No. 18-1807

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

SHIRE VIROPHARMA INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Delaware
No. 1:17-cv-00131
Hon. Richard G. Andrews

REPLY BRIEF OF THE FEDERAL TRADE COMMISSION

Of Counsel:

D. BRUCE HOFFMAN
Director, Bureau of Competition

HAIDEE SCHWARTZ
BRADLEY S. ALBERT
MEREDYTH ANDRUS
THOMAS J. DILLICKRATH
JUNE IM
NICHOLAS LEEFER
JOSEPH MATHIAS
JAMES WEINGARTEN

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

MATTHEW M. HOFFMAN
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3097
mhoffman@ftc.gov

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

I. Decades of Unbroken Precedent Establish That a Defendant "Is Violating, or Is About To Violate" the FTC Act When It Has Already Broken the Law and Is Reasonably Likely To Do So Again.....4

II. This Case Is Not About The FTC's Authority To Sue.....16

III. Under the Correct Legal Standard, the Complaint States a Claim for Injunctive Relief. 21

IV. The Complaint Also States a Claim for Equitable Monetary Relief.....24

CONCLUSION.....27

TABLE OF AUTHORITIES

CASES

Aaron v. SEC,
446 U.S. 680 (1980)..... 7, 18, 22

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006).....19

Board of Trade v. CFTC,
605 F.2d 1016 (7th Cir. 1979) 17, 18

California v. Am. Stores Co.,
495 U.S. 271 (1990).....20

CFTC v. American Metals Exch. Corp.,
991 F.2d 71 (3d Cir. 1993).....24

Check Investors, Inc.,
502 F.3d 159 (3d Cir. 2007).....25

DePierre v. United States,
564 U.S. 70 (2011).....13

Disabled in Action v. SEPTA,
539 F.3d 199 (3d Cir. 2008).....15

Erlenbaugh v. United States,
409 U.S. 239 (1972).....12

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009).....10

FTC v. Accusearch, Inc.,
570 F.3d 1187 (10th Cir. 2009) 8, 10

FTC v. AT&T Mobility, LLC,
883 F.3d 848 (9th Cir. 2018) 19, 25

FTC v. Evans Prods. Co.,
775 F.2d 1084 (9th Cir. 1985) 5, 7, 11, 25

FTC v. Magazine Solutions, LLC,
432 F. App'x 155 (3d Cir. 2011) 25

Gen. Refractories Co. v. First State Ins. Co,
855 F.3d 152 (3d Cir. 2017).....17

Golden v. Zwickler,
394 U.S. 103 (1969)..... 19, 21

Gomez-Perez v. Potter,
553 U.S. 474 (2008).....12

Hecht Co. v. Bowles,
321 U.S. 321 (1944)..... 8, 9, 25

Kokesh v. SEC,
137 S. Ct. 1635 (2017)..... 10, 26

Lafferty v. St. Riel,
495 F.3d 72 (3d Cir. 2007).....11

Lorillard v. Pons,
434 U.S. 575 (1978).....13

Mattox v. FTC,
752 F.2d 116 (5th Cir. 1985) 12

Mitchell v. Robert De Mario Jewelry, Inc.,
361 U.S. 288 (1960)..... 1, 9, 26

Phillips v. Cty. of Allegheny,
515 F.3d 224 (3d Cir. 2008).....23

Porter v. Warner Holding Co.,
328 U.S. 395 (1946).....26

Sebelius v. Auburn Reg'l Med. Ctr.,
568 U.S. 145 (2013).....12

SEC v. Bonastia,
614 F.2d 908 (3d Cir. 1980)..... 4, 5, 8, 10, 21, 22

SEC v. Commonwealth Chem. Sec., Inc.,
574 F.2d 90 (2d Cir. 1978)..... 5, 6, 7, 8, 10, 11, 12, 24

SEC v. Culpepper,
270 F.2d 241 (2d Cir. 1959).....13

SEC v. Manor Nursing Ctrs.,
458 F.2d 1082 (2d Cir. 1972)..... 6, 13, 22

SEC v. Richie,
No. 5:06-cv-63, 2008 WL 2938678 (C.D. Cal. May 9, 2008) 10

SEC v. Sargent,
329 F.3d 34 (1st Cir. 2003).....5

SEC v. Steadman,
967 F.2d 636 (D.C. Cir. 1992) 5

SEC v. Unifund SAL,
910 F.2d 1028 (2d Cir. 1990) 8, 25

SEC v. Universal Serv. Ass'n,
106 F.2d 232 (7th Cir. 1939) 13

Standard Oil v. FTC,
596 F.2d 1381 (9th Cir. 1979) 17, 18

Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment,
558 U.S. 67 (2009) 19

United States v. Joseph,
730 F.3d 336 (3d Cir. 2013) 17

United States v. Lane-Labs USA, Inc.,
427 F.3d 219 (3d Cir. 2005) 26

United States v. Local 30,
871 F.2d 401 (3d Cir. 1989) 22

United States v. Moore,
340 U.S. 616 (1951) 24

United States v. St. John's Gen. Hosp.,
875 F.2d 1064 (3d Cir. 1989) 15

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 9

Vt. Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 20

ZF Meritor, LLC v. Eaton Corp.,
696 F.3d 254 (3d Cir. 2012) 19, 20

STATUTES

15 U.S.C. § 45(b) 11

15 U.S.C. § 53(b) 16

28 U.S.C. § 1331 19

28 U.S.C. § 1337(a) 19

28 U.S.C. § 1345 19

RULES

Fed. R. Civ. P. 12(b)(1)..... 16, 19

Fed. R. Civ. P. 12(b)(6)..... 10, 16, 19

OTHER AUTHORITIES

3 Louis Loss, *Securities Regulation* (2d ed. 1961)..... 6, 7, 12, 13

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)..... 11, 13

H.R. Conf. Rep. 93-624 (1973).....18

S. Rep. 93-151 (1973).....14

INTRODUCTION

In Section 13(b) of the FTC Act, Congress gave the FTC broad discretion to sue for a permanent injunction whenever it has "reason to believe that [the defendant] is violating or is about to violate" a law enforced by the Commission. As shown in our opening brief, a vast body of precedent interpreting and applying this statute (and analogous provisions of the securities laws) establishes that once the FTC has exercised its discretion to sue, an injunction is warranted if the defendant has violated the law and there is a reasonable likelihood that the violations will recur. It necessarily follows that the FTC states a claim for injunctive relief where it plausibly alleges a past violation and a likelihood of recurrence. This well-established interpretation of the statute gives meaning to all of its parts and is consistent with both the FTC Act's remedial intent and "the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

ViroPharma, by contrast, proffers a novel and cramped interpretation of Section 13(b) that has never been accepted by any prior court. Under ViroPharma's reading, once a defendant's illegal activity has ceased, the FTC may not even go to court unless it can allege that a further violation is "imminent." That reading contradicts the plain language of the "reason to believe" clause, which gives the FTC discretionary authority to sue. And it also undercuts the

purpose of the statute, deviates from equitable principles, and contradicts decades of precedent from the Supreme Court, this Court, and other courts of appeals.

ViroPharma's reading suffers from two major flaws. First, rather than attempting to construe the statute as a coherent whole, ViroPharma plucks out individual words and reads them in isolation, without regard to context or statutory purpose. Thus, ViroPharma looks no farther than the dictionary definition of "about to" to support its assertion that the FTC must plead that a further violation is imminent. Br. 19. The issue here, however, is not the meaning of "about to" in the abstract, but how the phrase "is violating, or is about to violate" applies to a defendant that has already broken the law and has the incentive and means to do so again. Courts have long recognized that in these circumstances, past violations can raise a presumption of future violations. That is why every previous court to address the meaning of "is … or is about to" has concluded that the standard is satisfied where the defendant has already violated the law and is likely to do so again if not enjoined. ViroPharma simply ignores these holdings, which flatly contradict its purported "plain language" reading.

Second, ViroPharma reads the words "reason to believe" out of the statute entirely. It argues that the FTC may invoke the district court's jurisdiction only when a defendant "is violating, or is about to violate the law." Br. 16. But even setting aside the misinterpretation of "is … or is about to," that is not what the

statute says. Congress authorized the Commission to sue when it has "reason to believe" that the defendant is violating or is about to violate the law. That language authorizes the FTC to sue based on its evaluation of whether the past violations and the defendant's current circumstances reasonably suggest a likelihood of recurrence. And it also plainly shows Congress's intent to leave the choice whether to sue to the Commission's discretion. Once the Commission has decided to sue, the question before the district court is not whether it properly exercised that discretion, but simply whether the complaint alleges facts that would permit the court to grant relief. If the complaint fails to meet that standard, the proper remedy is dismissal for failure to state a claim, not for lack of jurisdiction or inability to sue. ViroPharma's insistence that the FTC should be required to meet an "imminence" standard just to get into court when it would not be required to prove an imminent violation to obtain an injunction is patently illogical and unsupported by any authority.

Accepting the FTC's allegations as true—as the Court must—the complaint states a claim for injunctive relief. ViroPharma deliberately engaged in a six-year campaign to thwart generic competition through meritless regulatory and court filings, earned hundreds of millions of dollars doing so, remains in the business of selling branded drugs, and has the incentive and opportunity to engage in similar tactics in the future. ViroPharma's sustained and deliberate scheme to prevent

competition gives rise to an inference that it will try to do so again if given the chance. Under the framework set forth in *SEC v. Bonastia*, 614 F.2d 908 (3d Cir. 1980)—which ViroPharma completely ignores—these allegations are more than sufficient to establish a likelihood of recurrence.

Finally, the FTC's claim for monetary equitable relief survives no matter what. Courts have unanimously held that Section 13(b) and analogous statutes authorize the award of monetary relief (*e.g.*, restitution) to redress the effects of the defendant's past violations even when the standard for a behavioral injunction is not satisfied. ViroPharma again offers no reason why this Court should disregard an unbroken line of precedent.

ARGUMENT

I. DECADES OF UNBROKEN PRECEDENT ESTABLISH THAT A DEFENDANT "IS VIOLATING, OR IS ABOUT TO VIOLATE" THE FTC ACT WHEN IT HAS ALREADY BROKEN THE LAW AND IS REASONABLY LIKELY TO DO SO AGAIN.

The key question in this appeal is whether the FTC states a claim for an injunction under Section 13(b) by alleging a *reasonable likelihood* that the defendant will violate the law again, or whether it must allege that a further violation is *imminent.* Courts have consistently interpreted Section 13(b) and analogous SEC statutes to require only a reasonable likelihood of further violations. This Court endorsed that standard in *Bonastia*, describing it as "well established." *Bonastia*, 614 F.2d at 912.

ViroPharma argues that the "plain meaning" of the statutory phrase "is violating, or is about to violate" requires the FTC to allege an ongoing or imminent violation. The error in ViroPharma's reasoning is evident from the fact that no court has previously read "is …or is about to" that way in either the FTC or the SEC statutes, despite many decades of decisions under both laws. Instead, courts have held that "is … or is about to" requires the agency to show a reasonable likelihood of recurrence. *See FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99 (2d Cir. 1978). As the First Circuit put it, "the legal standard for issuance of an injunction [is] reasonable likelihood of recidivism, not an imminent threat of it." *SEC v. Sargent*, 329 F.3d 34, 39 (1st Cir. 2003). To our knowledge, every circuit to consider the issue has endorsed this standard.[1]

ViroPharma largely ignores this body of precedent (and does not even cite this Court's decision in *Bonastia*). Instead, ViroPharma's analysis begins and ends with dictionaries that define "about to" to mean "on the verge of." Br. 19. But the issue here is not the meaning of "about to" in the abstract. The question is how the words "is … or is about to" apply to a defendant that is not merely "on the verge" of violating the law, but that has *already* engaged in violations (multiple times, in

[1] *See* cases cited in FTC Br. at 32-34. Courts sometimes use the term "cognizable danger" of recurrence, which amounts to the same thing. *See, e.g.*, *SEC v. Steadman*, 967 F.2d 636, 637-48 (D.C. Cir. 1992).

this case). While dictionaries do not answer this question, precedent does—and every court to consider the issue has equated "is … or is about to" with a reasonable likelihood of recurrence. Far from offering a "plain language" interpretation of Section 13(b), ViroPharma is proposing to graft in a new "imminence" requirement that is flatly contrary to the way the Supreme Court and courts of appeals have read the key language.

The Second Circuit squarely addressed the meaning of "is … or is about to" in *Commonwealth Chemical*, explaining that "[e]xcept for the case where the SEC steps in to prevent an ongoing violation, this language seems to require a finding of 'likelihood' or 'propensity' to engage in future violations." *Commonwealth Chem.*, 574 F.2d at 99 (Friendly, J.). Adopting the formulation in the leading securities law treatise by Professor Louis Loss, the court held that "[t]he ultimate test is whether the defendant's past conduct indicates … that there is *a reasonable likelihood* of further violation in the future." *Id.* (quoting 3 Louis Loss, *Securities Regulation* 1976 (2d ed. 1961)). This holding (which ViroPharma ignores) flows logically from the principle that "fraudulent past conduct gives rise to an inference of a reasonable expectation of continued violations." *SEC v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1100 (2d Cir. 1972). As *Commonwealth Chemical* recognizes, where a defendant has already broken the law and is likely to do so again, it makes perfect sense to say that the defendant "is violating, or is about to violate" the law.

Similarly, in *Evans Products*, the Ninth Circuit examined the phrase "is violating, or is about to violate" in Section 13(b). It concluded that past conduct by itself would not satisfy this standard, but that an injunction would be proper "if the wrongs are ongoing *or likely to recur*." *Evans Prods.*, 775 F.2d at 1087 (emphasis added); *see also id.* at 1088 ("Even though Evans' alleged violations have completely ceased, we must review whether those violations are likely to recur.") ViroPharma not only ignores the key holdings of *Evans Products*; it misrepresents the passage that it does quote.[2]

ViroPharma also ignores the Supreme Court's reading of "about to" in *Aaron v. SEC*, 446 U.S. 680 (1980). *Aaron* held that "[i]n cases where the [SEC] is seeking to enjoin a person '*about* to engage in any acts or practices which ... *will* constitute' a violation of [the securities laws], the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur." *Id.* at 701. The Court did not read "about to" to mean "imminent"; to the contrary, it cited *Commonwealth Chemical* and the Loss treatise, signaling agreement with the likelihood-of-recurrence standard. *Id.*

[2] The Ninth Circuit held that "the statutory language, legislative history, and cases indicate that § 13(b) may not be used to remedy a past violation *that is not likely to recur*." *Evans Prods.*, 775 F.2d at 1089 (emphasis added). ViroPharma quotes this sentence but omits the italicized last phrase. Br. 37.

ViroPharma's disregard for precedent also leads it to overlook this Court's decision in *Bonastia*, which adopted the likelihood-of-recurrence standard in reliance on *Commonwealth Chemical* and similar cases. *Bonastia*, 614 F.2d at 912. There was no ongoing or imminent violation in *Bonastia*; the most recent violations took place more than a year before the SEC filed suit and the defendant had since left the securities business. *Id.* at 910-12. But the Court nonetheless held that the defendant's central role in a five-year fraud scheme showed a likelihood of recurrence that mandated entry of an injunction. *Id.* at 913. The Court could not have reached this result if it construed "about to" as requiring a showing that further violations were imminent. And *Bonastia* does not stand alone; other courts have also found injunctions warranted based on a likelihood of recurrence, without any showing that violations were ongoing or imminent. *See, e.g.*, *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1201-02 (10th Cir. 2009).

ViroPharma's attempt to graft an imminence requirement into the statute also runs afoul of the rule that "[w]hen Congress grants district courts jurisdiction to enjoin those violating or about to violate federal statutes, it is authorizing the exercise of 'equity practice with a background of several hundred years of history.'" *SEC v. Unifund SAL*, 910 F.2d 1028, 1035 (2d Cir. 1990) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Congress therefore "must be

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

Here, reading "is … or is about to" as implementing a likelihood-of-recurrence standard comports with basic principles of equity, including the rules that "the court's power to grant injunctive relief survives discontinuance of the illegal conduct" and that an injunction is warranted if there is "some cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). By contrast, ViroPharma's interpretation eviscerates those principles, effectively substituting a new rule that if a defendant discontinues its illegal conduct, a court has no power to award relief unless and until another violation is "imminent." ViroPharma points to nothing in the statute (or its legislative history) to indicate that Congress intended "such an abrupt departure from traditional equity practice." *Hecht*, 321 U.S. at 330. Moreover, as shown in our opening brief (at 37-38), Congress used substantially the same "is … or is about to" formulation in many other statutes, making it even more implausible to read Section 13(b) differently from the time-honored understanding of its language.

None of ViroPharma's attempts to justify its purported "plain language" reading of Section 13(b) holds water.

1. ViroPharma attempts to avoid the unbroken line of precedent endorsing the likelihood-of-recurrence standard on the theory that those cases

address the standard for *relief*, whereas Section 13(b) imposes a stricter standard for *pleading*. Br. 28. That purported distinction makes no sense. To begin with, "is … or is about to" must mean the same thing in either context on ViroPharma's own interpretive theory. Moreover, the standard for *pleading* a claim for relief cannot be higher than the standard for *granting* relief; they are two sides of the same coin. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009); *SEC v. Richie*, No. 5:06-cv-63, 2008 WL 2938678 (C.D. Cal. May 9, 2008). This is evident from the text of Rule 12(b)(6), which allows dismissal for "failure to state a claim upon which relief can be granted." Whether a complaint states a claim thus turns on whether it alleges facts that would justify a court in *granting* relief. ViroPharma cites no case (and we are aware of none) requiring a plaintiff to plead more facts to get into court than it ultimately must prove to obtain relief. If ViroPharma were correct, the complaints in *Bonastia*, *Accusearch*, *Commonwealth Chemical*, and other injunction cases would have been dismissed at the pleading stage, as none of them involved ongoing or imminent misconduct.

2. ViroPharma argues that the SEC cases deserve no weight because they involve different statutes.[3] Br. 32. That is a distinction without a difference. Both agencies' statutes serve the same purpose—granting injunctive relief to

[3] This argument is at odds with ViroPharma's later argument concerning *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which we address below (at 26).

government agencies for violations of law—and use the same operative language. ViroPharma, which purports to rely on "plain meaning," does not explain how the phrase "is … or is about to" can have a different meaning in Section 13(b) than in the SEC statutes. It is a "common canon of statutory construction that similar statutes are to be construed similarly." *Lafferty v. St. Riel*, 495 F.3d 72, 82 (3d Cir. 2007); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (because statutes are part of the entire *corpus juris*, "laws dealing with the same subject … should if possible be interpreted harmoniously."). That principle has special force here, since courts have relied heavily on SEC precedent in Section 13(b) cases. *See, e.g.*, *Evans Prods.*, 775 F.2d at 1088.

3. ViroPharma also points to a difference in language between Section 13(b) and Section 5(b) of the FTC Act. Br. 3, 37. Section 5(b) authorizes the Commission to issue administrative complaints; it uses the words "has been or is" rather than "is … or is about to." 15 U.S.C. § 45(b). *Commonwealth Chemical* rejected a similar argument based on the use of the words "has engaged" rather than "is about to engage" in some securities statutes. *Commonwealth Chem.*, 574 F.2d at 99 n.7. It reasoned that Congress knew of the different phraseology, but concluded that amendments to the "is … or is about to" language were unnecessary "in light of existing holdings that a judge should consider past violations as

showing 'the existence of some cognizable danger of recurrent violation.'" *Id.* (citing Loss, *supra* at 1976-77 & n.4).

Beyond that, the argument fails because Section 5(b) and Section 13(b) were enacted by different Congresses six decades apart. Section 5(b) was part of the original FTC Act of 1914; Section 13(b) was added in 1973. Differences in language between two parts of a statute sometimes indicate that different meanings were intended, but that canon "makes the most sense when the statutes were enacted by the same legislative body *at the same time*." *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (emphasis added). Linguistic variations have little relevance to the interpretation of different sections written years apart. For example, in *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008), the Supreme Court rejected the contention that a provision in the Age Discrimination in Employment Act did not prohibit retaliation because a different provision enacted seven years earlier included a retaliation ban. No such implication could be drawn where the two provisions "were not considered or enacted together." *Id.* at 486; *see also Mattox v. FTC*, 752 F.2d 116, 122 (5th Cir. 1985) (declining to compare statutory provisions enacted 62 years apart).

Moreover, the difference canon is "no more than a rule of thumb." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 156 (2013) (cleaned up). As *Commonwealth Chemical* illustrates, "Congress sometimes uses slightly different

language to convey the same message." *DePierre v. United States*, 564 U.S. 70, 83 (2011); *see also* Scalia & Garner, *supra*, at 170 (legislative drafters may use "different words to denote the same concept"). It is neither surprising nor significant that Congress used slightly different words in 1973 than it used in 1914.

The more pertinent interpretive canon here is that Congress is presumed to be aware of existing judicial interpretations when it passes a new law. *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). When Congress enacted Section 13(b) in 1973, it was well established that "is … or is about to" meant likelihood-of-recurrence under the SEC statutes. As early as 1939, the Seventh Circuit had held that "[w]here there is reasonable ground to apprehend that there will be resumption of illegal activities, a court of equity may issue an injunction even though the activities have ceased." *SEC v. Universal Serv. Ass'n*, 106 F.2d 232, 239-40 (7th Cir. 1939). Later decisions reiterated this rule, which by the early 1960s was deemed black-letter law by the leading securities law treatise. *See SEC v. Culpepper*, 270 F.2d 241, 249 (2d Cir. 1959); *Manor Nursing Ctrs.*, 458 F.2d at 1100; Loss, *supra*, at 1976. Congress's use of the same "is … or is about to" formulation indicates that it intended Section 13(b) to be construed the same way.

4. ViroPharma argues that legislative history supports its interpretation. As shown in our opening brief (at 35), the legislative history—though sparse—makes clear that Congress believed some cases could be dealt with more efficiently

in federal court, rather than the FTC's administrative process, and thus meant to give the FTC a choice between the two routes. *See* S. Rep. 93-151, at 30-31 (1973). That intent supports reading Sections 13(b) and 5(b) as adopting the same standard, despite the minor difference in language. ViroPharma cites nothing in the legislative history that remotely suggests Congress wanted to deviate from the well-established likelihood-of-recurrence standard and impose a new imminence requirement.[4]

5. As shown in our opening brief (at 34-38), ViroPharma's reading of the statute would have pernicious consequences for the FTC and other agencies (like the SEC) whose injunctive relief statutes use the "is … or is about to" formulation. For example, a defendant engaged in illegal activities could immunize itself from an FTC lawsuit and retain its ill-gotten gains simply by discontinuing its activities as soon as it got wind of an investigation. ViroPharma argues that policy considerations are irrelevant because the statute is clear, but as

[4] ViroPharma misrepresents the facts when it asserts that the FTC describes Section 13(b) as "both limited and ancillary to Section 5(b) administrative proceedings." Br. 21. ViroPharma quotes a statement on the FTC's website relating to the use of Section 13(b) "for the purpose of obtaining preliminary injunctive relief against corporate mergers or acquisitions pending completion of an FTC administrative proceeding." But ViroPharma omits the very next sentence: "The Commission may also obtain permanent injunctive relief against an antitrust violation in an appropriate case, as well as disgorgement of unjust enrichment, restitution for injury suffered by consumers … or other appropriate equitable remedies." *See* https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.

shown above ViroPharma's proffered interpretation contradicts decades of precedent. Where statutory language is not clear, it is well settled that this Court will "consider the overall object and policy of the statute, and avoid constructions that produce odd or absurd results or that are inconsistent with common sense." *Disabled in Action v. SEPTA*, 539 F.3d 199, 210 (3d Cir. 2008) (citations and internal quotation marks omitted).

In attempting to downplay the consequences of its position, ViroPharma also misrepresents facts regarding the FTC's action against Volkswagen, which returned more than $8 billion to consumers. Br. 39. That complaint was filed in 2016 and alleged violations from 2007 to 2015; contrary to ViroPharma's claim, it did not allege ongoing violations. Under ViroPharma's reading of Section 13(b), it is unclear whether the FTC would have been able to recover any relief for consumers in the Volkswagen case and many other similar matters.

6. ViroPharma asserts that the FTC should not be permitted to seek an injunction because it "waited" too long to sue. Br. 38. This is a laches defense, which fails because it is "well established that the United States is not subject to the defense of laches in enforcing its rights." *United States v. St. John's Gen. Hosp.*, 875 F.2d 1064, 1071 (3d Cir. 1989). Moreover, even if laches were a defense, ViroPharma has not shown any prejudice.

II. THIS CASE IS NOT ABOUT THE FTC'S AUTHORITY TO SUE.

Under Rule 12(b)(6), this case turns on whether the FTC has pleaded facts that would permit a court to grant an injunction or monetary relief. ViroPharma, however, tries to frame the issue as whether the FTC had the authority to invoke the district court's jurisdiction (Br. 16), and suggests that the case should be analyzed for lack of subject-matter jurisdiction under Rule 12(b)(1) (Br. 15, 23-24). Neither assertion is correct.

1. As discussed above, ViroPharma's analysis of the "is … or is about to" clause is wrong. But ViroPharma also omits key language from the statute when it argues that the FTC's authority to sue under Section 13(b) "is expressly limited to situations in which the defendant '*is* violating' or '*is about to* violate' the law." Br. 16. Section 13(b) provides that the FTC may sue "[w]henever *the Commission has reason to believe* … that [the defendant] is violating, or is about to violate, any provision of law enforced by the [FTC]." 15 U.S.C. § 53(b) (emphasis added). The words "reason to believe," which ViroPharma improperly reads out of the statute, make clear Congress's intention to leave the decision to file suit to the Commission's discretion. Thus, the FTC plainly has the authority to sue under Section 13(b) based on its "reason to believe" determination, regardless

of whether courts ultimately agree that the defendant "is violating, or is about to violate" the law.[5]

Courts have uniformly held that a "reason to believe" determination is committed to agency discretion. *See, e.g.*, *Board of Trade v.* CFTC, 605 F.2d 1016, 1025 (7th Cir. 1979); *Standard Oil v. FTC*, 596 F.2d 1381, 1385 (9th Cir. 1979), *rev'd on other grounds*, 449 U.S. 232 (1980). ViroPharma attempts to distinguish these cases on the ground that they did not involve an agency affirmatively suing in federal court, but rather suits against the agency seeking judicial review of a "reason to believe" determination. Br. 24. ViroPharma misreads *Standard Oil* as holding that review of a "reason to believe" determination should occur "after an administrative decision." Br. 25. In fact, *Standard Oil* explains that a matter committed to agency discretion—such as the FTC's "reason to believe" determination—is "not susceptible of judicial review."

[5] ViroPharma asserts that the FTC has waived this argument. But ViroPharma is making a "plain meaning" argument; the Court cannot consider the plain meaning of the statute on the basis of one clause in Section 13(b) while ignoring the adjacent clause in the same sentence. In any event, the FTC specifically pointed to and relied upon the "reason to believe" language below. ECF No. 22 at 8, 15 (ECF page numbers). While our appellate brief addresses the language in greater detail, "[p]arties are free … to place greater emphasis and more fully explain an argument on appeal than they did in the District Court" and "may even, within the bounds of reason, reframe their argument." *United States v. Joseph*, 730 F.3d 336, 341 (3d Cir. 2013). The FTC's argument should also be considered because the proper interpretation of Section 13(b) is important not just to this case, but to dozens of other FTC enforcement cases. *See Gen. Refractories Co. v. First State Ins. Co*, 855 F.3d 152, 162 (3d Cir. 2017).

Standard Oil, 596 F.2d at 1385; *see also Board of Trade*, 605 F.2 at 1025 ("reason to believe" determination was "precluded from judicial review"). That is why ViroPharma's purported distinction is immaterial. When Congress commits a matter to agency discretion, judicial review is precluded regardless of context. ViroPharma offers no reason why the "reason to believe" determination should be unreviewable when the agency is a defendant but reviewable when the agency is the plaintiff.

Of course, the fact that the "reason to believe" determination is committed to agency discretion does not leave the courts without a role. When the FTC files a lawsuit, courts can assess whether the agency has pled facts sufficient to state a claim upon which relief may be granted. That requires an independent assessment of whether the "is … or is about to" standard is satisfied. *See Aaron*, 446 U.S. at 700-01. But that question goes to the merits of the FTC's case, not (as ViroPharma wrongly contends) to whether the FTC has the authority to sue.[6]

2. As set forth in the FTC's jurisdictional statement (which ViroPharma did not contest), the district court had subject-matter jurisdiction under 28 U.S.C.

[6] *Amicus curiae* Washington Legal Foundation cites the 1973 conference report accompanying Section 13(b), H.R. Conf. Rep. 93-624 (1973), and two cases cited therein. These authorities indicate that a court must make an independent judgment as to whether injunctive relief is appropriate, but do not suggest that the agency lacks authority to sue where a court disagrees with the FTC's "reason to believe" determination.

§§ 1331, 1337(a), and 1345.[7] ViroPharma's arguments fundamentally misapprehend the concept of subject-matter jurisdiction, which "refers to a tribunal's power to hear a case"—not the plaintiff's authority to file suit. *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009) (internal quotation marks omitted).

In *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006), the Supreme Court established a bright-line test for determining whether a statute is jurisdictional. Congress must "clearly state[] that a threshold limitation on a statute's scope shall count as jurisdictional"; if it does not, "courts should treat the restriction as nonjurisdictional in character." *Id*. at 515-16. Section 13(b) does not state that it is intended to be jurisdictional, so this case is properly evaluated under Rule 12(b)(6), not Rule 12(b)(1). *See FTC v. AT&T Mobility, LLC*, 883 F.3d 848, 853 (9th Cir. 2018) (en banc).

3. ViroPharma gets no help from cases involving private party standing under Article III's "case or controversy" requirement. Br. 29-30 (citing *Golden v. Zwickler*, 394 U.S. 103 (1969), and *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012)). This is not a private party action, but an antitrust enforcement

[7] ViroPharma argues that Section 1345 confers jurisdiction only to the extent that an agency is "expressly authorized to sue by Act of Congress." Br. 23. But Section 13(b) expressly authorizes the FTC to sue, and in any event Sections 1331 and 1337(a) independently confer subject-matter jurisdiction.

proceeding brought by a United States government agency, and it does not implicate any constitutional concerns. Indeed, ViroPharma's whole argument rests on the contention that *Congress* did not accord the FTC power to sue, not that the *Constitution* would forbid an otherwise authorized suit.

Moreover, while a private party must show an injury to its own interests to demonstrate standing, "[i]n a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief." *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990); *see also Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (injury to United States' sovereignty arising from violation of its laws suffices to support a Government lawsuit). Here, the requirements of Article III are satisfied because the FTC alleges that ViroPharma has violated the antitrust laws, is likely to do so again if not enjoined, and continues to retain the proceeds of its illegal actions.

By contrast, *ZF Meritor* was a private antitrust lawsuit by companies claiming injury from the defendant's anticompetitive practices. In the portion that ViroPharma cites, the Court held that the plaintiffs lacked standing to seek an injunction (but not damages) because they had completely withdrawn from the market and had not shown more than a mere possibility that they would reenter it. *ZF Meritor*, 696 F.3d at 300. This holding is inapposite to a suit by the FTC, which need not show injury to its financial interests. ViroPharma appears to rely

on *ZF Meritor* simply to argue that a mere "possibility" it will again violate the antitrust laws is insufficient to support an injunction. That is true but irrelevant. The argument goes to the statutory standard, not the constitutional one. And in any event, the FTC alleges not that it is merely *possible* that ViroPharma will violate the FTC Act again absent an injunction, but that it is *likely*. At the pleading stage, that allegation must be taken as true.

Golden is even farther afield. There, the plaintiff sought a declaration that he could lawfully distribute anonymous handbills against the reelection of a particular congressman. The Court held that there was no justiciable controversy because the congressman had left Congress for the bench and it was thus "most unlikely" that he would run for re-election. *Golden*, 394 U.S.at 109. Even if constitutional considerations of ripeness were pertinent here, the situation in *Golden* bears no resemblance to this case, which involves a government plaintiff that has alleged that ViroPharma is likely to violate the law again, an allegation that must be taken as true.

III. UNDER THE CORRECT LEGAL STANDARD, THE COMPLAINT STATES A CLAIM FOR INJUNCTIVE RELIEF.

In *Bonastia*, this Court established a multifactor test for determining whether a defendant's misconduct is likely to recur, which takes into consideration the number, nature, and severity of past violations as well as the defendant's current circumstances. *Bonastia*, 614 F.2d at 912. The district court considered none of

these factors. We showed in our opening brief that the FTC's allegations easily meet the *Bonastia* test: ViroPharma engaged in a six-year pattern of misconduct, acted deliberately, has given no assurance against future violations, and continues to be engaged in the same business with the incentive to violate again. FTC Br. at 40-41. ViroPharma fails to respond to this argument.

Instead, ViroPharma asserts that under *W.T. Grant* and the SEC cases, past misconduct alone will not justify an injunction. Br. 40-42. ViroPharma fails to recognize, however, that "[t]he likelihood of future wrongful acts is frequently established by inferences drawn from past conduct." *United States v. Local 30*, 871 F.2d 401, 409 (3d Cir. 1989); *see also Manor Nursing Ctrs.*, 458 F.2d at 1100 As the Supreme Court explained in *Aaron*, in determining whether future violations may occur "[a]n important factor … is the degree of intentional wrongdoing evident in a defendant's past conduct." *Aaron*, 446 U.S. at 701. Accordingly, while a past violation by itself may not be sufficient to justify injunctive relief, the number, nature, and severity of a defendant's past violations are critically important in assessing the likelihood of recidivism. As *Bonastia* explains, the court must "make[] a prediction of the likelihood of future violations based on an assessment of the totality of the circumstances surrounding the particular defendant and *the past violations that were committed*." *Bonastia*, 614 F.2d at 912 (emphasis added).

ViroPharma's factual arguments fail. It claims that the FTC has only specifically identified one other branded drug (Cinryze) that may be vulnerable to generic competition. Br. 40. But one drug is enough to support the FTC's claim that ViroPharma's conduct is likely to recur. Moreover, at this point, before discovery, the FTC does not yet have complete information on the extent to which Cinryze or other drugs may face threats of generic competition and is not required to allege such facts in detail.

ViroPharma also lists several allegations that are *not* made in the complaint. Br. 43-44. But the question here is whether the allegations that *are* made satisfy the *Bonastia* standard, which they clearly do. Finally, ViroPharma argues that the 2007 amendments to the Food, Drug, and Cosmetic Act reduced the opportunities for companies to abuse the petition process to thwart generic competition. But as the complaint specifically notes, the FDA has reported that the 2007 amendment did not discourage sham petitioning. Compl. ¶ 23 (A29). And ViroPharma's sham petitioning efforts continued through 2012. Compl. ¶ 49 (A36).

The FTC need not prove its case at the motion-to-dismiss stage. It simply must plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s]" of its claim. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (internal quotation marks omitted). The complaint here easily meets that burden.

IV. THE COMPLAINT ALSO STATES A CLAIM FOR EQUITABLE MONETARY RELIEF.

In addition to a behavioral injunction, the FTC also seeks equitable monetary relief to redress the effects of ViroPharma's past violations, which cost the public hundreds of millions of dollars. If the Court concludes that the FTC has stated a claim for injunctive relief, then the dismissal should be reversed and there is no need for the Court to separately consider monetary relief. But even if the Court concludes that the FTC has not adequately alleged a likelihood of recurrence, the dismissal must still be reversed as to the claim for monetary relief.

Stripped to its essence, ViroPharma's position is that if a company cheats consumers and then completely stops its illegal activities (even up to the day before an enforcement suit), the FTC is powerless to pursue the matter in equity and the company gets away scot-free. A well-developed body of precedent shows otherwise. The Supreme Court has recognized that courts may grant equitable monetary relief even when then there is no possibility of recurrence at the time the complaint was filed. *See United States v. Moore*, 340 U.S. 616, 620 (1951). This Court applied the same principle in *CFTC v. American Metals Exch. Corp.*, 991 F.2d 71 (3d Cir. 1993), holding that a district court did not err in issuing equitable monetary relief even though an injunction was not proper because there was no likelihood of recurrence. Other courts have applied the same rule in SEC and FTC cases. *See Commonwealth Chem.*, 574 F.2d at 103 n.13 (once a violation has been

established, "a failure … to show the likelihood of recurrence required to justify an injunction" will not "relieve a defendant found to have violated the securities laws from the obligation to disgorge"); *AT&T Mobility*, 883 F.3d at 864 (even if prospective injunction was unavailable, FTC could obtain monetary relief); *Evans Prods.*, 775 F.2d at 1088 (courts have inherent power to grant ancillary equitable remedies "when there is no likelihood of recurrence").

ViroPharma rehashes the "plain language" argument that it makes with respect to injunctive relief. But as shown above—and as the case law amply demonstrates—the language of Section 13(b) is not so rigid and inflexible as ViroPharma believes, and it must be construed in keeping with hundred years of years of equity practice giving courts flexibility to "mould each decree to the necessities of the particular case." *Hecht*, 321 U.S. at 329; *see also Unifund SAL*, 910 F.2d at 1035. Neither the statute nor its legislative history signals any congressional intent to depart from these well-established principles.

ViroPharma also suggests that Section 13(b) does not authorize equitable monetary relief at all. But eight other circuits have squarely held that it does. *See* FTC Br. at 43 n.13. This Court endorsed that conclusion in *FTC v. Magazine Solutions, LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011), and affirmed a $10.2 million restitution judgment in *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007). Binding decisions of the Supreme Court and this Court hold that statutes

authorizing injunctive relief also authorize the award of equitable monetary relief to accord full justice. *See Mitchell*, 361 U.S. at 291-92; *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946); *United States v. Lane-Labs USA, Inc.*, 427 F.3d 219, 225 (3d Cir. 2005). These decisions lead inexorably to the conclusion that monetary relief is available under Section 13(b).

ViroPharma also suggests that *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), "casts doubt" upon the availability of equitable monetary relief. Not so. *Kokesh* held that a disgorgement award under the SEC statutes is subject to a five-year statute of limitations. As ViroPharma concedes, "the Court was not asked to and did not decide" whether the SEC statutes or analogous provisions like Section 13(b) authorize disgorgement. Br. 34 n.13. The Court expressly stated 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. *Kokesh* thus does not undermine the Supreme Court's prior decisions in *Mitchell* and *Porter*, this Court's decision in *Lane-Labs*, or the unanimous holdings of other circuits that Section 13(b) authorizes equitable monetary relief.

CONCLUSION

The judgment of the district court should be reversed and the case remanded.

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

/s/ Matthew M. Hoffman
MATTHEW M. HOFFMAN
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3097
mhoffman@ftc.gov

Of Counsel:
D. BRUCE HOFFMAN
Director, Bureau of Competition

HAIDEE SCHWARTZ
BRADLEY S. ALBERT
MEREDYTH ANDRUS
THOMAS J. DILLICKRATH
JUNE IM
NICHOLAS LEEFER
JOSEPH MATHIAS
JAMES WEINGARTEN

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

August 30, 2018

COMBINED CERTIFICATIONS

COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limit of Fed. R. App. P. 37(a)(7)(B) because it contains 6,497 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14 point Times New Roman.

BAR MEMBERSHIP

All signatories to this brief are attorneys who work for a federal government agency.

IDENTICAL COMPLIANCE OF BRIEFS

I certify that the text of the electronically filed brief is identical to the text of the original copies that were sent on August 30, 2018, to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

PERFORMANCE OF VIRUS CHECK

I certify that on August 30, 2018, I performed a virus check on the electronically filed copy of this brief using Symantec Endpoint Protection Version 14 (14.0 MP2) build 2415 (14.0.2415.0200) (last updated August 29, 2018). No virus was detected.

SERVICE

I certify that on August 30, 2018, I filed the foregoing brief via the Court's electronic filing system. All parties will be served by the CM/ECF system.

August 30, 2018 /s/Matthew M. Hoffman
Matthew M. Hoffman