21 filed a Notice of Appeal on February 7, 2011 [DE.196] [ER.001-002], seeking review of the Summary Judgment Order, the Order Modifying Remedy, and the Order Implementing Distribution Plan.[2]

STATEMENT OF FACTS

A. LEC Billing and "Cramming"

Local telephone companies (also known as "local exchange carriers" or "LECs") send monthly bills to their residential and business customers that typically list detailed – and sometimes confusing – itemized charges. Consumers' potential confusion may be exacerbated when their monthly LEC phone bills also list charges for services provided by other vendors, such as long-distance

---

[2] On February 10, 2011, Inc21 filed an emergency motion with this Court seeking a stay pending appeal. The FTC, in its February 25 opposition, argued (among other things) that this Court lacks jurisdiction over Inc21's appeal because the notice of appeal was not timely filed. This Court denied the stay sought by Inc21, while declining to address the FTC's jurisdictional arguments "without prejudice to renewing the arguments in the answering brief." *FTC v. Inc21.com, et al.,* No. 11-15330, Order 2 (9th Cir., March 25, 2011) [ER.Supp.2].

companies, Internet service providers, and others. Since the late 1980s, LECs have offered billing and collection services to enable third parties to present their charges on LEC phone bills. The LECs then collect payments for those charges from consumers. *See* PIO 1-2 [ER.085-086] (discussing origins and history of LEC billing).[3] "Although charges from third-party vendors are listed separately on these telephone bills from LEC-related charges, the 'total amount due' presented to customers *includes* third party charges." SJO 20 [ER.044] (emphasis in original).

LEC billing is attractive to third-party vendors because "[c]ustomers pay third-party vendor charges directly to the LECs by simply paying the 'total amount due' on their phone bills." *Id.* From the vendors' viewpoint, consumers may be more likely to pay LEC-billed charges than charges on vendors' own invoices, due to the "common and well-founded perception held by consumers that they must pay . . . all phone bill charges . . . in order to maintain phone service." SJO 28 [ER.052] (citing *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006), and *Kemp v. AT&T*, 393 F.3d 1354, 1360 (11th Cir. 2004)).

---

[3] "Billing aggregators" play an important role in the LEC billing process. Billing aggregators serve as intermediaries between LECs and vendors, arranging for vendors' charges to appear on customers' phone bills and managing the disbursement of funds to vendors.

However, "[s]ince its institution, LEC billing has attracted fraudsters," who take advantage of the fact that many consumers often do not carefully "scrutinize their phone bills every month before paying them." PIO 2 [ER.086]. The practice of placing unauthorized charges on phone bills for purported services that the consumers never actually agreed to purchase is known as "cramming." *Id.*; SJO 22 n.17 [ER.046]. Both the FTC[4] and the Federal Communications Commission ("FCC")[5] have brought enforcement actions and adopted rules to combat cramming. Nonetheless, as this case demonstrates, the practice persists.

B. Inc21's Telemarketing and LEC Billing Practices

Inc21 engaged telemarketers to place cold calls to individuals and small businesses, purportedly to sell Internet-related services such as website design, "online yellow pages" listings, placement of advertisements next to related web search results, and email fax services. SJO 3-7 [ER.027-031]. In reality, however,

---

[4] *See, e.g., FTC v. Cyberspace.com, LLC*, 453 F.3d 1196 (9th Cir. 2006); *FTC v. Verity*, *supra*; FTC Comments to the FCC, *Consumer Information and Disclosure*, at 10 n.31 (October 29, 2009) [ER.Supp.85] (listing FTC enforcement actions); TSR, 16 C.F.R. § 310.3(b)(3)(ii). The Commission recently held a public forum on "Examining Phone Bill Cramming" (May 11, 2011) (transcript and related materials available at http://www.ftc.gov/bcp/workshops/cramming).

[5] *See, e.g.,* Notice of Proposed Rulemaking, *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (Cramming)*, FCC 11-106 (July 12, 2011), ¶¶ 1-18 [ER.Supp.91-98] (discussing FCC enforcement and rulemaking proceedings).

Inc21 completed few sales of these services. *Id.* 17-19, 23 [ER.041-043, 047]. Rather, in most cases, Inc21 used these telemarketing calls to obtain enough telephone billing information and other data to make it appear to LECs and billing aggregators that the recipients of these calls had actually agreed to these sales, when, in fact, they had not. In this way, Inc21 was able to place charges for these services on phone bills of "tens of thousands" of residential and business consumers. *Id.* 2 [ER.026]. Inc21 collected the billed amounts even though it knew that the vast majority of its purported customers had not agreed to purchase its products and had not authorized the charges. *Id.*

The TSR requires vendors who use telemarketing to create and retain audio recordings of the material portions of their sales calls to each customer, and to provide such recordings upon request to a customer or billing agent. 16 C.F.R. § 310.3(b)(3)(ii). This requirement enables these parties to verify that the customer has actually agreed to purchase and be billed for the services. LECs and billing aggregators frequently insist that vendors such as Inc21 submit these recordings to independent companies for third-party verification ("TPV"). Inc21 and its telemarketing call centers routinely falsified these audio recordings. SJO 14 [ER.038]. Inc21's telemarketers generated recordings that were spliced, cropped, or otherwise digitally altered to make it appear that a customer had

consented to a sale. For example, they used techniques such as splicing separate portions of conversations that did not relate to an agreement to purchase a service (*e.g.*, inserting "yes" answers to questions when no such answers were actually given); recording "conversations" in which no customer was on the line; and including purported affirmative responses in the voices of different individuals, automated voices, or voices of telemarketing agents attempting to imitate customers. *Id.* 13-14 [ER.037-038]. Even in the minority of cases where the TPV process successfully identified invalid recordings – indicating that customers had not really authorized the purported "sales" – Inc21 continued to bill and collect charges and failed to offer refunds unless a customer specifically called to complain. *Id.* 16-17 [ER.040-041].

As customer complaints about Inc21's unauthorized billings began to mount, the LECs and billing aggregators who were on the receiving end of these complaints gave Inc21 repeated warnings, and suspended its LEC billing privileges on numerous occasions. *Id.* 23-24 [ER.047-048]. Inc21 ignored these warnings; "lied to LECs and billing aggregators" about its plans to improve its practices; and "circumvented safeguards designed to prevent known fraudsters from re-entering the LEC-billing industry." *Id.* 25 [ER.049]. For example, in applications for LEC billing privileges, Inc21's principals signed numerous false affidavits, appropriated

the identities of others, forged signatures, and provided falsified information, so as to conceal their own involvement. *Id.* 24-25 [ER.048-049].

The FTC's expert witness, Dr. Howard Marylander, conducted a survey of a representative sample of over 1,000 Inc21 customers. The survey showed that "nearly 97 percent of defendants' 'customers' had not agreed to purchase the products for which they had been billed, 96 percent of these 'customers' had not received any services from defendants, and only five percent of these 'customers' were even aware that charges for defendants' products had been placed on their telephone bills." SJO 28 [ER.052].

Moreover, the district court had additional evidence corroborating this fact. In the Temporary Restraining Order, the court ordered the defendants to "mail a verification letter to each of their current customers asking them whether they had agreed to purchase defendants' products and warning them that failure to respond might result in a discontinuation of their services. Out of 10,924 letters mailed to defendants' 'customers,' only 36 returned the mailing and indicated that they had agreed to purchase defendants' products." SJO 17 n.10 [ER.041]; *see* PIO 6-9, 13 [ER.090-093, 097] (more detailed description); [ER.107] (relevant ordering paragraphs in Temporary Restraining Order). Nonetheless, Inc21 continued its

monthly billing of non-consenting "customers" and "would have continued to bill them if not for this lawsuit." SJO 17 [ER.041].

Billing records confirm that, from January 2004 through January 2010, consumers paid $37,442,602.89 in charges that Inc21 had placed on their phone bills. Inc21 also obtained at least $331,346.54 indirectly, through contractual arrangements with other vendors that used LEC billing to collect on Inc21's behalf. SJO 26 & n.18 [ER.050]. These net amounts exclude refunds that LECs or billing aggregators had credited back to consumers. *Id.* 26, 45 [ER.050, 069].

C. Proceedings Below

(1) The FTC's Complaint

The FTC's January 5, 2010, Complaint [DE.1] [ER283-295] included five counts regarding Inc21's conduct – two alleging violations of the FTC Act, and three alleging violations of the TSR. Specifically, Count One of the Complaint alleged that Inc21's billing practices were deceptive, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Count Two alleged that Inc21's billing practices were unfair, in violation of the same statute. Count Three alleged that Inc21 failed to disclose material terms of "negative option" offers (which required consumers to take affirmative action to avoid incurring charges), thus violating 16 C.F.R. § 310.3(a)(1)(vii). Count Four alleged that Inc21 had repeatedly failed to obtain

consumers' informed consent before submitting billing information for payment. 16 C.F.R. § 310.4(a)(6)(i)). And Count Five alleged that it failed to maintain audio recordings of sales calls to verify that consumers actually authorized the services and charges, as required by 16 C.F.R. § 310.3(a)(3)(ii)).[6]

The district court issued a Temporary Restraining Order on January 19, 2010 [DE.28] [ER.104-109], and a Preliminary Injunction Order on February 19 [DE.57-58] [ER.81-103]. The parties engaged in discovery under an accelerated schedule, as Inc21 had requested. SJO 27 [ER.051].

(2) The Summary Judgment Order

On June 17, both the FTC and Inc21 filed motions for summary judgment. The district court held a hearing on September 15; and on September 21, it issued the Summary Judgment Order, granting the FTC's motion and denying that of Inc21. The district court found no genuine issue of material fact for trial as to each element of each of the counts in the FTC's complaint. With respect to the first count (deceptive billing practices), the court concluded that there was no genuine issue of material fact that Inc21 had billed consumers for services they had not

---

[6] A sixth count in the complaint was directed against relief defendant Sheng Lin. It alleged that he had received funds obtained as a result of the other defendants' unlawful acts, and demanded that he repay those funds for customer restitution.

agreed to purchase, and that, as a matter of law, this false representation was deceptive, in violation of Section 5(a) of the FTC Act. SJO 27-32 [ER.051-056].[7]

On the second count (unfair billing practices), the district court held that, because consumers had not agreed to the charges, they had no reason to scrutinize their bills, and therefore could not reasonably avoid the charges. The court also found that almost none of Inc21's customers received any benefit. Accordingly, as a matter of law, Inc21's practices were unfair. *Id.* 32-34 [ER.056-058].[8]

As for the third, fourth, and fifth counts (TSR violations), the district court held that there was no genuine issue that Inc21 failed to disclose the negative option feature of the services it was selling, failed to obtain consumers' express consent before imposing charges, and failed to obtain verifiable authorization prior to imposing charges on consumers' telephone bills. *Id.* 36-40 [ER.060-064]. The TSR violations alleged in the complaint do not apply to sales to businesses; but the district court found that Inc21's telemarketers had, in fact, placed numerous calls to

---

[7] A deceptive practice consists of (i) a misrepresentation or omission that (ii) is likely to mislead consumers acting reasonably under the circumstances and (iii) is material. *SJO* 28 [ER.052]; *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *FTC v. Cyberspace.com*, 453 F.3d at 1199-1200.

[8] An practice is unfair if it (i) causes or is likely to cause substantial injury to consumers, (ii) that consumers cannot reasonably avoid, and (iii) that is not outweighed by countervailing benefits to consumers or to competition. *SJO* 32 [ER.056]; 15 U.S.C. § 45(n); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010).

individuals and other entities covered by the TSR, and that Inc21's purported subjective intent to target calls only to businesses was irrelevant. *Id.* 38 [ER.062].[9]

Having found the defendants liable on every count of the FTC's complaint, the district court, *inter alia*, permanently enjoined Inc21 from using LEC billing and imposed limits on its future telemarketing activities. *Id.* 41-42 [ER.065-066]. The district court also ordered Inc21 to disgorge $37,970,929.57, the entire amount that had been swindled from consumers during the period of January 2004 to January 2010 (excluding refunds already received by those consumers). *Id.* 44-47 [ER.068-071]. All of the defendants, including Roy Yu Lin and John Yu Lin individually, were held jointly and severally liable for the entire restitution obligation. *Id.* 34-36, 47 [ER.058-060, 071]. The district court directed that redress funds be distributed to consumers who submit claim forms and "acknowledge, under penalty of perjury, that they were billed without authorization and are entitled to the refund amount" set forth on the form. *Id.* 47 [ER.071].

(3) *<u>Modifying the Consumer Redress Remedy</u>*

On October 8, 2010, the FTC moved, pursuant to Fed. R. Civ. P. 59(e), to amend the injunctive provisions in the Summary Judgment Order governing

---

[9] The court also granted summary judgment on Count Six, concluding that relief defendant Sheng Lin received funds from Inc21's illegal practices to which he had no legitimate claim. Inc21 does not challenge the court's decision on this count.

distribution of redress funds to customers. FTC Mo. to Amend 10-20 [DE.172] [ER.Supp.13-23] The FTC argued that it would be nearly impossible to use the claim-form process set forth in the order, due to the manner in which the defendants, LECs, and billing aggregators maintained their records, and because the amount available to distribute to injured consumers likely would be far less than the nearly $38 million in restitution ordered by the district court. *Id.* 12-15 [ER.Supp.15-18]. The FTC also argued that requiring deceived customers to attest to the amount of their injury subject to penalty of perjury would unfairly exclude many consumers who lacked sufficient records to support such an attestation. *Id.* 15-16 [ER.Supp.18-19].

Thus, the FTC argued, it would be most straightforward and equitable to distribute funds on a *pro rata* basis, from an FTC-administered pool of funds, using a reasonable estimate of the amount each customer is owed. *Id.* 16-19 [ER.Supp.19-22]. Thus, if the pool held assets amounting to only about 20% of the total amount of restitution ordered by the district court,[10] then each customer would receive approximately 20% of the estimated refund to which the customer was entitled. *See* OMR 11-12 [ER.018-019] (summarizing FTC's position).

---

[10] The FTC later estimated that the pool of assets available for distribution would likely amount to $5.2 million or less. [DE.184] at 11 n.16 [ER.Supp.43].

On October 18, 2010, the district court granted the FTC's motion to amend by adopting revised language for the problematic provision in the permanent injunction. *See* Order Modifying Remedy 4-5 [ER.011-012]. The court also directed the FTC "to submit a reasonably detailed description of the process" for estimating the losses incurred by each customer, together with "a proposed order setting forth the essential details of its *pro rata* redress program." *Id.* 13 [ER.020]. The FTC did so on November 18, 2010. *See* FTC's Proposed Plan for Distribution of Redress Funds [DE.184] [ER.Supp.33-46]; Declaration in Support [DE.184-1] [ER.Supp.47-52]; Proposed Order [DE.184-2] [ER.004-007].

On January 25, 2011, the district court entered its Order Implementing Distribution Plan endorsing the FTC's proposed plan, subject to three additional conditions: that refund check envelopes not resemble junk mail; that they contain notices explaining recipients' rights; and that records be kept of check amounts, recipients, and dates on which checks are cashed or deposited. [DE.193] [ER.003].

STANDARDS OF REVIEW

1. *Appellate Jurisdiction*. "[E]very federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction," *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), and the "requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception." *Steel*

Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). "[T]he party asserting federal jurisdiction when it is challenged has the burden of establishing it." *Daimlerchrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

2. Summary Judgment. This Court reviews a district court's grant of summary judgment *de novo*, and will affirm if it concludes that "the district court correctly applied the relevant substantive law" and properly found no "genuine issues of material fact." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (*en banc*). In reviewing a "district court's grant of summary judgment," this Court scrutinizes "the district court's findings of fact for clear error." *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 518 (9th Cir. 2011). Once the moving party satisfies its initial responsibility to identify evidence demonstrating the absence of genuine issues of material fact, "the burden shifts to the [opposing] party to set forth . . . specific facts showing that there is a genuine issue for trial.'" *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007); *see also Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). To defeat summary judgment, the opposing party must present sufficient probative evidence to support a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *see also FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1996); *FTC v. Stefanchik*, 559 F.3d 924, 927-28 (9th Cir. 2009). It cannot prevail by

"simply show[ing] . . . some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); offering mere "[c]onclusory allegations unsupported by factual data," *Rivera v. National R.R. Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir. 2003), or relying on "self-serving testimony uncorroborated by other evidence." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002).

3. *Evidentiary Rulings*. "The standard of review applicable to the evidentiary rulings of a district court is abuse of discretion." *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997). That same deferential standard applies to district courts' decisions, in summary judgment proceedings, to admit or exclude expert testimony. *General Electric Co. v. Joiner*, 522 U.S. 136, 142-43 (1997).

4. *Equitable Remedies*. This Court "review[s] a district court's choice of remedy for abuse of discretion," *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066, 1082 (9th Cir. 2010). In applying its abuse of discretion standard, this Court reviews "the district court's findings of fact, and its application of those findings of fact to the correct legal standard," for whether those findings were "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (*en banc*).

In particular, given the "broad equitable remedial powers" of federal district courts, this Court will find a "choice of remedies" to be an abuse of discretion only "when no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found." *Stone v. City & County of San Francisco*, 968 F.2d 850, 861 & n.19 (9th Cir. 1992). *See also United States v. Alisal Water Corp.*, 431 F.3d 643, 654 (9th Cir. 2005) (reviewing "scope of the injunctive relief" for abuse of discretion); *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (reviewing "orders of disgorgement" for abuse of discretion); *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir.1986) (same standard used to review attorneys' fee awards). *Accord*, *FTC v. Assail, Inc.*, 410 F.3d 256, 262 (5th Cir. 2005) (reviewing for abuse of discretion a district court's decision on a "request to amend an asset freeze order in order to pay attorney's fees").

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review the Summary Judgment Order or the Order Modifying Remedy, because Inc21 missed the mandatory and jurisdictional deadline to file a notice of appeal of either order. The Order Implementing Distribution Plan merely interpreted, but did not amend, the two earlier orders, so it did not toll the deadline; and the latter order is neither a final decision nor a grant

or modification of an injunction, and thus is unappealable under 28 U.S.C. §§ 1291 and 1292(a)(1). (Part I, *infra*.)

If this Court determines that it does have jurisdiction, then it should affirm the district court's decision. The FTC presented "overwhelming" evidence that Inc21 operated a telemarketing scheme, and that it defrauded consumers out of nearly $38 million. Inc21 does not dispute the basic elements of the scheme: that it placed cold calls to consumers purporting to sell various Internet-related services, which only a minute number actually agreed to buy. Nor does it dispute that it taped portions of its calls to consumers and then spliced and falsified them to make it appear that consumers had purchased services that they had, in fact, rejected. And there is no question that Inc21 then crammed charges for these services onto consumers' phone bills. Consumers often paid these charges because they did not notice them, or were unsure how to, or whether they even could, dispute them.

Instead of questioning any of this, Inc21 instead challenges some evidentiary determinations made by the district court, and disputes the court's statutory authority to right the wrongs that Inc21 committed. In so arguing, it ignores that even if its evidentiary challenges prevailed (which they most certainly do not), abundant other evidence supports the court's decision. It also ignores that the

district court's statutory authority is supported by an unbroken line of decisions from this Court dating back more than 25 years.

With respect to its evidentiary challenges, Inc21 fails to impeach the district court's determination that the survey conducted by the FTC's expert witness was reliable. That survey demonstrated that nearly every sale made by Inc21 was deceptive. Inc21's objections to the survey are little better than quibbles. It complains about certain words used in survey questions. But in context, the questions were clear. Nor does the fact that some consumers sought refunds undermine the survey results. To the contrary, this confirms that those consumers were billed for services they did not want. Further, ample other evidence supports the survey's results, including consumer declarations, depositions of Inc21 employees, and a court-ordered survey conducted by Inc21. (Part II.A, *infra.*)

Although Inc21 does not deny what it did, it nonetheless challenges the district court's conclusion that its practices were deceptive (but concedes the court's conclusion that they were unfair). Inc21 admits two of the elements of deception – the charges it crammed onto consumers' phone bills were misrepresentations, and those misrepresentations were material. But it contends that, because there was no showing that consumers detrimentally relied on the misrepresentations, the FTC failed to satisfy the third element of deception – that

the misrepresentations were likely to mislead consumers acting reasonably under the circumstances. But it is well settled that the FTC does not have to show that consumers actually relied on a wrongdoer's deceptive statements: if it were otherwise, the FTC could not halt deceptive practices in their incipiency. In any event, in this case, the detrimental reliance could not be more apparent – consumers paid Inc21 more than $37 million for services they never ordered. Plainly, Inc21's misrepresentations were likely to (and in fact did) mislead consumers acting reasonably under the circumstances. (Part II.B, *infra*.)

Inc21's evidentiary challenge based on what it refers to as the "taint" of Inspector Andrew Wong fares no better than its other challenges. Inc21 fails to establish that Inspector Wong's search and seizure affidavit was materially improper, and the Fourth Amendment exclusionary rule does not apply to FTC civil actions. In any event, the district court's conclusions are supported by an overwhelming amount of evidence that is completely independent of any information gathered by Inspector Wong. (Part II.C, *infra*.)

Inc21's argument that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), does not authorize a district court to award monetary equitable relief has been rejected by this Court on several occasions (and by every other circuit court of appeals to have addressed the issue). Indeed, the argument should not even be considered

here; Inc21 waived it by failing to raise it before the district court. But if this Court were to address the argument, it should confirm once again that Section 13(b) *does* authorize monetary injunctive relief to redress injuries to consumers. Further, that authority is in no way limited by Section 19 of the Act, 15 U.S.C. § 57b. Section 19 allows the Commission, in certain cases, to seek not only equitable relief but also damages, and provides the Commission with authority to obtain monetary relief from respondents in its administrative actions. But by its own terms, Section 19 does not limit the Commission's authority under Section 13(b). (Part III.A, *infra*.)

The district court reasonably accepted the FTC's calculation that the harm to consumers amounted to nearly $38 million. The FTC supplied ample record evidence to support that estimate, while the defendants offered no affirmative evidence whatsoever to controvert it. Further, this Court's precedents make clear that the district court could base its award of monetary equitable relief on the losses suffered by Inc21's victims, and was not limited by Inc21's net proceeds. (Part III.B, *infra*.)

Inc21's complaints about the district court's system for distributing consumer redress on a *pro rata* basis are entirely unfounded. There is no legal requirement to subject consumers to a notice and claim process. In this case, such

a system would be impracticable due to deficiencies in Inc21's and other parties' billing records, and because the amount available to distribute is likely to be significantly less than the total amount of restitution to which consumers are entitled. The FTC can use alternative sources of information and analytical methods to develop reasonable estimates of each customer's losses. More fundamentally, the process Inc21 advocates – in essence, forcing each consumer to trace specific assets lost due to Inc21's misdeeds – would result in serious inequities. The court's system of disbursing redress funds to victims of Inc21's scam in proportion to the estimated harms caused to each consumer, would be fairer as well as less burdensome. The court did not abuse its discretion in fashioning this equitable remedy. (Part III.C, *infra*.)

Finally, Inc21 fails to show that the district court abused its discretion in authorizing the release of only limited amounts from the frozen assets to pay Inc21's attorneys' fees. The frozen assets (*i.e.*, funds that banks and payment processors are holding in escrow and in frozen bank accounts) consist of money that Inc21 unlawfully swindled from consumers through its deceptive cramming scheme. These consumers' rights to restitution trump any interest Inc21 may have in drawing from those limited funds to pay its lawyers. (Part IV, *infra*.)

ARGUMENT

I. INC21'S APPEAL FAILS FOR LACK OF JURISDICTION

Inc21 seeks to appeal three orders of the district court: (1) the September 21, 2010, Summary Judgment Order; (2) the October 18, 2010, Order Modifying Remedy; and (3) the January 25, 2011, Order Implementing Distribution Plan. This Court lacks jurisdiction to review the first two of these, because Inc21 missed the deadline to file a notice of appeal of either order. "The time limitations of Fed. R. App. P. 4(a) are 'mandatory and jurisdictional.' Failure to timely file a notice of appeal must result in dismissal for lack of appellate jurisdiction." *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984) (citing *Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978))

Inc21's time for filing a notice of appeal of the Summary Judgment Order was tolled when the Commission filed a timely motion to amend pursuant to Fed. R. Civ. P. 59(e). *See Clipper Exxpress v. Rocky Mtn. Motor Tariff Bur., Inc.*, 690 F.2d 1240, 1247 (9th Cir. 1982). But the time began to run again when the district court granted the Commission's motion with its October 18, 2010 Order Modifying Remedy – the final order in this case. Thus, Inc21 had 60 days from October 18 to file its notice of appeal of the Summary Judgment Order (and of the Order Modifying Remedy). *See* Fed. R. App. P. 4(a)(4)(A). Inc21, however, did

not file its notice of appeal until 112 days later, on February 7, 2011. [DE.196] [ER.001-002]. Because Inc21's notice of appeal of the Summary Judgment Order and the Order Modifying Remedy was untimely, its appeal of those two orders is jurisdictionally barred and must be dismissed.

Inc21, however, contends that the one-page Order Implementing Distribution Plan, issued on January 25, 2011, "substantially amends" the Summary Judgment Order and the Order Modifying Remedy, Br. 19, and thus, that it may appeal all three orders by filing a notice of appeal within 60 days of January 25. In particular, Inc21 claims that the Order Implementing Distribution Plan changed the consumer redress plan from a notice and claim process to a *pro rata* automatic check distribution plan. Inc21 is wrong. The district court had already adopted that change in the Order Modifying Remedy. *See* OMR 4 [ER.011] ("[T]he FTC argues that it would be more equitable . . . to transfer the escrowed funds . . . into a central pool that can be used to effectuate a *pro rata* consumer redress plan. . . . This order agrees.").[11]

---

[11] Inc21 is also wrong in claiming that the Order Implementing Redress Plan substantially "amends the Summary Judgment Order by directing that any remaining funds be disgorged to the U.S. Treasury." Br. 2. In fact, this is no substantive amendment; the Summary Judgment Order had already anticipated this issue, stating that "[a]ny undistributed amounts shall be distributed as per future court order." SJO 47 [ER.071]. Moreover, only a small fraction of the total restitution amount ordered will actually be available for consumer redress, OMR 4, 12 [ER.011, 019], and

In the Order Modifying Remedy, the court did direct the FTC to provide a clearer explanation as to how it would estimate the losses that each customer incurred. But the purpose of this was to clarify, not amend, the Order Modifying Remedy. As directed by the court, the FTC provided the requested explanation, and the court issued its Order Implementing Distribution Plan. An order that "merely interprets" an existing injunction but does not "substantially alter[] the legal relations of the parties" is not deemed to have modified the injunction. *Cunningham v. David Special Commitment Center*, 158 F.3d 1035, 1037 (9th Cir. 1998); *Public Serv. Co. of Colo. v. Batt*, 67 F.3d 234, 237 (9th Cir. 1995). Moreover, the Order Modifying Remedy is a final order even though the court needed additional clarification of the details of the redress process. *See Pacificare, Inc. v. Martin*, 1 F.3d 963, 964 (9th Cir. 1993) (order was final even though ministerial tasks remained for the district court).

This Court also would lack jurisdiction over an appeal of the Order Implementing Distribution Plan, standing alone (although it is unclear that Inc21 would seek to maintain such an appeal, and such an appeal would not provide this Court with jurisdiction over the two earlier orders. The order is not appealable

---

therefore it is virtually certain that no funds will remain undistributed. Thus, in reality, the theoretical possibility of a distribution to the U.S. Treasury is a non-issue.

under 28 U.S.C. § 1291 because it is not a final decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Englert v. MacDonell*, 551 F.3d 1099, 1103 (9th Cir. 2009). The final decision in this case was the Order Modifying Remedy, as discussed above. Nor is the Order Implementing Distribution Plan an interlocutory order granting or modifying an injunction appealable under 28 U.S.C. § 1292(a)(1), because it did not modify or amend the pre-existing injunction. Inc21 claims no other statutory basis for appellate jurisdiction, Br. 3, and none exists. *See Abney v. United States*, 431 U.S. 651, 656 (1977) ("in order to exercise [one's] statutory right of appeal, one must come within the terms of the applicable statute. . ."). Accordingly, this appeal must be dismissed.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT

The district court held in the Summary Judgment Order that "the record contains mountains of undisputed evidence" supporting the Commission's summary judgment motion. SJO 17 [ER.041]. The district court characterized the FTC's evidentiary showing as "overwhelming," "compelling," and "an avalanche of unrebutted evidence." *Id.* 2, 28 [ER.026, 052]. By contrast, "defendants put forth no affirmative evidence rebutting any of the material evidence confirming

their liability," and "provide no rebuttal evidence or expert testimony to create a genuine issue of material fact." *Id.* 3, 29 [ER.027, 053]. "Whatever quibbles that defendants have raised over peripheral facts in the record are small compared to the sweeping themes established by the FTC. In short, the defense presented by defendants is like disagreeing over the size of the iceberg while ignoring the monumental fact that the Titanic sank." *Id.* 3 [ER.027].

While Inc21 persists in maintaining that "it was error to grant summary judgment," Br. 45, it does not take issue with the vast majority of the district court's factual conclusions. Inc21 does not dispute the clearly established fact that the vast majority of the charges it placed on customers' phone bills were unauthorized, or that the verification tapes for these bogus sales were falsified. Inc21 instead limits its challenges to discretionary rulings of the district court regarding admissibility, credibility, and reliability on a small portion of the FTC's evidence, Br. 38-43, failing to point to any credible evidence of its own that counters the FTC's "mountains of undisputed evidence," SJO 17 [ER.041], establishing Inc21's liability.[12] But Inc21 fails to demonstrate that the district court committed an abuse of discretion in any of its evidentiary rulings. Moreover,

---

[12] *See infra* n.17 (discussing Inc21's citation of a late-filed declaration, Br. 43-44, that the district court declined to credit).

although Inc21 contests some of the district court's findings regarding the magnitude of its wrongdoing (*e.g.*, Br. 45-48), it makes no serious attempt to deny the conclusion that it engaged in unlawful cramming. Inc21's relatively minor "quibbles" over "peripheral facts in the record," SJO 3 [ER.027], lack merit and fail to establish a genuine issue of material fact.

A. The District Court Did Not Err In Crediting the Testimony of the FTC's Expert

The district court correctly relied on Dr. Howard Marylander's survey, which showed that about 97% of Inc21's sales were bogus. The district court found that Dr. Marylander conducted his survey using a "reliable methodology," and concluded that the survey "provides compelling and unrebutted evidence in support of the FTC's argument that the placement of unauthorized charges on consumer telephone bills was deceptive, false, and likely to mislead almost any consumer acting reasonably under the circumstances." SJO 28 [ER.052]. Inc21 never challenged Dr. Marylander's professional qualifications, *id.*, raising below only marginal objections as to form that were soundly rejected by the district court. On appeal, Inc21 raises a meritless challenge to the district court's "extensive reliance" upon Dr. Marylander's report and contends that the report "is without probative value." Br. 41. But Inc21 fails to establish that the district court

committed an abuse of discretion in admitting Dr. Marylander's expert testimony into the record or in finding it credible and reliable.

First, as the district court rightly concluded, Inc21's objections to the wording of Dr. Marylander's survey questions are unfounded and unpersuasive. Inc21 asserts that use of the phrase "Internet services" in the survey questions impeaches the reliability of the survey, because the defendants did not offer Internet access services. Br. 41-42. But, as the district court recognized, any confusion about the meaning of the term "Internet services"[13] was immaterial, as "the survey questions presented to interviewees also stated the name of the specific product supposedly purchased by each customer" – and Inc21 produced no evidence that any interviewees were confused or misled by the questions presented in [the] survey." SJO 31 [ER.055]. "The results were astounding," according to the district court: nearly 97 percent of the surveyed customers "stated that they had

---

[13] Significantly, the words "Internet services" (or "Internet offerings") often are used to refer to a far broader range of services than "the provision of access to the Internet to a customer" (*i.e.*, "Internet access service"), Br. 42, and frequently encompass services such as those supposedly offered by the defendants (*e.g.*, website design, Internet advertising, Internet search-related services, and Internet-based faxing). SJO 4-7 [ER.028-031]. *See, e.g.,* 47 C.F.R. § 8.3 (FCC rule governing "broadband Internet access services" and distinguishing them from the "Internet offerings" marketed by "content, application, service, and device providers").

not agreed to purchase the product" that the interviewer had named, and for which they were being billed by Inc21. *Id.* 17 [ER.041] (emphasis in original).

Second, the district court committed no abuse of discretion in concluding that, even if a substantial number of the "defrauded customers . . . had actually received refunds from defendants prior to being interviewed," as Inc21 contends (Br. 43-44), "this would not have rendered the survey methodology so 'unreliable' as to warrant its exclusion from evidence." OMR 7 [ER.014]. To the contrary, it would be fully consistent for customers who "had *not* agreed to purchase the product" (SJO 17 [ER.041]) for which they were being billed to have contacted the company to cancel and to demand a credit or a refund for the unwanted service. Br. 43, 44. If anything, Inc21's contention that these customers sought refunds confirms Dr. Marylander's finding that the vast majority had not authorized Inc21 to cram its charges onto their phone bills.

Third, Inc21 never presented any credible evidence refuting Dr. Marylander's testimony, and the district court therefore did not err in relying upon it in support of summary judgment. *Accord, FTC v. Stefanchik*, 559 F.3d at 929 (declining to discredit a survey where the defendants did "not contest the truth or validity of the individual responses reported in the survey. They offered no competent affirmative evidence of their own, either in the form of survey results,

contrary consumer declarations, sworn affidavits, or testimony[.]").[14] Inc21 did not attempt to demonstrate that any more than a small minority of customers who were charged for Inc21 services had actually agreed to purchase those services, nor did it produce any "showing that customers were *not* deceived by [Inc21's] billing practices." SJO 31 [ER.055]. Inc21 also "failed to depose Expert Marylander regarding the merits of his survey, did not conduct a rebuttal survey, and did not depose any of the forty-plus customers who submitted declarations." *Id.*

Finally, even if the district court had erred in admitting Dr. Marylander's testimony (which it did not), such error was harmless because there was other overwhelming evidence of Inc21's deceptive and unfair practices. *Id.* 15 [ER.039]. *See United States v. Butler*, 239 F.3d 1094, 1101 (9th Cir. 2001). Entirely apart from the survey results, "[t]he deposition testimony of defendants' own employees, the multiple lawsuits filed by defendants alleging unauthorized sales of their own products, and the declarations filed by over forty of defendants' 'customers' confirm[ed] that consumers were *in fact* misled by the deceptive charges placed on their telephone bills." SJO 28-29 [ER.052-053] (emphasis in original). And, when

---

[14] Inc21 complains that "its only available funds were seized or frozen at that time," and therefore the district court was unfair in having "faulted" it for failing to develop evidence to counter the Marylander survey. Br. 42. But as discussed below, the district court did not abuse its discretion in restricting the release of funds that Inc21 had misappropriated from consumers. *See infra* Section IV.

the district court directed Inc21 to send letters to each of its supposed customers requesting that any customer who had, in fact, ordered Inc21's services return a notice confirming the purchase, only 36 of the nearly 11,000 customers contacted confirmed that they wanted to continue receiving those services. SJO 17 n.10 [ER.041]; PIO 7 [ER.091].

B. Unrebutted Evidence Confirms that Inc21's Placement of Unauthorized Charges on Customers' Phone Bills Was a Deceptive Practice that Violated the FTC Act

Inc21 also attempts a broader assault on the district court's grant of summary judgment on the first count in the FTC's Complaint – that Inc21's billing practices were deceptive, in violation of Section 5(a) of the FTC Act. Br. 42-45. Inc21 asserts that "Marylander failed to ask the pertinent question of whether the consumer[s] believed that the representation or charges on the LEC telephone bill meant that they owed money to defendants" – *i.e.*, whether they "were *in fact* misled." Br. 42 (quoting SJO 29 [ER.053]). It finds it "disturbing that liability, both corporate and individual, here was prefaced upon alleged misrepresentations on the LEC bill, without any proof of injury or reliance emanating there from [*sic*] through consumer declarations." Br. 43-44. "Simply put, no declaration from a consumer alleges that the consumer believed he or she owed the money simply because it was on the telephone bill." *Id*. 44.

In so arguing, Inc21 fails to make any challenge to the district court's conclusions regarding the remaining elements of the deception standard – *i.e.*, that there was a false representation, and that it was material.[15] Inc21 does not contest the district court's finding that Inc21's "charges on consumer telephone bills . . . constituted an affirmative representation . . . that the consumer had in fact authorized the purchase and owed payment to defendants." SJO 28 [ER52]. *See, e.g.,* Br. 42 (referring to the "charges on the LEC telephone bill" as "representations"); *id.* 45 (equating reliance "upon the LEC bill" with reliance "upon a misrepresentation"). Moreover, Inc21 effectively concedes that its representations (*i.e.*, the charges it billed) were false in a large number of occasions: for example, according to Inc21, a large proportion of its customers realized that they had not ordered the service for which they had been billed, "called and cancelled the service," and sought "a credit or refund for the service." Br. 43-44.

Nor can there be any doubt that the misrepresentations were material, in that they "affected [consumers'] choice of, or conduct regarding, a product," *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Here, "the inclusion of these unauthorized charges on consumers telephone phone bills" induced tens of

---

15 *See supra* note 7.

thousands of consumers to pay millions of dollars "for products they had never purchased." SJO 29 [ER.053]. As the district court recognized, most consumers were misled to believe they have to pay charges on their phone bills – even those fraudulently inserted by bad actors such as Inc21 – because most "customers foreseeably believe that all phone bill charges have to be paid in order to maintain phone service." SJO 28 [ER.052] (citing *Kemp v. AT&T*, 393 F.3d at 1360. *Accord Verity*, 443 F.3d at 63 ("placement of . . . [unauthorized] charges on phone bills capitalize[s] on the common and well-founded perception held by consumers that they must pay their telephone bills."); PIO 15 [ER.099] (Inc21 "exploited the fact that most consumers do not carefully read their phone bills or are unaware that their phone bills may include third party fees to defraud them.").[16]

---

[16] Inc21 argues that many consumers realized that the charges were unauthorized and sought refunds (and thus were not deceived by those misrepresentations on their phone bills) by citing a declaration, submitted by individual defendant John Yu Lin, for the proposition that 70% of customers who were interviewed during Dr. Marylander's survey had called Inc21 to cancel the service and had "readily obtained a refund without question." Br. 43-44 (citing John Yu Lin Declaration [ER.168-169] (filed July 15, 2010)). The district court properly declined to consider Inc21's argument based on this "self-serving" and "uncorroborated" declaration, *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d at 1061, because Inc21 it failed to raise this argument in its opposition to the FTC's summary judgment motion. OMR 6 [ER.013]. More egregiously, Inc21's brief grossly mischaracterizes the content of the declaration it cites. Mr. Yu observes that "[t]he FTC submitted declarations of consumers with its motion for summary judgment," states that he "reviewed the billing and credit history for each of those consumers," and reports that, of the consumers in this group "for which we were able to find records, they were issued a credit or refund upon request." John Yu Declaration ¶ 4 [ER.168]; *see also* spreadsheet attached thereto [ER.172]

Thus, Inc21's dispute addresses only the final element of deception, *i.e.*, that the defendant's misrepresentation is "likely to mislead consumers acting reasonably under the circumstances."[17] But its argument fails because it incorrectly assumes that the FTC must demonstrate "detrimental reliance" in order to satisfy this element. If Inc21's view were correct, the FTC could not halt incipient deceptive practices, but would have to stand on the sidelines until consumers were actually injured. Fortunately, that is not the law. "Neither proof of consumer reliance nor consumer injury is necessary to establish a § 5 violation" for deceptive practices. *FTC v. Freecom Comm'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005).

This Court reaffirmed this standard in *Stefanchik*, where it upheld the district court's grant of summary judgment to the FTC on a charge of deceptive acts or practices, but did not cite any finding that consumers "relied" on these representations. Nonetheless, this Court concluded, based on a factual scenario similar to that in this case, that "the district court correctly granted summary judgment on the FTC Act [deception] claim because the marketing material made

---

(listing billing history of 33 declarant consumers). Mr. Yu's assessment of the track record of this small group of consumers does not necessarily bear any relation to the brief's unfounded claim regarding the experience of a much larger and more representative group – the over 1,000 randomly selected consumers who were interviewed in Dr. Marylander's survey.

[17] *See supra* note 7.

misrepresentations in a manner *likely to mislead* reasonable consumers." 559 F.3d at 929 (emphasis added). "The FTC was not required to show that all consumers were deceived, [and the] existence of some satisfied customers does not constitute a defense under the FTC Act." *Id.*, 559 F.3d at 929 & n.12 (citing *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir.1989)).

Of course, the FTC can obtain redress only for consumers who were injured by Inc21's misconduct – *i.e.*, those who actually paid the charges Inc21 crammed onto their phone bills. But under governing caselaw, "proof of individual reliance by each purchasing consumer is not needed." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). "[A] presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product. . . . [A]t this point, the burden shifts to the defendant to prove the absence of reliance." *Id.* at 605-06 (citing *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991), and *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985)).

C. Inspector Wong's Purportedly Tainted Search is a Red Herring.

Inspector Andrew Wong of the United States Postal Inspection Service conducted an investigation of Inc21, and on June 8, 2009, submitted affidavits that

were used to obtain search and seizure warrants in a separate forfeiture action (which ultimately was settled). *See generally* PIO 10 [ER.094]; Br. 11-13; SJO 29 n.21 [ER.053]. Inc21 characterizes the affidavit as "perjured" and "discredited," and asserts that "granting summary judgment utilizing items discovered during [Inspector Wong's] search . . . so tarnishes the process as to constitute a violation of Defendants' due process rights." Br. 5, 39.

Inc21's argument is unfounded. To begin with, "the record contains mountains of undisputed evidence," with no connection to Inspector Wong's affidavit or search, confirming the district court's conclusions on Inc21's violations of the FTC Act and the TSR. SJO 17 [ER.041]; *see supra* 33-34. Accordingly, even if Inc21's concerns over Inspector Wong's actions had any basis (which they do not), they would not affect the outcome of the case.

Moreover, Inc21 provides no support for its assertion that Inspector Wong's affidavit was so flawed as to be "discredited," let alone "perjured." Inspector Wong stated in his search warrant affidavit in the forfeiture proceeding that he personally contacted hundreds of customers, and received information about thousands more, who were billed for Inc21's services without their consent. Inc21 makes much of Inspector Wong's concession in his deposition that a handful of

customers actually had authorized Inc21's services – in contrast to the statement in his affidavit that he "did not identify a single customer who authorized charges." Br. 11-12 (citing Andrew Wong's affidavit and deposition testimony, [ER.251-263]). Inc21 fails to show that this omission was sufficiently material to disqualify the entire affidavit, especially when balanced against the affidavit's well-supported findings that thousands of other consumers had been billed for unauthorized charges. The district court was unmoved by Inc21's arguments on this basis at earlier stages of the case; it certainly did not "discredit" the affidavit. PIO 5-6, 10 [ER.090-091, 094].

In addition, no evidence would be excluded from the record, even if Inc21's concerns over the affidavit had any foundation, because the Fourth Amendment exclusionary rule clearly does not apply to an FTC civil enforcement action – or to any civil case (other than a forfeiture proceeding, which this is not) in which a government agency seeks equitable or remedial relief, as opposed to criminal or quasi-criminal (forfeiture) penalties. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (evidence gathered during allegedly illegal arrest need not be excluded in civil deportation proceeding); *United States v. Janis,* 428 U.S. 433 (1976) (exclusionary rule does not preclude IRS from introducing, in civil tax case,

evidence illegally seized by state law-enforcement authorities); *Grimes v. Comm'r of Internal Rev.*, 82 F.3d 286 (9th Cir. 1996) (same where evidence was seized by FBI agents); *NLRB v. South Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969) (no exclusionary rule in civil NLRB proceeding). Thus, Inc21's contentions concerning Inspector Wong can be discarded.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FASHIONING AN EQUITABLE REMEDY

A. Inc21's Contention that the District Court Lacked Authority to Award Monetary Equitable Relief is Meritless

Inc21 challenges, for the first time on appeal, the district court's award of monetary equitable relief, arguing that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), "does not grant district courts the authority to provide a monetary remedy." Br. 20; *see generally id.* 20-28. But this Court need not reach this argument. It was not raised below and is therefore waived. *See FTC v. Neovi, Inc.*, 604 F.3d at 1159 (declining to consider a similar argument raised for the first time on appeal). Although Inc21 contested the amount and nature of the monetary relief awarded, it never questioned the district court's well-supported authority to grant

such relief.[18] "Generally, arguments not raised before the district court are waived on appeal." *White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010).[19]

Even if it were properly before the Court, Inc21's present argument that district courts may not award monetary equitable relief as an ancillary remedy for violations of the FTC Act is hardly a "novel issue." Br. 20. Indeed, the argument is meritless and foreclosed by governing precedent from this Circuit and others. When, as here, the Commission brings an action pursuant to Section 13(b) and establishes a violation of the FTC Act (i.e., that the defendant has committed an unfair or deceptive act or practice), this Circuit has long recognized that the district court has authority to grant not just injunctive relief, but also monetary equitable

---

[18] Inc21, in its Emergency Motion to Stay Injunction and Judgment [DE.164] [ER.Supp.53-66] (filed October 4, 2010), challenged the monetary remedy adopted in the *Summary Judgment Order*, advancing arguments based on: (i) the supposedly applicable three-year statute of limitations (*id.* 5) [ER.Supp.57]; (ii) the FTC's damages calculation (*id.* 6-7) [ER.Supp.58-59]; and (iii) the methodology for distributing refunds to consumers (*id.* 8) [ER.Supp.60]. Inc21 never suggested that the district court lacked authority to order monetary remedies.

[19] Inc21 also effectively waived any argument that the individual defendants did not have the requisite knowledge to be held liable – notwithstanding the brief's single sentence, devoid of supporting reasoning or citations, on this issue. Br. 29 n.11. "This court deems issues unsupported by argument to be abandoned." *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1201 (9th Cir. 2009) (citing Fed. R. App. P. 28(a)(9)(A)). Moreover, Inc21 offers nothing to counter the substantial record evidence confirming the individual defendants' knowledge and direct involvement in Inc21's misconduct. *See*, *e.g.*, SJO 35-36 [ER.059-060].

relief. *See, e.g., FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982), *FTC v. Pantron I Corp*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Stefanchik*, 559 F.3d at 931; *FTC v. Americaloe*, 273 Fed. Appx. 621, 622 (9th Cir. 2008). The six other courts of appeals to have addressed the issue uniformly agree that Section 13(b) grants a district court this authority. *See*, *e.g.*, *FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1 (1st Cir. 2010); *FTC v. Magazine Solutions, Inc.*, 2011 WL 2489916, *2, n.2 (3d Cir. 2011); *FTC v. Amy Travel Serv.*, 875 F.2d at 571 (7th Cir. 1989); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d at 1314; *FTC v. Freecom Comm'ns*, 401 F.3d at 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468 (11th Cir. 1996). Indeed, Inc21 concedes that Ninth Circuit precedents going back as far as 1982 uniformly construe Section 13(b) as authorizing district courts to grant equitable monetary relief for violations of the FTC Act. Br. 27.

With good reason. Under Inc21's theory, if the FTC were unable to obtain monetary redress for consumers, then wrongdoers like Inc21 would be guaranteed a windfall, no matter how egregious their misconduct. It would be absurd to impute that intent to Congress. Consistently, well-established Supreme Court precedent confirms the district courts' authority, under Section13(b) of the FTC

Act, to award whatever equitable monetary relief is "necessary to accomplish complete justice." *FTC v. H.N. Singer, Inc.*, 668 F.2d at 1114. "When 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 v. Robert DeMario Jewelry, Inc*. 361 U.S. 288, 291-92 (1960).[20] Thus, "the comprehensiveness of [a district court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co., Inc.*, 328 U.S. 395, 397-98 (1946).[21]

---

[20] "[T]he fact that this relief takes the form of a money payment does not remove it from the category of traditional equity relief. Equity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from [defendant's] breach of duty or to prevent . . . unjust enrichment." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880 (2011); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) (characterizing "restitution" as "a remedy traditionally viewed as 'equitable'").

[21] Inc21 contends that, in *Porter v. Warner Holding Co.*, *supra*, the Court would not have permitted an award of disgorgement absent the fact that the statute in that case authorized the court to enter not just injunctive relief but also "other orders." Inc21 contends that in a case brought by the FTC, the court may not award monetary equitable relief because, although Section 13(b) provides for entry of injunctions, it does not authorize entry of "other orders." Br. 27-28. But in *Mitchell v. Robert DeMario Jewelry, Inc.*, the Supreme Court rejected this very interpretation of *Porter*,

Relying on this line of authority, this Circuit, in *FTC v. H.N. Singer, Inc.*, concluded that "Congress, when it gave the district court authority [in Section 13(b)] to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." 668 F.2d at 1114. Following *H.N. Singer*, this Court has time and again recognized that the "district court has broad authority under the FTC Act to 'grant any ancillary relief necessary to accomplish complete justice,' including the power to order restitution." *Stefanchik*, 559 F.3d at 931 (quoting *FTC v. Pantron I*, 33 F.3d at 1102). Moreover, a district court may reasonably exercise its discretion to order full consumer restitution even if that amount exceeds the unjust enrichment enjoyed by the defendants. *Stefanchik*, 559 F.3d at 924; *FTC v. Figgie Int'l, Inc.*, 994 F.2d at 606.[22]

---

and made clear that it would have reached the same result in that case even if the statute in that case had only provided for injunctive relief. 361 U.S. at 291.

[22] Citing *Verity*, Inc21 argues that the Second Circuit would limit the Commission to obtaining "equitable restitution." Br. 29-30. Even if this contention were correct, this Court would not be bound by a Second Circuit ruling. And in fact, as discussed above, *Porter v. Warner Holding Co.* holds that no such limitation is appropriate. *See also Stefanchik*, 559 F.3d at 931-32 (holding that monetary equitable relief may be based on amount of injury that defendants caused to consumers). Inc21 also cites

Moreover, Inc21's argument that Section 19 of the FTC Act, 15 U.S.C. § 57b, limits the range of equitable remedies available under Section 13(b) (Br. 21-28) has been repeatedly rejected. This Court and others have uniformly refused to graft the limitations of Section 19 onto Section 13(b)'s equitable powers. *See, e.g., FTC v. H.N. Singer, Inc.*, 668 F.2d at 1113; *FTC v. Gem Merchandising*, 87 F.3d at 469-70; *FTC v. Security & Bullion Corp.*, 931 F.2d at 1315. The additional remedies that Congress authorized in Section 19 do not provide the "clear and valid legislative command" needed to deprive courts of their full equitable powers. *Porter v. Warner Holding Co.,* 328 U.S. at 398. To the contrary, Section 19 was enacted to *enhance* the Commission's authority against rule violators and targets of administrative proceedings, not to tie its hands in district court actions under Section 13(b).[23] As Section 19 expressly provides, "[r]emedies provided in this

---

United States v. Int'l Bhd. of Teamsters, 964 F.2d 181 (2d Cir. 1992), and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), *see* Br. 30, 36, but neither is relevant. *Teamsters* merely holds that the All Writs Act does not authorize an award of damages. The district court's authority in this case comes from the FTC Act, not the All Writs Act, and the award in this case was not damages. *Sheldon* involves the calculation of profits in a private trademark infringement action, and has nothing to do with a case such as this one, where a federal agency is enforcing a congressional enactment in the public interest.

[23] Inc21 is mistaken when it contends that the Commission may not enforce rule violations under Section 13(b). Br. 38. In fact, Section 13(b) may be invoked with respect to "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. 53(b); *see FTC v. Gem Merchandising*, 87 F.3d at 468. This includes

section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e).

Inc21 concedes that "[a] review of the legislative history is helpful" for assessing a court's authority under Section 13(b), Br. 25, but it misreads that history. The relevant legislative history actually confirms Congress' intent to authorize monetary equitable relief in FTC actions brought pursuant to Section 13(b).[24] "Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that

---

violations of the Telemarketing Act, as implemented by the Commission's Telemarketing Sales Rule. This interpretation of Section 13(b) in no way "obliterate[s]" Section 19. Br. 28. To the contrary, Section 19 added to the FTC's pre-existing authority to obtain remedies for both statutory and rule violations, including (i) the ability to seek damages for rule violations, and (ii) the ability to obtain monetary relief respondents in administrative proceeding.

[24] When Congress amended Section 13(b) of the FTC Act in 1994 to expand its venue and service of process provisions to enable the Commission to bring a single lawsuit against multiple defendants even if they did not all reside in the same district, FTC Act Amendments of 1994, Pub. L. No. 103-312, § 10 (1994), an accompanying Senate Report specifically recognized that the FTC, under Section 13(b), has authority to obtain a court "order freezing assets, and is also able to obtain consumer redress." S. Rep. No. 103-130, at 15-16 (1993). If Congress had been dissatisfied with the Commission's use of Section 13(b) to obtain monetary equitable relief, it could have limited Section 13(b). Instead, it expanded the reach of the section.

interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *North Haven Board of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (citations omitted).[25]

B. The District Court Reasonably Accepted the FTC's Calculation that Inc21 Swindled Nearly $38 Million From Customers

Inc21 contests the district court's conclusion that the harm to customers amounted to nearly $38 million, contending instead that the amount of "unjust enrichment" was "closer to $20 million in gross revenues." Br. 47-48.[26] Inc21 contends that "the FTC failed to present any witnesses or worksheets in support of

---

[25] Inc21 argues in the alternative that, even if "equitable restitution [were] available" as a remedy under Section 13(b), "neither Section 13(b) nor Section 19 permits disgorgement[.]" Br. 29. It repeatedly characterizes the district court's award as "punitive." *See*, *e.g.*, Br. 23, 26, 32, 36, 39, 41, 53. But Inc21 is wrong. *See Americaloe*, 273 Fed. Appx. at 622 (order requiring defendants to pay an amount based on total amount paid by deceived consumers was not punitive). This argument is irrelevant, since the district court ordered payments to redress the amounts unlawfully taken from consumers – *i.e.*, restitution, rather than disgorgement. In any event, Inc21's contention that Section 13(b) precludes an award of disgorgement is incorrect. *See, e.g., FTC v. Neovi, Inc.*, 604 F.3d at 1159 (affirming district court's conclusion that "the appropriate measure of equitable disgorgement was [defendant's] total revenue") (citing *SEC v. J.T. Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006) ("the district court has broad equity powers to order the disgorgement of 'ill-gotten gains'")).

[26] Inc21 cites the Affidavit of David Sihota [DE.123-39] in support of its contention that its net revenues were $22.6 million. Br. 48. But as explained above, the monetary equitable relief in this case is not necessarily limited to Inc21's revenues. *See supra* note 25.

its damages calculation," so that "there was no witness or document on which defendants could even formulate a basis upon which to attack the calculations," *id.*; and asserts that the "unexplained business records of the aggregators" upon which the FTC relied were "not certified as . . . accurate" and are "inadmissible for the purpose used." Each of these contentions is untrue.

As the district court made clear, the FTC calculated the amounts that "consumers paid to the defendants as a result of [their] deceptive and unfair billing practices . . . [based on] declarations and billing records submitted by the billing aggregators who funneled LEC-billing revenue to defendants." SJO 45 [ER.069]. The FTC filed properly authenticated business records from the billing aggregators showing defendants' monthly total billings and credits, as well as the original subpoenas to which those documents were responsive. *See, e.g.*, DE 123-1,¶ 3 [ER.Supp.67-70]; DE 123-14 [ER.Supp.71-90]. Inc21 did not dispute these properly and timely filed records until *after* the district court issued its Summary Judgment Order. *See* OMR 13 n.3 [ER.020] ("defendants did not even attempt to show that the FTC's figures were inaccurate").[27]

---

[27] Inc21 does not explain why only those consumers who are "brave enough" would cash a refund check. Br. 34, 35. Due to the surreptitious nature of Inc21's deceptive cramming scheme, many consumers may not yet realize that they made payments to Inc21. But the district court's order requires that each check be

Inc21 further complains that "the FTC on reply admitted that its calculations were incorrect by approximately 15%," Br. 45, and contends that "[i]t was error to allow the FTC . . . to amend its damages calculation on reply[.]" *Id.* 48. This argument, too, is baseless. It ignores the fact that, while the FTC's math was corrected, its evidence remained the same. Thus, defendants had an adequate opportunity – using the evidence supplied by the FTC or their own – to contest any inaccuracies in the FTC's calculations. However, as the district court explained,

> [D]efendants failed to present *any* contradictory evidence or alternative calculations at summary judgment, despite having full access to the billing records upon which the FTC's original calculations were based. As such, even before the FTC made its corrections, defendants had the opportunity to examine the evidence upon which the FTC had based its original calculations, and could have proposed alternative calculations of a proper restitution amount. Defendants chose not to endeavor such an undertaking, and did not even realize that the FTC's original calculations contained an error until the FTC corrected it on its own.

OMR 8 & n.2 [ER.015].

Inc21 is correct when it avers that, once the FTC submits a reasonable approximation, the defendants must be allowed to rebut it. Br. 48 (citing *Verity*, 443 F.3d at 69). Clearly, to obtain restitution pursuant to Section 13(b), "[t]he Commission must show that its calculations reasonably approximated the amount

---

accompanied by a letter explaining the reasons for the check. *See* Order Implementing Distribution Plan [ER.003].

of customers' net losses, and then the burden shifts to the defendants to show that those figures were inaccurate." *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997). In the present case, the FTC *did* make such a showing. Its calculation included an adjustment to account for the "fraction of consumers who paid the bills [and] . . . actually used or authorized others to use the services at issue." *Verity*, 443 F.3d at 69; *see* SJO 45-46 [ER.069-070] (explaining this calculation).[28]

As discussed above, the defendants had an opportunity to rebut the FTC's "reasonable approximation," but failed to do so. "Once the FTC has made a prima facie case for summary judgment, the defendant[s] cannot rely on general denials; [they] must produce significant probative evidence that demonstrates that there is a genuine issue of material fact for trial." *FTC v. Publishing Clearing House*, 104 F.3d at 1170. Thus, the "district court did not abuse its discretion by holding the defendants liable for the full amount of loss incurred by consumers," as

---

[28] Inc21 suggests that the monetary equitable relief will somehow provide the U.S. Treasury with a "bonanza of funds." Br. 23 n.9. While courts may, in appropriate cases, direct that any funds remaining after the redress program has concluded be paid into the Treasury, *see FTC v. Febre*, 128 F.3d at 537, in this case the amount available for distribution is likely far less than the total restitution due to consumers. Thus, the Treasury almost certainly will receive nothing – and certainly no "bonanza."

calculated by the FTC, since the defendants "offered no affirmative evidence whatsoever to controvert this amount." *Stefanchik*, 559 F.3d at 931.[29]

C. The District Court's System for Distributing Restitution Funds to Consumers Was Not an Abuse of Discretion

The *pro rata* refund system ordered by the district court was no abuse of discretion. Inc21 contends that the district court's "modified refund methodology and distribution plan" improperly "dispenses with a notice and claim [process for consumers] to be eligible for a refund," and therefore fails to ascertain that refunded "money is 'traced' to the alleged deceptive practice." Br. 31; *see generally id*. 29-36 (criticizing *pro rata* distribution system). But once again, Inc21 ignores the well-settled law in this Circuit. Funds need not be traced, as Inc21 contends.[30] Instead, once the Commission shows that a misrepresentation

---

[29] Inc21 characterizes as "clear error" the district court's decision not to apply the three-year statute of limitations set forth in Section 19 of the Act to limit its award of monetary equitable relief. Br. 38. But there was no error at all. The FTC brought this case pursuant to both Section 13(b) and Section 19 of the FTC Act. Although Section 19 contains a three-year statute of limitations, it puts no limit on the Commission's authority under Section 13(b). *See* Part III.A, *supra*.

[30] *Cf. SEC v. Capital Consultants, LLC*, 397 F.3d 733, 747 (9th Cir. 2004) (*en banc*) ("We agree with the district court that a pooling and *pro rata* distribution, as opposed to the tracing of assets, was appropriate."); *United States v. Real Property Located at 13328 and 13324 State Highway 75 North*, 89 F.3d 551, 553 (9th Cir. 1996) (the "SEC's plan to distribute this inadequate fund *pro rata*" was far more equitable than "engaging in a tracing fiction" that would likely favor some similarly-situated fraud victims over others).

was widespread, it need only provide a reasonable approximation of consumer losses. *FTC v. Neovi, Inc.*, 604 F.3d at 1159. The burden then shifts to the defendant to refute that showing. *Id.*; *Verity*, 443 F.3d at 67; *FTC v. Febre*, 128 F.3d at 535.[31]

Without question, Inc21's misrepresentations were widespread. The survey conducted by the FTC's expert showed that nearly 97% of Inc21's purported sales were bogus. The survey conducted pursuant to the Temporary Restraining Order demonstrated that an even greater percentage of Inc21's sales may have been deceptive. Little wonder that, in calculating the appropriate amount of monetary equitable relief, the court based its calculation on the total net amount that consumers lost as a result of Inc21's misconduct. Virtually every Inc21 sale was deceptive. The court made allowance for consumers who received refunds, or who actually used any of Inc21's services. There was no other record evidence justifying any additional reduction.

Moreover, the defendants themselves are to blame for the difficulty in ascertaining the specific amount unlawfully collected from each individual

---

[31] Inc21 complains that refunds to consumers will be made "all at the FTC's discretion." Br. 46. But the FTC's submissions to the district court explained the method for distributing to consumers in detail. [DE.184, 193] [ER.Supp.3-45].

customer. "Defendants failed to even reliably maintain billing information, much less refund or payment information. . . . [Moreover], Defendants' own conduct has obstructed the possibility of tracking the billing and payment totals for a specific subset of their customers." FTC Mo. to Amend 11, 14 [DE.172] [ER.Supp.14, 17]. It is patently unreasonable for wrongdoers to object to the FTC's estimates of consumers' losses due to deficiencies in their own databases. *FTC v. Febre*, 128 F.3d at 535. "The risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." *Id.* (citing *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989)). Otherwise, scammers like Inc21 would be able to retain their unlawfully obtained funds simply by keeping bad records. "Of course, the reasonableness of an approximation varies with the degree of precision possible." *Verity*, 443 F.3d at 69. Here, given the demonstrated difficulties in obtaining the needed data, absolute precision clearly is not required.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE AMOUNT OF FROZEN FUNDS THAT IT RELEASED TO PAY INC21'S ATTORNEYS' FEES

Inc21 concludes its brief with the meritless argument that its "procedural and substantive due process rights" were violated by the district court's limits on its use of consumer restitution funds to for attorneys' fees. Br. 50-53. The district court

did not abuse its discretion. To the contrary, it was eminently reasonable to limit Inc21's access to frozen assets – *i.e.*, funds in frozen bank accounts and escrowed amounts held by LECs and billing aggregators – which consist of money that Inc21 unlawfully swindled from consumers through its deceptive cramming scheme.

Defendants in FTC cases have no right to use funds frozen for the benefit of injured consumers to pay their lawyers. *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989), citing *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). Any interest Inc21 may have in using these frozen assets to pay its attorneys' fees is "trump[ed] [by] the FTC's interest in obtaining restitution." *FTC v. Assail, Inc.*, 410 F.3d at 267. *See also FSLIC v. Ferm*, 909 F.2d 372, 374 (9th Cir. 1990).

Here, Inc21 cannot show that the district court abused its discretion in carefully limiting any diversion of these limited funds for the defendants' own use. Inc21 claims that the Sixth Amendment entitles it to additional releases of victims' funds. *Id.* 53. But the "Sixth Amendment only gives defendants the right to counsel in criminal proceedings. . . . The FTC action is not linked to any criminal prosecution. Since no such prosecution is pending, [defendants'] argument fails." *FTC v. World Wide Factors, Ltd.*, 882 F.2d at 347. Indeed, "once the court

determined that all the frozen assets were either a product of fraud or necessary to compensate the victims of the fraud for their losses, [defendant] had no right to use any part of the frozen money for his own purposes[.]" *FTC v. Think Achievement Corp.*, 312 F.3d 259 (7th Cir. 2002). Even in criminal cases, a "defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice." *Caplin & Drysdale*, 491 U.S. at 626.[32]

While Inc21 had no right to use any of the frozen funds to pay for its attorneys, the district court authorized a $50,000 disbursement for Inc21's attorneys on May 26, 2010 [DE.119] [ER.073-074], and an additional $10,000 disbursement on October 18, 2010. OMR 10-11 [ER.017-018]. In addition, in its May 26, 2010, order, the court released $8,000 per month to each of the individual defendants – funds they could have used to pay their attorneys. [DE.119] [ER.073-074]. As the district court correctly observed, "[t]hese payments were probably

---

[32] The single district court decision Inc21 musters to support its position is entirely distinguishable. Br. 51-52 (citing *United States v. Payment Processing Ctr., Ltd.*, 439 F. Supp. 2d 435 (E.D. Pa. 2006)). In *Payment Processing*, "wrongdoing [had] yet to be established," and the "record [was] not adequately developed to establish the potential restitution amount." 439 F. Supp. 2d at 439. By contrast, here, Inc21's wrongdoing has been firmly established, and the restitution amount has been determined based on a complete record.

more generous than required by due process, especially since they came out of the pockets of victims." OMR 8 [ER.015].

CONCLUSION

For all the reasons set forth above, this Court should affirm the district court's decision.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
General Counsel for Litigation

/s/________________________________
DAVID L. SIERADZKI
Attorney
Office of General Counsel

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
tel: (202) 326-2092
fax: (202) 326-2477
dsieradzki@ftc.gov

Of Counsel:

DOUGLAS V. WOLFE
SANDHYA P. BROWN
KERRY O'BRIEN
Attorneys

Bureau of Consumer Protection
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

August 17, 2011

STATEMENT OF RELATED CASES

Pursuant to 9th Cir. R. 28-2.6, the Federal Trade Commission states that it is unaware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I certify that the foregoing Brief of Plaintiff-Appellee Federal Trade Commission contains 13,601 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/
David L. Sieradzki

CERTIFICATE OF SERVICE

I certify that this Brief of Plaintiff-Appellee Federal Trade Commission is being submitted to the Court via the Court's Electronic Case Filing ("ECF") system on August 17, 2011, and that the ECF system will transmit the brief electronically to Joel R. Dichter, attorney for the defendants-appellants, using his email address on record in that system.

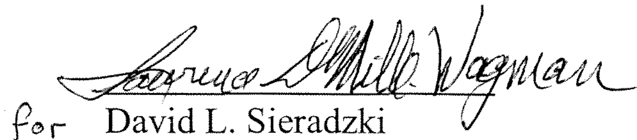
/s/
David L. Sieradzki

August 17, 2011

CERTIFICATE FOR BRIEF IN PAPER FORMAT

9th Circuit Case No. 11-15330

I, David L. Sieradzki, certify that this brief of Plaintiff-Appellee Federal Trade Commission is identical to the version submitted electronically on August 17, 2011.



for David L. Sieradzki

Date: August 19, 2011