15-1009, 15-1014 (CON)

United States Court of Appeals
for the Second Circuit

Federal Trade Commission, State of Connecticut,
Plaintiffs-Appellees,
vs.
LeadClick Media, Inc., a California corporation Successor LeadClick Media, LLC, CoreLogic, Inc.
Defendants-Appellants.

On appeal from the United States District Court for the District of Connecticut, No. 3:11cv1715(JCH)

FINAL FORM BRIEF FOR APPELLEES FEDERAL TRADE COMMISSION AND STATE OF CONNECTICUT

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STATEMENT OF JURISDICTION

The district court had jurisdiction over claims brought by the Federal Trade Commission under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b). It had supplemental jurisdiction over claims brought by the State of Connecticut under 28 U.S.C. § 1367. The district court entered final judgment on March 5, 2015, and appellants filed timely Notices of Appeal on April 2, 2015. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

LeadClick provided marketing services to drive Internet traffic to its clients' commercial websites. In this case, the client, LeanSpa, sold a diet product through fraudulent means. LeadClick hired sub-contractors who used bogus "news" sites that carried fake stories to direct viewers to LeanSpa's website by dishonestly touting the product. Some of the fees that LeadClick earned were funneled to its corporate parent, CoreLogic. The questions presented are:

1. Whether deceptive marketing arranged and controlled by LeadClick make it directly liable under Section 5 of the Federal Trade Commission Act and the analogous provision of the Connecticut Unfair Trade Practices Act, or alternatively, liable as a principal for the conduct of its agents;

2. Whether LeadClick's conduct falls outside the scope of Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1), which

states that a provider of an “interactive computer service” shall not be treated “as the publisher or speaker of any information provided by another information content provider”; and

3. Whether the district court properly found that CoreLogic failed to demonstrate a legitimate ownership interest in ill-gotten gains transferred to it by LeadClick and therefore ordered CoreLogic to disgorge that money.

STATEMENT OF THE CASE

The Federal Trade Commission and the State of Connecticut brought this action to halt a deceptive Internet marketing scheme that used seemingly legitimate news websites to entice consumers to click through to the merchant’s website, where they were offered a “free trial” of weight-loss products. In fact, the news stories were fake, and the free-trial offer was a ruse to obtain the consumers’ credit card information and charge them for recurring product shipments they did not authorize. Consumers were thus fooled twice: first, by deceptive claims in the fake news stories, and again by misrepresentations on the merchant’s website.

The government agencies initially sued the sellers of the underlying weight-loss products. The complaint named Boris Mizhen and various companies he controlled (collectively “LeanSpa”) and charged them with engaging in deceptive business practices in violation of (among other laws) Section 5 of the FTC Act, 15

U.S.C. § 45(a), and the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b ("the State statute").[1] Dkt. No. 1.

Discovery against LeanSpa showed that LeadClick participated directly in the deceptive marketing of LeanSpa's products. The government amended the complaint to include as defendants LeadClick Media, Inc., its successor, LeadClick Media, LLC (collectively, "LeadClick"), and LeadClick's former principal Richard Chiang.[2] The FTC also asserted a claim against LeadClick's parent company, CoreLogic, Inc., as a relief defendant—*i.e.*, a party that is not alleged to have committed the underlying law violations but holds the proceeds of unlawful acts. R. 110a-148a (Dkt. No. 246). LeanSpa and Chiang settled their cases in stipulated orders. Dkt. Nos. 274, 286.

The litigation against LeadClick and CoreLogic continued. In the order on review, the district court found LeadClick liable and entered summary judgment for the FTC. The court granted equitable monetary relief under Section 13(b) of

[1] Section 5 of the FTC Act prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C § 45(a). Section § 42-110b(a) of the State statute prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). Interpretation of the State statute is "guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act." *Id*. at § 42-110b(b).

[2] The amended complaint also named Mizhen's wife, Angela Strano. After her challenge to a preliminary injunction order was rejected by this Court in *FTC v. Strano*, No. 13-0653, 528 Fed. Appx. 47 (2d Cir. 2013), she settled the claims against her. Dkt. No. 274.

the FTC Act, 15 U.S.C. § 53(b),[3] ordering LeadClick to disgorge its proceeds from this deceptive scheme and CoreLogic to disgorge ill-gotten gains transferred to it by LeadClick. *FTC v. LeanSpa, LLC,* No. 3:11-CV-1715, 2015 WL 1004240 (D. Conn. March 5, 2015); R. 1a-40a (Opinion ("Op.")).

A. LeadClick's Participation In The Deceptive Marketing Of LeanSpa

LeadClick provided online marketing services to merchants through third-party entities called "affiliate marketers," which functioned as LeadClick's subcontractors. LeadClick did not itself conduct the marketing, but it hired the affiliates to do so and provided a service to track traffic generated (and hence revenue earned) by each affiliate to the underlying merchant's website. R. 4a-5a (Op. 4-5); R. 150a-151a, 154a (PX 22, Chiang Depo. 11-15, 33-35).

LeanSpa sold a purported weight-loss supplement over the Internet. It offered consumers a "free trial" offer but deceptively signed them up instead for automatic credit card billing. R. 116a-118a (Dkt. No. 246, ¶¶ 19-25). In September 2010, LeanSpa engaged LeadClick to provide affiliate network services to drive consumer Internet traffic to the LeanSpa website. R. 714a (PX 45); R.

[3] Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). "[C]ourts have consistently held that the unqualified grant of statutory authority to issue an injunction under [S]ection 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011) (internal quotations omitted).

240a-249a (PX 24). It agreed to pay LeadClick between $35 and $45 each time a consumer directed to LeanSpa's website by a LeadClick affiliate signed up for LeanSpa's "free trial" offer. R. 243a (PX 24); R. 348a-349a (PX 13, Chelew Depo. 180-81); R. 208a (PX 56, Davidson Depo. 17-18). LeadClick separately paid the affiliate whose website drove the consumer to the LeanSpa site. R. 6a-7a (Op. 6-7); R. 373a-374a (PX 25).

For the LeanSpa account, LeadClick specifically sought out affiliates that used fake news sites to tout products. Its "scouting report" identified potential affiliates that marketed diet products using websites with typical fake news site names like Health8News.net, News-Health6.com, and Consumer6Report.com. R. 716a (PX 26); *see* R. 156a-157a (PX 22, Chiang Depo 43-46); R. 236a (PX 65, Redmond Depo. at 55).[4] Such sites looked like genuine news sites, carried logos of legitimate news organizations, and featured headshots of supposed reporters. And they represented that objective news reporters had performed independent tests demonstrating the effectiveness of the products. The fake news sites urged consumers to try LeanSpa's products for themselves by clicking on hyperlinks taking them to LeanSpa websites. *See, e.g.*, R. 717a-722a (PX 59) (channel8health.com); R. 723a-728a (PX 60) (online6health.com); R. 729a-735a

[4] *See* R. 738a, 740a-745a (PX 95 at PDF pages 584-88) (showing that newshealth6.com was a fake news site used by a LeadClick affiliate promoting LeanSpa).

(PX 61) (dailyhealth6.com). But the claims of association with news organizations and independent testing were utterly false. R. 7a, 19a (Op. 7, 19); R. 212a (PX 56, Davidson Depo. 75-76).

LeadClick knew of and approved its affiliates' use of these fake news sites to promote LeanSpa's products. R. 7a-8a, 23a (Op. 7-8, 23); R. 158a-159a (PX 22, Chiang Depo. 60-61); R. 235a, 238a (PX 65, Redmond Depo. 29, 65). Its standard contract with the affiliate marketers required that "[o]nly websites and newsletters that have been reviewed and approved [by LeadClick staff] are permitted to use the programs." R. 371a (PX 25); *see* R. 746a (PX 112) (LeadClick affiliate manages asks affiliate to "please send me a copy of your landing page so I can check it out before you run these offers"). LeadClick's account manager for LeanSpa confirmed that he saw "many" fake news sites from LeadClick's affiliates that contained information he knew was "not truthful or accurate," including sites generating traffic for LeanSpa. R. 387a, 389a (PX 48, Olsen Depo. 23-24, 29-30). In conversations among themselves and with affiliates and merchants, LeadClick's employees regularly discussed fake article pages, fake news pages, and "news style" pages. R. 750a (PX 49); R. 756a (PX 113); R. 757a (PX 115).

LeadClick did not just passively allow the use of these deceptive webpages; it affirmatively authorized affiliates to use fake news sites. For example, it told one potential new merchant client that "[a]ll of our traffic would be through display on *fake article pages.*" R. 750a (PX 49) (emphasis added). And it similarly told one affiliate that "News Style landers"—the webpages that visitors first land on after clicking on links—"are totally fine." R. 761a (PX 116). In another exchange, one potential affiliate expressed its enthusiasm for this fake-news business model to LeadClick because, "even though the ads for the fake news sites are all over the internet[,] people still keep falling for it." R. 776a (PX 66). True to LeadClick's own appreciation of this advertising tactic, LeadClick's affiliate manager didn't hesitate to bring that affiliate on board, responding, "Yeah people are creative … send me your account # and I can set you up for the offers." *Id*. at 775a-776a.

LeadClick also provided instructions and advice on advertising content. R. 9a (Op. 9). When an affiliate promoting LeanSpa stated that he was considering "removing the reporter pics" from the site in light of a state's legal action against a similar website, LeadClick advised him not to stop using the phony reporter, but "just add [the word] advertorial." R. 231a-232a (PX 64 at FTC-LS-493396-97). LeadClick also advised the affiliate to delete references to acai berry and instead highlight a "special [ingredient], formula, secret, bla, bla, bla" because "we noticed a huge increase in [results] with stuff that doesn't [s]ay acai." R. 1015a (PX 64 at FTC-LS-493394). LeadClick sent yet another affiliate ingredient information about a LeanSpa product, calling it "good content that we can use for the page … if we get this inserted correctly and make the page look good we can blow this up." R. 778a-786a (PX 106). And LeadClick advised an affiliate promoting LeanSpa that "[i]t is much more realistic if you say that someone lost 10-12 1bs in 4 weeks rather than saying anything more than that." R. 788a (PX 68). It further instructed, "you CANT say anything about a free trial" but "maybe you can say something about the discounted price." *Id*. at 787a. LeadClick also ordered affiliates to make changes to parts of fake news sites that described a two-step weight-loss program. The program initially paired a LeanSpa product (step 1) with one made by another company (step 2). When LeanSpa introduced a new product to replace the other merchant's as step 2, LeadClick ordered its affiliates to change their websites accordingly. R. 800a-801a (PX 30); R. 158a (PX 22, Chiang Depo. 58-60).

In addition to recruiting and managing its affiliates, LeadClick also engaged in "media buying"—purchasing space for its affiliates on genuine news sites for banner advertisements that linked to fake news sites promoting LeanSpa products. R. 10a-11a (Op. 10-11); R. 167a (PX 22, Chiang Depo. 145-46); R. 219a (PX 56, Davidson Depo. 185-86); R. 802a-874a (PX 120) (LeadClick negotiates with The Nation to arrange banner ad placements linking to a fake news site promoting LeanSpa, attaching "an example of our website"); R. 875a-878a (PX 122) (arranging banner ad placement on the Austin American-Statesman linking to fake new site); R. 882a-885a (PX 117) (purchasing space on Slate). LeadClick explained its use of links to false news sites on the ground that it previously tried ads linking directly to a merchant's page, but "conversions dropped considerably (down by over 50%)." R. 887a-888a (PX 119). And when LeadClick solicited LeanSpa's business, it touted media buying as a way to "generat[e] quality traffic in very lucrative placements." R. 714a (PX 45).

LeadClick quickly became LeanSpa's primary promotional network, and LeanSpa became LeadClick's largest client. R. 1016a (PX 48, Olsen Depo. 91); R. 908a (PX 4) (LeanSpa was the "top LeadClick customer"). Over time, virtually all of the traffic to LeanSpa's websites originating from LeadClick's network came from fake news sites. *See* R. 736a-738a (PX 95, Marino Dec. ¶¶ 3-17 and Ex. H, PDF pages 568-696) (explaining that, of the 24 identifiable affiliate websites that sent 1,000 or more consumers to LeanSpa's websites, all were fake news sites).

LeanSpa was chronically behind on its payments. Merchant processing companies began freezing LeanSpa's accounts when large numbers of consumers disputed LeanSpa's fraudulent charges; such high "chargeback" figures are well-known signs of fraud. R. 11a-12a (Op. 11-12); R. 895a-907a (PX 89, Chen Dec. ¶¶ 9-15, 25-42). Aware of these problems and hoping eventually to collect its fees, LeadClick recruited even more affiliates for LeanSpa, sending it even more consumer traffic to dilute its chargeback ratio. R. 392a-393a (PX 48, Olsen Depo.

99-104); R. 161a-162a (PX 22, Chiang Depo. 82-83); R. 910a-911a (PX 54). And LeadClick found LeanSpa a replacement processor located overseas, where chargeback rules are less restrictive. R. 163a (PX 22, Chiang Depo. 106-15).

In April 2011, LeadClick learned that the FTC had sued some affiliate marketers (including some for LeanSpa) for using fake news sites to market products. R. 908a (PX 4). At that point, LeadClick began for the first time to implement screening measures for websites, requiring that affiliate webpages be reviewed and approved by the corresponding merchants. R. 160a (PX 22, Chiang Depo. 70-71). But LeanSpa did not ask LeadClick to bar fake news sites until the "extreme end" of their business together. R. 391a (PX 48, Olsen Depo. 62-63); *see* R. 912a-914a (PX 8) (June 2011 report indicates traffic is still being sent to LeanSpa); R. 915a (PX 94) (in July 2011, LeadClick references "new traffic [for LeanSpa] going to pay off old debt"). All told, LeadClick billed LeanSpa $22 million, of which LeanSpa paid $11.9 million. R. 12a-13a (Op. 12-13); R. 926a-929a (PX 151 at pp. 9-12).

B. CoreLogic's Funding Of LeadClick

By 2011, LeadClick was paying out more money to affiliates and websites on LeanSpa's behalf than it was receiving from LeanSpa. LeadClick's parent CoreLogic had to advance it funds to allow it to continue paying its affiliates so that it could continue generating customer traffic to LeanSpa. R. 162a (PX 22, Chiang Depo. 98-99). In early 2011, CoreLogic authorized LeadClick "to draw down cash in order to grow the business," disbursing funds to pay LeadClick's bills through a company-wide shared back office services system. R. 349a-350a (PX 13, Chelew Depo. 183-85); R. 937a (PX 9, Livermore Depo. 14-15). CoreLogic hoped to recoup these advances from LeadClick's future receivables, but the advances were not contingent on repayment. Moreover, there was no written loan agreement, no repayment schedule or deadline, no security for the advances, and no interest due. R. 14a (Op. 14); R. 939a (PX 9, Livermore Depo. 21-22).

When it advanced the money to its subsidiary, CoreLogic knew the nature of the marketing that its money was funding. LeadClick explained to CoreLogic officials that its revenues relating to diet products were attributable to fake news sites. R. 168a-169a (PX 22, Chiang Depo. 167-71). Indeed, in April 2011, CoreLogic learned that LeanSpa had used two affiliates the FTC had sued for deceptive marketing practices. R. 908a (PX 4). It also learned that LeanSpa's merchant account was frozen due to excessive chargeback levels. *Id*. Despite that knowledge, CoreLogic continued to fund LeadClick's marketing services for LeanSpa. *See* R. 14a (Op. 14).

In August 2011, shortly before CoreLogic concluded that LeadClick was no longer a viable business and decided to shut it down, LeadClick closed its bank account and transferred to CoreLogic the remaining balance of approximately $4.1 million. R. 13a (Op. 13); *see* CoreLogic Br. 10.

C. The District Court's Summary Judgment Ruling

In August 2013, the FTC and the State of Connecticut sued LeadClick and CoreLogic. R. 110a-148a (Dkt. No. 246). The complaint alleged that LeadClick, "directly or through affiliates acting on [its] behalf and for [its] benefit," made misrepresentations in fake news sites advertising LeanSpa's products (*id*. at ¶¶ 82, 122), in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a), and the Connecticut Unfair Practices Act, Conn. Gen. Stat. § 42-110b(a). The district court granted summary judgment to the government.

The court held that the uncontroverted evidence established that the fake news sites used to promote LeanSpa through LeadClick's network were deceptive because (1) they conveyed a false impression that independent and trustworthy sources had verified LeanSpa's product claims; (2) these misrepresentations were likely to mislead consumers; and (3) these misrepresentations were material to consumers' choices. R. 21a (Op. 21).

The court then addressed whether LeadClick was liable under the FTC Act for its conduct related to the fake news sites even though it did not create them. The court recognized that, under the FTC Act, a defendant may be directly liable for its conduct, "even where that conduct related in some way to the conduct of third parties," and also may be liable for the misrepresentations of others under common law principles of agency. R. 22a (Op. 22). In assessing LeadClick's liability for its conduct related to third parties, the court found guidance in factors that courts consider when assessing an individual's liability for corporate violations: participation in the practices at issue, authority to control the corporate defendant, and knowledge of the practices. *Id*.

The district court held that all three of these factors were present here. First, uncontroverted evidence established that "LeadClick had the authority to control the affiliate marketers' use of fake news pages." R. 24a (Op. 24). Second, LeadClick participated in the fake news sites' deception by, for example, purchasing advertising space for banner ads linking to the fake news sites and instructing affiliates on how to pair products in fake news sites advertising a purported reporter's test of a two-step weight-loss program. R. 25a-26a (Op. 25-26). And third, LeadClick indisputably "knew that fake news sites were being used to promote LeanSpa on [LeadClick's affiliate] Network." R. 23a (Op. 23). The district court concluded that this conduct established both LeadClick's direct liability, R. 26a (Op. 26), and its liability under agency principles, R. 21a (Op. 21, n.18).

Next, the district court considered LeadClick's claim of immunity from liability under Section 230(c)(1) of the Communications Decency Act. The court did not decide whether LeadClick met the threshold requirement of immunity—that it acted as a provider or user of an "interactive computer service." Instead, the court concluded that LeadClick was not entitled to immunity under this statute because LeadClick's activities made it an "information content provider" responsible (along with others) for the creation or development of the fake news site marketing for LeanSpa. R. 29a (Op. 29).

The district court entered a final judgment for monetary relief against LeadClick, requiring it to disgorge the proceeds it received from LeanSpa as a result of its affiliate marketing activities—*i.e.*, $11.9 million. R. 33a (Op. 33). The court also required relief defendant CoreLogic to disgorge $4.1 million that LeadClick had transferred to it. The court held, based on uncontroverted evidence, that this was a transfer of ill-gotten gains to which CoreLogic lacked a legitimate claim. R. 35a-38a (Op. 35-38). The court rejected as factually unsupported CoreLogic's argument that LeadClick's transfer of $4.1 was payment of a debt owed to another CoreLogic subsidiary. R. 38a-39a (Op. 38-39).

STANDARD OF REVIEW

The Court reviews *de novo* a district court's grant of summary judgment. *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 357 (2d Cir. 2011). "Summary judgment must be granted where the pleadings, the discovery and disclosure materials on file, and any affidavits show 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Id*. at 358, quoting Fed. R. Civ. P. 56(a). Where the moving party demonstrates the absence of a genuine issue of material fact, the burden is on the opposing party to come forward with specific evidence demonstrating the existence of a trial worthy issue. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 256-57 (1986). "Where no rational finder of fact could find in favor of the nonmoving party because the evidence to support its case is so slight, summary judgment must be granted." *Eli Lilly and Co*., 654 F.3d at 358 (internal quotation marks omitted). The Court may affirm on any basis supported by the record, whether or not the district court relied upon that ground. *Tolbert v. Smith*, 790 F.3d 427, 434 (2d Cir. 2015).

SUMMARY OF ARGUMENT

1.a. LeadClick orchestrated and directly participated in the deceptive use of fake news sites to market LeanSpa products. To that end, it recruited and hired affiliates knowing that they used fake news sites; it closely managed their marketing and controlled the content of their websites; it shared the proceeds of this deceptive marketing; and it disseminated this false content by securing space for ads on genuine news sites linking to the bogus news sites.

Those activities make LeadClick liable under the FTC Act and its Connecticut analog for deceptive practices under each of two independent rationales. First, a consistent line of judicial decisions dating from the infancy of the FTC Act through the present day establishes that the statute reaches market actors who, like LeadClick, contribute to consumer harm behind the scenes even though that harm is inflicted more directly by another party. Courts have made clear that such direct liability is distinct from aiding-and-abetting liability.

Second, LeadClick is independently liable for the misrepresentations of its affiliates, who acted as LeadClick's agents subject to LeadClick's control as principal. The principal-agent relationship between LeadClick and its affiliates is manifest in their conduct: in furtherance of LeadClick's contract with LeanSpa, the affiliates undertook their deceptive tasks on LeadClick's behalf and for its financial benefit. LeadClick also approved and exercised control over its affiliates' use of fake news sites.

b. LeadClick's unlawful conduct is not immunized by Section 230(c)(1) of the Communications Decency Act for two independent reasons. First, the statute applies only to an "interactive computer service" provided to consumers. LeadClick did not supply such a service under any reasonable reading of the statute. Its software platform was simply a mechanism to track traffic and sales. It provided no content or discernable service to consumers, who received no benefit from it and to whom it was invisible.

In any event, as the district court held, LeadClick was acting as an "information content provider" ineligible to invoke the statute's protections because it was “responsible, in whole or in part,” for the sham news sites. 47 U.S.C. § 230(c)(1), (f)(3). That conclusion follows both from the court’s finding that the affiliates acted as LeadClick’s agents and from LeadClick’s role as the instigator and manager of the deceptive marketing scheme.

2. The district court properly ordered CoreLogic to disgorge $4.1 million of ill-gotten proceeds that it received from its subsidiary LeadClick. The transfer of money was not repayment of a loan to which CoreLogic was legally entitled. CoreLogic’s cash advances to LeadClick were at most an investment on which it hoped to earn a return. CoreLogic alternatively argues that, even in the absence of anything resembling a loan agreement, its status as LeadClick’s investor entitled it to keep these funds. Under that argument, however, any investment in a business would give the investor a legitimate claim to the ill-gotten gains of the business. That position is meritless and would radically restrict the equitable power of courts to achieve redress for victims of fraud. In any event, CoreLogic has no rights cognizable in equity because it cannot even claim to have received the ill-gotten funds in good faith: it knew of facts that should have alerted it that LeadClick’s revenues derived from deception.

Finally, there is no merit to CoreLogic’s claim that another of its subsidiaries effectively laundered LeadClick’s ill-gotten funds when the funds passed through that other subsidiary’s account en route to CoreLogic’s account. That subsidiary had only nominal possession of the funds for a few minutes at most. Under those circumstances, the subsidiary's fleeting possession cannot insulate the funds from equitable disgorgement.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD LEADCLICK RESPONSIBLE FOR DECEPTIVE PRACTICES.

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). "To prove a deceptive act or practice under § 5(a)(1), the FTC must show three elements": 1) "a representation, omission, or practice" that 2) "is likely to mislead consumers acting reasonably under the circumstances" and that 3) "is material." *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (internal quotation marks omitted).[5] The same deception standard applies under the State statute. *See Caldor, Inc. v. Heslin*, 577 A.2d 1009, 1013 (Conn. 1990). LeadClick does not challenge the district court's conclusion that the use of fake news sites to market LeanSpa products was a deceptive practice. LeadClick disputes only that it can be held liable under the FTC Act and the State statute for this deception. The district court's affirmative

[5] In contrast, knowledge that a representation is misleading is not an element of deception under the FTC Act. Although the FTC must show knowledge to obtain *monetary* relief from *individual* defendants held liable for corporate violations, it need not show knowledge either to prove liability or to obtain monetary relief against corporate defendants. *See, e.g.*, *FTC v. Stefanchick*, 559 F.3d 924, 930-31 (9th Cir. 2009) (holding corporate defendant liable for equitable monetary relief under agency principles and examining knowledge only of individual defendant).

answer to this question was correct under either of two rationales: direct liability and agency.

A. LeadClick Is Directly Liable For The Deceptive Marketing Of LeanSpa Products Using Fake News Sites.

As discussed above, LeadClick specialized in online marketing schemes involving fake news sites, mainly for its lead client: LeanSpa. *See* pp. 4-10, *supra*. It reached out to affiliate marketers that it knew used fake news sites and recruited them to drive traffic to LeanSpa's websites through LeadClick's network. LeadClick managed its affiliates' bogus news-site marketing for LeanSpa, provided input to affiliates on the content of their phony news reports, and specifically instructed them on requirements for fake news sites promoting LeanSpa's products. LeadClick also disseminated this false content through its own media buying, purchasing space on third-party websites for banner ads that linked to fake news sites promoting LeanSpa products. As the district court found, these facts amply demonstrate that LeadClick had authority to control, and directly participated in, the representations at issue in the fake news site marketing for LeanSpa. R. 23a-26a (Op. 23-26).

That control and participation make LeadClick directly liable under the FTC Act for these deceptive representations. Although LeadClick did not make misrepresentations directly to consumers, it orchestrated the deception. Under longstanding precedent, that central role makes it as legally responsible for the deception as the affiliates and LeanSpa itself. As courts have consistently held for many years, the phrase "unfair or deceptive practices" in the FTC Act reaches actors who cause consumer harm behind the scenes.

The Supreme Court first embraced that principle in the early years of the FTC Act, in *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922). The defendant there was a manufacturer that supplied clothing with false labels. The labels did not mislead the retailers who purchased the product directly from the manufacturer, but they did mislead the consumers to whom the product was resold. The Supreme Court found that the manufacturer violated the FTC Act even though it did not directly defraud consumers. The Court explained that "a person is a wrongdoer who so furnishes another with the means of consummating a fraud." *Id*. at 494. That principle, the Court explained, "has long been a part of the law of unfair competition." *Id*.

Courts have continuously reaffirmed that principle ever since. For example, in *Regina Corp. v. FTC*, 322 F.2d 765 (3d Cir. 1963), the Third Circuit held that "[o]ne who places in the hands of another a means of consummating a fraud…is himself guilty of a violation of the [FTC] Act." *Id*. at 768 (quotation marks and citation omitted). Similarly, as the Ninth Circuit has explained, "[i]t is well established that one who puts into the hands of others the means by which such others may deceive the public is equally as responsible for the resulting deception."

FTC v. Magui Publishers, Inc., 9 F.3d 1551, 1993 WL 430102, at *4 (9th Cir. 1993) (table). The court made clear that this basis for liability is distinct from a theory of aiding and abetting. *Id*.

Most recently, the Ninth Circuit reaffirmed the same principle in *FTC v. Neovi, Inc.*, 604 F.3d 1150 (9th Cir. 2010). The defendant there operated a website that allowed users to create and send unverified checks. The site became a platform for check-drawing fraud: the defendant "create[d] and delivere[d] [for payment] checks without proper verification" even though it had "reason to believe that a vast number of checks were being drawn on unauthorized accounts." *Id*. at 1157. The court rejected the website's argument that the service's users—not the site operator—committed the fraud and thus alone could be liable under the FTC Act. As the court explained, the website "is not discharged from liability under the FTC Act" simply because the direct fraud was committed by "independent causal agents"; to the contrary, "a single violation of the Act may have more than one perpetrator." *Id*. at 1155. As in *Magui*, the court explained that liability was not premised on a theory of aiding and abetting. Even though the site's practices "might have served to assist others in illicit or deceptive schemes," its liability under the FTC Act "is not mediated by the actions of those third parties" because the site "caused harm through its own deeds—in this case creating and delivering unverified checks." *Id.* at 1157. Section 5 of the FTC Act thus "easily extends to its conduct." *Id.*[6]

Finally, in *FTC v. Direct Mkt'g Concepts, Inc.*, 569 F. Supp. 2d 285 (D. Mass. 2008), *aff'd,* 624 F.3d 1 (1st Cir. 2010), the court held a credit card processor directly liable under the FTC Act for deceptive advertising conducted by a third party. The processor received half of the net profits from sales based on the false ads and exerted "editorial influence" over them. 569 F.Supp. 2d at 292. It argued that it could not be liable because it "had no role in the sale or advertising" but "simply transmitted orders." *Id.* at 309. The court rejected that argument on the ground that the processor was "essentially a joint venturer" in the false ads. *Id.* It "did not have a practice of having infomercials reviewed for compliance with FTC law, viewing that as the function of the advertiser and producer," and it thus "permitted claims that were not substantiated to be made to consumers." *Id.* at 309-10. The court accordingly concluded that the processor "share[d] responsibility" for the deception. *Id*. at 310 (internal quotation marks omitted).

[6] LeadClick is thus wrong to claim that *Neovi* relied on an aiding-and-abetting theory. *See* LeadClick Br. 44, n.107. It is also irrelevant (*see id.*) that *Neovi* concerned the "unfairness" clause of Section 5 of the FTC Act rather than the "deception" clause. The relevant holding in *Neovi* was not limited to the precise elements of liability under one clause or the other; instead, it addressed more generally the circumstances in which multiple actors may be liable for violating either clause through a shared course of conduct.

So too here. Like the defendants in the foregoing cases, LeadClick engaged in culpable conduct that makes it directly liable under the FTC Act. LeadClick developed and orchestrated a marketing scheme that relied on sham news sites; it recruited and hired the operators of those sites to promote LeanSpa products; it closely managed the marketing, including shaping the bogus news content; and it shared the proceeds of the pervasive deception. Beyond those activities, LeadClick took direct action to expand the reach of this deceptive marketing through its media buying on genuine news sites. In doing so, it lured even more consumers to the fake news sites it had orchestrated.

LeadClick does not seriously dispute any of these facts. Instead, it seeks to avoid liability on the grounds that it made no misleading statements directly to consumers; that it merely aided and abetted the conduct of others; and that aiding-and-abetting liability is foreclosed by *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). LeadClick Br. 36-38 (also discussing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 174 (2d Cir. 1998)). That argument is meritless. LeadClick did not simply "aid and abet" the bogus news site operators; it selected and managed them and, in the *Neovi* court's words, "caused harm through its own deeds." 604 F.3d at 1157. Similarly, in the *Direct Marketing* court's words, it is liable for engaging in a "joint venture" with the phony news site operators. 569 F. Supp. 2d at 309.

Moreover, *Central Bank* is inapposite not only because it involved a distinct liability theory (aiding and abetting), but also because it concerned a very different statute. To begin with, reliance is a necessary element of liability under the Securities Exchange Act and was central to the Supreme Court's analysis,[7] whereas reliance is *not* an element of liability under Section 5.[8] Just as important, the Securities Exchange Act deals with fraud in the specific, highly regulated context of activity "in connection with the purchase or sale of any security." 15 U.S.C. § 78j. It was not intended or designed to address deceptive practices in the

[7] 511 U.S. at 178-80; *see Wright*, 152 F.3d at 175 (emphasizing "the reliance requirements of the [Securities Exchange] Act"); *Pac. Inv. Mgmt. Co., LLC v. Mayer Brown LLP*, 603 F.3d 144, 156 (2d Cir. 2010) ("attribution is necessary to show reliance").

[8] Conduct violates the FTC Act if it is deceptive, material, and "*likely* to mislead consumers acting reasonably under the circumstances." *Verity*, 443 F.3d at 63 (emphasis added); *see FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) ("[n]either proof of consumer reliance nor consumer injury is necessary to establish a § 5 violation"). In contrast, proof of actual reliance "is *unnecessary* to establish a § 5 violation" even though it is "necessary to establish the right to consumer redress." *Freecom Commc'ns,* 401 F.3d at 1206 (emphasis added); *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 543 (S.D.N.Y. 2013) (State statute "requires neither reliance nor proof of intent to deceive, to defraud or to mislead") (internal quotation marks omitted). Even as to consumer redress, reliance is presumed "once the Commission has proved that the defendants made material misrepresentations, that were widely disseminated, and that consumers purchased the … products." *FTC v. Figgie Int'l*, 994 F.2d 595, 605 (9th Cir. 1993). Here, the district court found that the government was entitled to a presumption of reliance, and LeadClick offered no evidence to rebut that presumption. R. 30a-31a (Op. 30-31). LeadClick has not appealed that aspect of the district court's decision; therefore, its passing swipe (LeadClick Br. 34, n.80) at the court's finding of consumer harm lacks any force.

marketplace generally. *See Pac. Inv. Mgmt. Co., LLC v. Mayer Brown LLP*, 603 F.3d 144, 160 (2d Cir. 2010) (recognizing "the dangers of expanding liability [under the Securities Exchange Act] to the whole marketplace in which the issuing company does business") (internal quotation marks omitted). The FTC Act, in sharp contrast, broadly prohibits "deceptive acts or practices in or affecting commerce" generally. 15 U.S.C. § 45(a).

In short, reading the FTC Act to encompass a greater range of behavior than the Securities Exchange Act would comport with the substantive differences in the two statutory schemes. Again, however, the Court need not even reach that issue because the government's theory of direct liability in this case is distinct from the aiding-and-abetting liability theory at issue in *Central Bank.*

B. LeadClick Is Liable For Misrepresentations Under Common Law Principles Of Agency.

As discussed, LeadClick is directly liable for its conduct under the joint-causation theories embraced in cases from *Regina* to *Neovi* and *Direct Marketing.* As the district court explained, however, LeadClick is independently liable for the misrepresentations of its affiliates because they were acting as LeadClick's agents, subject to LeadClick's control as principal.[9]

[9] Even in the securities law context, *Central Bank* does not apply to liability premised on agency principles. *See Suez Equity Investors v. Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001) (distinguishing *Central Bank* and *Wright* because "there was no allegation [in those cases] that the defendants were agents of

This Court and others have long held principals responsible under the FTC Act for the actions of their agents. *See, e.g.*, *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 13 (2d Cir. 1954) (affirming FTC's determination that defendants violated the FTC Act because of alleged misrepresentations by their salesmen); *FTC v. Stefanchick*, 559 F.3d 924, 930 (9th Cir. 2009) ("under the FTC Act, a principal is liable for the misrepresentations of his agent acting within the scope of the agent's actual or apparent authority"); *Goodman v. FTC*, 244 F.2d 584, 592-93 (9th Cir. 1957); *Int'l Art Co. v. FTC*, 109 F.2d 393, 396 (7th Cir. 1940). As this Court has explained, agency "depends on the existence of three elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking." *Cleveland v. Caplaw Enterprises*, 448 F.3d 518, 522 (2d Cir. 2006) (internal quotation marks omitted). As discussed below, LeadClick's relationship with the affiliates it engaged for LeanSpa satisfies all of these elements.

the alleged defrauder, acting for the defrauder"); *cf. Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1430-31 (3d Cir. 1994) ("courts imposing liability on agency theories"—as opposed to aiding and abetting—"are not expanding the category of affirmative conduct proscribed by the relevant statute; rather, they are deciding on whose shoulders to place responsibility for conduct indisputably proscribed by the relevant statute").

More specifically, the relationship among LeanSpa, LeadClick, and the affiliate marketers fits the pattern of a principal-agent-subagent relationship:

> A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal. The relationship[] between a subagent and the appointing agent … [is a] relationship[] of agency….

Restatement (Third) of Agency § 3.15 (2006).[10] Indeed, the Tenth Circuit has deemed a merchant's use of affiliate marketing arranged through an affiliate network to be equivalent to a subagency relationship. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1236, 1251 (10th Cir. 2013) (citing Restatement § 3.15).

The same pattern exists here: LeanSpa (principal) engaged LeadClick (agent) to generate traffic to LeanSpa's website.[11] LeadClick then engaged

[10] *See* Restatement (Second) of Agency § 362, cmt. a (1958) (a subagent "is also … an agent of the agent and subjects the latter to liability within the sphere of activity in which he is authorized to act").

[11] Although LeadClick denies an agency relationship between it and LeanSpa (LeadClick Br. 52, n.132), it is clear from their contract that LeanSpa "engage[d] [LeadClick's] marketing services including [LeadClick's affiliate] Network to generate 'Actions' on behalf of" LeanSpa. R. 243a (PX 24); *see* R. 944a-945a (PX 27) (LeanSpa asks LeadClick, "are you still working on bringing more [publishers] to the offer?" LeadClick's account manager replies, "Our guys are working hard, and I even brought one in myself this morning…."). It is also clear that LeadClick acted on LeanSpa's behalf by engaging affiliates to generate traffic for LeanSpa to dilute LeanSpa's high chargeback ratio. *See* p. 9, *supra*; R. 11a (Op. 11).

affiliate marketers (subagents) to drive consumer traffic to LeanSpa's websites.[12] *See* pp. 4-5. In undertaking this marketing, the affiliates acted on behalf of and for the benefit of both LeanSpa and LeadClick. They acted for LeanSpa's benefit because they generated traffic leading to orders of LeanSpa's products; they acted for LeadClick's benefit because LeadClick earned a commission for each order that resulted from traffic generated by its affiliates. R. 215a (PX 56, Davidson Depo. 118-19) (LeadClick affiliate explains that "the more money I make, the more money [LeadClick] make[s] because they're taking their cut from each sale").

In arguing that it had no agency relationships with the affiliates it engaged to drive traffic to LeanSpa's websites, LeadClick relies primarily on contractual boilerplate disclaiming an agency relationship with those affiliates. But as this court has recognized, "[s]lavish deference to contractual language is inappropriate" in determining the existence of an agency relationship. *Cleveland*, 448 F.3d at 523. "Agency is a legal concept which depends on the manifest *conduct* of the parties, not on their intentions or beliefs as to what they have done." *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 523 F.2d 527, 537 (2d Cir. 1975) (emphasis added).

[12] *See* R. 370a-377a (PX 25); R. 23a (Op. 23).

Thus, in *Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994), this Court found a principal-agent relationship between landlords and a real estate firm where the landlords gave the firm "listings of their apartments and their criteria for acceptable tenants" and, in turn, the firm "engaged in the business of renting these apartments and in 'screening' the applicants to make sure that they met [the landlords'] specifications." *Id*. at 387. As in *Cabrera*, LeadClick provided affiliates with merchant offers and the criteria for marketing. *See, e.g.*, R. 950a-953a (PX 105). The affiliates then engaged in that marketing, modifying their websites to reflect the particular merchant's offer. *See, e.g*., R. 746a (PX 112) (affiliate engaged by LeadClick to promote LeanSpa sends LeadClick a copy of its webpage, saying "let me know if any changes are required on the landing page"); R. 213a (PX 56, Davidson Depo. 79-80) (affiliate made changes to his website after LeadClick told him "to get my page updated" to promote new LeanSpa product). Under *Cabrera*, that behavior shows a mutual agreement to enter an agency relationship.

The undisputed evidence also shows, as the district court found, that "LeadClick had the authority to control the affiliate marketers' use of fake news pages." R. 24a (Op. 24). LeadClick had the contractual right to review the affiliates' webpages and "to withhold or refuse approval on any website … for any reason, whatsoever." R. 371a (PX 25). After it approved affiliates to market

LeanSpa products, LeadClick continued to exercise control. For example, it required affiliates to change their pairing of products in fake news sites promoting a two-step weight-loss program. R. 158a (PX 22, Chiang Depo. 59-60); *see* p. 8, *supra*. And after the FTC sued various affiliate marketers for using fake news sites in April 2011, LeadClick forbade its affiliates to advertise diet products without the merchant's approval of that marketing. R. 160a (PX 22, Chiang Depo. 70-71). Thus, LeadClick unquestionably exercised the requisite control over its affiliates' fake news site marketing, including power to give "interim instructions" (LeadClick Br. 45). *See Cabrera*, 24 F.3d at 387 (control demonstrated by evidence that the "landlords had the power to deny further listings to [the realty firm] if the brokerage referred unacceptable applicants for the apartments").[13]

LeadClick argues that its affiliates were controlled more "by the merchants than by LeadClick." LeadClick Br. 52. Even if that were true, however, it is legally irrelevant: an agent can serve more than one principal. Indeed, that is the nature of a subagency relationship: LeadClick exercised direct control over the affiliates it engaged to provide marketing for LeanSpa, while LeanSpa exercised indirect control over their marketing activities. *See 1-800 Contacts*, 722 F.3d at

[13] Contrary to LeadClick's unsupported contention that the principal must have the power to control the agent's conduct "in a detailed way" (LeadClick Br. 46), this Court has recognized that "the control asserted need not 'include control at every moment; its exercise may be very attenuated.' " *Cleveland*, 448 F.3d at 522, quoting Restatement (Second) of Agency § 14 cmt. a.

1251 ("the principal's control [over a subagent] is indirect"). Even if LeanSpa had some indirect control over the fake news sites, LeadClick exercised direct control over them.[14]

Finally, there is no merit to LeadClick's claim that no agency theory was properly presented because the Complaint did not plead agency. In fact, the Complaint alleged that LeadClick made misrepresentations in fake news sites "directly or *through affiliates acting on [its] behalf and for [its] benefit*." R. 133a, 141a (Dkt. No. 246 at ¶¶ 82, 122) (emphasis added). That language plainly encompasses an agency theory. The Complaint did not need to specify the word "agency." To the contrary, "plaintiffs are required to plead facts not legal theories." *Brown v. City of Oneonta*, 235 F.3d 769, 783 (2d Cir. 2000). Thus, "[a] complaint need not set out the correct legal theory on which the claim is based, so long as the complaint provides full notice of the circumstances giving rise to the plaintiff's claim." *Morris v. Schroder Capital Mgmt. Int'l*, 445 F.3d 525, 530 n. 3 (2d Cir. 2006). The Complaint here provided such notice. LeadClick, moreover, can show no prejudice (and claimed none below) from the government's reliance

[14] The affiliates were indisputably acting "within the scope of [their] actual or apparent authority" (*Stefanchick*, 559 F.3d at 930) for purposes of agency liability principles: LeadClick engaged them to provide website marketing for LeanSpa and approved their use of fake news sites. *See also* Restatement (Third) of Agency § 3.01, cmt. c ("A principal may ratify an agent's acts when the agent did not act with actual authority, thereby replicating the effects of actual authority.").

on an agency theory because the facts that show agency are the very same facts that prove LeadClick's direct liability.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE COMMUNICATIONS DECENCY ACT DOES NOT IMMUNIZE LEADCLICK'S UNLAWFUL CONDUCT.

Section 230 of the Communications Decency Act states that "[n]o provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). LeadClick claims immunity under that provision. But Section 230 is inapplicable here for two independent reasons. First, LeadClick is not an "interactive computer service" provider within the meaning of that provision. Second, as the district court held, LeadClick itself was an "information content provider" that played a central role in supplying deceptive messages to consumers. Either ground is an adequate basis for rejecting LeadClick's Section 230 claim.

A. LeadClick Was Not A Provider Of An Interactive Computer Service.

Although the district court did not reach the issue, LeadClick's Section 230 claim founders on a threshold defect: it was not a provider of an "interactive computer service." The statute defines that term to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2).[15] As the cases cited by LeadClick itself reflect, interactive computer services covered by Section 230 include ISP services,[16] websites where users can post information or access content,[17] search engines,[18] and similar platforms that interact with consumers.

LeadClick implausibly claims to fit the same statutory definition based on the functions of the "HitPath" software platform that it used to track the traffic and any resulting sales from the affiliates' websites to the underlying merchants' site (such as LeanSpa's). HitPath operated as follows. When LeadClick approved an

[15] "Access software provider" is defined as:

> a provider of software (including client or server software), or enabling tools that do any one or more of the following:
>
> (A) filter, screen, allow, or disallow content;
> (B) pick, choose, analyze, or digest content; or
> (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

47 U.S.C. § 230(f)(4).

[16] *See, e.g.*, *Zeran v. AOL*, 129 F.3d 327, 329 (4th Cir. 1997) (internet service provider that allowed subscribers to "transmit information privately via electronic mail, or … communicate publicly by posting messages on [online] bulletin boards"); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (internet service provider that allowed users to connect to the Internet and provided email services).

[17] *See, e.g.*, *Universal Commc'ns Sys. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007) (anonymous postings on "Internet message board operated by" defendant); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 252 (4th Cir. 2009) (consumer reviews posted on defendant's website).

[18] *See, e.g.*, *Murawski v. Pataki*, 514 F. Supp. 2d 577, 582 (S.D.N.Y. 2007) (search engine); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (search engine).

affiliate to promote a merchant offer, it gave the affiliate a link with unique identifiers for the particular affiliate and merchant. A publisher placed that link on its website, and when a consumer clicked on it, he was directed to the HitPath server, which then tabulated the click and forwarded the consumer to the underlying merchant's website.[19] R. 155a (PX 22, Chiang Depo. 39); R. 380a-381a (PX 46, Prokop Depo. 16-19).

That process did not qualify as an "interactive computer service" eligible for CDA immunity. LeadClick argues that HitPath "provided or enabled computer access by multiple users to a computer server" within the meaning of the CDA because it allowed consumers "access to the server that ran the HitPath software and from which they were directed to the merchants' sites." LeadClick Br. 22. But consumers did not "access" the HitPath server for purposes of the statutory definition.[20] As LeadClick itself confirms (LeadClick Br. 10), consumers were not attempting to navigate to the HitPath server. It was completely invisible to them,

[19] LeadClick's brief refers to the server on which the HitPath software resided as the "WebApps server." WebApps was the firm that licensed the HitPath software. LeadClick Br. 10. For ease of reference, we refer to both server and software as "HitPath."

[20] LeadClick asserts that "access" means only a "means of approaching" and that "[c]onsumers undeniably approached" the HitPath server. LeadClick Br. 22, n.51. In the computer networking context, however, the term "access" does not mean "approach," but "obtain, examine, or retrieve (data or file)." *See* Oxford English Dictionary (online version Sept. 2014; accessed October 10, 2015). Here, it is undisputed that consumers did not "obtain, examine, or retrieve" any information from the HitPath server.

displayed no content to them at all, and provided them with no perceivable services. There was no meaningful "interaction" between HitPath and the consumer. R. 381a-382a (PX 46, Prokop Depo. 20-21) (HitPath "is 100 percent in the background"). It merely served a hidden routing function that allowed LeadClick to track traffic and sales.[21]

Furthermore, LeadClick's unreasonably expansive interpretation of Section 230 would is unhinges from Congress's purpose in enacting that provision: to advance "the availability of educational and informational resources to our citizens," and "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(1), (a)(3). These provisions reflect the CDA's purpose of enhancing and protecting an individual's ability to speak, learn, and otherwise engage in communication. The affiliates' websites and LeanSpa's

[21] LeadClick argued below that under *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009), it did not matter that HitPath is invisible to consumers. The defendant there sold software that consumers intentionally installed on their computers and that was "designed to communicate via the Internet" to use "online databases" and "update services." *Id*. at 1171. The court rejected an argument that the service constituted an "interactive computer service" only if users retrieved the software updates "volitionally" and not automatically. It explained that either way, the service "*does* provide users with access to the new … content that is available on its servers." *Id*. at 1176 (emphasis original). The case has no bearing here because it involved a service that consumers intentionally used. By contrast, no consumer intended to use HitPath.

websites may have provided consumers with this type of interaction (albeit deceptively). LeadClick's HitPath tracking software, however, did not.

B. The District Court Correctly Held that LeadClick Is Not Entitled To Section 230(c)(1) Immunity Because LeadClick Itself Was An Information Content Provider.

In any event, this Court need not resolve whether HitPath was an "interactive computer service" because, as the district court correctly concluded, LeadClick is independently ineligible for Section 230(c)(1) immunity because it was acting for relevant purposes as an "information content provider" in its own right. "Information content provider" means "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The district court held that LeadClick's solicitation of and material contributions to the fake news site marketing for LeanSpa made it "responsible, in whole or in part, for the creation or development" of this deceptive content.

That conclusion follows as a matter of logic from the court's holding that LeadClick is a principal responsible for the actions of its agents. The content of the phony sites is properly imputed to LeadClick, which thus is an information content provider not entitled to CDA immunity. Section 230 does not disturb common law agency principles. Indeed, in *Batzel v. Smith*, 333 F.3d 1018, 1035-

36 (9th Cir. 2003), the court accepted without question that agency law principles apply under Section 230 (although it ultimately found no principal-agent relationship).

Furthermore, as discussed at pages 5-9 above, undisputed evidence shows that LeadClick deliberately orchestrated the use of fake news sites to drive consumer traffic to LeanSpa's websites. LeadClick reached out to affiliate marketers that it knew used fake news sites, recruited them to promote LeanSpa's products, and actively managed their activities. LeadClick paid the affiliates for this deceptive marketing and was paid by LeanSpa in turn. Such activities make LeadClick "responsible, in whole or in part, for the creation or development" of the offending content.

LeadClick is not immune under the CDA for the same reason that the defendant was not immune in *FTC v. Accusearch, Inc.,* 570 F.3d 1187 (10th Cir. 2009). Accusearch operated a website that sold confidential telephone records, which it paid researchers to obtain. *Id*. at 1191. When the FTC sued it, Accusearch claimed immunity under the CDA, arguing that it merely displayed the content that originated from its third-party researchers. *Id*. The court rejected this argument and held instead that Accusearch "developed" the confidential telephone records within the meaning of the CDA. It reasoned that "[b]y paying its researchers to acquire telephone records, knowing that the confidentiality of the records was protected by law, it contributed mightily to the unlawful conduct of its researchers." *Id*. at 1200. The court rejected Accusearch's claim that it simply served as a neutral intermediary between information seekers and the researchers Accusearch retained, explaining that Accusearch "solicited requests for confidential information protected by law, paid researchers to find it, [and] knew that the researchers were likely to use improper methods." *Id*. at 1201. A similar description applies to LeadClick, which solicited bogus news sites, paid affiliates to display phony content, and knew that they would do so.

The en banc Ninth Circuit rejected a CDA defense for similar reasons in *Fair Hous. Council of San Fernando Cnty. v. Roommates.com, LLC,* 521 F.3d 1157 (9th Cir. 2008) (en banc). There, the defendant's website matched landlords and tenants. Users' mandatory personal profiles were required to specify sex, sexual orientation, and whether the would-be tenant had children. *Id*. at 1161. Plaintiff alleged those requirements violated fair housing laws. Roommates.com sought immunity pursuant to § 230(c)(1). The court rejected that defense and held that Roommates was an information content provider not entitled to immunity. "By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers," the court explained, Roommates served as "much more than a passive transmitter of information provided by others," but became "the developer, at least in part, of that information." *Id.* at 1166. Furthermore, Roommates was responsible "for the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal." *Id.* at 1170. The court stressed that defendant "both elicits the allegedly illegal content and makes aggressive use of it in conducting its business." *Id.* at 1172.

LeadClick's involvement in the development and dissemination of bogus news reports is at least as extensive as that of the defendants in *Accusearch* and *Roommates.com*. Like Accusearch, LeadClick was hired by customers to provide a service (consumer traffic over the Internet) and contracted with third-party providers (affiliate marketers) to fulfill that service. Like Accusearch, LeadClick solicited those third-party providers, knew that they used or "were likely to use improper methods" (fake news sites), paid its third-party providers, and made money from that service. LeadClick' actions, like those of Accusearch, "were intended to generate such content."

Like the defendant in *Roommates.com*, LeadClick is responsible "for the predictable consequences" of a business model that both "elicits" illegal conduct and "makes aggressive use of it in conducting its business." LeadClick is therefore much more than a "passive transmitter of information provided by others." It is, at least in part, responsible for the development of that information and thus does not qualify for § 230(c)(1) immunity.

As these cases further demonstrate, LeadClick misses the mark when it argues that immunity analysis here turns on whether LeadClick helped create or develop particular aspects of the fake news sites. *See* LeadClick Br. 26. As in *Accusearch* and *Roommates.com*, LeadClick's responsibility under the CDA for the content of the deceptive marketing arises not from its direct creation of the particular deceptive content, but from its deliberate recruitment and selection of fake news site marketers.

Nor is there merit to LeadClick's argument that it cannot be responsible for the creation of a fake news format that predated its business with LeanSpa. That argument ignores the term "development" in the definition of "information content provider" and improperly focuses only on "creation." In *Accusearch*, the Tenth Circuit rejected a similar argument that the defendant "made nothing new nor brought anything into existence." 570 F.3d at 1198. If that were enough for CDA immunity, the court explained, "the word *development* would add nothing not already conveyed by the word *creation.*" *Id*. (emphasis original). That fake news sites were already in existence when LeanSpa signed on with LeadClick does nothing to diminish LeadClick's use of fake news sites as the principal means to generate sales for LeanSpa.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE DISCRETION WHEN IT ORDERED CORELOGIC TO DISGORGE ILL-GOTTEN GAINS RECEIVED FROM LEADCLICK.

CoreLogic did not violate the FTC Act, but it received proceeds of the unlawful acts of its subsidiary LeadClick, and it did so after learning of facts indicating that those proceeds were ill-gotten. The district court, exercising equitable discretion, ordered CoreLogic to disgorge those ill-gotten gains. There is no dispute here that the district court had equitable authority to order disgorgement where appropriate. There also is no dispute that CoreLogic received $4.1 million in ill-gotten funds from LeadClick. The only question is whether the district court properly held CoreLogic liable as a relief defendant. The answer is yes, both because CoreLogic was LeadClick's investor rather than its creditor and because, in any event, CoreLogic cannot claim to have received the funds in good faith.

A. CoreLogic Has No Legitimate Claim To The Money Because Its Cash Payments To LeadClick Were Not Made In Exchange For Consideration.

A court may order equitable disgorgement against recipients of ill-gotten funds when they lack a legitimate claim to them. *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998); *see FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365-67, 372-74 (2d Cir. 2011). To have a "legitimate claim" to ill-gotten gains transferred to it, a relief defendant must "have provided some form of valuable consideration in good faith in return for the proceeds of fraud." *CFTC v. Walsh*, 618 F.3d 218, 226

(2d Cir. 2010). A loan may constitute valuable consideration, but as CoreLogic acknowledges, a gratuitous transfer of money does not. CoreLogic Br. 22, citing *SEC v. Better Life Club of America, Inc.*, 995 F. Supp. 167, 180 (D.D.C. 1998) , *aff'd*, 203 F.3d 54 (D.C. Cir. 1999), and *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005).

CoreLogic makes essentially two arguments: first, that its payments to LeadClick were essentially loans, despite the lack of any repayment promises; and second, that it should be immune from equitable disgorgement even if the payments were not equivalent to loans and CoreLogic was thus acting as an investor rather than a creditor. Neither argument has merit.

First, CoreLogic's payments to LeadClick were not loans, either formal or informal. CoreLogic made the payments pursuant to a company-wide policy to fund any ongoing subsidiary business without any assurance of repayment. R. 37a (Op. 37); R. 938a (PX 9, Livermore Depo. 17) ("we collected funds and we advanced funds for all the businesses and that was the normal course"). A CoreLogic official testified that "as long as the business was in existence I think our expectation is that we would continue to meet the obligations of the business—even if we didn't like it." R. 938a (PX 9, Livermore Dep. 18). And CoreLogic in fact imposed no legal obligation on LeadClick to repay the money. The advances also bore none of the hallmarks of a loan, such as an "agreed upon repayment schedule or repayment deadline," "security for those advances," a "written loan agreement," or "interest due." R. 38a (Op. 38); R. 939a (PX 9, Livermore Depo. 21-22); R. 668a (PX 72, Balas Dec. ¶ 15). In short, the payments were not loans, either in legal status or in practical effect. "[A] claimed ownership interest must not only be recognized in law; it must also be valid in fact." *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 (4th Cir. 2002). "Otherwise, individuals and institutions holding funds on behalf of wrongdoers would be able to avoid disgorgement (and keep the funds for themselves) simply by stating a claim of ownership, however specious." *Id*.

CoreLogic suggests that it conferred something akin to loan status on these payments by virtue of implementing a "shared services" program, through which CoreLogic made cash advances and collected funds from LeadClick and other subsidiaries. CoreLogic Br. 24-25. That argument is perplexing. The shared services program was merely the bureaucratic mechanism CoreLogic used to transfer funds to and from LeadClick. It proves nothing about CoreLogic's right to repayment. CoreLogic seems to argue that the shared services program demonstrates that these intercompany transfers were not "sham" transactions, but that is irrelevant: just because the transfer of funds is not a sham does not mean that the transferor has a right to repayment.[22] And however useful or common such cash management services are today, they cannot *ipso facto* serve as a vehicle for insulating ill-gotten money from the reach of a court's equity power.

CoreLogic alternatively argues that it should be immunized from equitable disgorgement even if its advances to LeadClick were not loans but, as the district court found, mere "investments made in the hopes of future returns." R. 36a (Op. 36). CoreLogic claims that it is beyond the reach of equity because, it says, only a "mere conduit" or an "empty vessel" can be subject to equitable disgorgement. CoreLogic Br. 29.

That position would radically restrict the scope of equity, and unsurprisingly CoreLogic cites no precedent for it. At bottom, CoreLogic argues that any investment in a business gives the investor a legitimate claim to the ill-gotten gains of the business and places the money beyond the reach of equity. If that were so, wrongdoers could immunize their unlawful proceeds (and defeat full relief to victims) simply by transferring money back to those who funded the enterprise.

[22] In passing, CoreLogic suggests that its back-end services were sufficiently valuable that, quite apart from its monetary payments to LeadClick, they independently served as consideration for the $4.1 million repayment it later collected from LeadClick. CoreLogic Br. 26-27. CoreLogic did not raise that argument below and has thus waived it. In any event, CoreLogic has presented no evidence that the value of these services even approaches $4.1 million or that the services were provided to LeadClick in exchange for any commitment to make that payment.

The creators of illegal schemes could easily create corporate structures to shield illegitimate assets. They could also "circumvent the [court's] power to recapture fraud proceeds, by the simple procedure of giving stock to friends and relatives." *Cavanaugh*, 155 F.3d at 137.

That is not the law, which is why courts inquire whether a relief defendant has a legitimate claim to ill-gotten gains before letting them off the equitable hook. Courts insist, for example, on evidence of a *bona fide* debt obligation entitling the relief defendant to repayment. *See, e.g.*, *Janvey v. Adams*, 588 F.3d 831, 834-35 (5th Cir. 2009) (holding that innocent investors in Ponzi scheme who purchased CDs from fraudulent bank had debtor-creditor relationship with the bank based on written agreements, and thus a legitimate ownership interest in CD proceeds received); *SEC v. McGinn*, 752 F. Supp. 2d 194, 214-15 (N.D.N.Y. 2010) (spouse not entitled to ill-gotten proceeds she received from husband's company as supposed loan repayment because she was not a *bona fide* creditor), *aff'd sub nom. Smith v. SEC*, 432 Fed. Appx. 10, 12-13 (2d Cir. 2011) (summary order); *SEC v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (finding a debtor-creditor relationship based on written agreements establishing legitimate ownership interest in funds); *Better Life Club of America*, 995 F. Supp. at 182 (rejecting relief defendant's claim to funds received from Ponzi scheme because she was not a *bona fide* creditor).

Indeed, this Court has upheld a district court's judgment that relief defendants claiming entitlement under a partnership agreement to distributions of ill-gotten gains have no legal right to those funds and are not immune from equitable disgorgement. In *SEC v. Aragon Capital Mgmt., LLC*, 672 F. Supp. 2d 421 (S.D.N.Y. 2009), the district court held that "[b]y choosing to operate … as a limited partnership, [defendant] created a situation in which any funds paid into the partnership by the limited partners would ordinarily be constituted equity contributions, not loans." *Id.* at 442-43. It therefore followed that the partners "are not entitled to any offset against the SEC's claim for disgorgement" of profit distributions resulting from unlawful activity. *Id.* This Court affirmed, holding that because the relief defendants had no legal entitlement to those distributions under state partnership law, they lacked a legitimate claim to those distributions. *SEC v. Rosenthal*, 426 Fed. Appx. 1, 3-4 (2011). *Rosenthal* defeats CoreLogic's claim (CoreLogic Br. 30) that relief defendants have legitimate claims to equity distributions.

In contrast, CoreLogic's cases are simply inapposite. For example, in *FTC v. Direct Mkt'g Concepts, Inc.*, 648 F. Supp. 2d 202 (D. Mass. 2009), the court denied equitable disgorgement not because investors are categorically immune from it, but because the court was uncertain whether the shareholder distributions at issue included ill-gotten gains in the first place. *Id.* at 222-23 (amounts "may or may not have included [tainted] proceeds" and "may have been a legitimate distribution"). Here, there is no dispute that the funds CoreLogic received from LeadClick are ill-gotten. Similarly, in *SEC v. Heden*, 51 F. Supp. 2d 296 (S.D.N.Y. 1999), an insider trading case, only the *profits* of the unlawful trades were ill-gotten. The court held that the relief defendant had no entitlement to those funds, but had a legitimate claim to the initial principal—not ill-gotten—used to purchase the securities. *Id*. at 301-02. And in *SEC v. Quan*, No. CIV 11-723, 2014 WL 4670923 (D. Minn. Sept. 19, 2014), the court held that a wife's financial contributions and non-monetary improvements to real estate purchased with her husband (the defendant) gave her a legitimate ownership interest in that property "to the extent of her direct and untainted contributions." *Id*. at *19. That holding is narrow and does not support CoreLogic's sweeping claim that an investment in a legally culpable venture insulates the investor from equitable disgorgement of proceeds it later receives from that venture.

Of course, the ultimate question in equitable disgorgement cases is not simply whether a court *has* equitable discretion to recoup ill-gotten gains that have found their way into the hands of a third party, but whether it should *exercise* that discretion. A court may have such discretion but choose not to order disgorgement because of various case-specific equitable factors, including the circumstances of the third party and the nature of its relationship with the wrongdoers. Here, however, the district court elected to exercise its discretion against CoreLogic on the particular facts of this case. That decision was reasonable. Indeed, as next discussed, the basis for exercising equitable discretion against CoreLogic was quite compelling.

B. CoreLogic Cannot Claim To Have Received The Ill-Gotten Funds In Good Faith.

CoreLogic's attempt to avoid equity fails for an independent reason as well. As noted, CoreLogic is immune from equitable relief only if it "[1] provided some form of valuable consideration [2] *in good faith*." *Walsh*, 618 F.3d at 226 (emphasis added). But even if (counterfactually) CoreLogic had provided "valuable consideration," CoreLogic knew of facts that should have alerted it that these funds were ill-gotten, and it therefore cannot claim to have acted "in good faith." *See* p. 11, *supra*.

Undisputed evidence shows that, by 2011, CoreLogic knew that LeadClick earned its money from fake news sites. The head of LeadClick's advertiser network testified that the fake news sites were discussed "openly" during meetings between LeadClick management and CoreLogic officials, when LeadClick management explained to CoreLogic why sales for their clients were "taking off." R. 168a-169a (PX 22, Chiang Depo. 167-171). By April 2011, CoreLogic officials also knew: (1) that LeadClick's increased revenues that year were primarily due to business with its top client, LeanSpa; (2) that LeanSpa had "benefited" from affiliate marketers who had been sued by the FTC for deceptive marketing practices; and (3) that LeadClick's merchant account had been frozen because the bank was worried about LeanSpa's increasing chargeback levels, a telltale sign of fraud. R. 908a (PX 4). CoreLogic officials also learned that LeanSpa was losing half its continuity plan customers every month, which likewise suggests fraud. R. 960a (PX 17); R. 345a-346a (PX 13, Chelew Depo. 108-09).

All this information showed that LeadClick's top customer in 2011 was operating a deceptive enterprise and that LeadClick's own revenues derived from deception. Possession of that information thus deprived CoreLogic of any claim that it received those revenues in good faith. *See SEC v. Constantin*, 939 F. Supp. 2d 288, 311-12 (S.D.N.Y. 2013) (inquiring if "knowledge as to the illicit source" of subject funds was imputed to each relief defendant); *CFTC v. Hanover Trading Corp*., 34 F. Supp. 2d 203, 204-05, 208 (S.D.N.Y. 1999) (inquiring if relief defendant "had sufficient knowledge of the nature of the [liability defendant's] conduct to make his retention of his compensation inequitable"); *compare Walsh,* 618 F.3d at 229 & n.8 (no equitable liability where relief defendant "had no notice that the money she received in her divorce was derived from fraud").[23]

[23] CoreLogic may argue that its good faith turns on the standard in fraudulent conveyance cases: whether it had "either actual or constructive knowledge" that LeadClick transferred funds to *defraud its creditors*. But that standard has no bearing here. Fraudulent conveyance law examines whether the *transfer itself* is fraudulent. Equitable disgorgement law examines whether the *underlying funds*

C. The District Court Correctly Rejected CoreLogic's Argument That Another CoreLogic Subsidiary Has An Independent Claim To The Ill-Gotten Gains.

The district court rejected CoreLogic's alternative argument that the $4.1 million transfer was actually a transfer to CoreLogic's subsidiary, CoreLogic US, Inc. ("CLUSI"), as payment against an outstanding promissory note and loan agreement. The court's decision was correct because CLUSI was an empty conduit that never had any genuine claim to or possession of the money.

The $4.1 million briefly passed through CLUSI's account before being swept automatically into CoreLogic's account. On August 25, 2011, LeadClick closed its principal bank account. Five days later, it deposited the balance into another account. On that day, the funds were "automatically swept" into an account of CLUSI, and then immediately transferred through another automated sweep to CoreLogic's account. CoreLogic Br. 10; R. 39a (Op. 39).

CoreLogic argues that, by virtue of this pass-through, CLUSI had a legitimate claim to the money for a brief interim period and that this claim effectively laundered the money and insulated it from equitable disgorgement once it arrived in CoreLogic's own account. CoreLogic Br. 37-40. This argument fails. CLUSI had no claim of its own to the money in the first place because the money

are illegitimate. *SEC v. Colello*, 139 F.3d 674, 676-77 (9th Cir. 1998). If the transferee had actual or constructive knowledge that they were, it is subject to equitable disgorgement.

simply transited the CLUSI account via an automated sweep process. CLUSI did not retain or otherwise benefit from LeadClick's money. Indeed, CoreLogic admitted that none of the funds were credited to the promissory note on which CoreLogic bases CLUSI's "independent" legitimate claim to these funds. R. 39a (Op. 39); R. 662a (PX 71, Balas Depo. 81-84) (noting that the last payment on the promissory note was August 2010). As the district court recognized, therefore, CoreLogic controlled the whole process—the money did not have to be routed through CLUSI's account at all, since CoreLogic ended up holding the funds. R. 39a (Op. 39). *See Walsh*, 618 F.3d at 225 ("[a] relief defendant is a person who *holds* the subject matter of the litigation.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 12,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and 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 Times New Roman 14-point font.

s/ Michele Arington
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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2015, I served the foregoing Final Form Brief for Appellees the Federal Trade Commission and the State of Connecticut on counsel of record by electronic service through the Court's CM-ECF system.

s/ Michele Arington
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