No. 16-17197

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

AMG CAPITAL MGMT., LLC; BLACK CREEK CAPITAL CORP.; BROADMOOR CAPITAL PARTNERS, LLC; LEVEL 5 MOTORSPORTS, LLC; and SCOTT A. TUCKER,
Defendants-Appellants, and

PARK 269 LLC and KIM C. TUCKER,
Relief Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nevada, No. 2:12-cv-00536
Hon. Gloria M. Navarro, Chief Judge

BRIEF OF THE FEDERAL TRADE COMMISSION

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

THEODORE (JACK) METZLER
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3502

Of Counsel:
NIKHIL SINGHVI
JASON D. SCHALL
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

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QUESTIONS PRESENTED

Scott Tucker and his company AMG stole more than a billion dollars from unwitting consumers through a massive, fraudulent, short-term loan scheme. Tucker offered consumers a $300 loan for a payment of $390 two weeks later (or like terms on other amounts). But instead of hewing to that straightforward deal, Tucker withdrew as much as $975 from his victims' bank accounts in 10 payments over 20 weeks, purporting to rely on a self-serving interpretation of confusing fine-print terms in the loan documents. The district court found that Tucker's loan practices were misleading and violated the FTC Act as well as the Truth In Lending Act and its implementing rule, Regulation Z. The court ordered Tucker to repay $1.3 billion in ill-gotten gains and the relief defendants to pay $26 million that they received from Tucker. The questions presented by this appeal are:

1. Whether undisputed facts showed that Tucker's loan disclosures were likely to mislead consumers and failed to disclose the true terms of his loans in violation of the FTC Act, the Truth In Lending Act, and Regulation Z;

2. Whether the district court made procedural errors in granting summary judgment;

3. Whether the district court correctly held that the FTC did not need to present the testimony of consumers who were actually deceived to find that Tucker's loan disclosures were likely to mislead consumers;

4. Whether the Court should continue to follow its holding in *FTC v. Evans Products Co.*, 775 F.2d 1084 (9th Cir. 1985), that Section 13(b) of the FTC Act is not limited to cases of "routine fraud";

5. Whether the FTC must initiate a rulemaking rather than sue to enjoin deceptive acts or practices and violations of the Truth In Lending Act;

6. Whether the district court abused its discretion when it calculated monetary relief; and

7. Whether the district court abused its discretion when it ordered the relief defendants to disgorge tainted proceeds they received from Tucker and to which they make no legitimate claim.

JURISDICTION

The FTC agrees with the appellants' jurisdictional statement.

STATEMENT OF THE CASE

A. Scott Tucker's Payday Lending Enterprise

"Payday" loans are small, short-term, high-interest loans intended to help people with poor credit meet unexpected financial burdens with funds that can be repaid on their next payday. The amount borrowed usually ranges from $300 to $500, and the loan term coincides with the borrower's pay

schedule—typically two weeks. ER 2359. Payday lenders usually express the interest charge as a set dollar amount per $100 borrowed, but on an annualized basis the rates can approach 800 percent. ER 2328, 2358-2359.

Appellant Scott Tucker founded a massive payday lending enterprise, AMG, that operated over the internet. Although he told consumers he would withdraw from their bank accounts their loan amount plus 30% interest on their next payday, he didn't do that. Instead, he automatically "renewed" consumers' loans, rolling over the principal and withdrawing a 30% "finance charge"—the interest—multiple times before ever withdrawing a payment on the principal. The upshot was that a consumer who took out a $300 loan and expected to pay $90 in interest could ultimately pay as much as $675 in interest (in addition to repaying the $300 principal).

Tucker's lending enterprise encompassed a host of interrelated companies marketing loans using the trademarks UnitedCashLoans, USFastCash, Ameriloan, and 500FastCash, each associated with its own loan "portfolio."

ER 4.[1] To avoid the scrutiny of state regulators (and state usury laws), Tucker shielded his lending activities under the immunity afforded to Indian tribes. Tucker enlisted three tribes, who became "authorized lenders" for his companies. ER 13. But the tribes did not invest any capital or fund any of the loans. *E.g.* SER 145-146. [2] Tucker simply paid them a monthly fee to nominally "administer" the loans. *Id.*; ER 13-14. Each tribe set up a company which ostensibly took on one or more of Tucker's "loan portfolios."[3] ER 4. The tribal entities thus became the nominal lenders on the loan portfolios, but the tribes played no meaningful role in running the business. ER 4, 13. Instead, Tucker operated the entire enterprise through his own companies. ER 13-14. Tucker and his companies (the appellants here) are referred to collectively in this

[1] Tucker's companies included National Money Service, Inc., CLK Management LLC, and Universal Management Services, Inc. ER 4. The individual identities of the companies are irrelevant here since they operated as a common enterprise under the direction of Tucker. *See* ER 17-19. Blaine Tucker (Scott Tucker's brother), a defendant below, died while the case was pending. His estate subsequently settled with the FTC. Docket No. 599; 1085. For simplicity's sake Blaine Tucker and his companies are omitted from the discussion below.

[2] SER refers to the FTC's Supplemental Excerpts of the Record.

[3] The tribal corporations were defendants SFS, Inc.; Red Cedar Services, Inc.; and MNE Services, Inc. ER 4. An additional tribal entity, AMG Services, Inc., was later set up to use tribal immunity to shield one of Tucker's companies from a state regulator's investigative subpoena. *See United States v. Tucker*, No. 1:16-cr-91 (S.D.N.Y. June 6, 2017) (Docket No. 175 at 4, 6).

brief as "Tucker." Tucker's lending enterprise, which encompassed his companies as well as the tribal entities, is referred to as "AMG."

Tucker's control of AMG was comprehensive; he personally approved AMG's loan disclosures and websites, he controlled the content of its loan applications and notes, and he directed the schedule for withdrawing payments from borrowers' bank accounts. ER 14-15. Tucker treated the operation's income like his personal bank account—he signed thousands of checks on the tribal entities' behalf to fund his lavish lifestyle, freely transferring money to himself, his companies, and his wife. ER 15, 18.

B. Tucker's Loan Process

Consumers typically arrived at one of Tucker's loan websites after searching for loans on the internet and being referred to a Tucker company by a third-party lead-generation website. ER 242, 295-298. Tucker offered loans to any applicant who was employed, over 18, and capable of completing the online loan process (which was identical for all Tucker's websites). ER 240-241, 243. After navigating through several preliminary application pages (and accepting Tucker's requirement to authorize automatic withdrawals from their bank accounts), prospective borrowers invariably arrived at a "Confirmation and E-Signature Page," shown immediately below, which informed

them that they had been "pre-approved" for a loan and the maximum amount—between $150 and $800. ER 58, 243; *see* ER 300-304.

CONGRATULATIONS!

500FastCash? has Pre-Approved you for up to: $400
Your first due date will be 04/23/2012

Confirmation Number: [illegible]

If you would like less cash, please choose a new amount from the drop-box below.
Desired loan amount: $400

The terms of this loan are described in the LOAN NOTE AND DISCLOSURE.
Please review and confirm that you agree to the terms of the following related documents.

YES (click on each to confirm)

- I have read and accept the terms of the Application, including the terms and provisions of the LIMITED WAIVER OF SOVEREIGN IMMUNITY and the ARBITRATION PROVISION contained therein.
- I have read and accept the terms of the Privacy Policy & Electronic Disclosure and Consent Agreement.
- I have read and accept the terms of the Authorization Agreement.
- I have read and accept the terms of the Loan Note and Disclosure, including the terms and provisions of the LIMITED WAIVER OF SOVEREIGN IMMUNITY and the ARBITRATION PROVISION contained therein.

500FastCash? has developed a comprehensive Loan Alert System, including text messaging. By selecting Text and Email Alerts you agree to receive text messages from our Loan Alert System. Standard message and data rate may apply. See Application for full details.

- Text and Email Alerts
- Email Alerts Only

By typing your full name below to provide your **Electronic Signature** and clicking the **"I Agree"** button, you agree to accept this loan pursuant to the terms and provisions of all the loan documents above.

Type your full name (Mcrobertstsstest Marzinnotsstest) in the box above.

By Clicking on "I AGREE" below, I understand and agree that I will receive this loan from Red Cedar Services, Inc., doing business as 500FastCash, a tribal lending entity, direct to my bank account, and agree to be bound by the terms and provisions of all the loan documents above.

ER 306.

To complete the loan, consumers were required to click four checkboxes (circled in the vertical oval above), type their name in an "Electronic Sig-

nature" box (circled in the horizontal oval), and click "I agree." Checking the boxes purportedly confirmed that the consumer had read and accepted the terms of nine documents: (a) the loan application, which also included a "limited waiver of sovereign immunity" and an arbitration provision; (b) a privacy policy; (c) an "electronic disclosure and consent agreement"; (d) an "authorization agreement"; and (e) a "loan note and disclosure," which also included its own separate "limited waiver of sovereign immunity" and arbitration provision. *Id.* But Tucker did not require consumers to actually open any of those critical documents before clicking the checkboxes. ER 1538. Nevertheless, when consumers clicked "I agree," Tucker affixed their "electronic signature"—their typed name—to those documents and completed the loan. *See* ER 310-324. Tucker considered these "signed" documents valid, although the consumer may not have ever seen them.

1. What Tucker told borrowers about their loans

Tucker's "Loan Note and Disclosure" prominently featured a box purporting to describe the loan terms, surrounded by dense blocks of small-print text:

LOAN NOTE AND DISCLOSURE

Borrower's Name: KELLYE SLIGER **Date: 09/07/2010 ID#: Ameriloan-1908859402**

Parties: In this Loan Note and Disclosure ("Note") you are the person named as Borrower above. "We" Ameriloan are the lender (the "Lender"). All references to "we", "us" or "ourselves" mean the Lender. Unless this Note specifies otherwise or unless we notify you to the contrary in writing, all notices and documents you are to provide to us shall be provided to Ameriloan at the fax number and address specified in this Note and in your other loan documents.

The Account: You have deposit account [redacted] You authorize us to effect a credit entry to deposit the proceeds of the Loan (the Amount Financed indicated below) to your Account at the Bank.

DISCLOSURE OF CREDIT TERMS: The information in the following box is part of this Note.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate (e) 684.38%	FINANCE CHARGE The dollar amount the credit will cost you. $90.00	Amount Financed The amount of credit provided to you or on your behalf. $300.00	Total of Payments The amount you will have paid after you have made the scheduled payment. $390.00

Your Payment Schedule will be: 1 payment of $390.00 due on 2010-09-24 , if you decline* the option of renewing your loan. If your pay date falls on a weekend or holiday and you have direct deposit, your account will be debited on the business day prior to your normal pay date. If renewal is accepted you will pay the finance charge of $90.00 only, on 2010-09-24 You will accrue new finance charges with every renewal of your loan. On the due date resulting from a fourth renewal and every renewal due date thereafter, your loan must be paid down by $50.00. This means your Account will be debited the finance charge plus $50.00 on the due date. This will continue until your loan is paid in full. *To decline the option of renewal, you must select your payment options using the Account Summary link sent to your email at least three business days before your loan is due. Security: The loan is unsecured.

Prepayment: You may prepay your loan only in increments of $50.00. If you prepay your loan in advance, you will not receive a refund of any Finance Charge.(e) The Annual Percentage Rate is estimated based on the anticipated date the proceeds will be deposited to or paid on your account, which is 9-8-2010.

Itemization Of Amount Financed of $300.00; Given to you directly: $300.00; Paid on your account $0

See below and your other contract documents for any additional information about prepayment, nonpayment and default.

Promise To Pay: You promise to pay to us or to our order and our assignees, on the date indicated in the Payment Schedule, the Total of Payments, unless this Note is renewed. If this Note is renewed, then on the Due Date, you will pay the Finance Charge shown above. This Note will be renewed on the Due Date unless at least three Business Days Before the Due Date either you tell us you do not want to renew the Note or we tell you that the Note will not be renewed. Information regarding the renewal of your loan will be sent to you prior to any renewal showing the new due date, finance charge and all other disclosures. As used in the Note, the term "Business Day" means a day other than Saturday, Sunday or legal holiday, that Ameriloan is open for business. This Note may be renewed four times without having to make any principal payments on the Note. If this Note is renewed more than four times, then on the due date resulting from your fourth renewal, and on the due date resulting from each and every subsequent renewal, you must pay the finance charge required to be paid on that due date and make a principal payment of $50.00. Any payment due on the Note shall be made by us effecting one or more ACH debit entries to your Account at the Bank. You authorize us to effect this payment by these ACH debit entries. You may revoke this authorization at any time up to three Business Days prior to the date any payment becomes due on this Note. However, if you timely revoke this authorization, you authorize us to prepare and submit a check drawn on your Account to repay your loan when it comes due. If there are insufficient funds on deposit in Your Account to effect the ACH debit entry or to pay the check or otherwise cover the Loan payment on the due date, you promise to pay Us all sums You owe by another form of payment other than personal check. We do not accept personal checks, however, if You send Us a check, You authorize Us to perform an ACH debit on that Account in the amount specified.

Return Item Fee: If sufficient funds are not available in the Account on the due date to cover the ACH debit entry or check, you agree to pay us a Return Item Fee of $30.

Prepayment: The Finance Charge consists solely of a loan fee that is earned in full at the time the loan is funded. Although you may pay all or part of your loan in advance without penalty, you will not receive a refund or credit of any part or all of the Finance Charge.

Governing Law: Both parties agree that this Note and your account shall be governed by all applicable federal laws and all laws of the jurisdiction in which the Lender is located, regardless of which state you may reside, and by signing below or by your electronic signature, you hereby contractually consent to the exclusive exercise of regulatory and adjudicatory authority by the jurisdiction in which the Lenders is located over all matters related to this Note and your account, forsaking any other jurisdiction which either party may claim by virtue of residency.

Arbitration of All Disputes: You and we agree that any and all claims, disputes or controversies between you and us, any claim by either of us against the other (or the employees, officers, directors, agents, servicers or assigns of the other) and any claim arising from or relating to your application for this loan, regarding this loan or any other loan you previously or may later obtain from us, this Note, this agreement to arbitrate all disputes, your agreement not to bring, join or participate in class actions, regarding collection of the loan, alleging fraud or misrepresentation, whether under common law or pursuant to federal, state or local statute, regulation or ordinance, including disputes regarding the matters subject to arbitration, or otherwise, shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed. No class arbitration. All disputes including any Representative Claims against us and/or related third parties shall be resolved by binding arbitration only on an individual basis with you. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION. This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed. Rules and forms of the NAF may be obtained and all claims shall be filed at any NAF office, on the World Wide Web at www.arb-forum.com, by telephone at 800-474-2371, or at "National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota 55405." Your arbitration fees will be waived by the NAF in the event you cannot afford to pay them. The cost of any participatory, documentary or telephone hearing, if one is held at your or our request, will be paid for solely by us as provided in the NAF Rules and, if a participatory hearing is requested, it will take place at a location near your residence. This arbitration agreement is made pursuant to a transaction involving interstate commerce. It shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgment upon the award may be entered by any party in any court having jurisdiction.

NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION Agreement Not To Bring, Join Or Participate In Class Actions: To the extent permitted by law, you agree that you will not bring, join or participate in any class action as to any claim, dispute or controversy you may have against us, our employees, officers, directors, servicers and assigns. You agree to the entry of injunctive relief to stop such a lawsuit or to remove you as a participant in the suit. You agree to pay the attorney's fees and court costs we incur in seeking such relief. This agreement does not constitute a waiver of any of your rights and remedies to pursue a claim individually and not as a class action in binding arbitration as provided above.

Survival: The provisions of this Loan Note And Disclosure dealing with the Agreement To Arbitrate All Disputes and the Agreement Not To Bring, Join Or Participate In Class Actions shall survive repayment in full and/or default of this Note.

No Bankruptcy: By signing below or electronically signing you represent that you have not recently filed for bankruptcy and you do not plan to do so.

NOTICE: We adhere to the Patriot Act and we are required by law to adopt procedures to request and retain in our records information necessary to verify your identity.

By signing or electronically signing this Loan Note you certify that all of the information provided above is true, complete and correct and provided to us, Ameriloan, for the purpose of inducing us to make the loan for which you are applying. By signing below or electronically signing you also agree to the Agreement to Arbitrate All Disputes and the Agreement Not To Bring, Join Or Participate in Class Actions. By signing or electronically signing this application you authorize Ameriloan to verify all information that you have provided and acknowledge that this information may be used to verify certain past and/or current credit or payment history information from third party source(s). Ameriloan may utilize Teletrack or other similar consumer-reporting agency for these purposes. We may disclose all or some of the nonpublic personal information about you that we collect to financial service providers that perform services on our behalf, such as the servicer of your short term loan, and to financial institutions with which we have joint marketing arrangements. Such disclosures are made as necessary to effect, administer and enforce the loan you request or authorize and any loan you may request or authorize with other financial institutions with regard to the processing, funding, servicing, repayment and collection of your loan. (This Application will be deemed incomplete and will not be processed by us unless signed by you below.)

ER 378-379. The large box contained four smaller boxes that listed the "amount financed," the "annual percentage rate," the "finance charge" and a "total of payments." *Id.*

The "finance charge"—the interest Tucker charged consumers to borrow money for one pay period—was 30% of the amount borrowed. So for a $300 loan, consumers were told they would pay a $90 finance charge (an annualized rate of 684.38%) for a total repayment amount of $390. *Id.*; *see also* ER 318-320 ($120 finance charge for $400 loan for a total payment of $520); ER 60. In a box immediately below the credit terms box, Tucker said that the payment schedule would consist of "1 payment," equal to the amount listed as the "total of payments" (the amount financed plus the finance charge), due on their next payday. ER 379.

2. How Tucker's loans really worked

Tucker's disclosures were not accurate. He did not follow the promised "payment schedule" by withdrawing "1 payment" equal to the "total of payments." Instead, on the due date Tucker withdrew only the finance charge—$90 in the $300-loan example. Tucker then automatically "renewed" the loan

for an additional period—without informing the borrower what it was doing. Tucker did the same thing again three more times after that, each time withdrawing only the interest from the consumer's bank account and rolling over the principal. On the fifth due date, Tucker began withdrawing $50 toward the principal in addition to the $90 interest charge ($140 in all), rolling the remaining principal over yet again to the next period. The loan would finally be paid after five more cycles, with the consumer ultimately paying a total of $975. Tucker's actual payment schedule is set forth in the table below (ER 61), which shows that for a $300 loan, the consumer wound up paying $675 in interest rather than the promised $90 interest charge.

Due Date	Payment	Finance Charge (30% of remaining principal balance)	Amount Applied To Principal	Remaining Principal Balance	Total Paid To Date
1	$90	$90	$0	$300	$90
2	$90	$90	$0	$300	$180
3	$90	$90	$0	$300	$270
4	$90	$90	$0	$300	$360
5	$140	$90	$50	$250	$500
6	$125	$75	$50	$200	$625
7	$110	$60	$50	$150	$735
8	$95	$45	$50	$100	$830
9	$80	$30	$50	$50	$910
10	$65	$15	$50	$0	$975
TOTAL	**$975**	**$675**	**$300**		**$975**

According to Tucker, consumers signed up for this bait-and-switch tactic when they failed to "decline the option of renewing [their] loan," as indicated in the "payment schedule" description in the dense text below the large

boxes. But consumers were never presented with an option to renew that they could decline—renewal was automatic and could be avoided only if the borrower followed a convoluted process to avoid it.

The only clue Tucker gave consumers about this highly consequential aspect of the loan was an asterisk next to the word "decline" which corresponded to another asterisk buried even deeper in the fine print of Tucker's disclosure. ER 379. At the second asterisk, the fine print instructed: "To decline the option of renewal, you must select your payment options using the Account Summary link sent to your email at least three business days before your loan is due." *Id.* Tucker did not explain what was meant by "payment options" or "Account Summary link," nor did he inform consumers that the *default* payment option was the ten-payment, automatic renewal schedule described above.

The fine print's descriptions of "renewal" were also inconsistent, jumbled up with unrelated terms, and at odds with other terms of the loan. *See id.* For example, the first sentence of the fine print—inaccurately describing "your payment schedule" with the asterisked "decline* the option of renewal"—is followed by an unrelated sentence about due dates falling on weekends. The fine print then introduces the description of renewal with the phrase, "If renewal is accepted," which suggests—incorrectly—that an af-

firmative act of acceptance (either by the consumer or the lender) was required before "renewal." *Id.* The fine print then describes the process of interest-only payments and subsequent principal repayments, but does not state that "renewal" was automatic, every pay period, without either side "accepting" anything. *Id.* It then skips back to the asterisk about "declining" renewal, and then moves on to a contradictory section about "Prepayment," which suggests that paying off the loan with a single payment might not be available at all: "You may prepay your loan only in increments of $50." *Id.* More unrelated terms follow, and then the fine print goes back over all of the above in slightly different and contradictory language. For example, the first go-round describes "select[ing] your payment options using the Account Summary link sent to your email," while the second one says the loan will be "renewed on the Due Date unless at least three Business Days Before the Due Date either you tell us you do not want to renew the Note or we tell you that the note will not be renewed." *Id.* The disclosure never states the how much the borrower would pay—either in interest charges or overall—under the default, multi-renewal payment schedule.

Borrowers who were able to sort through this morass could theoretically cancel the default payment schedule and instead pay the "total amount of payments" that Tucker's disclosure promised they would pay on their initial

due date. But even then, it was not easy and they had to enter yet another agreement. Specifically, to "decline" Tucker's "option of renewing," the consumer had to: (1) wait for an email from the lender, sent three days after the loan was funded; (2) follow a link in the email; (3) log into their account; (4) select "Next Payment Date" from a menu; (5) click a link, "Click here to view payment options"; (6) select "Pay Total Balance" on the next page and click submit; (7) click "submit" again on a verification page; (8) check a box indicating they "have read and accept the terms" of a hyperlinked "Account Summary Doc" (which they were not required to open or read); (9) type their name as their signature; (10) click "I agree"; and (11) do so by 4:30 pm, three business days before their due date.[4] ER 248-250, 335, 337, 339, 352-355; *see also* ER 62. Borrowers who did not follow those steps were automatically "renewed." Not surprisingly, only about 6-8% of consumers managed to navigate this process and cancel automatic renewals during the first loan period. *See* SER 7-20 (column 1, "Paid").

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[4] Because Tucker waited 3 days to send the email and required consumers to cancel three full business days before their due date, the window within which consumers could theoretically cancel the automatic renewal process was 5-7 days at most, depending on the day of the week their loan was due. *See* ER 286 ("[I]f you are due on Friday, we need to have the document by 4:30 p.m. on Monday."). After the first renewal, Tucker sent the email three *business* days after it deducted a payment, ER 248, reducing the window to as little as two days.

3. Tucker concealed the true cost of his loans.

Consumers did not understand how much Tucker was going to charge them from his disclosures. If a would-be borrower called customer service and asked for an explanation, the representative refused to provide one. Instead, at team meetings, employees were instructed: "Do not give information to anyone who is not a customer." SER 2-3, 27, 30-31. For "[a]nyone calling that does not have an existing account—you cannot explain how the loan works. All you can do is direct them to the website." *Id.*

But the websites did not explain the loan either. On the webpage titled "How it works," the only information about repayment was: "When your loan is due, we automatically deduct your scheduled payment from your bank account along with any applicable fees." *E.g.* SER 5. That did not explain how it worked in reality. The site did not tell the borrower that the loan would automatically renew. It did not say the default "scheduled payment" was an interest-only payment. It did not reveal that the principal would carry over. It did not inform the borrower of additional "finance charges." And it did not disclose that the next "scheduled payment" would also be an interest-only payment that did not pay down the loan.

Borrowers soon discovered that they were paying much more than they expected. *E.g.* ER 62-63. In telephone calls, in writing, and in complaints to

the FTC, consumers consistently complained that Tucker's companies said they would charge one thing but actually charged a different, much higher, amount. *E.g.* SER 88-89, 98-99, 108-109. When consumers who had already been duped called customer service, representatives were finally allowed to explain. In one recorded call, for example, the representative got right to the point:

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1 ALICIA: Okay, this is how the loan works. For
2 your first four payments that you chose to pay us $60 has
3 just been a service charge fee, so it did not pay down
4 the loan. You have to notify us three days before that
5 due date that you wanted to pay it for if you wanted to
6 pay more money down. And if you did not notify us, we
7 were just going to automatically debit the service charge
8 fee.

9 You're allowed to pay that for four times.
10 Starting on your fifth payment, if your loan still has
11 not been paid in full, you're going to begin the pay-down
12 process and the loan is going to pay down itself.
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SER 98. Other recorded calls were similar. *E.g.* SER 88, 109-110. Consumers said that they thought the total of their payments would equal the "total of payments" stated on their loan note. SER 58, 62, 65-66, 69. As the customer in the call above reacted: "Yeah, but you – you – okay, I – I agreed to a loan amount of $200 plus a $60 fee, and you guys have taken $445 out of my account." SER 98. Consumers did not expect that their loans would "renew," and did not want them to. SER 62, 88. When Tucker withdrew less than the total amount due, consumers often believed the payment was going toward their principal. *E.g.* SER 39, 58, 118-120; ER 88, 719, 720, 721.

Tucker was well aware that his customers did not understand the terms when they agreed to their loans. ER 17. One customer service representative estimated that 80% of customers complained that withdrawals from their account were more than the loan required. ER 88. Two others estimated that more than half the complaints were from consumers who did not understand the terms of the loan. *Id.* And an AMG analysis showed that 40% of accounts were referred to its compliance department because of disputes about "terms," defined to include disputes about whether payments were properly credited to the loan amount. SER 131-132.

Nevertheless, Tucker did not act to make the disclosures clear and repeatedly rejected employees' suggestions to make the loan disclosures more understandable. ER 88. It's not hard to understand why: as one training manager explained, when customer service representatives use "terms like renew and pay down" before obtaining a loan, "customers ask to withdraw after the explanation." *Id.* To ensure consumers remained in the dark, Tucker disciplined employees who gave consumers "too much detail." SER 41.

Thousands of consumers also complained to the FTC. *See* ER 718-858. Four consumers who complained to the FTC ultimately were deposed. They all testified that they believed they would pay the total shown on the lender's

website; none believed they would pay two and a half times as much. ER 433, 499, 516, 550.

4. Tucker aggressively collected the loans.

Tucker responded to consumer complaints with threats. When borrowers said that they had not understood the loan disclosures, customer service representatives accused them of having "falsified information on the loan" by "stating [they] had read and understood the terms of the loan that wasn't the case." SER 23; *see also* SER 44. Tucker's collections department threatened to sue people, garnish their wages, and report them to credit reporting agencies. *See* SER 49, 77. Tucker's employees testified that they heard collections agents threaten to sue multiple times a day. SER 47, 48-49, 61. Yet Tucker never actually filed lawsuits, attempted to garnish wages, or reported consumers to credit bureaus. SER 135.

5. Tucker fleeced borrowers of $1.3 billion, which he used to fund his extravagant lifestyle.

Measured by the amount of money it brought in, Tucker's lending scheme was wildly successful. Between 2008 and 2012, AMG collected more than $1.3 billion—with a "b"—in renewal finance charges alone, *after* subtracting the original principal *and* the 30% interest charge the borrowers agreed to pay.

Scott Tucker and his wife lived a lavish lifestyle on their ill-gotten gains. Among other things, Tucker bought luxury vehicles and charter flights, established his own automobile racing team and became a Ferrari race-car driver, and bought and furnished a multimillion-dollar home in Aspen, Colorado. Docket No. 908-87 at 3 (Land Rover, Porsche Cayenne), 4 (Ferrari), 5 (Mercedes repairs); 908-86 at 2 (Mercedes Benz); 908-91 at 2-5, 908-92 at 3-7 (charter flights); 908-92 at 19-20 (racing).[5] In total, Tucker and his wholly owned companies received at least $419 million from AMG. Of that amount Tucker directly received more than $186 million from 2002 to 2011. *See* SER 142, 149. Tucker's racing team, Level 5 Motorsports LLC, received an additional $67 million. Docket No. 908-116 (Level 5 responses to interrogatories). And another Tucker company, BA Services, received $166 million. *See* Docket No. 908-117.

Tucker diverted millions of dollars from his illegal enterprise to his wife, relief defendant-appellant Kim Tucker, and to her company, relief defendant-appellant Park 269, LLC, the corporate owner of the Aspen house. ER 19. Although Kim Tucker had no ownership interest in her husband's businesses and provided no services for them, the companies paid her huge

[5] This Court currently has before it another appeal that involves the disposition of a race-car trailer that Tucker's racing team paid $500,000 for while this suit was ongoing. *See FTC v. E.T.S. Ventures, LLC*, No. 17-15552.

sums. One Tucker business called Black Creek cut her a check for $4.1 million. ER 19. At Tucker's direction, several of his loan portfolios made payments to one of his companies, which simultaneously paid the total aggregate amount to his wife. ER 19-20. Ms. Tucker admitted that she received money from Tucker through his businesses "for . . . personal and household uses." ER 20; SER 160. She further admitted that she did not provide any consideration for the sums she received. ER 20; SER 160.

Kim Tucker's company Park 269 also received millions of dollars from Scott Tucker. ER 20. At Tucker's direction, AMG undisputedly paid for the home and all of its expenses. ER 20. Neither Park 269 nor Kim Tucker claims to have offered any services or other value for the monies paid on its behalf. ER 20; SER 160, 164-165 (interrogatory answers).

C. The FTC's Enforcement Lawsuit

1. The FTC's complaint

The FTC sued to stop Tucker's unlawful lending practices, naming as defendants Scott Tucker, his companies, the tribal lending entities, the relief defendants, and several others.[6] *See* ER 204-226. In four counts, the com-

[6] Tucker's counsel in this appeal, Tim Muir, was originally named as a defendant, but the FTC later dismissed him from the suit. Docket No. 671. Muir and Tucker were both convicted of criminal RICO and TILA offenses for their roles in the AMG lending enterprise. *See United States v. Tucker*, No. 1:16-cr-91 (S.D.N.Y. Oct. 13, 2017) (Docket No. 309).

plaint charged that Tucker's payday loan operation violated (1) the FTC Act, 15 U.S.C. §§ 41-58 (two counts); (2) the Truth In Lending Act (TILA), 15 U.S.C. §§ 1601-1667f, and Regulation Z, TILA's implementing rule, 12 C.F.R. §§ 1026-1026.61; and (3) the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r. The Commission also charged that relief defendants Park 269 and Kim Tucker had received funds from Tucker's fraud to which they had no right.

Section 5 of the FTC Act outlaws "deceptive acts or practices." 15 U.S.C. § 45(a)(1). The complaint alleged that Tucker's loan disclosures were deceptive and also that defendants threatened consumers with litigation and other actions that they never intended to take.

The Truth in Lending Act (TILA) "requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). TILA is implemented by Regulation Z, which requires that creditors disclose these terms "clearly and conspicuously" before credit is extended. 12 C.F.R. § 1026.17(a)-(c). The complaint charged that Tucker's disclosures violated both the rule and its implementing regulation because they told prospective

borrowers they would receive one set of terms when in fact Tucker applied a different set it claims was hidden in the fine print.

The Electronic Funds Transfer Act prohibits requiring preauthorized electronic fund transfers as a "condition [of] the extension of credit to a consumer." 15 U.S.C. § 1693k. The complaint charged that Tucker's loan enterprise violated that provision.

The defendants agreed to a preliminary injunction and the parties agreed to bifurcate the case into "liability" and "relief" phases. ER 227. In phase I, the liability phase, the court was to adjudicate the FTC Act, TILA, Regulation Z, and Electronic Funds Transfer Act violations. ER 235. In phase II, the court was to adjudicate any remaining issues, including whether the defendants operated as a common enterprise, the liability of the individual defendants, and the determination of equitable relief. ER 236. During phase I, the parties settled the debt collection and Electronic Funds Transfer Act charges. ER 161. As a result of the settlement, the defendants agreed to a permanent injunction that prohibits them from engaging in deceptive debt collection practices and from conditioning the extension of credit on preauthorized electronic fund transfers. ER 163-164.

2. The magistrate judge's evidentiary rulings and phase I summary judgment recommendation

The FTC and Tucker filed cross-motions for summary judgment on the remaining phase I liability issues: whether Tucker's loan practices violated the FTC Act, the Truth in Lending Act, and Regulation Z. In response to the FTC's motion, Tucker filed two motions seeking to exclude evidence cited in the FTC's motion. *See* ER 1316-1321 (Docket No. 502); ER 1322-1348 (Docket No. 498). In the first motion (Docket No. 498), Tucker objected under Federal Rule of Civil Procedure 56(c) that three categories of the FTC's evidence were inadmissible hearsay: consumer complaints in the FTC's database, recordings of consumers' telephone calls to AMG customer service, and the testimony of Tucker's former employees. In the second motion (Docket No. 502), Tucker argued that the FTC violated Federal Rule of Civil Procedure 26(a) by failing to disclose as "witnesses" the consumers whose complaints were reflected in the database and whose statements were reflected in the consumer calls. ER 1317-1318.

All of the motions were referred to the magistrate judge. The summary judgment motions were referred for proposed findings of fact and recommendations of law; Tucker's evidentiary objections, however, were referred for the magistrate's *decision* (subject to reconsideration by the district court). *See* 28 U.S.C. § 636(b); D. Nev. Local R. IB 1-4.

Summary judgment recommendation: The magistrate judge recommended summary judgment against Tucker on the FTC's charges that his loan practices violated the FTC Act and the Truth in Lending Act. ER 82-117. On the FTC Act, the magistrate judge recommended finding that Tucker had acted deceptively because his disclosures made two sets of contradictory representations – those in the "TILA box"—the heavily outlined box containing the loan terms shown on p.8 above—and those in the "fine print." ER 94. The TILA box said consumers would pay, in total, the amount of the loan plus a finance charge, whereas the fine print described (and convolutedly at that) the far costlier sequence of interest-only and $50 "paydown" withdrawals that Tucker actually made. ER 95-96. The magistrate judge also recommended finding that the fine print contradicted itself, for example by describing the process to avoid renewal in different, irreconcilable ways. ER 96. The magistrate judge recommended finding that the contradictory representations were material and likely to mislead consumers. ER 97-99; 103. He also recommended finding that Tucker's loan note was likely to mislead for the additional reason that, as a contract, its internally inconsistent provisions were ambiguous as a matter of law. ER 99-103.

With regard to TILA and Regulation Z, the magistrate judge recommended finding that the FTC had satisfied its burden to show that Tucker

failed to disclose the terms of the legal obligation between the parties before extending credit. ER 109. The judge reasoned that Tucker's loan note was ambiguous as a matter of law because its disclosures said consumers would pay a single finance charge in one payment but in fact Tucker defaulted to a multi-payment, multi-renewal plan that ultimately cost the consumer much more than the note disclosed. ER 113. In addition, the judge recommended finding the contract ambiguous because its descriptions of how to cancel the "renewal" plan were vague, circular, and contradictory. ER 111-112. Because the contract was ambiguous, the judge reasoned, the disclosures could not have clearly disclosed the terms of the loan as TILA requires. ER 109-110; 112-113.

Evidentiary rulings: The magistrate judge resolved Tucker's evidentiary motions in an order issued just before his summary judgment recommendation. ER 118-142. The judge first considered whether the FTC had failed to disclose the names of consumers whose complaints were found in the FTC's database as witnesses under Rule 26(a). ER 126, 128.[7] The judge reasoned that although the FTC had produced its database of approximately 7,500 consumer complaints, it had incorrectly identified the database as a

[7] Tucker unsuccessfully made this same argument regarding statements of former employees and AMG's own recordings and transcripts of consumer calls; he does not appeal those rulings. *See* ER47 & n.5.

"document" that the FTC "may use to support its claims or defenses" under Rule 26(a)(1)(A)(ii), when it should instead have identified each consumer as an individual "likely to have discoverable information" that the FTC "may use to support its claims" under Rule 26(a)(1)(A)(i). ER 130-131. In other words, the magistrate judge concluded that "the FTC should have designated the consumer complaints as 'individuals.'" ER 130. As a sanction, the judge concluded that the complaints need not be excluded, but Tucker could inform the jury of the FTC's "late disclosure" of the FTC's database complaints, as contemplated by Rule 37(c)(1)(C). ER 134-135.

The judge then considered whether the consumer complaints contained inadmissible hearsay. The judge rejected the FTC's argument that the consumer complaints in its database were nonhearsay under Federal Rule of Evidence 803(3), but found the evidence was admissible under the residual exception of Rule 807. ER 137-141.

3. The district court's phase I orders

Tucker objected to the magistrate judge's summary judgment recommendation and moved the district court to reconsider the magistrate judge's evidentiary rulings. ER 1238-1266, 1216-1237. The district court accepted the magistrate judge's recommendation and entered summary judgment in fa-

vor of the FTC. ER 57-81. In a separate order, it declined to reconsider the magistrate judge's evidentiary rulings. ER 39-56.

On the FTC Act, the district court held that Tucker's disclosures were likely to mislead borrowers "because the large prominent print in the TILA Box implies that borrowers will incur one finance charge while the fine print creates a process under which multiple finance charges will be automatically incurred unless borrowers take affirmative action." ER 71. Moreover, Tucker's rabbit-warren of web pages hid from borrowers "the existence of the automatic renewal and the process for declining renewal." ER 71. The terms are "scattered throughout the fine print" and "never expressly state that the renewal plan is automatic." ER 71-72.

The court addressed and rejected many of the arguments that Tucker now raises in his appeal. Specifically, the district court rejected Tucker's argument that the magistrate judge had improperly weighed facts in recommending a finding that the net impression of his disclosures was likely to mislead. ER 68-69. The district court explained that when the operative facts (here, the contents of Tucker's disclosures) are undisputed, the legal effect of those facts "effectively becomes a question of law." ER 69 (quoting *FTC v. Gill*, 71 F.Supp.2d 1030, 1035 (C.D. Cal. 1999)). The district court likewise

rejected Tucker's argument that the magistrate judge had "ignored" his evidence and improperly deemed it "immaterial." ER 69-70.

The district court denied Tucker's motion to reconsider the magistrate judge's evidentiary rulings. ER 39-56. Tucker had argued that the magistrate judge should have excluded the FTC's entire complaint database as a sanction for failing to identify the thousands of consumers in the database as "witnesses" under Rule 26(a). ER 47-48. The court noted, however, that in other cases courts have held that Rule 37 does not mandate exclusion and concluded that the magistrate judge acted within his discretion when he ordered a less severe sanction. ER 48-49.

Following the district court's order, several defendants (the tribal entities and related persons: AMG Services, Inc., MNE Services, Inc., SFS, Inc. Red Cedar Services, Inc., Don Brady, Troy LittleAxe, and Robert Campbell) settled, resulting in monetary judgments totaling nearly $25.5 million. ECF Nos. 727, 760, 761, 762, 888, 889. After the settlements, only Scott Tucker and his wholly owned companies remained as defendants; only Kim Tucker and her wholly owned company (Park 269) remained as relief defendants.

4. The district court's phase II summary judgment order

Phase II of the proceedings in the district court involved three issues: (i) whether the corporate defendants acted as a common enterprise; (ii)

whether Scott Tucker was personally liable, and (iii) the amount of monetary relief against the defendants and the relief defendants. The parties filed cross-motions for summary judgment in phase II. The district court granted summary judgment to the FTC and resolved all of the remaining issues. ER 2-38.

The court rejected a number of "affirmative defenses" urged by Tucker, including that the FTC's case was barred by laches and the statute of limitations, that the FTC may file suit in federal court only in cases of "routine fraud" (which Tucker claimed this case is not), and that the agency should have resolved whether his loan process was deceptive by rulemaking rather than proceeding by litigation. With regard to laches, the court noted that laches does not apply to the federal government and that there is no statute of limitation in the FTC Act. ER 10. The court rejected Tucker's argument that FTC cases are limited to "routine fraud." It found instead that this Court had already resolved that issue the other way in *FTC v. Evans Products Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985). ER 10-11.

The court also rejected Tucker's attempt to show that the FTC abused its discretion by proceeding through adjudication rather than rulemaking. ER 11. The court noted the Supreme Court's holding that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."

ER 11 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). The court found that the FTC properly proceeded by adjudication, reasoning that this case simply "applies the established principles of the FTC Act" and "will not result in any changes to existing law." ER 11. The court held that the FTC was not attempting to skirt the Administrative Procedure Act because it is not attempting to "amend a recently amended rule, or to bypass a pending rule-making proceeding." ER 11 (quoting *Union Flights, Inc. v. Adm'r, Fed. Aviation Admin.*, 957 F.2d 685, 688 (9th Cir. 1992)).

The district court further found no material factual dispute that relief defendant Kim Tucker received $19 million from the scheme and that she did not have any legitimate claim to the funds. ER 20. The court found that Kim Tucker's company Park 269 LLP likewise received $8 million though it had not provided any services or other consideration to Tucker's companies. ER 20. The court therefore ordered Ms. Tucker to disgorge $19 million and Park 269 to disgorge $8 million. *Id.*

The court found that the defendants operated as a "common enterprise." ER 18. "[N]o real distinction exist[ed]" between the various corporations; they all were owned and run by Scott Tucker; they used the same personnel and operated from the same addresses; and they freely commingled their funds. ER 18. The court found Scott Tucker personally liable because of

his extensive involvement in setting up and running the enterprise, his prior conviction related to another lending scheme, and his invocation of the Fifth Amendment during his deposition. ER 21-22.

The court ordered $1.3 billion in monetary relief against Tucker. The FTC calculated consumer harm from Tucker's consumer and loan data files for loans made from 2008-2012, which comprised more than 5 million loans and 6 million borrowers.[8] *See* ER 1445-1449. Given the large amount of data, FTC employee Elizabeth Anne Miles used data analysis software to perform the calculation. ER 1446. After combining the various data files, she matched consumers to loans using an identifier field that was common to both data sets but unique to each loan. *Id.* She discarded 3.4 million consumer records that had no matching loans and 3,063 loans that had no matching consumer. ER 1446-1447. The remaining records described 5 million loans to just under 3.3 million consumers. ER 1447. From those, Miles identified loans in which the consumer paid more than Tucker promised they would; that is, the amount borrowed plus a 30% interest charge. ER 1447-1448. She then subtracted the amount borrowed plus 30% from what the consumers actually paid. The excess payments totaled $1.3 billion. ER 1448. The FTC offered

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[8] Although Tucker had been in business for ten years, the pre-2008 data was unusable. ER 1445-1446.

Miles's computation as a summary calculation under Federal Rule of Evidence 1006.

Tucker did not set forth his own calculation of consumer harm. Instead, he objected to the FTC's calculation, largely on the ground that it was inadmissible. ER 25-26. The court accepted the FTC's calculation of harm, held that it was admissible, and rejected Tucker's objections to it. Tucker had argued that the calculation was flawed because it did not include the 3.3 million consumer records and 3,063 loan records described above. ER 24-25. The court reasoned that the absence of these records was not unreasonable and did not prejudice Tucker because it likely made the calculation of harm *smaller*. ER 25. The court further rejected the argument that the FTC had not shown that all of the borrowers whose loans were in the calculation had relied on the representations. ER 25. The court noted that reliance on material misrepresentations made to large numbers of consumers is presumed when they are the type that a reasonable consumer would rely on, unless the defendant shows otherwise. Thus, "proof of individual reliance by each purchasing customer is not needed." ER 25 (quoting *FTC v. Figgie Int'l*, 994 F.2d 595, 605 (9th Cir. 1993)).

The court also rejected Tucker's argument (based on his expert report) that repeat borrowers should be excluded from the calculation because, by

virtue of the fact that they took out another loan from one of Tucker's companies, those customers must not have been confused by the disclosures. ER 26. The court determined that the expert had wrongly assumed that such borrowers "plainly understood the loan terms"; the assumption was not supported by any evidence and was therefore insufficient to create a genuine issue of fact. *Id.* Moreover, Tucker had not shown that borrowers who had borrowed from multiple Tucker-controlled lenders with different names knew they were dealing with the same enterprise. ER 26.

Scott Tucker, Kim Tucker, and their respective related entities appeal.

SUMMARY OF THE ARGUMENT

At its core, this case is quite simple. The undisputed facts showed that Tucker violated the FTC Act, the Truth in Lending Act, and Regulation Z by telling consumers they would get one set of loan terms but actually holding them to different, hidden terms. A consumer who read Tucker's TILA disclosure box learned that she would make a single payment totaling the amount borrowed plus a 30% finance charge. In fact, the loans were automatically renewed, resulting in far higher charges. Those facts alone are enough to sustain the district court's judgment; the bulk of Tucker's brief is devoted to factual disputes that are not material to the question of whether his disclosures were deceptive.

1.a. Tucker violated the FTC Act's prohibition on deception because his loan disclosures were likely to mislead consumers into believing they would receive the clearly stated loan terms rather than the obscure terms they actually received. The district court correctly focused on the "net impression" conveyed by the loan disclosure. The court properly held that the fine-print terms did not explain the renewal process or override the misleading terms that appeared prominently in large bold boxes. In the absence of any dispute over the disclosures themselves, the analysis of their net impression was an appropriate question of law for summary judgment. Other facts extrinsic to the loan process were not material to the net impression of the disclosures themselves.

b. The same undisputed facts also support the district court's finding that Tucker violated the Truth in Lending Act and its implementing Regulation Z. Those provisions require lenders to clearly and conspicuously disclose the terms of a loan before credit is extended, but Tucker's disclosures did not meet that basic requirement. In a prominently placed "TILA box," Tucker falsely told borrowers that they would be charged a specific amount on a specific date. In fact, Tucker withdrew multiple payments, one after the other, totaling far more than the disclosed figure.

Tucker's loan disclosures did not "technically comply" with TILA and neither court below found that they did. The terms in the TILA box reflected, at best, how much the borrower would pay if she managed to navigate the complicated process to stop automatic renewal and did so within a short window; few people actually did so. That does not amount to a clear and accurate disclosure of the loan terms as required by the statute. Nor are the renewals "subsequent events" that require no new disclosures under TILA; renewal was automatic from the get-go and thus flowed from the original loan. TILA required Tucker to clearly disclose all of the loan terms at the outset.

2. Tucker shows no procedural error that precluded summary judgment. The district court complied with Rule 56(f) because its decision was based on grounds that the FTC argued in its motion, including that Tucker's disclosures misled consumers about loan renewal. Tucker thus had reasonable notice of the grounds urged against him.

The judgment below also complies with Rule 56(c). The magistrate judge issued a final ruling on Tucker's evidentiary objections before the district court granted summary judgment. Although the district court did not resolve Tucker's motion to *reconsider* the magistrate judge's ruling before granting summary judgment, seeking review did not render the initial evidentiary ruling non-final. In any event, the district court later affirmed the magis-

trate judge's rulings so the summary judgment ruling would have been no different if the court had resolved Tucker's reconsideration motion sooner.

3. The FTC need not provide proof of actual deception to show a violation of the FTC Act, as Tucker acknowledges. The judgment below therefore would be sound even if Tucker were correct that the FTC presented no evidence that consumers were actually deceived by Tucker. In fact, however, the FTC presented abundant evidence of deceit, including thousands of consumer complaints to the FTC detailing how the complainants had not knowingly agreed to automatic renewals and multiple finance charges. The agency also presented transcripts and recordings of consumer calls to AMG customer service expressing frustration and surprise at the actual terms loans as well as the testimony of Tucker's own employees about how consumers did not understand the loan terms.

The district court properly declined to exclude the consumer complaint database under Rule 26 as a sanction for failing to identify each individual complainant. Even assuming that there was a violation of Rule 26, the district court had ample discretion to impose a lesser sanction than exclusion.

The complaint database was properly admitted under the residual exception to the hearsay rule. A large number of consumers who had no reason to lie to the FTC independently described similar experiences with Tucker's

loans. There was no reason to think the complaints were the result of faulty memory or mistake, the chief dangers of admitting hearsay. Indeed, this Court approved the admission of an essentially identical complaint database in *FTC v. Figgie Int'l*, 994 F.2d 595 (9th Cir. 1993). Moreover, the FTC produced the database to Tucker long before moving for summary judgment, so he had plenty of notice that it might be used for summary judgment.

Tucker's proffered evidence of "nondeception" fails to show a material fact dispute that should have precluded summary judgment. Even if the evidence were subject to dispute, none of it is material because it has no bearing on whether Tucker's disclosures were likely to mislead consumers. There was *no* dispute of fact over the disclosures. Tucker cites various "categories" of evidence that courts have found relevant to deception in prior cases, but he fails to show that such evidence is material in this case.

Tucker is wrong that the district court improperly rejected his evidence because "no reasonable jury" would believe it. The court found Tucker's evidence immaterial, not unbelievable. And it held only that any reasonable jury would find that Tucker's disclosures were likely to mislead reasonable consumers.

4. This Court decided three decades ago in *FTC v. Evans Products Co.*, 775 F.2d 1084 (1985), that a "proper case" under Section 13(b) of the FTC

Act is any case involving violations of any law the FTC enforces. The Court rejected the idea that Section 13(b) is limited to cases involving "routine fraud." Tucker asks the Court to reverse that ruling, but he provides no good reason to do so even if one panel of the Court could overrule another panel's controlling opinion.

5. The FTC was not required to proceed by rulemaking rather than an enforcement lawsuit. The question was resolved 70 years ago in *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), which is binding here and held that an agency may choose the most effective means of enforcement. The choice was easy here, because the FTC's case involves the application of long-applied standards for deception under the FTC Act and for violations of the Truth in Lending Act. That Tucker's deceptive practices may have been common in his industry does not immunize them from enforcement of existing law.

6. The monetary relief ordered by the district court was within its broad discretion. The FTC's calculation of monetary relief used simple arithmetic to subtract the amount Tucker told consumers they would pay (their loan amount plus 30%) from the amount they actually paid. The numbers came from Tucker's own databases, which were merged using standard commercial software. Indeed, Tucker neither submitted his own calculation nor argued

that the FTC's calculation was incorrect. Tucker claims that the FTC's figure is overstated because not all consumers were misled. But under this Court's decision in *Figgie*, 994 F.2d at 605, the FTC need not prove reliance by each consumer. Once the FTC showed that deception was widespread, the burden shifted to Tucker to prove lack of deception. He made no such showing.

The data underlying the calculation was admissible and authenticated under Federal Rule of Evidence 1006. Tucker is wrong that the calculation was expert testimony and not a Rule 1006 summary. Laypeople may learn and use commercial software to prepare summaries from large databases without becoming "experts" under the rules of evidence. The claim that a calculation of damages is reliable only if "authenticated" by an expert is flatly wrong; there is no such requirement. Rather, the court relies on the adversary process to test summary data—and Tucker did not challenge the accuracy of the FTC's calculation.

Monetary relief was not limited by laches or a statute of limitations. Laches does not apply to the government. TILA's one-year limitation period expressly applies to cases brought under "this section"; that is, 15 U.S.C. § 1640(c). The limitation does not apply here because this case was brought not under Section 1640, but under Section 13(b) of the FTC Act. Section 13(b) contains no limitations period. The three-year limitation period of Sec-

tion 19 of the FTC Act is similarly inapplicable. That provision states expressly that its remedies are "in addition to" other remedies under the Act and that nothing in Section 19 affects the FTC's authority under any other provision of law. Courts routinely reject attempts to use Section 19 to limit Section 13(b) remedies.

No different answer is even suggested by the Supreme Court's recent decision in *SEC v. Kokesh*, 137 S.Ct. 1635 (2017). *Kokesh* applied the general five-year statute of limitations for "penalties" to an order to disgorge funds under the Securities Exchange Act. Nothing in *Kokesh* suggests, let alone mandates, that every federal law enforcement action must be subject to the statute of limitations nearest at hand. And even if *Kokesh* could be read to apply to FTC cases like this one, it would have no effect here because the district court's monetary relief did not extend beyond five years.

7. The undisputed facts support the district court's order against the relief defendants. Kim Tucker and Park 269 each undisputedly received ill-gotten funds from Tucker and his companies and neither asserts that they had any legitimate claim to the money. *See SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998). Kim Tucker says some of the money was untainted because she received it after the defendants agreed to a preliminary injunction. But she fails to show that the money was generated legitimately, and a court can-

not assume that the money is clean merely because it was transferred after the illegal conduct ceased. Tucker cannot launder his assets by giving them to his wife. For its part, Park 269 makes no genuine challenge at all to the order against it.

STANDARD OF REVIEW

The Court reviews a district court's grant of summary judgment *de novo* to determine "whether, viewing the evidence in the light most favorable to the non-moving party, there are genuine issues of material fact and whether the lower court correctly applied the relevant substantive law." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1138 (9th Cir. 2010).

A district court may reconsider a magistrate judge's evidentiary rulings if they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). This court "review[s] a district court's denial of a motion to reconsider a magistrate's pretrial order under that same standard." *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002); *In re Optical Disk Drive Antitrust Litig.*, 801 F.3d 1072, 1076 (9th Cir. 2015).

The Court "gives particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)." *R & R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1243 (9th Cir. 2012). The court will reverse only for an abuse of discretion.

ARGUMENT

I. TUCKER VIOLATED THE FTC ACT AND THE TRUTH IN LENDING ACT.

The district court correctly determined that Tucker violated both the FTC Act and the Truth in Lending Act. Either finding is sufficient to sustain the judgment against him.

A. Undisputed Facts Showed That Tucker Violated The FTC Act.

Section 5 of the FTC Act prohibits "deceptive acts or practices" and directs the FTC to prevent them. 15 U.S.C. § 45(a)(1). An act or practice is deceptive if there is (1) a representation or omission; that (2) is likely to mislead consumers acting reasonably under the circumstances; and (3) is material to a consumer's decision. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). To determine whether a representation is misleading, the Court looks to the "net impression" that the representation conveys to consumers. *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (quoting *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006)). The net impression of a representation may be misleading even if it also contains truthful disclosures. *Id.* The undisputed facts showed that Tucker's lending practices violated the FTC Act.

To begin with, loan terms are plainly material, and Tucker does not argue otherwise. A material representation is one "likely to affect a consumer's decision to buy a product or service." *FTC v. E.M.A. Nationwide, Inc.*, 767

F.3d 611, 631 (6th Cir. 2014). Tucker's representations about the amount the amount borrowed, the finance charge, the interest rate, and the total repayment amount clearly were likely to affect a consumer's decision whether to borrow from him.

The undisputed facts also show that the net impression of Tucker's disclosures was misleading. The disclosures featured a large box—the "TILA box"—prominently placed in bold type that told consumers the loan terms. It states that for a $300 loan (for instance), the borrower would pay a $90 finance charge for a total repayment amount of $390, to be withdrawn in one payment on a specific date. Scattered throughout the fine print, by contrast, were indications that the deal might not really be for a one-time payment of the stated amount, but an automatically renewing loan resulting in multiple payments of substantially higher amounts. Thus, the scenario described in the TILA box was unlikely to occur. It could come to pass only if the borrower (1) realized that the loan would automatically renew; (2) discovered the convoluted process to "decline the option to renew" in the fine print of the disclosures; and (3) successfully completed that process within the small window of opportunity Tucker provided. In short, Tucker prominently told consumers one set of terms but applied a very different set, partially described and hidden in the fine print.

The undisputed facts thus plainly support the district court's determination that the terms in the fine print "are arranged in the document in such a way that the existence of the automatic renewal and the process for declining renewal are hidden from borrowers." ER 71. The undisputed facts show further that the true terms "are concealed from borrowers" and "never expressly state that the renewal plan is automatic." *Id.* The district court thus correctly held that the net impression created by Tucker's disclosure page was a misleading one. *See Cyberspace.com*, 453 F.3d at 1200.

The net impression analysis accommodates the possibility that the actual terms of the loan were partly discernable from the fine print. "A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." *Cyberspace.com*, 453 F.3d at 1200. Indeed, in *Cyberspace.com*, this Court specifically rejected the idea that "fine print notices" are sufficient to overcome a deceptive net impression. *Id.* (collecting cases from the Second, Third, Ninth, and D.C. Circuits). That holding applies foursquare to this case. Any other approach would eviscerate the point of the "net" impression analysis.

Tucker complains that the district court improperly treated the net impression analysis as a question of law rather than (allegedly disputed) fact. Br. 28. But this Court has repeatedly affirmed district court decisions granting

summary judgment based on the net impression of representations. *E.g. Cyberspace.com*, 453 F.3d at 1201; *Stefanchik*, 559 F.3d at 928; *FTC v. Gill*, 71 F.Supp.2d 1030, 1043-1044 (C.D. Cal. 1999), *aff'd* 265 F.3d 944 (9th Cir. 2001). The Sixth Circuit has similarly rejected the "claim that the net impression of . . . representations is a question of fact to be determined by a jury," and explained instead that "courts may decide this issue on summary judgment." *E.M.A. Nationwide*, 767 F.3d at 631-632.[9] Other than his bare claim that it was literally possible for a diligent consumer to ferret out the true terms of the loan, Tucker offers no reason to second-guess the district court's determination of the net impression of Tucker's disclosures, which were matters of undisputed fact as set forth above.

Tucker is also wrong that the district court erred in assessing the "net impression" of his representations without considering other evidence in the record, including "direct evidence from consumers," "consumer complaints," "chargeback rates," survey evidence, and the like. Br. 28-34. The district court held that "the terms of the TILA Box and the fine print of [the disclo-

[9] Tucker argues that the magistrate judge couldn't both find that the contract was ambiguous and "simultaneously determine its meaning as a matter of law." Br 35-36. That mixes two separate questions—the interpretation of Tucker's loan document *as a contract* (an analysis the district court engaged in to determine whether the disclosures met the requirements of TILA) is not the same as whether the disclosures as a whole were likely to mislead consumers.

sure] provided the basis" for the net impression analysis. ER 70. To a consumer considering borrowing from Tucker, "any facts other than the terms of the Loan Note Disclosure and their presentation in the document are immaterial." *Id*. That determination was sound.

A would-be borrower had no help beyond Tucker's disclosures to understand the loan on offer.[10] In determining whether consumers were likely to be deceived, the district therefore correctly focused on the net impression those disclosures would convey to consumers. *E.M.A. Nationwide*, 767 F.3d at 631. That is because the representations made to consumers "must stand on [their] own merits." *Id.* at 632 (quoting *Removatron Int'l Corp. v. FTC.*, 884 F.2d 1489, 1497 (1st Cir. 1989) & collecting cases). Consumers did not have the benefit of chargeback rates or complaints or expert testimony on repayment data, so the district court did not have to consider such things in determining the net impression of Tucker's disclosures.

Tucker is therefore wrong when he claims that the district court was required to consider evidence extrinsic to the loan application process and disclosures. Br. 29. Nor does the finding that Tucker's proffered evidence was immaterial mean, as Tucker contends (Br. 30), that the district court in-

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[10] Indeed, as described at pages 12-13 above, Tucker prohibited his customer service representatives from providing any additional information.

correctly "ignored" the evidence. For purposes of summary judgment, a fact is material only if it has the ability to affect the outcome of the suit given applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). As described above, Tucker's proffered evidence was not material because it could not have altered the court's net impression analysis, which properly rested on the disclosures made to consumers. And as described in part III.D below, the evidence lacks probative value in any event.

It is undisputed that Tucker told his customers that their interest and total repayment amounts were less than Tucker actually required them to pay. On that record, the district court correctly determined that his loan disclosures were material misrepresentations that violated Section 5 of the FTC Act.

B. Undisputed Facts Showed That Tucker Violated The Truth In Lending Act.

Tucker's violation of the FTC Act is sufficient by itself to justify the judgment against him. He also independently violated the Truth in Lending Act. TILA "requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). Regulation Z, which implements the Act, requires that creditors disclose these terms "clearly and conspicuously," and that they do so before credit is extended. 12 C.F.R. § 1026.17(a)-(c). The Act requires

"absolute compliance by creditors." *Rubio v. Capital One Bank*, 613 F.3d 1195, 1199 (9th Cir. 2010). Further, it is "liberally construed in favor of the consumer and strictly enforced against the creditor." *Id*. at 1202. A lender's disclosures are judged by an "objective standard" against the requirements of the Act, and violations do not depend on "subjective deception or misunderstanding of particular consumers." *Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982). "[A]ny misleading ambiguity" in the lender's disclosures "should be resolved in favor of the consumer." *Rubio*, 613 F.3d at 1202 (quotation marks omitted).

The district court correctly held that the undisputed facts (the same facts as those at issue in the FTC Act violation) showed that Tucker violated TILA because his disclosures did not clearly and conspicuously reveal the actual terms of his loans. Tucker's TILA box told consumers they would pay a single "finance charge" equal to 30 percent of the amount borrowed for a "total of payments" equal to 130 percent of the amount borrowed; as noted above, for example, $90 on a $300 loan for a total of $390. *See* ER 378-379. None of that was true. In reality, the borrower unwittingly signed up for an automatically renewing loan that resulted in $675 in finance charges and a total payment of $975. Similarly, the stated finance charge was not "[t]he dollar amount the credit will cost you," as Tucker represented. ER 379. Nor was

"[t]he amount you will have paid after you have made *the* scheduled payment" accurate. *Id.* (emphasis added). Tucker's grossly misleading disclosures plainly violated TILA and Regulation Z.

1. Tucker's claims of "technical compliance" are baseless.

Tucker argues that he "technically complied" with TILA, claiming that (1) the finance charge, total of payments, and APR disclosed were accurate at the outset of the transaction; (2) the automatic renewals were "subsequent events" which "do not render TILA disclosures provided before consummation inaccurate, or misleading"; and (3) the "renewals" did not require new TILA disclosures. Br. 42, 46-47 (citing 12 C.F.R. § 1026.17(e) & 15 U.S.C. § 1634). The argument is wrong at every step.

At the outset, Tucker's repeated claims (Br. 24, 41, 43-44) that the district court found his disclosures to be "technically correct" or that they "technically complied" with the statute are false. Although the magistrate judge used the words "technically correct," he did so in a wholly different context. The magistrate judge explained that Tucker's disclosures violated TILA even if he could "articulate an unambiguous interpretation of the loan note, which—with the guidance and skill of a trained attorney—proves to be the technically correct interpretation." ER 113-114. Neither the magistrate judge

nor the district court ever described Tucker's *disclosures* as "technically correct" or held that Tucker "technically complied" with the statute.

Second, it is true that TILA disclosures must correspond to the terms of the loan at the outset of the transaction. 12 C.F.R. § 226.17(c) (disclosures must reflect "the terms of the legal obligation between the parties"). But Tucker's disclosures did not reflect the terms of the loans at the time they were made. At best, the amounts listed in the disclosure were conditional—they reflected how much the borrower would pay *if* the borrower discerned and followed the convoluted opt-out process described in the fine print. In practice, few borrowers ever navigated that byzantine route. Further, Tucker's contention that the disclosed terms reflected the borrower's legal obligation is belied by the admission that consumers had to enter a *new* agreement to cancel the automatic renewals. As AMG's 30(b)(6) witness admitted, when a consumer used the opt-out process to make "a change from the minimum payment schedule," that meant "they're changing the amount to be pulled" and therefore "we have required them to sign the document." SER 154. Disclosures do not reflect the terms of the loan if the borrower must enter another agreement to get the disclosed terms.

Third, Tucker's disclosures did not become inaccurate because of "subsequent events." *See* Br. 42, 46-47. TILA provides a safe harbor that ap-

plies when an accurate disclosure "is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures." 15 U.S.C. § 1634. Regulation Z uses similar language to specify that there is no violation when a disclosure "becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures." 12 C.F.R. § 1026.17(e). But Tucker's disclosures did not "become inaccurate"; they were inaccurate from the start. The hidden automatic renewal program was the default when the loan was originally issued. The renewals do not fall within the safe harbor because they were not the result of any "event that occur[red]" or any "act, occurrence, or agreement" after Tucker gave the borrower the "required disclosures" (even if Tucker had ever provided the "required disclosures").

Tucker's argument gets this exactly backwards: on the rare occasions that the disclosures matched what consumers paid, the disclosures were rendered *accurate* by the borrower's subsequent acts—successfully navigating the opt-out process during the narrow window (and entering a new agreement). TILA's safe harbor cannot plausibly be read to excuse disclosures that are inaccurate when they are given because it is theoretically possible that they could become accurate later.

Finally, Tucker's argument that the automatic renewals did not require new disclosures under 12 C.F.R. § 226.20 is beside the point. That section carves out the "renewal of a single payment obligation with no change in the original terms" from the definition of "refinancing," which otherwise requires new lending disclosures. 12 C.F.R. § 226.20(a)(1). The question here is not whether new disclosures were required with each automatic "renewal"—it is whether Tucker's disclosures accurately reflected the terms at the outset of the transaction. As explained above, they did not.

2. Tucker's remaining claims under TILA also fail.

Tucker complains at length about the reasoning behind the district court and the magistrate judge's finding that he violated TILA, but the complaints are empty. He first contends that the magistrate judge wrongly focused on whether the disclosures were "ambiguous as a matter of law" rather than whether they "technically complied" with TILA. Br. 43-44. Along the same lines, he protests that the district court should have determined not whether the disclosures were ambiguous, but whether borrowers were "legally obligated" to renew the loan. In Tucker's view, if they were not obligated to renew, then the disclosures "technically complied" with TILA because the costs of renewal were not "legal obligations" for which TILA requires disclosure. Br. 44-45.

That line of argument rests on the faulty premise that lenders can obscure the terms of their loans and avoid accurate TILA disclosures by artfully drafting their loan documents so that the terms can be cast as something short of "legal obligations." Such legerdemain cannot be squared with the statute or its purposes. TILA disclosures must be "clear and conspicuous," stated in a "reasonably understandable form," and "presented in a way that does not obscure the relationship of the terms to each other." Truth in Lending (Regulation Z), 76 Fed. Reg. 79,970 (Dec. 22, 2011) (official commentary). As the Sixth Circuit put it, "when a loan agreement is drafted to obscure the relevant terms of the agreement, rather than to explain the terms in clear and meaningful language, the agreement violates the TILA." *Burton v. Pub. Fin. Corp.*, 657 F.2d 842, 843 (6th Cir. 1981). Tucker's artful-drafting theory would negate TILA's reason for being.

Tucker mistakenly relies (Br. 45) on *Hauk v. JP Morgan Chase Bank United States*, 552 F.3d 1114 (9th Cir. 2009), but that decision is irrelevant here. *Hauk* held that a lender did not violate TILA when it advertised a promotional interest rate for balance transfers even though the lender knew that the borrower would not qualify for that rate due to his history of late payments. The advertised rate was real and available to borrowers who qualified for it. The Court held that the accurate rate information did not become inac-

curate because the bank did not intend to offer that rate to all customers. *Hauk*, 552 F.3d at 1121. Tucker argues that if failing to disclose an "unstated intent" to charge a different interest rate doesn't violate TILA, neither does his *disclosed* intent (in the fine print) to charge more than the disclosed finance charges through the automatic renewal policy. Br. 46.

But Tucker violated TILA not because his intent differed from his disclosures, but because the disclosures themselves were misleading. "*Hauk* did not condone misleading disclosures," as the Court later explained. *Rubio v. Capital One Bank*, 613 F.3d 1195, 1200 (9th Cir. 2010). To the contrary, "Regulation Z prohibits a [TILA] Box from making 'misleading' APR disclosures, where 'misleading' means a disclosure that a reasonable consumer will either not understand or not readily notice." *Id.* The district court here properly held that Tucker's disclosures violated TILA because a reasonable borrower could think the information accurately reflected the legal obligations without needing to undertake any additional action. ER 76-77. Nothing in *Hauk* undermines that determination.

II. TUCKER'S PROCEDURAL OBJECTIONS TO SUMMARY JUDGMENT FAIL.

Tucker makes two meritless procedural objections under Federal Rule of Civil Procedure 57 to the district court's summary judgment order in phase I.

A. The FTC Raised The Claim On Which The District Court Granted Summary Judgment.

Tucker first contends that the district court erroneously failed to give him the notice required by Rule 56(f) by granting summary judgment on a ground that the FTC did not raise: that his description of how to opt out of automatic repayment was misleading. Br. 39-40. As the district court explained, however, the FTC *did* argue that Tucker's disclosures—including those regarding opt-out—were misleading. The parts of the magistrate judge's recommendation that Tucker now complains about simply described Tucker's misleadingness with greater particularity than the FTC did.

Rule 56(f) allows a district court to grant summary judgment on grounds not raised by a party's motion so long as it first provides "notice and a reasonable time to respond." Fed. R. Civ. P. 56(f). "Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment." *Norse v. City of Santa Cruz*, 629 F.3d 966, 972 (9th Cir. 2010) (quoting *Portsmouth Square, Inc. v. S'holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985)).

According to Tucker, the district court violated Rule 56(f) because it did not give him the opportunity to oppose "new theories invented by the magistrate judge"; namely, that Tucker's disclosures were misleading "because it is unclear how a borrower may opt out of the renewal plan." Br. 39

(quoting ER 97). Tucker claims that he "never received notice of this theory, or time to respond." Br. 40. But the Commission specifically argued that Tucker "used inconspicuous, contradictory, confusing, and vague language in [his] loan documents regarding so-called 'renewals' and 'pay downs.'" ER 655; *see also, e.g.*, ER 673 (quoting email about consumers "not understanding our process of renewals and paydowns"); ER 678, 679, 684 (detailing consumers' confusion about the renewal process). Consumers would not have been confused about renewals if Tucker had made it clear how they could opt-out of them. Given the FTC's arguments, Tucker "cannot complain that [he] was not warned of what was at stake in the summary judgment, and . . . had no opportunity fully to present [his] position." *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1556 (9th Cir. 1991).

The district court thus properly rejected Tucker's Rule 56(f) objection because the particular ambiguity that the magistrate judge identified was simply "a subset of the larger issue" that the FTC raised in its motion. ER 72-73 (quoting *Ervco, Inc. v. Texaco Ref. & Mktg., Inc.*, 422 F. Supp.2d 1084, 1086 (D. Ariz. 2006)). But even if the FTC had not raised the ambiguity of the renewal disclosures, the magistrate judge's recommendation would *itself* have given Tucker notice of his reasoning. Tucker then had the opportunity to oppose the magistrate's conclusions—as he did—in his objections to the dis-

trict court. *See* ER 72-73. Tucker's Rule 56(f) argument is completely baseless.

B. Tucker's Evidentiary Objections Were Resolved Before Summary Judgment.

Tucker also contends that the district court violated Rule 56(c) by failing to rule on his evidentiary objections before granting summary judgment. Br. 40-41. This argument fails because the magistrate judge, who was authorized to decide evidentiary matters, resolved the objections well before the district court entered summary judgment. And even if Tucker had shown an error in the sequence of rulings, it would have been harmless.

Rule 56(c) permits a party moving for summary judgment to cite "particular parts" of the record to support the motion. The opposing party may then object that the motion is not supported by admissible evidence. Fed. R. Civ. P. 56(c)(2). "While the evidence presented at the summary judgment stage does not yet need to be in a form that would be admissible at trial, the proponent must set out facts that it will be able to prove through admissible evidence." *Norse*, 629 F.3d at 973. Thus, "[b]efore ordering summary judgment in a case, a district court must . . . rule on evidentiary objections that are material to its ruling." *Id.*

Tucker objected to several categories of evidence cited in the FTC's phase I summary judgment motion and moved to exclude it. *See* Docket Noa.

498 & 502.[11] He contends that these objections had not been resolved by May 28, 2014, when the district court entered summary judgment in phase I. Br. 40-41; *see* ER 57-81. Not so. The magistrate judge was authorized to rule on Tucker's objections and did rule on them on January 28, 2014, four months before the district court granted summary judgment on May 28, 2014. *See* ER 118-142; ER 57-81.

Subject to specific exceptions—which do not include evidentiary objections—a magistrate judge may resolve "any pretrial matter pending before" a district court. 28 U.S.C. § 636(b)(1)(A); *see* D. Nev. Local R. IB 1-4 ("A magistrate judge may hear and finally determine any pretrial matter not specifically enumerated as an exception in 28 U.S.C. § 636(b)(1)(A)"). The magistrate judge was therefore empowered to rule on Tucker's evidentiary objections. As this Court has held, such decisions are "essentially final decisions of the district court." *United States v. Abonce-Barrera*, 257 F.3d 959, 968 (9th Cir. 2001).

The magistrate judge ruled on Tucker's evidentiary objections in January 2014, before he issued his report and recommendation and well before the district court granted summary judgment in May 2014. *See* ER 3145-3146

[11] Tucker mistakenly identifies the second objection as Docket No. 501 rather than 502.

(Docket), Docket Nos. 538 & 539. Tucker's complaint that those motions remained "outstanding" is simply wrong on the facts.

Tucker moved the district court to reconsider the magistrate judge's evidentiary determinations—and that motion was still pending when the district court issued its summary judgment order. ER 1216-1237; *see* ER 45. The motion to reconsider did not, however, mean that the evidentiary issue remained unresolved; rather, like a district court opinion on appeal, the magistrate judge's decision was final despite being subject to clear-error review by the district court. 28 U.S.C. § 636(b)(1)(A); *Abonce-Barrera*, 257 F.3d at 968.

Accordingly, it was no error that the district court did not decide Tucker's motion for reconsideration before granting summary judgment. Even if there were one, it would be harmless. *See Sanchez v. Aerovias De Mex., S.A. de C.V.*, 590 F.3d 1027, 1029 (9th Cir. 2010) (applying harmless error rule to this situation). The district court did rule on the motion for reconsideration, and denied it, as Tucker concedes. Br. 40 n.17; *see* Docket No. 628, ER 46-47. Thus, the district court would not have rejected the FTC's evidence even if it had been required to decide Tucker's motion for reconsideration. Moreover, as explained in part III below, Tucker's evidentiary objections themselves lacked merit.

III. TUCKER'S PHASE I EVIDENTIARY ARGUMENTS ARE WRONG.

Tucker claims that the district court improperly considered the FTC's evidence and improperly ignored his evidence. As set forth below, the arguments lack substance. But more fundamentally, the arguments are irrelevant because they concern the admissibility and consideration of evidence that did not form a part of the court's summary judgment analysis and that was not material to the questions presented in the phase I summary judgment proceeding.

A. Evidence Of Actual Deception Was Not Required, But There Was Plenty Of It.

Tucker asserts that the district court improperly granted summary judgment in the absence of evidence "that one actual consumer had been deceived." Br. 27. The argument is wrong both legally and factually. "Proof of actual deception is unnecessary to establish a violation of Section 5" of the FTC Act. *Cyberspace.com, LLC*, 453 F.3d at 1201 (quoting *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979)); *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095, 1102 n.33 (9th Cir. 1994) (rejecting argument that FTC must show "actual deception"). Tucker thus unsurprisingly concedes that "courts have held actual consumer deception is not required to prove a violation of Section 5 of the FTC Act." Br. 27. Tucker's argument thus fails on the law alone.

Even if the law were otherwise, the record includes overwhelming evidence—consumer complaints to the FTC, recordings of consumer telephone calls to AMG customer service, and Tucker's own employees' testimony—that many consumers were actually confused by the loan disclosures.

In page after page of complaints to the FTC, consumers detailed how they were misled about Tucker's loans. *See* ER 718-858. They complained that they expected to pay only their loan plus the finance charge but instead the company deducted multiple payments adding up to far more. In just the first three (out of 171) pages of the FTC's complaint database, consumers stated:

- "According to my application, '1 payment of $585 due on 2012-11-23.'" ER 718.
- "I was aware that I had to pay back a total of $650." ER 719.
- "I was led to believe that they would debit my account on the third of March 2010 the whole $260.00" ER 719.
- "One Click Cash offered me a $500 loan, with an interest of $150 – total payment $650." ER 720.
- "I took a $500 loan with a $150 loan fee, totaling $650. Since that time, I have paid $480 toward the loan and fee. However, I have been receiving e-mails and phone calls stating that I still owe the original $500 plus an additional $450, totaling $950." ER 720.

Consumers clearly did not understand that Tucker's "renewals" were automatic or that the payments Tucker withdrew were applied only to interest and not to principal. For example:

- "I never opted to renew[] my loan." ER 718.
- "I was just told today that none of that money has gone towards the loan and all that is a fee." ER 718.
- "[S]he is telling me that this $300 loan plus the $90 finance charge=$390, will not be paid off until May 2012??? Stating my balance as of now is still $390? How is that? I have made three payments (debited directly from my checking acct.) at $90." ER 719.
- "I have been making payments of $150 every 2 weeks since beginning of September. However, none of that has been applied to my loan." ER 720.

Indeed, consumers stated directly that they believed they had been misled:

- "They were not very clear as to how the loan was to be paid back. I feel that it is misleading." ER 719.
- "I am very upset that this company is trying to scam me with bogus charges by making me pay back double the loan amount and the finance charges along with it." ER 719.
- "I believe these are Fraudulent Offers and should be investigated." ER 719.

Consumers' calls to customer service likewise revealed their confusion. For example, when one consumer was told she had a $455 balance with a minimum payment of $155, she replied: "Well, that's what I'm trying to—why is the total amount due 455? The loan was taken out on August 7th, and there have been at least four or five payments made on this account. I'm trying to figure out why the balance is at 455." SER 172. Another consumer explained her confusion similarly: "But it's already been paid off. It just re—it's

recalculating my loan every time, and I've already paid like $400 for the $150 loan. Like, I don't understand that." SER 88-89. Numerous other customer service calls tell the same story. *E.g.* SER 98, 110-111, 118-120.

Tucker's employees also testified that consumers were confused. One customer service representative estimated that 80% of customers complained of withdrawals from their account beyond what the loan required. ER 88. Two others estimated that more than half the complaints were from consumers who did not understand the terms of the loan. *Id.* Indeed, the employees repeatedly suggested (to no avail) that Tucker clarify the disclosures so that consumers would not be confused. SER 66.

B. Rule 37 Did Not Require Exclusion Of Consumer Complaints.

The magistrate judge held that the FTC had failed to properly disclose consumer complainants as witnesses under Rule 26(a). He reasoned that although the FTC had timely provided Tucker with its database of consumer complaints to the FTC about his loans, it should have disclosed the names of the individual consumers who complained as "witnesses" because it relied on the complaints in its motion for summary judgment. ER 130. The magistrate judge concluded that the disclosure violation did not require that the complaints be excluded, but that a much lighter alternative sanction contemplated by Rule 37(c)(1)(C) would be appropriate. Specifically, the magistrate judge

determined that Tucker could inform the jury of the FTC's "late disclosure" of the names of the witnesses that it relied on in its summary judgment motion. ER 134-135. The district court denied Tucker's motion to reconsider that sanction. ER 48.

Tucker now contends that Rule 37 required the district court to exclude the complaints. At the outset, the matter is little more than an academic debate (and any error would be harmless), because as shown in parts I and III.A above the FTC did not need to present any evidence of consumer confusion to justify judgment in its favor on either the FTC Act or TILA violations. Even if the evidence of consumer complaints had been wrongly admitted, it would make no difference.

But there was no error in any event. The district court did not abuse its discretion or transgress its "particularly wide latitude" to issue sanctions under Rule 37(c)(1). *R & R Sails*, 673 F.3d at 1245. Rule 37(c) provides that if a party "fails to provide information or identify a witness," it "is not allowed to use that information or witness" at trial "unless the failure was substantially justified or is harmless." But as an alternative sanction, a district court may order payment of fees and expenses caused by the failure; or "inform the jury of the party's failure"; or "impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi)." Fed. R. Civ. P. 37(c).

Tucker argues that Rule 37(c) mandates exclusion for a discovery violation unless the district court finds that the nondisclosure was substantially justified or harmless, and that the district court therefore erred by imposing an alternative sanction. Br. 47. But that reading cannot be squared with the text of the Rule. Rule 37(c) certainly allows a court to exclude undisclosed evidence. But it then provides that "[i]n addition to *or instead of*" exclusion, the court may order alternative sanctions. Fed. R. Civ. P. 37(c) (emphasis added); *see Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296-298 (2d Cir. 2006). Consistent with that plain text, courts may impose a sanction appropriate to the severity of the violation. As this Court has noted, Rule 37 gives district courts "broad discretion to manage discovery and to control the course of litigation." *Hunt v. County of Orange*, 672 F.3d 606, 616 (9th Cir. 2012) (cleaned up).[12]

The Court did not hold otherwise in *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011). *See* Br. 47. The Court described exclusion under Rule 37(c)(1) as "self-executing" and "automatic," *id*. at 827, but it did not address the question presented here of whether alternatives are

[12] The parenthetical (cleaned up) indicates that internal quotation marks, brackets, and citations have been omitted from the quotation. *See*, *e.g.*, *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017); *Smith v. Kentucky*, 520 S.W.3d 340, 354 (Ky. 2017).

permissible. Even so, the opinion indicates that exclusion of evidence is discretionary rather than mandatory even when a failure to disclose was not justified or harmless. In a passage overlooked by Tucker, the Court agreed that a party "failed to comply with Rule 26(a) when she did not timely disclose expert reports," but held, "as a matter of discretion," that the party should be allowed "to rectify her error." *Id.* at 826. If Tucker's reading of the rule were correct, that outcome would have been impermissible.

Tucker also argues (Br. 48) that the district court abused its discretion by wrongly basing its sanction on factors that were developed under a now-superseded version of the rule.[13] Br. 48. According to Tucker, the Court held in *R&R Sails*, 673 F.3d 1240 (9th Cir. 2012), that those factors should *only* apply if excluding the evidence would amount to dismissing the claim. Br. 48. The Court held no such thing. *R&R Sails* reaffirmed that the factors apply when exclusion would amount to dismissal of the case, but it did not even suggest that they apply only in that situation. *See* 673 F.3d at 1240.

Tucker complains further that the court acted improperly because sanctions other than exclusion may be imposed only "on motion and after giving an opportunity to be heard," which did not happen here. Br. 49 (quoting Fed.

[13] The district court relied on *Wanderer v. Johnson*, 910 F.2d 652 (9th Cir. 1990), and *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997).

R. Civ. P. 37(c)(1)). But as the district court pointed out, the "opportunity to be heard" belongs to the party *to be sanctioned*, not the party who sought exclusion. ER 47. Indeed, Tucker had the opportunity to be heard on exclusion of the evidence—he was heard both in his motion to exclude the evidence and in his motion to reconsider the magistrate judge's decision. *See* ER 39, ER 49.

Finally, Tucker suggests that the magistrate judge and the district court committed reversible error in imposing a jury instruction sanction in a non-jury case. Br. 47-50. In choosing the sanction, the magistrate judge clearly recognized the *de minimis* nature of the offense and thus opted to impose the least severe penalty. A judge, just like a jury, can take into account the fact of late disclosure. In any event, the point is both moot and a matter of harmless error because the case was decided on summary judgment and never would have reached a jury under any circumstance.

C. The District Court's Hearsay Rulings Were Correct.

The district court rejected Tucker's argument that the magistrate judge improperly admitted the FTC's consumer complaint database under the residual hearsay exception of Federal Rule of Evidence 807. ER 50-53. Tucker argues that the district court misapplied the residual exception and that he was not afforded proper notice under Rule 807. Br. 50-55. Any error would be

harmless because the evidence was not necessary for summary judgment (*see* part I.A above) but neither argument is persuasive anyway.

"The purpose of the notice requirement is to give adverse parties an opportunity to attack the trustworthiness of the evidence." *Piva v. Xerox Corp.*, 654 F.2d 591, 596 (9th Cir. 1981). Where the adverse party is given a fair opportunity to meet the challenged statements, however, failure to satisfy the notice requirement is "harmless error." *Id.* The district court correctly held that Tucker had ample opportunity to attack the trustworthiness of the complaints in the FTC's database because they were provided to him more than seven months before the FTC's summary judgment motion. ER 51. Moreover, Tucker "specifically reserved but did not exercise the right to depose the complainants in the database." ER 51. If Tucker did not get notice, any error was harmless.

The magistrate judge properly found that the FTC's consumer complaint database satisfied the residual exception to the hearsay rule.[14] Br. 52-54. The residual exception permits the admission of a statement that is "of-

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[14] Tucker argues that the magistrate judge improperly relieved the FTC of its burden by deciding the residual exception *sua sponte*. Br. 51. Not so. As the district court explained, by relying on the cases the FTC cited, the magistrate judge implicitly found that the FTC satisfied its burden. The same circumstantial guarantees of trustworthiness are present here as were in the FTC's cases. ER 52 n.10.

fered as evidence of a material fact" if it is "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts"; has "equivalent circumstantial guarantees of trustworthiness" to other hearsay exceptions; and "admitting it will best serve the purposes" of the rules and the interest of justice. Fed. R. Evid. 807(a). Tucker challenges the court's determination of the circumstantial guarantees of trustworthiness and the efforts necessary to produce more reliable evidence. Br. 52-53. The rulings were sound.

In *FTC v. Figgie International*, 994 F.2d 595, 608 (9th Cir. 1993), this Court found that consumer complaints made to the FTC, just like those here, contained circumstantial guarantees of trustworthiness because they "were sent independently to the FTC from unrelated members of the public," and "they all reported roughly similar experiences." *Id*. The Court found that the complainants had "no motive to lie to the FTC," and that there was "little risk" that the complaints were "the product of faulty perception, memory or meaning, the dangers against which the hearsay rule seeks to guard." *Id.* (quotation marks omitted). That holding applies equally to consumer complaints in this case (which come from the same type of database and were collected in the same way). The district court properly followed *Figgie* when it found that the residual exception applied here.

Tucker attempts to distinguish *Figgie* on the ground that the complaints in that case were used to determine the amount of consumer redress rather than to establish liability. Br. 53. But there is no reason to believe that the complaints are more reliable for one purpose than another, and Tucker does not attempt to supply one. Nor was the database rendered unreliable because, unlike in *Figgie*, Tucker allegedly "deposed and impeached" the FTC's consumer declarants. As explained in part III.D.1 below, the depositions simply showed that consumers could understand Tucker's loan documents when his attorney carefully led them through each sentence and clause of the documents, line by line. Such questioning does not call into question the reliability of complaints from consumers who independently contacted the FTC with similar stories of how Tucker misled them about the terms of their loans.[15] Here, as in *Figgie*, there were circumstantial guarantees that the FTC's consumer complaint database was trustworthy.

[15] Tucker also argues that some of the complaints are suspect because they are written in "third person," and that the database as a whole is suspect because the magistrate judge believed it was "prepared in anticipation of litigation and had been 'truncated, modified, and subsequently corrected' by the FTC." Br. 53-54 (quoting ER 132). In fact, the complaints were not altered or edited and there is no evidence to the contrary. *See* Docket No. 583-1 at 5-6. The magistrate judge assumed there were modifications or edits because some complaints refer to the complainant in third person, but that is simply because some complaints were received by telephone and were therefore entered into the database by the person took the call rather than by the consumer himself. *See id.*

Tucker also fails to show that reasonable efforts would have produced more reliable evidence. He claims that "a limited number of consumer depositions" could provide reliable evidence.[16] Br. 55. As the district court observed, however, the database as a whole served the "main purpose" of showing that "a large number of consumers were confused." ER 52. "A limited number" of individual consumer depositions could not show the scale of deception. And, as the Court held in *Figgie*, it "would not be reasonable" to require the FTC to bring hundreds of consumers "into court to swear, under oath and subject to cross-examination, that the contents of their [complaints] were true." 994 F.2d at 608-609.

D. Tucker's Evidence Did Not Create A Material Fact Question.

As explained in parts I.A.2 and III.A above, the district court's analysis of whether Tucker's disclosures and loan note were likely to mislead consumers properly turned only on the net impression those materials conveyed to consumers. No other evidence was material to that issue. *See* ER 105-107; ER 70. The court therefore did not improperly "ignore" evidence proffered by Tucker because whatever that evidence was, it could not have created a fact

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[16] Throughout his brief, Tucker draws heavily on the magistrate judge's statements that the FTC's consumer declarants had been "impeached" and that their testimony was sometimes contrary to their declarations. *E.g.* ER 54-55. But the magistrate did not suggest—and the testimony did not establish—that the witnesses understood their loans *from Tucker's disclosures*.

question sufficient to avoid summary judgment on Tucker's violations of the FTC Act and TILA.

As mentioned above, a fact is "material" if it can affect the outcome of a suit given applicable law. *Liberty Lobby*, 477 U.S. at 252. Tucker presents a lengthy list of what he claims is "overwhelming evidence of nondeception," Br. 28, but none of that evidence is probative of the question at issue: whether the loan disclosures were likely to mislead consumers about the terms of the loan. *See Pantron I Corp.*, 33 F.3d at 1095.

1. Tucker's alleged "direct evidence" of nondeception is no such thing.

Tucker first claims that the depositions the defendants took of the FTC's consumer witnesses constitute "direct evidence" that consumers were not confused. Br. 31. Tucker represents that the witnesses testified that they had not read the disclosures before they obtained their loans, Br. 31, but unread disclosures cannot demonstrate that a consumer knew the terms of a loan.

Tucker claims further that the consumer witnesses "all understood the disclosures upon reading them at their depositions." Br. 31. But the testimony shows only that the witnesses could understand the disclosures when an expert attorney carefully guided them, line by line, through the documents. For example, when examining one witness, Tucker's attorney took 40 pages of

testimony to make it through the loan documents. ER 534-545 (Barboza Dep. pp.65-104). In another deposition, Tucker's attorney took 60 pages of testimony to cover the same ground. *See* ER 587-593; 599-608 (Sliger Dep. pp.127-150, 173-210). If anything, such testimony shows that unassisted consumers could not navigate Tucker's disclosure labyrinth. Moreover, this Court has rejected the argument that the net impression of a representation is not deceptive so long as "most consumers can understand the fine print . . . when that language is specifically brought to their attention." *Cyberspace.com*, 453 F.3d at 1201.

2. The "loan process as a whole" does not undo Tucker's misleading disclosures.

Tucker next points to the "loan process as a whole," which he insists contains "multiple loan documents" that warned consumers of additional fees and automatic renewals. Br. 31. But as we showed above, the question here is not whether it was theoretically possible to uncover the truth, but whether the *net impression* of the loan process is misleading. "A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." *Cyberspace.com*, 453 F.3d at 1200. Tucker's argument simply repeats his challenge to the net impression analysis, and it fails for the reasons discussed in part I.A above.

It is of no moment that a consumer "had to certify she had read and accepted the terms of the loan" by clicking check boxes. Tucker's website did not require a borrower to actually open or read the documents. Proof that a consumer clicked the box shows only that she clicked it; it does not show that she read, much less understood, the disclosures. In any event, the district court's net impression analysis expressly considered the disclosures, thus effectively assuming that the borrower read them.

Documents sent to borrowers *after* the loan was completed are even less probative. Br. 31. "A court need not look past the first contact with a consumer to determine the net impression from that contact." *E.M.A. Nationwide*, 767 F.3d at 632. By the time Tucker sent his victims post-loan documents, it was too late; moreover, even the post-loan documents Tucker cites failed to tell borrowers the true cost.

3. Tucker's expert report failed to show that consumers were not misled.

Tucker next claims that his expert's report shows "an absence of confusion or deception at any level," based on the purported correlation of "repayment and default data" between first-time and repeat borrowers. Br. 32. The argument is that the number of repeat customers identified by the expert shows that consumers were not misled. Br. 33, 37. The argument is wrong.

As the district court explained, Tucker's expert's opinion was insufficient to create a genuine fact question even on the amount of relief. The opinion rests on the faulty assumption that repeat borrowers "plainly understood the loan terms." ER 26 (quoting ER 1560). As the district court correctly concluded, that conclusory assumption rendered the report insufficient to create a genuine dispute of material fact. *Id.* And that was not the expert's only unrealistic assumption. He also assumed, for example, that even a first time borrower could not have been deceived about the terms of the loan "beyond the first due date of his first loan" because he would have realized the lender had not withdrawn the full amount due. ER 1562 & n.4; ER 1564. Tucker's expert also assumed without any evidence that "repeat" borrowers would understand that they were borrowing from Tucker even if their loans came from lenders with totally different names. The district court properly rejected those assumptions too. ER 26. The report plainly presents no triable fact on whether repeat customers necessarily were not misled.

4. Tucker's purported "complaint ratio" and "chargeback ratio" are meaningless.

Tucker contends that consumers were not deceived because his operation had a low "complaint ratio"—a figure he derives by dividing the number of complaints in the FTC's database with the number of loans he made. Br. 32. The comparison is meaningless. The number of consumers who com-

plained to the FTC reveals nothing about those who did not complain. The "complaint ratio" does not support any inference that noncomplaining consumers were not deceived—more plausibly, they didn't realize they were robbed or they didn't know where to complain. Bogus statistics of such type do not create a genuine fact question about whether Tucker's disclosures were misleading. Moreover, as discussed in part I above, the FTC could have proven its case even in the absence of complaining victims. The question is whether reasonable consumers would be misled by the disclosures, which speak for themselves.

Similarly, Tucker asserts that his companies had low "chargeback" rates for unauthorized transactions in comparison to other FTC cases. Br. 33. The figure suffers from the same flaw discussed above: the number of consumers who challenged automatic withdrawals does not support the inference that others were not deceived. The comparison between this case and other FTC cases is particularly inapt. Those matters involved credit card transactions; Tucker's scheme ran on automatic bank withdrawals. Tucker cites nothing to suggest that chargeback rates in credit card cases bear any relation to rates at which consumers challenge charges to their bank accounts. In the absence of such evidence, there is no reason to believe that the relative

chargeback rates could have affected the outcome of the suit. *See Liberty Lobby*, 477 U.S. at 252.

5. Any "value" from Tucker's services does not excuse misleading disclosures.

Tucker claims that he provided a valuable service to consumers, but even if that were true, he fails to explain how that could possibly show that his disclosures were not misleading. And the courts have roundly rejected the argument that the purported value of a product excuses deception in selling it. "[A] dishonest jeweler who represented that the rhinestones he sold were diamonds" cannot limit the customer's recovery "'to the difference between what they paid and a fair price for rhinestones.'" *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (quoting *Figgie*, 994 F.2d at 606). This is "because if the customers had known the truth, they might not have bought any rhinestones at all." *Id.*

6. It doesn't matter how long Tucker was in business.

Tucker touts his ten years in the loan business as evidence that it was not a "smash-and-grab" business like other defendants in FTC Actions. Br. 34. He fails to show a connection between that fact and the question whether his disclosures were misleading.

7. A survey was not required.

Tucker notes that survey evidence can be "significant" in FTC cases. Br. 34. True, perhaps, but so what? "Courts, including the Supreme Court, have uniformly rejected imposing [a survey] requirement on the FTC." *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) (collecting cases).

* * *

In sum, Tucker claims that a reasonable fact-finder could have found for him if the district court had drawn reasonable inferences in his favor. But none of the proffered evidence would have created a genuine fact issue about whether Tucker's disclosures were misleading.

E. The District Court Did Not Apply An Improper Standard.

Tucker claims that the district court improperly rejected his proffered evidence on the ground that "no reasonable jury" would believe it. He says that the ruling was error under *Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999), which requires that when the parties submit conflicting evidence on summary judgment, the court must "assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *Id.* (quotation omitted); *see* Br. 38-39.

This case does not present the situation in *Leslie* for the simple reason that the district court did not reject Tucker's evidence on the ground that no

reasonable jury would believe it. It held instead Tucker's evidence was not material and that under the undisputed facts, "no reasonable factfinder could conclude that [the loan disclosures were] not likely to mislead consumers." ER 69. The two are not the same. It is not error for a court decide a case because "no reasonable factfinder could conclude" that a representation "was not likely to mislead." *Cyberspace.com*, 453 F.3d at 1201. Here, Tucker's proffered evidence was not sufficient to create a genuine issue about whether consumers were likely to be deceived by Tucker's disclosures even if the court accepted all of his evidence as true. A factfinder could well believe, for example, that the relative number of chargebacks was lower than in FTC cases involving unauthorized credit card charges. But for all the reasons set forth above, those facts do not create a triable issue on whether Tucker's disclosures were likely to mislead consumers acting reasonably under the circumstances.

IV. THIS IS A "PROPER CASE" UNDER SECTION 13(B) OF THE FTC ACT.

Section 13 of the FTC Act, 15 U.S.C. § 53(b), states that "[w]henever the Commission has reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission," the Commission "may bring suit in a district court of the United States to enjoin any such act or practice" through a

preliminary injunction and that "[p]rovided further, . . . in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." Tucker contends that this case is not a "proper case" within the meaning of Section 13(b) because it does not involve "routine fraud." Br. 56-59.

This Court rejected that argument decades ago in *FTC v. Evans Products Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985), and nothing that has happened since undermines its holding. In *Evans*, the Court held that the statutory phrase "proper case" allows the Commission to seek a permanent injunction "against violations of *any provisions of law enforced by the Commission*." *Id.* at 1086 (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)). The court expressly rejected "any attempt to limit § 13(b) to cases involving 'routine fraud' or violations of previously established FTC rules" as "misread[ing] both the case law and the legislative history." *Id.* at 1087 (cleaned up).

Tucker concedes that the "proper case" argument is foreclosed by *Evans*. He nevertheless asserts that the decision was "wrong." Br. 63. But "[a]s a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel." *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992). "An exception to this rule arises when 'an intervening Su-

preme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.'" *Id.* (quoting *United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985)). But there is no Supreme Court decision that undermined or overruled *Evans*, and Tucker does not cite one. Of the thousands of cases the FTC has brought over the last 40 years, many of them not involving routine fraud, Tucker cannot cite a single judicial opinion that supports his claim. Besides, a lending scheme that misleads borrowers about loan terms can reasonably be described as "routine fraud."

V. THE FTC WAS NOT REQUIRED TO PROCEED BY RULEMAKING.

Tucker next argues that the FTC could address his loan practices only through rulemaking and not through a lawsuit to enforce the FTC Act and TILA. Br. 67-74. He claims that his lending model of hidden contract terms and undisclosed renewals was "the industry standard for years" before the FTC brought this case. He complains that the agency "reversed course" and applied a "novel interpretation" of TILA in this case without having given "any guidance to the online payday lending industry." ER 70-74.

This claim is squarely foreclosed by the Supreme Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). In *Chenery*, the Court held that the choice to proceed by rulemaking or adjudication lies "in the informed discretion of the administrative agency." *Id.* at 203. The Court reaffirmed that

agencies have a choice of paths in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). Following that long-established law, this Court has likewise held that "[a]bsent express congressional direction to the contrary, agencies are free to choose their procedural mode of administration." *Davis v. United States EPA*, 348 F.3d 772, 785 (9th Cir. 2003).

Those principles control this case. The FTC was not required to engage in rulemaking because this case simply applied existing principles under the FTC Act and the TILA to Tucker's deceptive loan operation. It is firmly established that material representations violate the FTC Act if their net impression is likely to mislead consumers acting reasonably under the circumstances. *Gill*, 265 F.3d at 950; *Stefanchik*, 559 F.3d at 928. Similarly well-established law has interpreted TILA and Regulation Z to require that creditors clearly and conspicuously disclose the terms of their loans to consumers before extending credit. *Ocwen Fed. Bank*, 523 U.S. at 412; 12 C.F.R. § 1026.17(a)-(c). The FTC's case simply applies these principles to Tucker's practices. And the FTC can hardly be faulted for failing to engage in rulemaking when an existing rule—Regulation Z—already prescribed his conduct.

That Tucker (and others) may have been deceiving borrowers for years before the FTC took enforcement action against them does not curtail the agency's discretion. Deceitful lending practices violate the FTC Act and

TILA whether or not the government has prosecuted them. Tucker thus gets no help from cases like *Union Flights, Inc. v. Adm'r, Fed. Aviation Admin.*, 957 F.2d 685 (9th Cir. 1992), finding that a "sudden change of direction" can require rulemaking. *Id.* at 688. There could have been a change of direction only if the FTC had previously *approved* of Tucker's practices, but Tucker points to no such approval beyond mere prior non-enforcement.

It is of no moment that Tucker's loan model was purportedly the "industry standard[]." Br. 9. A deceptive practice that violates federal statutes is not immune simply because it is widely used. As this Court has held, "a practice that is standard to a particular industry can still violate the FTC Act." *FTC v. Commerce Planet, Inc.*, 642 F. App'x 680, 682 (9th Cir. 2016) (unreported), citing *FTC v. Cement Institute*, 333 U.S. 683, 688, 720-721 (1948).

VI. THE DISTRICT COURT'S MONETARY RELIEF WAS WITHIN ITS DISCRETION.

District courts enjoy broad discretion in fashioning equitable relief in FTC Act cases. *FTC v. Network Services Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010). To show the extent of consumer harm, the FTC must present a "reasonable approximation" of the defendants' ill-gotten gains. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159 n.8 (9th Cir. 2010); *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997). The "burden [then] shifts to the defendants to show that those figures were inaccurate." *Id.* The district court's determination is

reversible "only for abuse of discretion or the erroneous application of legal principles." *Network Services Depot*, 61 F.3d at 1129.

Tucker argues that the FTC's calculation was not reasonable and based on inadmissible evidence. Neither claim is correct.

A. The Monetary Award Was Reasonable.

FTC employee Elizabeth Ann Miles calculated the amount Tucker wrongfully took from consumers using AMG's loan records and consumer data files. Miles first matched AMG's loan records with its consumer records, identified loans in which the Tucker withdrew more than the loan amount plus a 30% finance charge, and subtracted the amount borrowed plus 30% from the total amount paid for each loan. ER 1447-1448. The excess payments totaled $1.3 billion. ER 1448. The FTC's calculation was a reasonable approximation of consumer harm because it represents the amount consumers paid beyond what they were told they would pay. It therefore approximates the money Tucker's lending enterprise wrongfully obtained as a result of the deceit.

Tucker argues that the FTC's calculation of consumer harm was not reasonable because "not all consumers were misled." Br. 80. Relying again on his purported evidence of "nondeception" (discussed at pages 71-77 above), he claims that AMG's low "FTC complaint rate" and "ACH unau-

thorized transaction rate" show that few consumers were deceived, and that repeat borrowers were "satisfied" and therefore should have been excluded from the calculation. Br. 80-82. But as we explained, that some borrowers complained to the FTC or challenged automatic debits does not imply that other borrowers understood their loan disclosures. And the district court correctly rejected the idea that Tucker's expert supported his assumption that repeat borrowers necessarily understood the loans. As discussed above, Tucker's expert simply assumed, unrealistically and without any evidence whatsoever, that borrowers would have realized they were in for multiple renewals after the first interest-only withdrawal.

Tucker's argument also fails because it rests on the false premise that the FTC must show that each individual consumer relied on the misleading disclosures. In fact, this Court has held the opposite: "Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section." *Figgie*, 994 F.2d 595 at 605. Thus, "[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." *Id.* There is no dispute that Tucker's misleading disclosures were widely disseminated or that consumers purchased

his product. Accordingly, those customers are presumed to have relied on the misleading disclosures. Tucker's purported "nondeception" evidence does not rebut the presumption.

B. Tucker's Challenges To The Calculation Are Meritless.

Tucker objects that the FTC's calculation of consumer harm was inadmissible for a slew of reasons: because it was not properly authenticated summary evidence (Br. 76-77), because the underlying data were untrustworthy (Br. 77), because it was presented by a witness who lacked sufficient knowledge of the underlying documents (Br. 77-78), and because it was expert evidence offered by a non-expert (Br. 78-79). None of those objections holds water.

Federal Rule of Evidence 1006 permits a party "to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court" by way of a "summary, chart, or calculation." "The purpose of the rule is to allow the use of summaries when the documents are unmanageable or when the summaries would be useful to the judge and jury." *United States v. Rizk*, 660 F.3d 1125, 1130 (9th Cir. 2011) (cleaned up).

Tucker argues that the documents underlying the FTC's summary calculation of consumer harm had to be independently admissible and authenticated by an appropriate witness. Br. 76-77. They were. The documents under-

lying the FTC's calculations were AMG's own business records, as shown by Derek Douglas, a controller at AMG for three years, who premised his testimony on personal knowledge and review of the documents themselves. SER 179-180. Douglas confirmed that the data were recorded by persons with knowledge at or near the time of the events, and were created and maintained by AMG in the ordinary course of its business.[17] *Id.* Because the underlying documents were properly authenticated and admissible, the FTC's witness did not need independent knowledge of their contents.

Tucker asserts that the summary was not really a summary at all, but expert evidence encompassing "complex data computations" outside the knowledge of ordinary laymen. Br. 77-78. In reality, the calculation itself was a simple subtraction of the total amount consumers were told they would pay from the total amount the consumers actually paid. The rest of the effort to create the summary involved using commercially available software to match loans identified by a unique field in one database with consumer files that included the same field in another. While the software involved (like any program) must be learned, that does not mean using it requires the application of

[17] Tucker's claim that the underlying data is "untrustworthy" because it was created for the purpose of litigation (Br. 77) is false.

expert knowledge, nor does it transform simple arithmetic into expert opinion.

Tucker also claims that the calculation should have been "authenticated by expert testimony," without which, he argues, "the district court had no way of determining whether the computations can be relied upon." Br. 78-79. But there is no requirement that summary evidence be authenticated by an expert. *See Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 515 n.9 (9th Cir. 1985) (rejecting argument that Rule 1006 summary should be excluded because it was "unverified"). To the extent Tucker believed the calculation was inaccurate, he had the opportunity to cross-examine the employee who performed it. *See id.* ("Any inaccuracies . . . could have been brought out on this cross-examination."); *United States v. Meyers*, 847 F.2d 1408, 1412 (9th Cir. 1988) (cross-examination allowed defendants to "alert the jury to any alleged discrepancies in the chart."). Tucker could also have presented his own calculation from the loan data. He didn't do either. And he never argued that the FTC's calculation was incorrect. Thus, the district court did not need an expert to "authenticate" the FTC's calculation because it could rely on the adversarial process—and the lack of any substantive challenge—to test the evidence.

C. Tucker's Due Process, Laches, And *Kokesh* Arguments Do Not Provide A Basis To Limit The Monetary Award.

Tucker claims that the monetary award must be limited because he did not receive "fair notice" of the conduct that was prohibited. This argument fails for the same reason as his argument that the FTC should have engaged in rulemaking—the FTC Act and the decades of cases in which it has been applied provide adequate notice that companies may not fool consumers into making purchases by deceiving them about the material terms of an offer or hiding them in the fine print. *See, e.g.*, *Cyberspace.com*, 453 F.3d at 1200; *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 255 (3d Cir. 2015) ("Fair notice is satisfied here as long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute."). In the face of the FTC Act's prohibition on deceptive conduct and TILA's plain requirements, Tucker hardly needed to be told that he could not trick borrowers through obscure loan disclosures.

Tucker's argument that the FTC unreasonably delayed bringing this case (Br. 83-84) likewise lacks foundation. This Court recognized long ago that "[t]he government is not subject to the defense of laches when enforcing its rights." *United States v. Menatos*, 925 F.2d 333, 335 (9th Cir. 1991); *see also Chevron, U.S.A., Inc. v. United States*, 705 F.2d 1487, 1491 (9th Cir. 1983) (same). Tucker cites no authority to the contrary. Besides, the FTC

brought its case only 4 years after the first loans for which it sought monetary relief.

Finally, Tucker is wrong that this case is governed by a one- or three-year statute of limitations. Br. 86-87. He claims that two possible limitations provisions apply: one contained in TILA, 15 U.S.C. § 1640(e), and one contained in the FTC Act, 15 U.S.C. § 57b. Neither applies.

TILA's one-year limitations period is for the private right of action granted by 15 U.S.C. § 1640(a)—the statute specifically imposes the one-year period on "action[s] under this section." 15 U.S.C. § 1640(e). It separately authorizes state attorney general enforcement actions, for which it imposes a longer, three-year limitations period. *Id.* Section 1640 does not mention or impose any limitations period on federal enforcement actions like this one, which are authorized by a different section, 15 U.S.C. § 1607(c). Section 1607 provides that a violation of TILA is "deemed an unfair or deceptive act or practice" under the FTC Act, and grants the FTC all of its enforcement "functions and powers" under the FTC Act, which contains no statute of limitations. *Id.*

Although Tucker cites (Br. 86) one district court decision from another circuit that applied the one-year period to a TILA action brought by the CFPB, that case neither binding on this Court nor persuasive. In *CFPB v. ITT*

Education Services, the district court did not acknowledge the express textual limitation of the one-year period to actions "under this section," nor did it recognize that state attorney general actions are subject to a longer period. 219 F. Supp. 3d 878, 922-923 (S.D. Ind. 2015). Those provisions are crucial to understanding that TILA's statute of limitations for private actions does not apply to actions brought by the FTC. The Court should apply TILA consistently with its plain text.

Tucker's alternative argument suffers from the same flaw. He claims that the three-year statute of limitations for actions brought under Section 19 of the FTC Act should apply. Br. 87. But this case was not brought under Section 19; it was brought under Section 13(b). Section 19 specifically states that "[n]othing 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). Courts have thus rejected attempts to apply the Section 19 limitations period in Section 13(b) cases. *See*, *e.g.*, *FTC v. Inc.21.com Corp.*, 745 F. Supp. 975, 1012 (N.D. Cal. 2010), aff'd, 475 F. App'x 106 (9th Cir. 2012) (Section 19's three-year statute of limitations does not apply to action brought under Section 13(b) for statutory and rule violations).

In a last-ditch effort to reduce his monetary liability, Tucker argues that even if those statutes of limitations do not apply on their own terms, the Court

should apply them anyway because of the Supreme Court's decision last term in *Kokesh v. SEC*, 137 S.Ct. 1635 (2017). The argument is that *Kokesh* "mandates the application of a statute of limitations to FTC 13(b) actions," so the Court should pick one of those two. Br. 86. *Kokesh* held nothing of the sort.

In *Kokesh*, the Supreme Court addressed whether 18 U.S.C. § 2462, the general five-year statute of limitations for "penalties," applies to a monetary judgment under the Securities Exchange Act that required disgorgement to the Treasury. 137 S. Ct. at 1643-1644. That case concerned the Securities and Exchange Commission, not the Federal Trade Commission and considered disgorgement judgments with the purpose of punishment and deterrence, "as opposed to compensating a victim for his loss." *Id.* at 1642. The judgment here is intended to be used for such compensation. Although the Court discussed generally the importance of statutes of limitations, *see id.* at 1641-1642, it did not say that every government enforcement action must be sub-

ject to one. Nor does the decision even hint that a court should apply whatever statute of limitations is at hand, however inapplicable.[18]

Section 13(b) does not contain a statute of limitations. As this Court has held, "[i]n the absence of a federal statute expressly imposing or adopting one, the United States is not bound by any limitations period." *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993). *Kokesh* did not purport to override that principal. Even if it did, however, the Court need not reach the issue. Even if *Kokesh* meant that the five-year statute of limitations on "penalties" applied to FTC requests for equitable monetary relief (which it does not), all of the loan revenue that formed the basis for the monetary relief in this case was collected less than five years before the FTC filed suit.

VII. THE DISTRICT COURT PROPERLY ORDERED RELIEF DEFENDANTS TO REPAY THE MONEY TUCKER GAVE THEM.

A district court may order "relief defendants"—third parties who receive the proceeds of illegal activity—to disgorge their ill-gotten gains. *SEC*

[18] The Supreme Court itself rejected Tucker's claim (Br. 88-89) that *Kokesh* stands for the proposition that the FTC may not seek equitable monetary relief under Section 13(b). The opinion states explicitly that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." *Kokesh*, 137 S.Ct. at 1642 n.3. This Court has long recognized that monetary relief is available under Section 13(b)—indeed, it ratified the principal as recently as last year. *FTC v. Commerce Planet*, 815 F.3d 593, 599 (9th Cir. 2016).

v. Colello, 139 F.3d 674, 676 (9th Cir. 1998); *Network Servs. Depot*, 617 F.3d at 1142. To justify such relief, the FTC must show that the relief defendant (1) "received ill gotten funds" and (2) "does not have a legitimate claim to those funds." *Colello*, 139 F.3d at 677. A relief defendant who receives property "as a gift, without the payment of consideration," does not obtain a "'legitimate claim' sufficient to immunize the property from disgorgement." *CFTC v. Walsh*, 618 F.3d 218, 226 (2d Cir. 2010). Further, when a third party receives funds from one of the companies involved in a "common enterprise,"[19] the FTC need not "demonstrate with exact precision which funds initially came from which companies." *Network Servs. Depot*, 617 F.3d at 1142. This is because when numerous companies are "beneficiaries of and participants in a shared business scheme, . . . the common revenue generated in the course of that scheme [is] the proper subject of the court's equitable powers." *Id.* at 1143. The measure of relief is the amount of the ill-gotten funds that the relief defendant obtained. *See Colello*, 139 F.3d at 677. To establish the proper amount, an agency must advance a "reasonable approximation" of the moneys transferred to the relief defendants; there is no dollar-for-dollar trac-

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[19] A "common enterprise" permits the court to ignore corporate formalities when nominally separate entities, often with overlapping ownership and management, operate as one by "pool[ing] resources, staff, and funds." *Network Servs. Depot*, 617 F.3d at 1142-1143.

ing requirement. *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998).

The district court held that Tucker's companies acted as a common enterprise because "no real distinction exist[ed]" between the various corporations. ER 18. Neither Tucker nor the relief defendants challenges the ruling on common enterprise. The relief defendants do not challenge the district court's holding that Tucker's companies defrauded consumers of over $1.3 billion, nor do they deny that they received nearly $28 million from members of the common enterprise.

The district court's award against Kim Tucker was based on bank statements showing payments that she received from Tucker amounting to just under $19.1 million, though she claimed no ownership or other interest in any of Tucker's companies and did not contend that she had provided valuable services to them. ER 19 (citing Docket No. 908-227). The court's order against Park 269 (Kim Tucker's wholly owned LLC) was based on $8 million in payments from Tucker's companies for which Park 269 does not claim to have offered any services or other value. ER 20.

Kim Tucker and Park 269 now argue that the FTC failed to distinguish between funds they received before December 7, 2012—the date that the parties filed the stipulated injunction—and funds received after that date.

R.D.Br. 3-4.[20] They claim that the illegal lending activities stopped on that date, and therefore funds received after then were not the fruit of unlawful conduct. Ms. Tucker claims that she received several payments after December 7, 2012; namely $78,651 from AMG Services, representing salary payments for her husband Scott Tucker, and $12.125 million, also from AMG by way of Scott Tucker's company BA Services, LLC, purportedly as a payment to Scott Tucker for "future" software royalties. R.D. Br. 11-12. Although Park 269 joins Kim Tucker's appeal, this argument does not pertain to it, because it does not claim that it received any payments after December 7, 2012.

Ms. Tucker's argument fails to show any facially plausible ground to find that the district court abused its discretion. Even if Tucker stopped his illegal lending activities after December 2012, the scheme had reaped $1.3 billion by that point, making it virtually inconceivable that the millions of dollars Ms. Tucker received, even after December 2012, were not the proceeds of fraud. Ms. Tucker points to no evidence that *any* of AMG's profits were derived from legitimate activity. In any event, the FTC is not required to trace the amounts the relief defendants received back to their illegal source. *See First Pacific Bancorp*, 142 F.3d at 1192 n.6. As this Court has held in the analogous context of relief defendants in SEC cases, the government may re-

[20] R.D.Br. refers to the relief defendants' brief.

cover ill-gotten gains from "one who has received the proceeds *after the wrong*." *Colello*, 139 F.3d at 676 (emphasis added). That principle prevents Tucker from dissipating his assets and avoiding the judgment by making payments to his wife and characterizing them as derived from legitimate sources. Further, because the relief defendants' payments were received from members of the common enterprise, there was no need to distinguish the ill-gotten funds that were "commingled among several participants in the same unlawful enterprise" from funds that might have been legitimate (if there were any). *Network Servs. Depot*, 617 F.3d at 1143.

Neither Ms. Tucker nor Park 269 asserts any legitimate claim to the funds. The best that Kim Tucker can muster is that she received funds that belonged to her husband—the architect of the fraud—either as salary or as royalties paid from one of his companies to another. R.D.Br. 11-12. But Scott Tucker faces a $1.3 billion judgment, and he cannot immunize assets that could be used to satisfy the judgment simply by transferring them to his wife. Thus, whether or not he legitimately received salary from AMG or royalty payments from BA Services after December 2012, *Kim Tucker* has no legitimate claim to the funds. Ms. Tucker calls this "spousal strict liability" and argues that it is error to say she must "turn over every penny her husband has ever earned and transferred to her." R.D.Br. 18. But her argument boils down

to a claim that she can serve as the launderer of her husband's ill-gotten gains because he is her husband. For its part, Park 269 does not make *any* claim that the funds it received were legitimate.

Kim Tucker argues that she never obtained "the benefit" of some payments because she used the money to pay her husband's taxes. R.D. Br. 19. But she repeatedly invoked the Fifth Amendment during her deposition regarding all money she received—and it is now too late to provide that information. Moreover, "[a] person who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained." *SEC v. Platforms Wireless Int'l*, 617 F.3d 1072, 1098 (9th Cir. 2010). It therefore is no defense that the money has already been spent. *See SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1116 (9th Cir. 2006) ("The manner in which [the recipient of ill-gotten funds] chose to spend the illegally obtained funds has no relevance to the disgorgement calculation."). The district court properly ordered the relief defendants to disgorge money they received from Tucker and AMG.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

Nov. 28, 2017

/s/ Theodore (Jack) Metzler

THEODORE (JACK) METZLER
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Of Counsel:
NIKHIL SINGHVI
JASON D. SCHALL
Attorneys

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

RULE 28-2.6 STATEMENT OF RELATED CASES

A related appeal is currently pending before this Court in *FTC v. E.T.S. Ventures, LLC*, No. 17-15552, involving the disposition of an asset owned by Level 5 Motorsports LLC, one of Scott Tucker's companies.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number No. 16-17197

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