IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff-Appellee, v. CREDIT BUREAU CENTER, LLC, et al., Defendants-Appellants	)	Appeal from the United States District Court for the Northern District of Illinois, No. 17-cv-194 Matthew F. Kennelly, Judge Nos. 18-2847, 18-1330

OPPOSITION OF THE FEDERAL TRADE COMMISSION TO MOTION FOR STAY OF JUDGMENT PENDING APPEAL

This Court should deny appellant Michael Brown's motion to stay pending appeal the district court's Final Judgment of June 26, 2018. That order imposed permanent injunctive and monetary relief to remediate a scheme conducted by Brown that bilked consumers out of $6 million after tricking them into enrolling into a credit monitoring program. Brown fails to satisfy a single one of the stay factors.

BACKGROUND

Brown and his company, Credit Bureau Center, LLC (CBC), deceived consumers into enrolling in a costly credit monitoring service. Would-be apartment renters were told they needed a credit report and were directed to CBC's website to get one. Unbeknownst to them, ordering a report also signed them up

for a credit monitoring service with recurring monthly fees. DE.1. In a lawsuit filed in January 2017, the FTC charged Brown, CBC, and others with violating Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); Section 4 of the Restoring Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. § 8403; Section 612(g) of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681j(g); and the Free Reports Rule (FRR), 12 C.F.R. §§ 1022.130-1022.138. The FTC obtained a temporary restraining order (TRO) and preliminary injunction (PI) against Brown and CBC. DE.16, 58, 59.

In the judgment on review, the district court granted summary judgment in favor of the FTC. DE.238. Undisputed facts showed that Brown owned and controlled CBC, which operated websites offering paid access to credit scores, credit reports, and credit monitoring services. *Id.* at 3. Brown attracted customers through "affiliate marketers," third parties that directed customers to CBC's websites. Defendants Pierce and Lloyd, two of his principal affiliates, were by far Brown's largest affiliates. *Id.* at 4. With Brown's approval, they began to post rental ads on Craigslist falsely purporting to be landlords and directing prospective renters to obtain a credit report through CBC. *Id.* The CBC website led the would-be renters to believe that the report would be free (with a one-time $1 processing fee), but it signed them up for a nearly $30-per-month ongoing credit monitoring program that CBC did not fairly disclose. *Id.* at 3, 10-11. The scheme

generated $5.2 million for CBC – and numerous consumer complaints, about which Brown was aware. *Id*. at 4-5.

The court concluded that the fake Craigslist ads violated the ban on deceptive conduct in Section 5(a) of the FTC Act. *Id.* at 6-7. CBC was liable because it ratified its affiliate marketers' conduct. *Id.* at 6-9. Separately, CBC's own websites were deceptive because they misled consumers into believing they were signing up for a free credit score and report (with its $1 processing fee), not a costly ongoing program. *Id.* at 9-13. The same conduct violated ROSCA, 15 U.S.C. § 8403. *Id*. at 13-16. Defendants also violated the FCRA and the FRR by failing to notify consumers of their right to an annual free credit report. *Id*. at 16-18. Undisputed facts, including emails, customer complaints, and credit-card refunds, proved Brown's knowledge and control of the scheme and rendered him personally liable for both the deceptive CBC websites and the Craigslist scheme. *Id*. at 19-22.

The court permanently enjoined Brown from offering credit monitoring services with a negative option feature and restricted his use of affiliate marketers. DE.239 §§ I, III. The injunction also requires Brown to provide disclosures relating to free credit reports, and disclosures and the receipt of consumer consent for sales he makes using negative options. *Id*., §§ V-VI, VIII. The court ordered equitable monetary relief of $5,260,671.36, the amount consumers lost from the

Craigslist scheme. *Id*. § IX. The court subsequently directed the FTC, which had received the receivership assets, to refrain pending appeal from distributing the money to defrauded consumers. DE.266.

ARGUMENT

A litigant can merit a stay pending appeal only if it (1) makes "a strong showing" of likely success on the merits; (2) shows it will be irreparably injured absent a stay; (3) shows that the stay will not substantially injure other interested parties; and (4) shows that the stay will serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also In re A&F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). Brown fails to make any of those required showings.

1. Brown is Unlikely to Prevail on the Merits

Brown makes a series of scattershot arguments, none of which are remotely likely to succeed.

a. Section 13(b) authorizes equitable monetary relief

Brown first argues that he is likely to prevail on the ground that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), does not authorize a court to issue monetary relief. Motion 6-8. Consistent and longstanding precedent of this Court shows otherwise.

This Court held three decades ago that Section 13(b) gives district courts the authority to award monetary relief against a defendant whose deceptive conduct

causes monetary harm to consumers. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). The Court has ratified that holding no fewer than four times since then. *See FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Think Achievement Corp.*, 312 F.3d 259, 262 (7th Cir. 2002); *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 634 (7th Cir. 2005). Every other court of appeals to have considered the issue has come to the same conclusion.[1] That unbroken line of binding decisions precludes any chance of success.

The unanimous decisions of the courts of appeals are firmly rooted in Supreme Court precedent. The FTC Act grants district courts the power to issue "a permanent injunction." 15 U.S.C. § 53(b). In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the Court held that where Congress authorizes an injunction, a district court has at its disposal "all the inherent equitable powers" necessary for "the proper and complete exercise of that jurisdiction," including the authority to award monetary relief. *Id*. at 398. The Court later emphasized that when Congress grants a court the power to issue an injunction, it "must be taken to have acted

[1] *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598-99 (9th Cir. 2016)*; FTC v. Ross*, 743 F.3d 886, 890-92 (4th Cir. 2014); *FTC v. Bronson Partners*, LLC, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished); *FTC v. Direct Mktg. Concepts, Inc*., 624 F.3d 1, 15 (1st Cir. 2010*); FTC v. Freecom Commc'ms, Inc*., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005*)*; *FTC v. Gem Merch. Corp*., 87 F.3d 466, 468-70 (11th Cir. 1996); *FTC v. Security Rare Coin & Bullion Corp*., 931 F.2d 1312, 1314-1315 (8th Cir. 1991).

cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960). Less than four years ago, the Court, citing *Porter*, reaffirmed that "[w]hen federal law is at issue and the public interest is involved, a federal court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake," including the power to "accord full justice" to all parties. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (cleaned up).

Brown nevertheless claims (Motion 7) that he will prevail because in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the Supreme Court "rejected the broad expansionist view" of equitable authority set forth in *Porter*. Not so.

In *Kokesh*, the Court addressed only whether the general five-year statute of limitations for "penalties" in 28 U.S.C. § 2462 applies to disgorgement under federal securities law. *Id.* at 1639. Disgorgement, the Court explained, is a specific type of restitution, measured by the defendant's unlawful gain. *Id.* at 1640. The Court noted that "in many cases, SEC disgorgement is not compensatory," because disgorged funds are paid to the U.S. Treasury rather than to victims. *Id.* at 1644. The Court thus held that this type of disgorgement was a "penalty" for purposes of the statute of limitations. *Id.* at 1644-45. But the Court expressly limited its holding to the application of the statute of limitations to the

securities laws. Effectively rejecting the very argument Brown now makes, the Court stated that:

> Nothing 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.

Id. at 1642 n.3. *Kokesh* plainly does not support a wholesale reversal of decades of decisions rendered by eight circuits. Brown gets no help from comments made by individual justices at the *Kokesh* oral argument. Motion 7. The Court's unanimous opinion speaks for itself.

Kokesh also has no bearing here for several additional reasons. The case concerned application of the statute of limitations, an issue not presented here.[2] It also involved disgorgement, with the disgorged funds dispersed to the Treasury, coupled with civil penalties. The Court determined that remedy serves deterrent, not compensatory, purposes. *Kokesh*, 137 S. Ct. at 1643-44. Here, by contrast, the FTC seeks redress of consumers' losses caused by Brown's deceptive practices, not retribution or deterrence. The FTC fully intends to distribute to defrauded consumers the

[2] The complaint was filed in January 2017 seeking relief for deceptive conduct beginning in January 2014, within Section 2462's five-year statute of limitations. DE.1 ¶11.

money it collects from Brown and CBC.[3] As the Supreme Court has recognized, a "public remedy" granting equitable monetary relief is not "rendered punitive" when it is compensatory. *Mitchell*, 361 U.S. at 293.[4]

Brown also is wrong that *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), limited *Porter*. Motion 8. *Meghrig* held that a citizen-suit provision in an environmental law that gives district courts injunctive authority to order the remediation of present harms and the prevention of future ones did not allow a court to award compensation to private parties for past cleanup costs. *Id.* at 484. *Meghrig* reached that determination by comparing the statute before it with a similar environmental statute that afforded identical injunctive relief, but expressly provided for the recovery of past cleanup costs. Congress "knew how to provide for the recovery of cleanup costs," the Court explained, so its decision to provide such a recovery in one statute revealed an intent not to do so in the other statute, which lacked the operative language. *Id.* at 485. Moreover, the injunctive authority conveyed in the statute before it limited relief to instances of "imminent"

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[3] Indeed, in recent years as much as 99.9% of the monetary remedies obtained in Section 13(b) cases were distributed to consumers (less the costs of distribution). *See* Federal Trade Commission, Office of Claims and Refunds, *Annual Report 2017*, https://www.ftc.gov/reports/bureau-consumer-protection-consumer-refunds-program-consumer-refunds-effected-july-2016).

[4] Brown also cites (Motion 9) a recent concurring opinion in which two of the judges acknowledge controlling Ninth Circuit precedent, but opine that it should be overruled. *See FTC v. AMG Capital Mgmt.*, LLC, 910 F.3d 417 (9th Cir. 2018). For the reasons discussed herein, we respectfully disagree with that view.

danger, which an already-cleaned-up site did not pose. *Id.* at 485-86. The holding, which turns on the particularities of two specific environmental statutes, sheds no light on how to interpret Section 13(b).

Indeed, Congress has twice ratified the FTC's authority to obtain equitable monetary relief under Section 13(b). A decade after courts recognized the availability of such relief, Congress expanded the statute's venue and service-of-process provisions. *See* FTC Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat. 1691 (Aug. 26, 1994). Even as it amended Section 13(b), Congress let stand the many existing decisions permitting monetary relief under the statute. Indeed, the Senate Report accompanying the legislation recognized that Section 13(b) authorizes the FTC to "go into court … to obtain consumer redress." S. Rep. No. 103-130, at 15-16 (1993). When Congress knows of judicial interpretations of a statute, but lets the interpretations stand when it amends the statute, it is presumed that "the legislative intent has been correctly discerned." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (cleaned up).

Congress directly codified the judicial understanding of Section 13(b) when it enacted the U.S. Safe Web Act of 2006, Pub. L. 109-455, 120 Stat. 3372 (Dec. 22, 2006) (codified in scattered sections of 15 U.S.C.). There, the legislature expanded the FTC's authority to enforce the FTC Act against certain practices abroad, providing that "[a]ll remedies available to the Commission with respect to

unfair and deceptive acts or practice shall be available for acts and practices [in foreign commerce] … including restitution to domestic or foreign victims." 15 U.S.C. § 45(a)(4)(B).

b. Section 13(b) allows the FTC to seek a permanent injunction

Brown next contends Section 13(b) limits the FTC to preliminary injunctive relief and then only when it has first issued an administrative complaint under Section 5(b). Motion 8, 9. This Court long ago rejected that argument as well. It recognized that a permanent injunction is expressly authorized in the "second proviso" of Section 13(b), which states: "provided further, that in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." The Court held that the preliminary injunctive relief authorized under the first part of the statute and the permanent injunctive relief authorized under the second proviso "are entirely different animals." *United States v. JS & A Group, Inc.*, 716 F.2d 451, 456 (7th Cir. 1984).

As the Senate Report supporting Section 13(b) explained, where the FTC "does not desire to further expand upon the prohibitions of the [FTC] Act through the issuance of a cease-and-desist order," the Commission could "seek a permanent injunction" in district court. S. Rep. No. 93-151, 93d Cong., 1st Sess. 30-31

(1973).[5] This Court relied on that history to hold that the Commission may seek a permanent injunction in federal court where the agency does not need to apply its "expertise to a novel regulatory issue through administrative proceedings." *World Travel Vacation Brokers*, 861 F.2d at 1028.

Brown also asserts he cannot be enjoined because he "is not violating, or about to violate the FTC Act." Motion 8. When the FTC filed its complaint, Brown was actively violating the Act and stopped only after the district court restrained his conduct. His related contention that the FTC cannot "seek damages for past conduct," Motion 8, is plainly wrong in light of the legions of decisions recognizing the agency's ability to obtain monetary redress, which necessarily involves past conduct.

c. Brown's challenges to the findings that he violated the Free Reports Rule and ROSCA are meritless

Brown next challenges (Motion 9-10 ¶17) the district court's conclusion that he violated the Free Reports Rule, which requires that an advertisement for a free credit report must disclose that a consumer has the right to obtain a free credit report annually. 15 U.S.C. § 1681j(g)(1); 12 C.F.R. § 1022.138. He does not

[5] Brown's reliance (Motion 8) on a law review article written by former FTC personnel is misplaced. Even the authors recognize that Section 13(b) should "allow for monetary relief when the practices at issue are dishonest or fraudulent," as they are here. *See* J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 32 (2013).

contest the finding that CBC failed to provide that notice. Rather, he asserts principally that he will prevail because the rule, which was promulgated under the FCRA, may be enforced only through administrative proceedings and not in federal court. The argument is that the statute, 15 U.S.C. § 1681s(a)(1), provides that violations of FCRA-based rules "shall be subject to enforcement by the Federal Trade Commission under section 5(b)" of the FTC Act, 15 U.S.C. § 45(b), and thus requires administrative but not judicial proceedings. Congress's use of "shall," Brown asserts, means that only administrative enforcement is allowed.

The argument fails at the starting gate for two reasons. First, Brown waived it by failing to raise it below until his reply brief. *See Mendez* v. *Perla Dental*, 646 F.3d 420, 423-24 (7th Cir. 2011). Second, the argument is a red herring because even if it had merit, it would provide no basis for a stay of the judgment. The monetary and injunctive remedies rested not only on the FCRA violation, but also on Brown's independent violations of the FTC Act and other statutes. Reversal of the FCRA count would secure Brown no practical relief from the judgment.

But even if considered on its merits, the argument fails because it cannot be squared with the plain language of the FCRA or the FTC Act. The FCRA states that "a violation of any requirement or prohibition imposed under" the FCRA "constitute[s] an unfair or deceptive act or practice … in violation of Section 5(a) of the [FTC] Act." 15 U.S.C. § 1681s(a)(1). Section 13(b) of the FTC Act in turn

allows the FTC to seek both injunctive and monetary relief for the violation of "any provision of law enforced by" the FTC. 15 U.S.C. § 53(b); *see World Travel Vacation Brokers*, 861 F.2d at 1028 (FTC may sue in court "to halt a straightforward violation of section 5"). The plain statutory terms thus defeat Brown's claim that the FTC can enforce the FCRA only through administrative proceedings.

Congress's use of the word "shall" in § 1681s(a)(1) does not change the picture. It is obvious from the passive statutory usage of the term – "shall be subject to enforcement" – that Congress used the word "shall" to provide *authority* to the FTC to enforce through administrative proceedings, not as a *mandate* for that means of enforcement. Indeed, the statute also states that a violation of the FCRA "shall constitute an unfair or deceptive act or practice" in violation of the FTC Act, thereby subjecting the violator to all the means of FTC enforcement of that Act.[6] The full statutory context is important because it can show, as here, that "shall" can be "the equivalent of 'may.'" *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001).

Brown further argues that CBC's product, which combined a credit report and a credit score, is not subject to the FRR, which it claims does not apply to

[6] When the FCRA was enacted in 1970, *see* Pub. L. 91-508, 84 Stat. 1127, 1134-1135 (1970), the FTC's sole means of enforcement was through administrative proceedings. But Congress expanded the FTC's enforcement arsenal when it added section 13(b) in 1973 and authorized judicial enforcement as well.

credit scores. Motion 10. The Commission rejected this argument when it amended the Rule. It explained that "advertising for bundled services that promote free credit reports, in addition to other products and services, such as credit monitoring, is the very type of advertising that is likely to confuse consumers," and thus must be covered by the rule. Free Annual File Disclosures, 75 Fed. Reg. 9726, 9733 (Mar. 3, 2010) (now codified at 12 C.F.R. § 1022.130). Brown's contention that consumers were not injured by Brown's FRR violations, *id*., is belied by the fact that the Craigslist scheme duped them of $5.2 million instead of informing them they could get a credit report for free.

Brown's challenge to the district court's finding that CBC's websites violated ROSCA is frivolous. Motion 10-12 ¶¶18, 20. That statute prohibits charging consumers for online purchases that employ a negative option feature unless the seller adequately discloses all the material terms of the transaction and obtains the consumer's express informed consent. 15 U.S.C. § 8403(1) & (3). CBC's credit monitoring service was a negative option program under ROSCA. *See* 16 C.F.R. § 310.2(w). Undisputed evidence showed that CBC did not sufficiently disclose the program's terms or obtain consumers' consent to be enrolled. Indeed, CBC never even described the credit monitoring service it purported to provide. *See* DE.238 at 16.

Brown nonetheless claims that all online consumers understand negative option features and know that they must cancel to avoid charges. Motion 10-11 ¶18. So what? ROSCA prohibits Brown's actions whether or not consumers may have seen through his deceit (although there is no evidence that they did, and the many complaints indicate they did not). Equally irrelevant is Brown's contention that all customers who cancelled within a short period received refunds. Refunds do not erase violations of the FTC Act. *Think Achievement*, 312 F.3d at 261-62.

Brown challenges the FTC's consumer declarants, claiming they engaged in "friendly fraud" by lying about their knowledge of CBC's program in order to cancel their subscription and get a refund. Motion 12-13 ¶¶21-22. But, having chosen not to depose the FTC's witnesses or provide his own consumer testimony, Brown cannot escape the FTC's evidence now. His affidavits and deposition testimony challenging consumers' motives and honesty are irrelevant and should be given no weight because they were not based on his personal knowledge, as required by Fed. R. Evid. 602 and Fed. R. Civ. P. 56(c)(4), and constituted improper lay opinion testimony under Fed. R. Evid. 701.[7]

[7] The "evidence" that purportedly shows the harm caused by friendly fraud, *see* DE.206-1, Ex.10 and Affidavit ¶8, is a blog post/advertisement that lacks foundation and is inadmissible hearsay. Fed. R. Evid. 801(c), 802; Fed. R. Civ. P. 56(c)(2) & (4).

Brown next claims that the CBC websites adequately disclosed the negative option feature because it was presented in twelve-point font and "not overshadowed" by other information. Motion 11 ¶19. But, as shown in undisputed screenshots of the websites, DE.11-4 (McKenney Att. C); DE.238 (App. II); DE.215 ¶50,[8] and supported by undisputed consumer declarations, the prominent feature consumers saw on CBC's websites was its large bolded banner headline that offered a "Free Credit Score and Report." *See* DE.238 at 9; DE.215 ¶41; DE.11-4 at 11-12, 51. In contrast, the negative option disclosures and monthly "membership" fee information were much smaller and fainter, appearing in fine print and below the space where consumers entered their credit card information. DE.238 at 10-11; DE.11-4 at 15, 43, 65; DE.215 ¶45. The consumer declarants stated that the only payment information they saw was a "$1.00 refundable processing fee," announced above the payment space. DE.211 ¶32; *see*

[8] The district court determined that Brown's response to the FTC's statement of undisputed facts, DE.207, did not rebut the FTC's statement with admissible evidence as required by the local summary judgment rules. DE.238 at 2. The court's factual recitation in its summary judgment order is therefore drawn largely from the FTC's statement (although the court provided few paragraph cites), which were undisputed in light of the court's rejection of Brown's response. Because Brown's later-filed corrected response, DE.215, has slightly different paragraph numbers than the original response beginning with paragraph 78, not all the paragraph numbers deemed admitted in the court's opinion correspond with those in the corrected response. The FTC's citations to DE.215 in this opposition were either directly admitted by Brown, deemed admitted by the court for failure to comply with the local rules, or not contested with admissible probative evidence.

also DE.11-3 at 99. There was no evidence that consumers read the negative option and monthly payment information.

Brown thus is unlikely to show that the district court erred in determining that the "net impression" of CBC's websites conveyed the claim "that consumers who enroll in the service will obtain a free credit score – not that they will enroll in a credit monitoring service with monthly charges." DE.238 at 9. Because the disclosures were "embedded … into pages with larger, bolded text that promised 'free' credit reports and scores[, t]he disclosures were not prominent when compared to the rest of the page." *Id.* at 15.

d. Brown knew about the Craigslist fraud

Brown further claims there is a genuine fact issue as to his knowledge of the Craigslist fraud. Motion 13 ¶23. Specifically, he contends that he was unaware of consumer complaints, which he says were screened by others. That is not a material issue, even if were disputed. The law is clear that the owner of a business may not avoid liability for illegal acts by sticking his head in the sand. *Bay Area Bus. Council*, 423 F.3d at 638. The undisputed evidence shows that any ignorance on Brown's part was self-imposed. He admitted that he told his customer service contractor *not* to escalate real-estate related complaints to him. DE.215 ¶85; DE.194-7 at PDF pg. 44**.** He dismissed emails he received indicating that Pierce and Lloyd were not acting on behalf of real landlords or advertising real properties.

DE.215 ¶¶82-83; DE.194-7 at PDF pp. 42, 44-45. He had access to data showing the high level of chargebacks and consumer complaints due to Pierce. DE.215 ¶¶ 71-74, 98-100; DE.194-11 (PX 21 ¶¶12-14 & Att. S). He chose to ignore numerous consumer complaints filed with the Better Business Bureau. DE.215 ¶93; DE.194-7 at PDF pg. 58.

Beyond the evidence that Brown deliberately ignored, the record showed that Brown undisputedly knew of fraud. He knew that his business faced sky-high credit-card chargeback levels, a sure sign of fraud. DE.215 ¶¶65, 67-70; DE.194-6 at PDF pp. 35-38, 200-19. He knew a sponsor stopped its support due to "deceptive listings on craigslist," and that "a lot" of reviews of his websites alleged fake ads. DE.215 ¶90; DE.194-7 at PDF pp. 47-48. He discussed the high level of chargebacks with Pierce and knew that Pierce was using the fake Craigslist ads and landlord emails to drive traffic to CBC's websites, even though he was unaware of any relationships Pierce had with actual landlords. DE.215 ¶¶75-78, 80. Brown even admitted working with Pierce on the fake landlord emails. DE.215 ¶79; DE.42-2 at PDF pp. 39, 130. Despite that knowledge of fraud, Brown continued to work with Pierce. DE.215 ¶¶101-02.

e. The terms of the permanent injunction were within the district court's discretion

Brown also challenges the permanent injunction as overly broad and punitive. Motion 14-15. To succeed in such an argument, Brown would have to

show that the district court abused its discretion. *Febre*, 128 F.3d at 534. He does not nearly pass that high bar.

The court enjoined Brown after determining that he was likely to engage in future violations. *SEC v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982). Not only were consumers harmed, but Brown was "deeply involved" in the scheme and could engage in similar conduct again. Brown eschewed culpability, as shown by his blame-the-consumer "friendly fraud" defense. DE.238 at 23. Worse, Brown violated the preliminary injunction by, among other things, operating a website with a negative option feature without consumer consent and processing payments from CBC customers. DE.106.

Brown objects to the remedial provisions on several grounds, but none stick. He principally challenges Section III of the Final Judgment ("Prohibited Affiliate Program Activities"), which requires him both to notify potential affiliates about the order and to take steps to ensure compliance (including obtaining agreement from the affiliate to comply). Brown cannot use or pay for an affiliate's marketing materials that are noncompliant and, if he determines that an affiliate is noncompliant, he cannot pay them and must terminate their relationship. This provision is plainly appropriate to guard against recurrence of Brown's past unlawful conduct, and he is very unlikely to convince the Court that it represents an abuse of discretion.

Brown claims the provision is punitive because it dissuades affiliates from doing business with him. Affiliates may wish not to do business with a proven fraudster, but that does not turn a sensible prophylactic requirement into a punishment. No law-abiding affiliate marketer would hesitate to acknowledge the order. Further, as the district court noted, legitimate affiliates would find out about the order anyway when they conduct due diligence on Brown. DE.266 at 2-3

Brown's complaint that the affiliate provision has already scared away potential business partners, Motion 14 ¶25, is overblown. The emails on which he relies show that negotiations with affiliate networks fell through when Brown demanded that the networks send him signed orders from each individual affiliate. *See, e.g.*, Doc. 15-2 (Ex. B) (E-mail from Mike Brown to Agop Diulgerian (Dec. 13, 2018, 3:45 pm)). But the injunction allows Brown to delegate the monitoring of individual affiliates to the network for which they work, *see* Section III.C, D; Brown was demanding something not required and that provides no ground to second-guess the district court's judgment.

Brown also objects to what he terms the "life time ban on negative option marketing." Motion 15 ¶26. There is no such ban. The district court forbade him from engaging in "a credit monitoring service with a negative option feature," DE.239 § I, which is the precise conduct at issue here and well within the court's

equitable discretion. Brown may work in other fields employing a negative option feature, subject to safeguards.

The remainder of Brown's challenges to the injunction are insubstantial. He says the court "ignored" his challenge to the FTC's authority under Section 13(b), *id.*, but the court considered this issue twice. *See* DE.238 at 25; DE.183 at 2. Brown blames his lawyer for his violations of the PI, *id.*, but he was found in contempt for charging over 4,000 consumers for credit card monitoring without their consent while prohibited from engaging in that very conduct. DE.106; DE.99 at PDF pp. 5-7. He, not his lawyer, is responsible for the violation. Finally, Brown tries to pin the blame for his conduct on Pierce, whom he describes as a "rogue affiliate." Motion 14 ¶25. In fact, Pierce was Brown's largest source of revenue, generating nearly half of CBC's sales and earning 92% of its commissions. DE.215 ¶¶12-13, 20. As described above, Brown knew or should have known of Pierce's fraudulent conduct.

2. Brown Has Failed To Show Irreparable Injury

Brown makes only a token effort to show harm and has no credible claim of irreparable injury absent a stay. The district court has already stayed the distribution of assets, so in the unlikely event he prevails on appeal, he will be able to recover his money. His principal alleged harm is a purported inability to work due to the injunction, an argument that rests on Brown's false characterization of

the injunction as banning all negative option marketing. As discussed above, it does not. Brown also relies on the unconsummated affiliate deals discussed above. It is clear that the injunction did not harm those deals. More fundamentally, Brown does not even begin to describe why he cannot get a job that does not require the use of negative options (or even internet-based marketing).

3. A Stay Would Harm The Commission And The Public Interest

Brown's victims and the general public would be harmed by a stay. Brown is a proven fraudster, and the injunction is necessary to protect the public from further harm. Freeing him of its restrictions would enable him to continue his depredations. The public interest requires preserving those restraints on appeal for the same reason they were entered in the first place.

CONCLUSION

The Court should deny Brown's Motion for Stay of Judgment Pending Appeal.

Respectfully submitted,

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Dated: January 2, 2019

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Opposition of the Federal Trade Commission to Motion for Stay of Judgment Pending Appeal complies with the form, typeface, type style, and length of motions requirements in Fed. R. App. P. 27(d), 32(a)(5), 32(a)(6), because it contains 5193 words, and has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

s/ *Michael D. Bergman*
Michael D. Bergman
Attorney, Federal Trade Commission

Date: January 2, 2019

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CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on January 2, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Michael D. Bergman

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CERTIFICATE OF SERVICE

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

counsel / party:	address:
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

s/_____