No. 20-50113

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDERAL TRADE COMMISSION
and
STATE OF OHIO EX REL. ATTORNEY
GENERAL DAVID YOST,
Plaintiffs-Appellees,

v.

EDUCARE CENTRE SERVICES, INC., et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas
No. 3:19-CV-196 (Hon. Kathleen Cardone)

Joint Opposition Of The Federal Trade Commission And State Of Ohio To Appellants' Motion For Stay Pending Appeal

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INTRODUCTION

Appellant Mohammad Souheil ran a deceptive telemarketing scheme that, through a campaign including abusive robocalls, promised consumers substantially lower interest rates on their credit cards, backed by a 100% money-back guarantee. The vast majority of purchasers received neither a rate reduction nor their money back when they asked for it. The scheme, which has operated from Canada, the Dominican Republic, and the United States, bilked consumers out of over $11 million using forms of payment collection that are illegal in telemarketing sales.

The Federal Trade Commission and the state of Ohio (together, "the government") sued Souheil, his company, and other participants in the scheme for violating federal and state consumer protection laws. After a hearing, the district court determined that the government was likely to show that the defendants violated the Telemarketing Sales Rule and the FTC Act. The court entered a preliminary injunction appointing a receiver, freezing defendants' assets, and requiring defendants to repatriate foreign assets to the United States, all to preserve the possibility of monetary relief to victims after final judgment. Souheil and his company ask the Court to stay the asset freeze and other aspects of the injunction pending appeal of the injunction.

The Court should deny the motion. Appellants fail to establish any of the elements required for the extraordinary measure of a stay. To begin, they barely

attempt to show irreparable harm absent a stay. The only specific "harm" they identify – having to appear at a contempt hearing for violating court orders – does not constitute irreparable harm.

Appellants also fall well short of showing a likelihood of success. They do not challenge the district court's determination that their activities likely violated the law. Rather, they claim that the injunction was improper because their unlawful conduct has stopped; the law does not allow monetary relief or asset freezes; and the injunction's repatriation requirements, enforcement mechanisms, and use of a receiver are "overly broad."

None of these claims has merit. The first argument is squarely foreclosed by binding Circuit precedent establishing that courts may issue injunctions where the alleged misconduct is likely to recur. *FTC v. Southwest Sunsites*, 665 F.2d 711, 723 (5th Cir. 1982). Appellants waived their other legal challenges to the injunction by failing to raise them below, but they are meritless in any event. This Court has long held both that the law permits monetary relief in equity and that a district court has broad powers to preserve assets for future consumer restitution. Appellants' remaining arguments dispute the district court's factual findings, but this Court will disturb them only if clearly erroneous, which they are not.

The equities weigh strongly against a stay. Unfreezing the assets and staying other aspects of the injunction now could permanently deprive victims of the

restitution to which they likely will be entitled. Should appellants encounter some specific hardship, they can ask the district court to modify the injunction. These circumstances do not merit the unusual step of a stay pending appeal.

BACKGROUND

A. Educare's Deceptive Scheme

Since at least early 2016, Souheil has run a large-scale telemarketing scheme known as Educare, executed through a network of individuals and corporate entities, including his company, 9896988 Canada, Inc., or "989." Using services provided by another Souheil company, Globex Telecom, Inc., Educare cold-called U.S. consumers and deceptively marketed a credit card interest rate reduction service. For a fee ranging from $798 to $1,192, Educare promised to substantially lower interest rates on consumers' credit cards, backed by a 100% money-back guarantee. *See, e.g.*, Dkt. 83 at 1-2; Dkt. 7-2: PX-1 ¶ 6; PX-6 ¶¶ 4, 15.[1]

Educare's promises were false or unsubstantiated and thereby violated the FTC Act and the Telemarketing Sales Rule ("TSR"), which prohibit deceptive telemarketing practices, including making false or unsubstantiated claims to consumers. The vast majority of consumers who purchased the service did not receive the promised rate reduction, and Educare routinely failed to refund money when asked. The scheme also violated the TSR by using unauthorized calls,

[1] "PX-" refers to the government's exhibits to its TRO motion (Dkt. 7-2).

including robocalls; charging a fee in advance of providing debt relief service; collecting payments through remotely created checks or money orders; and failing to adequately disclose the identity of the seller. *See* Dkt. 83 at 2.

The scheme took more than $11.5 million from consumers over a three and a half year period. *See* Dkt. 7-2: PX-2 ¶ 6. While some unlawful conduct has since stopped, payments to Souheil and 989 related to the scheme continued into at least July 2019, and the business infrastructure has remained largely intact. *See* Dkt. 119 at 2-3.

B. The Government's Enforcement Lawsuit

1. The Complaint and TRO

The government alleges that the Educare scheme violates the TSR, 16 C.F.R. Part 310, Section 5 of the FTC Act, 15 U.S.C. § 45(a), the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108, and parallel Ohio laws. The First Amended Complaint charges that all of the "Educare" defendants, including appellants, are jointly and severally liable because they acted as a common enterprise and because the individuals participated in, controlled, and knew of the deceptive practices.[2] Dkt. 81 ¶¶ 79-81.

The government moved *ex parte* for a TRO with an asset freeze, temporary receivership, and order to show cause why a preliminary injunction should not

[2] The Educare defendants include Souheil and 989; Educare, Prolink, and Tripletel; and individuals Sam Madi, Charles Kharouf, and Wissam Jalil.

issue. The court granted that relief, and the parties stipulated to extend the preliminary injunction hearing until December 16, 2019. *See* Dkts. 19, 46, and 65. The First Amended Complaint was filed on December 3, 2019.[3] *See* Dkt. 81.

2. The Preliminary Injunction Hearing

At the preliminary injunction hearing, the government presented hundreds of pages of documents, over 200 consumer complaints, and declarations from consumers, investigators, and data analysts demonstrating that appellants' promises were deceptive.[4] The evidence also showed their use of unlawful marketing methods, including robocalls and other abusive practices.[5] Defendants offered *no* rebuttal evidence; their lawyer simply refused to "argue the merits of this case today." PI Hearing Transcript (PI Tr., excerpts attached as Exhibit A) at 99:8-9.

The court also heard evidence regarding the need for an asset freeze, receivership, and repatriation requirement. The government showed that the receiver was having difficulty locating assets; for example, the scheme yielded

[3] It alleged additional wrongdoing, alleged that 989 was part of the common enterprise (not merely a relief defendant), and added defendant Globex. Dkt. 81 ¶¶ 39-46, 79-81. The court issued a separate TRO against Globex. Dkt. 84.

[4] Dkt. 7-2: PX-1 ¶ 6; PX-5 ¶ 21; PX-6 ¶ 14, 15; PX-7 ¶ 21; PX-8 ¶¶ 13, 15; PX-10 ¶ 5; PX-13 ¶ 26; PX-14 ¶ 6; PX-19.

[5] *Id*. at PX-1 ¶ 5, PX-8 ¶ 2, PX-10 ¶ 3, PX-13 ¶ 3 (robocalls); PX-1 ¶ 7; PX-2; PX-5 ¶ 9 Att. A; PX-10 ¶ 5; PX-11 ¶ 4; PX-14 ¶ 7 (remotely created payment orders).

over $11 million, but the receiver had been able to identify only about $350,000 in assets in the United States. PI Tr. 96:21-97:7; Dkt. 7-2: PX-2 ¶ 6. The government further demonstrated that Educare was a sophisticated, multi-entity, international operation; that several defendants had past involvement in unlawful practices; and that defendants continued to operate in the same or similar industries and thus were well positioned to continue harming consumers. *See* PI Tr. at 94:22-98:5; Dkt. 119 at 6; Dkt. 83 at 13. The evidence also showed millions of dollars of payments from the Educare defendants to Canadian entities affiliated with Souheil and other defendants, and millions more in other suspicious payments. *See* PI Tr. at 94:22-98:5.

3. The Preliminary Injunction Orders

The next day, the court granted the preliminary injunction against Souheil, 989, Madi, Kharouf, and Prolink.[6] Dkt. 124 ("PI Order").

a. The PI Order

The court found that the government had showed that defendants "have engaged in and are likely to engage in" violations of the FTC Act, the TSR, and other laws, and that the government therefore was "likely to prevail on the merits." *Id.* at 2-3. It found that defendants "are engaged in an unlawful telemarketing scheme that markets a credit card interest rate reduction . . . service," and that they

[6] The court separately imposed injunctions against other defendants as well. *See* Dkts. 25, 125.

"deliver unauthorized pre-recorded telephone messages ('robocalls') to consumers," use "remotely created payment orders or remotely created checks [] as payment," and otherwise assist and facilitate the unlawful scheme, all in violation of the TSR. *Id.* at 3.

The court concluded that the government had "sufficiently demonstrated that immediate and irreparable harm will result" from defendants' "ongoing violations" unless restrained. *Id*. It determined that good cause existed for appointing a receiver, freezing assets, and granting other equitable relief, and found that its injunction was "in the public interest" given the court's weighing of the equities and the government's "likelihood of ultimate success on the merits." *Id.* at 3-4.

b. The January Order

The court later issued a separate order addressing defendants' argument that the court lacked authority to issue injunctive relief because the conduct had stopped. Dkt. 145 ("January Order"). The court determined as a factual matter that the government had shown that aspects of the unlawful scheme were continuing, but it also rejected defendants' legal argument, finding it inconsistent with this Court's decision in *FTC v. Southwest Sunsites*, 665 F.2d 711 (5th Cir. 1982). Jan. Order at 6-9.

In *Sunsites*, as here, defendants in an FTC case had argued that "the unlawful conduct at issue had ended and 'there was no showing of any continuing

or future violations.'" *Id.* at 6 (quoting *Sunsites*). The district court explained that this Court affirmed the injunction "because 'the evidence developed to date suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices, giving rise to a fair inference of a reasonable expectation of continued violations absent restraint.'" *Id.* at 6-7 (quoting *Sunsites*) (cleaned up). Injunctions may be ordered when "the FTC acts on evidence that supports a reasonable inference that violative conduct will continue absent injunctive restraint." *Id.*

The court found that the government had shown that (1) "the scheme's allegedly unlawful payment processing was continuing in the months and weeks leading up to the original complaint's filing," and even after; (2) several defendants "remained active corporations"; (3) other defendants "maintained active bank accounts"; (4) the government had evidence "that illegal proceeds continued to be processed and transferred among many of the Defendants"; and (5) Souheil remained in control of certain defendants at the time of the complaint's filing. *Id.* at 8. "[T]hese facts support [the] reasonable expectation that violations would continue absent restraint, despite Defendants' claimed cessation." *Id.*

Additional factors supported the likelihood of recurrence. The court found that the alleged conduct "was egregious, recurrent in nature, and required high degrees of scienter"; "repeatedly defrauded consumers" and took place across multiple countries; generated over $11 million in consumer harm; and involved

"failure to honor business guarantees" and "methods to evade bank account closures." *Id.* at 9-11. And because Souheil remained able to control corporate defendants, the opportunity for further violations continued. *Id.*

The district court rejected the defendants' reliance on a recent Third Circuit case taking "a different approach," finding that *Sunsites* foreclosed that decision's rationale but that the facts satisfied even that standard. *Id.* at 5-6, 11-13.

4. Souheil's Noncompliance With The Court's Orders

Souheil repeatedly has failed to comply with the court's orders against him.[7] He has taken steps to destroy and alter corporate records; interfered with the receiver; and refused to repatriate foreign assets. *See* Dkt. 196 at 3-4; *see also* Dkt. 198 at 3-6. On February 28, the government filed a contempt motion, seeking to hold Souheil accountable for these violations. Dkt. 197.

5. The District Court Stay Motion

Meanwhile, Souheil and 989 sought a stay of the preliminary injunction pending appeal, which the district court denied. Dkts. 191, 233 ("Order Denying Stay"), at 3.

The court found that movants failed to show a likelihood of success, noting again that their main "argument relies on Third Circuit precedent that is contrary to on-point Fifth Circuit precedent." *Id.* at 5 & n.1 (noting that binding precedent

[7] Appellants' disregard for the court's orders dates back to well before then. *See* Dkt. 197 at 5, 7.

rejected "the precise issue raised by Movants"). They also failed to establish irreparable injury, pointing only to "the economic costs of compliance" and other costs which the court determined were merely temporary, *id.* at 6-7; any unrecoverable costs were far outweighed by the public interest in "robust enforcement of consumer protection laws" and in preserving funds for the potential recovery of "unlawfully obtained consumer assets." *Id.* at 10-11 (noting the substantial risk of asset diversion in consumer deception cases). Moreover, denying the stay would maintain the status quo, since the injunctive terms at issue had been in place since July 2019. *Id.* at 11.

Finally, the court observed that "Movants' alleged failures to comply with the Court's injunctive orders have been a primary issue in this litigation" and were already the subject of multiple filings alleging ongoing violations of the preliminary injunction. *Id.* at 12-13. Granting the stay "could potentially reward Movants' alleged evasion of their obligations," while denying it ensures the court's ability to decide those "live issues" and "preserves the status quo." *Id.* at 13.

ARGUMENT

To merit a stay, appellants must make a strong showing that (1) they are likely to succeed on the merits; (2) they will be irreparably harmed absent a stay; (3) a stay will not substantially injure other parties; and (4) the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors are the "most critical," and the last two "merge when the Government is a party." *Id.* at 434-35. Because "[a] stay is an intrusion into the ordinary processes of administration and judicial review," it "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken*, 556 U.S. at 427). "The party who seeks a stay bears the burden of establishing these prerequisites." *Ruiz v. Estelle* (*Ruiz II*), 666 F.2d 854, 856 (5th Cir. 1982).

Appellants utterly fail to meet their burden, meaningfully addressing none of these four factors.[8] Their legal arguments are not likely to succeed because they defy binding precedent, which establishes both that asset freezes are proper to preserve ultimate monetary relief and that past violations with a likelihood of recurrence warrant an injunction. And their factual arguments rest on misstatements of the record, which shows that the possible recovery greatly

[8] The less demanding "substantial case" standard applies only when the other factors weigh heavily in favor of a stay. *See Ruiz II*, 666 F.2d at 856-57. It does not apply here because the other factors are "at most, mixed – if not unanimously weighing against" a stay. Dkt. 233 at 3-4.

exceeds the known assets and that the wrongful conduct was continuing when the FTC filed its case.

The equities also disfavor a stay. A stay is appropriate only when it "maintain[s] the status quo pending a final determination on the merits." *Ruiz v. Estelle* (*Ruiz I*), 650 F.2d 555, 565 (5th Cir. 1981). Here the injunction maintains the status quo by ensuring that funds are available for restitution after judgment.

I. SOUHEIL AND 989 HAVE NOT SHOWN IRREPARABLE INJURY

A showing of likely irreparable harm is the cornerstone of any successful stay request, *see Nken* at 433-35, but it is glaringly absent from appellants' motion. Sprinkled throughout are allusions to two possible forms of harm: (1) that appellants will remain "subject to the underlying orders for over a year until trial" and (2) that they "face the prospect of being held in contempt, fined, and/or jailed for an unlawful asset freezing order," including at a hearing scheduled for May 28. Mot. 2; *see also id.* at 10. The first demonstrates no injury absent concrete details about how being subject to the orders specifically harms appellants, as to which the motion is silent.[9] The second likewise is insufficient because the contempt hearing is about appellants' *past* violations of the district court's orders, some of which relate to unchallenged aspects of the injunction (such as its record preservation

[9] The claim that the injunction would make Souheil "take the shirt off his back and deliver it to the United States," Mot. 7, is hyperbole but in any event does not show irreparable harm.

requirements). *See* Dkt. 197 at 2-8. The hearing thus likely will happen even if this Court grants a stay, albeit perhaps with a more limited scope.

Appellants elsewhere describe what they *want* – access to their property pending appeal "without government interference," Mot. 5 – but do not explain why temporarily denying them that access equates to irreparable harm. *Cf. Nken*, 556 U.S. at 435 (in immigration case, even "serious burden" of removal "is not categorically irreparable").

"[L]ikelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). The Court therefore need not proceed further.

II. SOUHEIL AND 989 ARE UNLIKELY TO SUCCEED ON THE MERITS

Appellants do not even try to show that their conduct was lawful. Instead, they challenge the district court's power to do anything about it. None of their three main arguments has merit.

A. The FTC Act Authorizes Injunctions Against Unlawful Conduct That Has Stopped But Is Likely To Recur

Appellants' principal argument is that Section 13(b) of the FTC Act does not authorize an injunction because their unlawful conduct has stopped. That claim is not likely to succeed because it disregards both the law and the facts.

Section 13(b) says that when the FTC "has reason to believe" that someone is "or is about to violate" any of the laws it enforces, the FTC may bring suit directly in district court to enjoin violations, including by seeking "a permanent injunction." 15 U.S.C. § 53(b). This Court determined years ago that this Section's broad grant of equitable powers permits an injunction when past violations are likely to recur. In *Sunsites*, the defendants argued that Section 13(b) did not authorize an injunction because their unlawful conduct had ended and "there was no showing of any continuing or future violations." 665 F.2d at 723-24. The Court rejected that argument, holding that the district court "acted well within its discretion" in issuing an injunction under Section 13(b) because "the evidence developed to date suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices, giving rise to a 'fair inference of a reasonable expectation of continued violations' absent restraint." *Id.* (quoting *SEC v. Manor Nursing Center, Inc.*, 458 F.2d 1082, 1100-01 (2d Cir. 1972)). In other words, Section 13(b) authorizes injunctive relief even when misconduct has stopped if it reasonably is expected to recur.

Since *Sunsites*, lower courts in this Circuit have followed its approach,[10] and other Circuits have adopted similar standards. The Tenth Circuit affirmed an

[10] *See, e.g., United States v. Cornerstone Wealth Corp.*, 549 F. Supp. 2d 811, 816 (N.D. Tex. 2008); *FTC v. Inv. Devs., Inc.*, CIV. A. No. 89-642, 1989 U.S. Dist.

injunction against discontinued conduct where the company remained in the same industry and had the capacity to engage in future violations. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201-02 (10th Cir. 2009). The Ninth Circuit likewise has explained that while "past wrongs" alone are insufficient, Section 13(b) authorizes injunctive relief when wrongs are "ongoing or likely to recur." *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087–88 (9th Cir. 1985). The Eleventh Circuit agrees too. *FTC v. USA Fin., LLC*, 415 F. App'x 970, 975 (11th Cir. 2011).

Appellants ignore these authorities and rely on a recent Third Circuit case that interpreted Section 13(b) to require ongoing or impending violations. *See FTC v. Shire Viropharma, Inc.*, 917 F.3d 147 (3d Cir. 2019). That case conflicts with *Sunsites* and therefore has no force here. But even under its reasoning, *Shire* gives appellants no help because the district court determined that parts of the Educare scheme were continuing.[11] Jan. Order at 11-13; Order Denying Stay at 5. Contrary to defendants' "claimed cessation," the court found that unlawful payment processing was continuing even after the government filed suit, that some defendants remained active corporations and maintained active bank accounts, and

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LEXIS 6502, at *10-12 (E.D. La. June 8, 1989); *FTC v. Hughes*, 710 F. Supp. 1524, 1531 (N.D. Tex. 1989).

[11] The Third Circuit expressly declined to define a temporal requirement beyond the facts presented. *Id.* at 160. Moreover, *Shire* involved a motion to dismiss for failure to satisfy pleading requirements, not the court's power to grant relief. *See id.* at 157-58.

that the scheme's "illegal proceeds continued to be processed and transferred among many of the Defendants." Jan. Order at 8; *see also* Dkt. 119 at 2-3. In *Shire*, by contrast, the unlawful conduct had stopped five years earlier (and the product at issue had been divested), and the FTC had not argued below that it was likely to repeat. 917 F.3d at 160.

Appellants disagree with the court's factual determinations, Mot. 14-19, but the scope of review of those findings is particularly narrow, and this Court will not disturb them unless clearly erroneous. *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985).

B. The FTC Act Authorizes Monetary Relief, Including Asset Freezes

Appellants also contend that the district court lacked authority to freeze assets and that Section 13(b) of the FTC Act does not permit *any* monetary relief. They raised neither argument below and "arguments not raised before the district court are waived and cannot be raised for the first time on appeal."[12] *LeMaire v. Louisiana*, 480 F.3d 383, 387 (5th Cir. 2007). Both arguments fail regardless.

1. Asset freezes

This Court's precedent permits asset freezes in precisely the situation presented here. *Sunsites* held that "in the exercise of [its] inherent equitable

[12] Beyond mere waiver, appellants' counsel expressly offered to continue the freeze, focusing instead on objections to repatriation. PI Tr. 115:3-4 ("We'll even continue with the asset freeze.").

jurisdiction the district court may order temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case." 665 F.2d at 717-18. The decision applies foursquare here, where the court preserved funds for potential future consumer restitution. Other circuits agree that "[a]n asset freeze is within the district court's equitable powers" under Section 13(b). *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1234 (11th Cir. 2014) (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996)); *see also FTC v. H. N. Singer*, 668 F.2d 1107, 1112-13 (9th Cir. 1982) (rejecting argument that a freeze is in effect a prejudgment attachment).

Appellants claim that courts may not freeze assets to protect "an in personam money judgment." Mot. 10. Perhaps, but the government does not seek such a judgment. Rather, it requests equitable monetary relief: the return of money that defendants wrongfully took from consumers. *See, e.g.*, Dkt. 81 at 38 (seeking "such relief as . . . necessary to redress injury to consumers . . . including . . . rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies"). In such cases, as the Court recognized in *Sunsites*, district courts may protect the availability of the ultimate relief by freezing assets.

Appellants' own cases explain the distinction their argument confuses. In *Federal Savings*, discussed at Mot. 8-9, this Court acknowledged that where a

plaintiff seeks "legal relief in the form of damages," the court generally should not freeze assets pre-judgment. 835 F.2d at 560. By contrast, a district court may "exercise its equitable powers in ordering a preliminary injunction to secure an equitable remedy such as restitution." *Id.* at 561. The Court thus upheld the asset freeze, concluding that it was "an appropriate method to assure the meaningful, final equitable relief sought" in the suit by a federal agency. *Id.* This Court and others have repeatedly affirmed such freezes. *See, e.g.*, *CFTC v. Muller*, 570 F.2d 1296, 1300-01 (5th Cir. 1978) (upholding freeze to ensure "that an ultimate decision for the [CFTC] could be effective"); *SEC v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1105-06 (2d Cir. 1972) (asset freeze justified to secure return of illegally obtained proceeds).

Far from helping appellants, *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308 (1999), Mot. 11-13, firmly supports the asset freeze here. There, a creditor sought money damages from a debtor. The Supreme Court held that the district court could not freeze assets in that context, but recognized explicitly that an asset freeze in suits for *equitable* relief "has nothing to do with" the relief available in a suit for "the collection of a legal debt."[13] 527 U.S. at 325. Indeed, the Court emphasized that in equity, courts "will 'go much farther both to

[13] *In re Fredeman*, 843 F.2d 821 (5th Cir. 1988), a private RICO action for damages, Mot. 9-10, 12, does not apply here for the same reasons.

give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Id.* at 326 (quoting *United States v. First Nat. City Bank*, 379 U.S. 378, 383 (1965)); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 ("[When] the public interest is involved . . . [a court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."); *Sunsites*, at 718 (discussing *Porter*).

De Beers is no more helpful to appellants. The government's suit there did not seek monetary relief. It sought an asset freeze to preserve assets for a hypothetical contempt fine, a matter "wholly outside the issues in the suit." *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 219-20 (1945). (The Court deemed the link especially tenuous because the contempt order *might* result from defendants' *possible* future violation of the court's orders, *if* the court imposed fines and *if* assets had been dissipated. *Id.* at 219.) More pertinent here, the Court acknowledged that a "preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *Id.* That describes to a T the relief granted here.

2. Monetary relief

Appellants are highly unlikely to persuade this Court that Section 13(b) precludes monetary relief. *See* Mot. 19-22. This Circuit's cases "make indisputably

clear that . . . Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it." *Sunsites*, 665 F.2d at 718 (collecting cases interpreting similar language in other statutes). That determination is consistent with the holding of the Supreme Court in *Porter*, 328 U.S. at 397-98, and with holdings from seven courts of appeals that have held that Section 13(b) authorizes monetary relief. *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. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991).

Appellants concede that "Fifth Circuit precedent from 1982 has held that the word 'injunction' contemplates monetary relief," Mot. 4-5, but argues it "should be revisited and overturned" in the wake of the Seventh Circuit's recent decision in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), which overturned that Circuit's own precedent and held that Section 13(b) does not allow monetary relief. Mot. 5. The Seventh Circuit's decision is currently before the Supreme Court on a petition for a writ of certiorari, *FTC v. Credit Bureau Ctr., LLC*, No. 19-125 (petition filed Dec. 19, 2019). But the existence of one outlier

decision does not satisfy appellants' burden to show it is *likely* that this Court will follow suit. Indeed, *Sunsites* and other cases indicate that this Court would follow the approach of the 7-circuit majority.[14]

Appellants' other cases are not persuasive. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), Mot. 20-22, involved private civil litigation and shed no light on how to interpret regulatory enforcement statutes like Section 13(b).[15] Likewise, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), Mot. 12, did not involve remedies available to public agencies under statutes that grant an unqualified right to injunctive relief. Even so, it did not question that courts in a government action may order "the recovery of that which has been illegally acquired," *Porter*, 328 U.S. at 399.

C. The Preliminary Injunction Is Not Otherwise Overbroad

Appellants further claim that aspects of the preliminary injunction are overbroad and not permitted before final judgment, Mot. 7-14, but they again ignore precedent, relying on inapposite cases involving purely private parties seeking legal, not equitable, remedies. *See supra*, at 17-19. As to receivers, it is

[14] Appellants rely on the concurrence in *FTC v. AMG Capital Mgmt.*, 910 F.3d 417 (9th Cir. 2018), but omit that by denying en banc review, the Ninth Circuit rejected its invitation to "revisit" precedent allowing monetary relief, *id.* at 437. *See* 2019 U.S. App. LEXIS 18551 (9th Cir. June 20, 2019).

[15] The same is true of *Owner-Operator Indep. Drivers Ass'n v. Landstar Sys.*, 622 F.3d 1307, 1324 (11th Cir. 2010), and *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 632 F.3d 1111, 1121 (9th Cir. 2011), Mot. 21-22.

well established that once a district court's equitable jurisdiction is invoked, the court may appoint receivers as part of any preliminary relief. *See Sunsites*, 665 F.2d at 718-19; *SEC v. First Financial Grp. Of Texas*, 645 F.2d 429 (5th Cir. 1981).[16] And where the likely recovery far exceeds the identified assets, appellants cannot possibly show overbreadth, Mot. 9.

III. A STAY WOULD IRREPARABLY HARM CONSUMERS AND THE PUBLIC INTEREST

Appellants wholly ignore the public interest and therefore concede that this factor weighs against a stay. Here, the real risk of irreparable harm is to the victims of the Educare scheme who could go without relief if the preliminary injunction is stayed. That is why the district court found that "immediate and irreparable harm will result" absent the injunction. PI Order at 3. Stripping away its protections would allow appellants to dissipate or hide their ill-gotten gains, permanently depleting the assets available for restitution. The public interest plainly requires that the preliminary injunction remain in place.

CONCLUSION

The Court should deny the motion for a stay pending appeal.

[16] *Netsphere, Inc. v. Baron*, 703 F.3d 296 (5th Cir. 2012), rejected the use of a receivership "to control a vexatious litigant" in private party litigation; it is inapposite here. *Id.* at 305.

Respectfully submitted,

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April 24, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the foregoing response complies with the volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains **5,199** words, as created by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on April 24, 2020, I filed the foregoing with the Court's appellate CM-ECF system, and that I caused the foregoing to be served through the CM-ECF system on counsel of record for defendants-appellants, who are registered ECF users.

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