No. 12-2340

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Federal Trade Commission,
Plaintiff-Appellee,

v.

Kristy Ross, individually and
as an officer of Innovative Marketing, Inc.,
Defendant-Appellant,

and

Innovative Marketing, Inc., *et al.*,
Defendants

On Appeal from the United States District Court
For the District of Maryland
Hon. Richard D. Bennett
No. 1:08-cv-03233-RDB

Final Brief of the Federal Trade Commission

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Introduction

Appellant Kristy Ross placed millions of dollars of deceptive internet advertisements that scared consumers into buying security software they did not need. These consumers paid more than $163 million to Innovative Marketing, Inc., the company that Ms. Ross helped start and where she was part of the inner circle of leadership with four of her codefendants. After a two-day trial the district court rightly held her jointly and severally liable for Innovative Marketing's deceptive acts based on her participation in and knowledge of the deceptive acts and her position of control in the company.

Ms. Ross now appeals, basing much of her argument on the astounding—and false—argument that the district court never decided that the advertisements were deceptive. Not so. The district court unambiguously decided that issue in an order issued June 12, 2012, though Ms. Ross does not mention that dispositive order even once in her brief. Ms. Ross also urges the Court to reject liability standards for FTC actions crafted over thirty years and applied uniformly in every court of appeals to have considered them. That argument is likewise without merit and Ms. Ross's appeal should be rejected.

Jurisdictional Statement

The district court had jurisdiction under Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345. The district court's final judgment was entered September 24, 2012. (A001206.) A timely notice of appeal was filed October 24, 2012. (A001208.) This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court abused its discretion by (i) excluding expert testimony that was not relevant to any issue at trial, (ii) admitting evidence pursuant to the coconspirator exclusion to the hearsay rule, or (iii) admitting evidence pursuant to the residual hearsay exception.

2. Whether the district court correctly applied the standard uniformly adopted by other courts for holding individuals liable for corporate violations of the FTC Act.

3. Whether the district court's findings of fact were clearly erroneous.

4. Whether Section 13(b) of the FTC Act authorizes district courts to award relief ancillary to an injunction, including equitable monetary relief, in order to accomplish complete justice.

Statement of the Case

A. Nature of the case, course of proceedings, and disposition below.

This case involves an illegal scheme to sell computer software through internet "scareware"—advertisements that appeared while consumers browsed the internet, often mimicking the look of their computers' dialog boxes and claiming that their computers were infected with viruses, spyware, and "illegal" pornography. Millions of consumers were tricked into clicking on the ads and routed to websites offering to fix their fictitious security problems with defendants' software. These consumers spent more than $163 million on defendants' products.

The FTC brought suit in 2008 under Sections 5(a) and 13(b) of the Federal Trade Commission Act to halt these deceptive practices, naming Appellant Kristy Ross, Innovative Marketing Inc., five other individuals, and one other corporate entity. The cases against all of the defendants except Kristy Ross were resolved by default judgments against those who failed to appear or participate in the case (including Innovative Marketing) and settlements with the others. (A001179.)

Having left the United States,[1] Ms. Ross appeared in the case only through counsel, and did not participate in discovery except to answer a few routine questions about her background and education and decline to answer the rest on the ground that the answers might incriminate her. The FTC moved for summary judgment against Ms. Ross, seeking to hold her liable for her participation in and control over the deceptive practices of Innovative Marketing. In back-to-back orders issued over two days, the district court (1) held that "there is no genuine issue of material fact with respect to FTC Act violations perpetrated by Ms. Ross' co-defendants in this case" (A000925), and (2) denied summary judgment against Ms. Ross and set the matter for trial on the extent of her participation, control, and knowledge of Innovative Marketing's deceptive advertising practices. (A000911-23.)

The court decided several matters in advance of the trial. *First,* in light of its conclusion "that Innovative Marketing was engaged in deceptive advertising," the court rejected as irrelevant the proposed testimony of a proffered expert who would have addressed that issue

[1] Ms. Ross's whereabouts are unknown to the government. When repeatedly asked of her location, Ms. Ross declined to answer on the ground that her answer might somehow incriminate her.

anew. (A001103.) *Second*, in the same order the court held there was "no genuine issue of material fact with respect to the total amount of consumer injury," which is just under $163.2 million. (A001101-02.) *Third*, the court denied Ms. Ross's motion to exclude certain evidence as hearsay. (A001166, A001172.)

Following a two-day trial, the court held that the FTC had established "by a preponderance of the evidence" that Ms. Ross both "participated in" and "had authority to control the deceptive marketing scheme," that she did so "from its inception until it was interrupted by the FTC," and that she "had knowledge of the deceptive practices . . . or alternatively she clearly acted with reckless indifference and intentionally avoided the truth." (A001182, 1195-96, 1204.) The court enjoined Ms. Ross from marketing computer security software and engaging in deceptive marketing and held her jointly and severally liable for the consumer redress amount of $163,167,539.95. (A001204.)

This appeal followed.

B. Statement of the Facts.

1. Formation of the Innovative Marketing, Inc. Joint Venture. Innovative Marketing, Inc. was formed in 2002 as a

collaborative venture between Appellant Kristy Ross and defendants Daniel Sundin and Sam Jain. (A001597-98.) The three partners came together at the instigation of Ms. Ross, who introduced Mr. Sundin and Mr. Jain to each other. (A002890, 1742, 3002.) Mr. Jain then brought on defendant Marc D'Souza, who had expertise in sales and marketing, as a fourth partner. (A001184.)

According to a sworn affidavit of Mr. D'Souza, the business purposefully employed a "convoluted, complex, and opaque business structure[]," designed to conceal "the identity of the true owners and operators" and to "confuse customers and regulators." (A003014.) In sworn affidavits, however, the other three principals admitted to having the following roles: Ms. Ross was the company's Vice President of Business Development, Mr. Jain was its Chief Executive Officer, and Mr. Sundin was its Chief Operating Officer and later Chief Technology Officer.[2] (A001589, 1596, 1741.) Although they did not reduce their agreement to writing, each of them was entitled "to certain percentages of [the company's] profit." (A001597.) Ms. Ross and Mr. Jain initially

[2] The three principals stated in affidavits that they performed these roles without any title from the company's inception, though they were only formalized in 2006. (A001589, 1596.)

deferred their compensation, leaving it "in the company" to grow the business. (A001744.) Upon joining, Mr. D'Souza was also entitled to a percentage of the company's monthly profits, and his compensation agreement likewise was not reduced to writing. (*Id.*; A001746.)

The company eventually grew to over 600 employees, although it never had more than a handful of officers[3] and the four principals were the only individuals entitled to a share of the profits. (*Id.*)

2. The Canadian Litigation. At the end of 2006, the principals of Innovative Marketing had a falling out. Mr. Sundin and Mr. Jain subsequently sued Mr. D'Souza in a lawsuit over Innovative Marketing's profits in the Ontario Superior Court of Justice. In the course of the suit, each of the four principals, Ms. Ross, Mr. Sundin, Mr. Jain, and Mr. D'Souza, filed sworn affidavits describing the formation of Innovative Marketing as well as their respective responsibilities and compensation. Ms. Ross expressly adopted the affidavits of Mr. Jain and Mr. Sundin, stating that she agreed with them.[4]

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[3] Ms. Ross admits she was a "former officer" in her brief. (Opening Br. 4.)

[4] Ms. Ross has not disputed that she adopted these affidavits. (*See*, *e.g.*, A001004, 1055.)

3. Ms. Ross's Role. Innovative Marketing's main business consisted of selling computer security products marketed through deceptive internet advertisements. The products included, among others, WinFixer, WinAntivirus, WinAntiVirusPro, WinAntiSpyware, Popupguard, WinFirewall, InternetAntispy, WinPopupguard, ComputerShield, WinAntispy, PCsupercharger, ErrorSafe, SysProtect, DriveCleaner, ErrorProtector, and SystemDoctor. (A001186.)

Ms. Ross's assertion that she was a mere "media buyer" for Innovative marketing is contrary to the record. Ms. Ross was a corporate officer and the cornerstone of a crucial aspect of the company's business—its deceptive ads for computer security software. (A001188-89.) Her activities included managing large advertising accounts for the company, approving the deceptive advertisements for distribution, and approving company expenditures. (*Id.*) Not only did she review the content and appearance of advertisements while they were in development, she made specific changes to advertisements, such as instructing developers to remove the word "advertisement" on two occasions, and instructing them to make the ads more aggressive. (A001189.) Ms. Ross further managed and at times reprimanded and

disciplined subordinates—and even entire departments—that were responsible for technical aspects of the deceptive scheme, such as the company's servers and domain names. (*Id.*)

Ms. Ross also had an important role in overall company management. Not only was she the Vice President of Business Development, the responsibilities of which she described as including business expansion, sales and marketing, and product optimization (A003004), Ms. Ross also assumed the duties of Chief Operating Officer when a medical condition forced Mr. Sundin to vacate that role. (A001600, A003004.) At times, Ms. Ross had access to Mr. Sundin's email and was copied on all email sent to him. (A001187.) In his sworn affidavit Mr. Sundin praised her as "a savvy manager" and "technically knowledgeable in my areas of computer software design as well as marketing skills." (A0001600, A003005.)

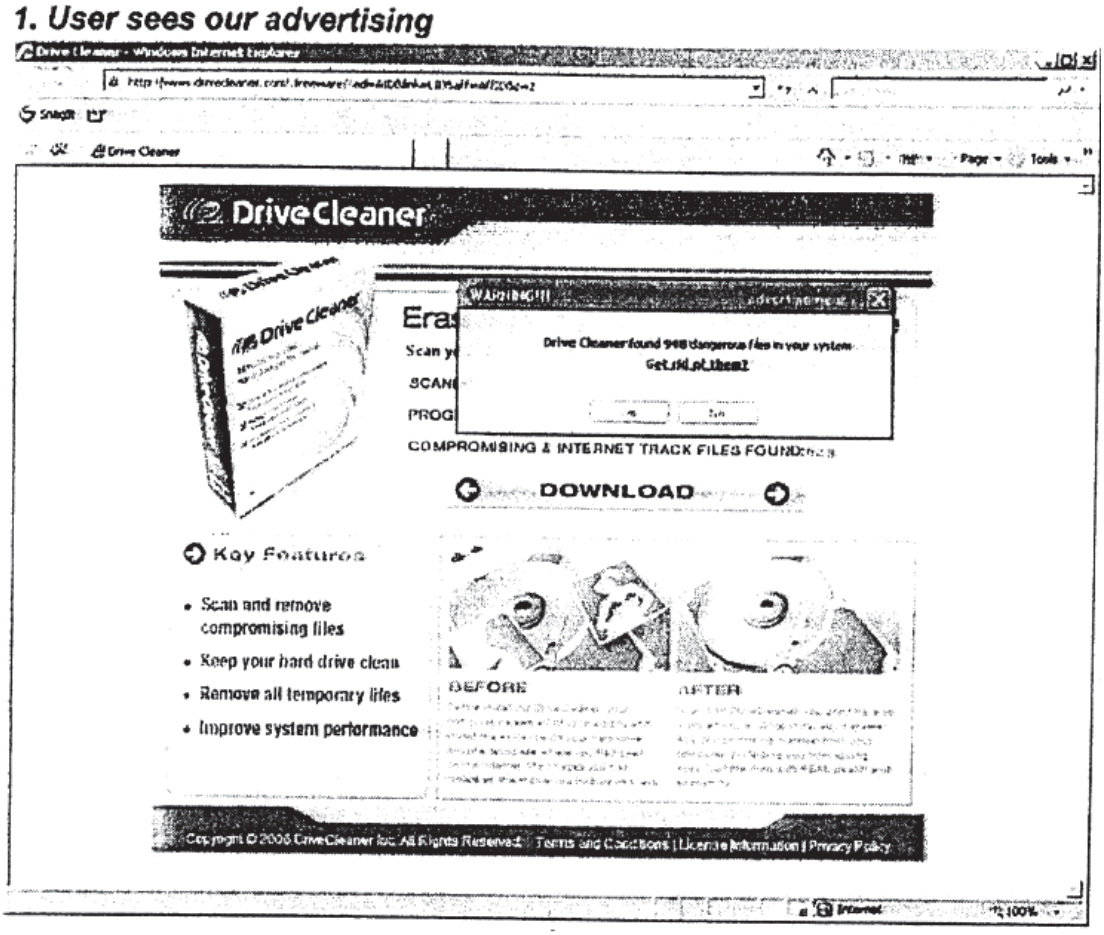
In managing Innovative Marketing's placement of its deceptive advertisements Ms. Ross claimed responsibility for more than 500 contracts with internet advertising networks, for which Innovative Marketing was often the biggest client. (A003606.) Over a period of five years, Ms. Ross and Innovative Marketing placed more than one billion

advertisements for the company's products, many featuring false "system scans" that purported to detect malicious software, "illegal" pornography, or critical system errors on consumers' computers. The ads induced customers to purchase Innovative Marketing's software products at a cost of up to $100 to fix these non-existent problems. Ms. Ross personally placed millions of dollars in deceptive advertising for these products, including for WinFixer, WinAntivirus, ErrorSafe, DriveCleaner, ErrorProtector, and SystemDoctor. (A003005-06.)

4. Innovative Marketing's Deceptive Business Practices. In his affidavit, Innovative Marketing's Chief Operating Officer—Mr. Sundin—laid out the process by which a consumer would purchase one of the company's products.[5] (A001599, 1605-06.) The first step of the process, according to Mr. Sundin, was when the "[u]ser sees our advertising." (A001605.) This did not occur because consumers were looking for security software or had purposefully visited Innovative Marketing's website. Rather, the advertisement would simply appear on the user's screen while they were browsing unrelated sites on the internet.

[5] Ms. Ross adopted Mr. Sundin's affidavit in a sworn affidavit of her own. (A001589.)

To illustrate this initial step Mr. Sundin included a screen shot of one of the company's deceptive advertisements. (*Id.*) The advertisement, for the DriveCleaner product, is typical of Innovative Marketing's practices:



(A001605.) As part of this ad, a dialog box appears, mimicking the dialogs generated by consumers' computers, with the title, "WARNING!!!" The dialog box states, "DriveCleaner found 948 dangerous files on your system. Get rid of them?" (*Id.*) Clicking on the

"Yes" button caused installer software to be downloaded and run.[6] (A001605.) The user would then be prompted to agree to Innovative Marketing's license agreement and provide payment. (A001605-06.)

Underneath the deceptive dialog box, the advertisement used an animated "scanner" to make it appear that a scan was actually occurring.

To bolster that impression, a series of file names appeared next to the word "Scanning," the "Progress" bar appeared to show the "scan"

[6] This ad generated numerous complaints to Ms. Ross from the advertising networks where she placed it because the installer would often run even if the consumer clicked on the "Cancel" button or on the "X" to close the dialog box. (*See* A003758-59.)

progressing, and the tally of "compromising" files counted upward to 948. In fact, all of these representations were false. The advertisement did not and could not perform any scan of consumers' computers or detect any problem files. The advertisement was effectively an animated movie that showed the same files being "scanned," the same movement of the progress bar, and the same result of 948 "dangerous files" every time it was played and regardless of whose computer it was supposedly "scanning." (FTC Ex. 63, Johnson Expert Report 493-96; Ex. 58, Nolet Rebuttal Expert Report 162.)

The record is replete with numerous examples of similar advertisements, all of which follow the same pattern: The consumer is deceived into believing that some problem has been detected on his computer and is induced to download and purchase Innovative Marketing's software. Some examples include:

A DriveCleaner ad purports to have detected visits to "Adult websites" and "Illegal websites," and falsely says that graphic URLs such as "gayanalsex.com," and "asianteens.net" were visited. (A003033.)

A WinAntiVirus ad falsely tells consumers: "WARNING: YOUR CURRENT ANTIVIRUS PROTECTION IS NOT EFFECTIVE!" and

falsely claims, "Your system is currently sending private information and documents to a remote computer." (A003028.)

Several WinAntiVirus ads—falsely warning that "YOUR CURRENT ANTIVIRUS PROTECTION IS NOT EFFECTIVE!" and "YOUR PRIVATE INFORMATION IS BEING EXPOSED"—deceptively mimicked the look of the Microsoft Windows XP Security Center, a program bundled with Microsoft Windows XP that runs automatically and notifies consumers when their security settings put them at risk. (A003029.)

These advertisements and many many more like them—specifically designed to scare consumers into believing that they had errors, pornographic files, viruses, and dangerous files on their computers—were widely disseminated to consumers. Consumers alarmed by the false claims were fooled into purchasing Innovative Marketing's software products. (A001186.)

The FTC received approximately 3,000 complaints from consumers about Innovative Marketing's products and advertising. (*Id.*) More than fifty consumers submitted sworn declarations in support of the FTC's motion for summary judgment, describing their experiences

with 47 of the Innovative Marketing's products. (*Id.* n.6.) No matter which product the Defendants were pitching, the consumers' experience was the same. While browsing the internet, they encountered a pop-up purporting to show that their computer was infected with a virus, had system errors, or contained pornography or other dangerous material, and recommending they install Innovative Marketing's software to fix the problem. More than a million consumers fell for it and purchased the software, spending more than $163 million.[7] (A001186, A001102.)

5. Ms. Ross's Participation and Knowledge of the Deceptive Nature of the Advertisements. Several of the 500 advertising contracts Ms. Ross had responsibility for were with an advertising network known as MyGeek. (A001189.) Ms. Ross opened and managed more than 50 accounts with MyGeek, which disseminated Innovative Marketing's deceptive advertisements for an 18-month period, displaying well over 600 million impressions to consumers across

[7] To add insult to injury, many of the consumers reported that the software either failed entirely to function or actually damaged their computers. (*E.g.*, Fieler Decl. 26-27; Furney Decl., 30-31; Hildebrand Decl. 38-39; Pritchett Decl. 74-75.) Consumers also reported that the software was forced onto their computers without their consent. (Small Decl. 85; Roberts Decl. 81-82.) Indeed, every major computer security vendor considered Innovative Marketing's software to be a threat. (A001186.)

thousands of websites. (A001189.) Ms. Ross was authorized to open these accounts and make expenditures on behalf of Innovative Marketing, and even did so with her personal credit card. (A001189.)

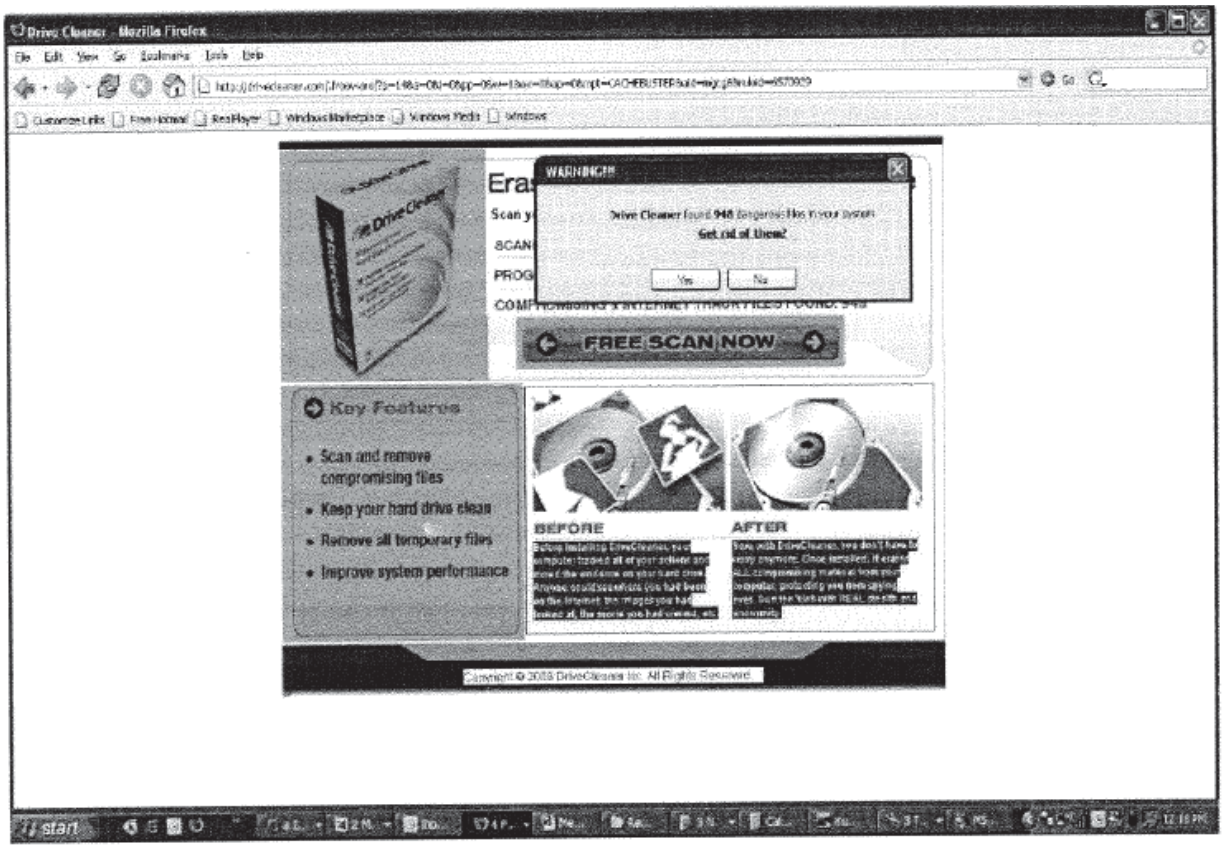
As the person who approved and placed millions of dollars of ads, Ms. Ross was intimately familiar with Innovative Marketing's deceptive practices. She knew what the advertisements looked like; she knew there were multiple complaints about the ads, and she knew that they did not and could not scan users' computers as they claimed to do.

For example, in one computer "chat" log kept by Innovative Marketing, a developer discusses how one of the "scanner" ads should look, including the number of errors found and how fast the button should blink. (A003579.) He asks for Ms. Ross's approval and she tells him, "it's fine." (*Id.*)

In another instance, Ms. Ross was involved in "chat" conversation with overseas employees about the language of a particular ad being developed. The ad claims to have detected purchases of "explicit goods" potentially exposing the consumer to "crime responsibility." (A003566.) Ms. Ross ignores this blatantly false representation and assures the

others that an American employee would fix the English, consistent with the intent that the ad be "very scary." (A003566-67.)

Ms. Ross also knew her ads did not really scan anything. One of her duties was to handle complaints from ad network MyGeek, through which she placed Innovative Marketing's advertisements. (A001190.) When MyGeek received complaints about Innovative Marketing's ads (which happened regularly) it would forward screen shots of the ads to Ms. Ross to fix the problem. (A001190.) In one exchange, MyGeek asks Ms. Ross about a DriveCleaner advertisement that spawns a pop up window (a violation of MyGeek's rules), attaching a screen shot. (*Id.*; A003793.)



The ad is the same one pictured in the attachment in Mr. Sundin's affidavit, claiming, "WARNING!!! DriveCleaner found 948 dangerous files in your system. **Get rid of them?**" Ms. Ross, blithely ignoring the deceptiveness of the ad, replies, "This is not a popup, it is flash in the website . . . this is an example of the scanner . . . This is certainly not a popup or Active x." (A003794.) By acknowledging that the popup was mere flash animation—in effect a movie—Ms. Ross demonstrates that

she knew the popup did not really scan a consumer's computer, and that it was just mimicking the look of a genuine security scan.[8]

In yet another chat log Ms. Ross makes an advertisement *more* deceptive, instructing that "we have to get all this advertisement stuff off these ads." (A003580.) She is asked, "what do you mean off?" And she responds, "the 'advertisement'"; that is, the word "advertisement" itself. (*Id.*) In other words, Ms. Ross tells her subordinates to remove information that could give consumers a clue that they were looking at an advertisement, not the result of real software scanning their computer. Indeed, another participant in the conversation notes that the ad says "advertisement 3x in big red bold," and that that is "a very bad ad," asking "how is that going to scare any[one]?" (*Id.*)

C. Procedural History

1. The Complaint. To halt the defendants' deceptive practices, the FTC brought suit in 2008 under Sections 5(a) and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) & 53(b). (A00024.) The FTC sued Innovative Marketing, the company responsible for the deceptive ads; Ms. Ross, Sam Jain, Daniel Sundin, and Marc D'Souza as

[8] MyGeek ultimately cancelled its accounts with Innovative Marketing despite that Innovative Marketing was one of its biggest customers.

individuals who directed or participated in the violations; and ByteHosting Internet Services, LLC and its principal James Reno, who enabled and perpetuated Innovative Marketing's deceptive scheme.[9] (A001177.) The district court entered an ex parte temporary restraining order on Dec. 2, 2008, and a preliminary injunction on December 12, 2008, prohibiting the defendants from continuing to market their software using deceptive advertisements. (A000002.)

Innovative Marketing failed to answer or appear and a default judgment was entered against it. (A000216.) Default judgments were also entered against two individual defendants, Sam Jain and Daniel Sundin, who failed to appear or participate in the case. (A000248, 254.) James Reno and his company ByteHosting settled with the FTC, as did Marc D'Souza and Maurice D'Souza. (A0001179.)

2. The FTC's Summary Judgment Motion. Despite the defendants' invocation of the Fifth Amendment and their refusal to participate in discovery, the FTC amassed a mountain of evidence from duped consumers and through its own investigators and third party

[9] The FTC also named Maurice D'Souza as a relief defendant, contending that he had received proceeds of the deceptive marketing scheme.

subpoenas. The FTC sought summary judgment against the only remaining defendant, Ms. Ross.

In its June 11, 2012 order deciding the motion the district court noted that "the FTC has clearly been able to compile a substantial and impressive amount of evidence in this case." (A000917.) The court also noted that Ms. Ross "[did] not directly contradict" the FTC's allegations or evidence regarding the deceptive marketing scheme. (A00914, 917.) That evidence included that the defendants "conspired to sell computer security software by means of deceptive Internet advertising," including "advertisements that redirected consumers to sites that falsely claimed that consumers' computers had been scanned and that certain viruses, pornographic pictures, or compromised files had been discovered." (A000913.) Rather than challenge the deceptiveness of these practices, Ms. Ross's opposition "center[ed] on her role in the company"; specifically, whether she was a "control person," or had "the requisite knowledge of the misconduct at issue." (A000914; *see also* A000917 ("Ross does not contest much of FTC's evidence regarding the other defendants' alleged violations of the FTC Act.").)

Accordingly, the bulk of the district court's analysis focused on whether it could "conclusively determine," without making "credibility findings, inferences, [or] findings of fact," if Ms. Ross had sufficient participation in or control over her codefendants' violations to be held jointly and severally liable with them. (A000918.) The court concluded that summary judgment was not appropriate because "conflicting inferences" could be drawn from the evidence on these issues, and set the matter for a September 2012 trial. (A000921.)

Importantly—though Ms. Ross does not mention it in her brief[10]—on June 12, 2012, the day after its order denying summary judgment and setting the case for trial, the district court issued a letter order in which it clarified the issues to be decided in the trial. (A000925.) The court held that "there is no genuine issue of material fact with respect to FTC Act violations perpetrated by Ms. Ross' co-defendants in this case." (*Id.*) The court thus held that "the crux of the issue for trial concerns the scope of Ms. Ross' involvement with Innovative Marketing and whether she can be held individually liable." (*Id.*) The court

[10] To the contrary, her brief hinges its first argument on the false premise that the district court "never . . . held" what it actually did hold in the June 12, 2012 order. (*E.g.*, Opening Br. 22.)

emphasized that "[n]otwithstanding the informal nature of this letter, it is an Order of this Court." (*Id.*)

3. The District Court's Pretrial Rulings. The district court issued several additional orders before the trial, resolving motions brought by both parties.

On August 28, 2012, the court denied Ms. Ross's motion to call an expert witness to testify "that certain of the advertisements placed by Ross were neither false nor deceptive." (A001103.) The court noted that "[i]n its previous rulings in this matter," "this Court has concluded that Innovative Marketing was engaged in deceptive advertising." (A001101 & n.3 (citing June 12, 2012 Letter Order); A001103.) In light of those holdings, the court held that the expert's testimony would be "irrelevant to the issue before the Court;" namely, "whether defendant Kristy Ross may be held individually liable for those violations." (A001101, A001103.) The court stated that "Mr. Ellis's conclusion that some advertisements were not deceptive is, quite simply, of no import" to the salient issues of whether Ms. "Ross had the requisite control at the company, and had sufficient knowledge of the deceptive acts." (A001103.)

In the same order, the court granted the FTC's motion for partial summary judgment, holding that the total amount of consumer harm from Innovative Marketing's deceptive sales of computer security software was $163,167,539.95. (A001101-02; *see* A000927-37.) The court accepted the FTC's argument that "there was no genuine issue of material fact" that this was the total amount of consumer injury, and that the amount therefore represented "the upper limit on the amount of consumer injury possibly attributable to Ms. Ross," leaving whether she had sufficient control over the company, and if so during what period, for trial. (A001101-02.)

The court also issued a memorandum order denying Ms. Ross's motions *in limine* to exclude evidence on hearsay grounds, including sworn affidavits of Innovative Marketing's principals submitted in the Canadian lawsuit. (A001166.) The FTC argued that the documents were not hearsay or fell within an exception to the hearsay rule, and alternatively that the evidence was admissible under the residual exception of Federal Rule of Evidence 807. (A001168.) The court accepted the latter argument, finding that "the evidence in question meets the four requirements of the rule." (A001169.) The court held that

the evidence was material and was "more probative than other evidence that can reasonably be obtained." (A001170.) The court also held that the evidence had the "ring of reliability," due to corroboration by "unchallenged evidence," and that it had "equivalent circumstantial guarantees of trustworthiness" in that the statements were made by high-ranking executives of Innovative Marketing "in anticipation that they would be evaluated and challenged in a court of law." (A001169-70.) The court concluded that admission would "best serve the purposes of these rules and the interest of justice." (A001171, quoting Fed. R. Evid. 807.)

4. The Trial and the District Court's Judgment. A two-day trial was held beginning September 11, 2012. (A000022.) Ms. Ross did not attend or testify.

Following the conclusion of the trial, the court held that Ms. Ross "had authority to control the deceptive practices or acts of Innovative Marketing and that she participated directly in these deceptive practices."[11] (A001182.) The court further found that the "FTC has

[11] To hold Ms. Ross individually liable the court needed only find that she directly participated or had authority to control; the court found both.

shown by a preponderance of the evidence" that Ms. Ross "had knowledge of the deceptive practices . . . or alternatively she clearly acted with reckless indifference and intentionally avoided the truth." (*Id.*) "As a result, Kristy Ross is individually liable for [Innovative Marketing's] unlawful practices." (*Id.*)

The court recited the procedural history of the case and its pretrial rulings, including its holding "that there was no genuine issue of material fact that Ms. Ross's co-defendants violated Section 5 of the FTC Act by making misrepresentations to consumers through Internet-based ads and software-generated reports that induced consumers to purchase their computer security products." (A001180, citing orders of June 11 & 12, 2012.) The court noted that as a result of its rulings "the precise issues remaining in this case concerned the extent of Defendant Ross's control over or participation in [Innovative Marketing's] deceptive marketing practices, and her knowledge of these practices." (A001181-82.)

The court's determination that Ms. Ross had authority to control the deceptive conduct was based on its findings that she "was an original founder of the company"; that she received "shares of the

profits"; that Mr. D'Souza included Ms. Ross as one of the principals when attempting to dissolve their joint venture; and that she identified herself as a Vice President of Business Development and stated she was "responsible for business expansion, sales and marketing, as well as product optimization." (A001195.) The court found Ms. Ross was one of only four people who received a percentage of the company's profits; one of only seven who could approve expenses, and that she was "one of the main individuals to appear in a managerial role in chat logs, emails and advertising contracts." (*Id.*) In short, the court concluded that "her role with the company," her adoption of the other founders' affidavits in the Canadian litigation, and a "plethora of evidence in emails and chat logs" showed that she was a "control person" at Innovative Marketing. (*Id.*)

The court also found "compelling evidence" establishing that "Ms. Ross participated in the deceptive marketing scheme." (A001196.) That evidence included that she "controlled the contents and appearance" of the deceptive ads, she "reprimanded and disciplined departments when the work did not coincide with her standards," and she was involved in "key company decisions," like "partnership arrangements," "how to reorganize the company," and "whom to hire." (*Id.*) In addition, Ms.

Ross "had access to company accounts," "approved corporate expenses," and even "opened advertising accounts [for the company] using her own personal credit card." (*Id.*) Ms. Ross also "supervised the ad developers, made changes and gave orders concerning the ads, and funded the dissemination of those ads." (*Id.*) Accordingly, the court concluded that Ms. Ross "was not just a staff member" and "directly participated in the deceptive marketing scheme." (*Id.*)

In concluding that Ms. Ross "had actual knowledge of the deceptive marketing scheme" the district court found that "she wrote, edited, reviewed and participated in the development of multiple advertisements." (A001199.) The court also found that Ms. Ross "had the marketing expertise," "instructed developers to make the advertisements more aggressive," and "contributed to the deception" by ordering developers "to remove the term 'advertisement' on at least two occasions." (A001199-1200.) The court found Ms. Ross was "fully aware of the many complaints from consumers and ad networks and was in charge of remedying the problems." (*Id.*)

The court held in the alternative that, even if Ms. Ross "had not had actual knowledge" of the deceptive nature of the advertisements,

she was "at the very least recklessly indifferent or intentionally avoided the truth." (A001200.) The court found this was demonstrated by the above evidence, together with (1) her knowledge regarding complaints "that the advertisements purported to scan but that the ads themselves were not supposed to scan"; (2) her knowledge of other facts, including—in her own words—the "unpleasant" nature of the ads, the company's low customer retention, and that MyGeek terminated its relationship by telling her that "her advertisements were threatening [its] reputation"; and (3) her access to Mr. Sundin's email, receipt of profits from the company, and her relationships with other principals. (A001200.)

The court permanently enjoined Ms. Ross "from marketing computer security software and software that interferes with consumers' computer use." (A001202.) As a result of her participation in, control over, and knowledge of Innovative Marketing's deceptive practices, the court held her jointly and severally liable for the full amount of consumer redress, $163,167,539.95. (A001204-05.)

Standard of Review

A. The District Court's Evidentiary Rulings.

"[T]he party challenging the district court's ruling on the admissibility of evidence faces [a] heavy burden." *Noel v. Artson*, 641

F.3d 580, 591 (4th Cir. 2011). "A district court's evidentiary rulings are entitled to substantial deference, because a district court is much closer than a court of appeals to the 'pulse of the trial.'" *United States v. Russell*, 971 F.2d 1098, 1104 (4th Cir. 1992), quoting *United States v. Fernandez*, 913 F.2d 148, 155 (4th Cir. 1990). Accordingly, the trial court's evidentiary rulings "are not to be overturned . . . absent an abuse of discretion." *United States v. Godwin*, 272 F.3d 659, 670 (4th Cir. 2001). And this Court "'will only overturn an evidentiary ruling that is arbitrary and irrational.'" *Artson*, 641 F.3d at 591, quoting *United States v. Cole*, 631 F.3d 146, 153 (4th Cir. 2011). Moreover, even if an evidentiary ruling constitutes an abuse of discretion, reversal is only appropriate if the error "affects a party's substantial rights." *Schultz v. Capital Int'l Sec.*, 460 F.3d 595, 606-07 (4th Cir. 2006).

1. Rulings on relevancy. "The determination of the relevancy of proof offered at the trial is a matter resting largely within the sound discretion of the trial court, and is not ordinarily reviewable upon appeal." *Beaty Shopping Ctr., Inc. v. Monarch Ins. Co. of Ohio*, 315 F.2d 467, 471 (4th Cir. 1963).

2. Preliminary factual determinations for admissibility.

This Court reviews the district court's factual findings regarding "threshold criteria for admission under the clearly erroneous standard." *United States v. Shores*, 33 F.3d 438, 442 (4th Cir. 1994).

B. The District Court's Findings of Fact and Legal Conclusions.

For a ruling arising from a bench trial, the trial judge's findings of fact may not be set aside unless clearly erroneous, "viewing the evidence in the light most favorable to the appellee." Fed. R. Civ. P. 52(a); *Martin v. Harris*, 560 F.3d 210, 217 (4th Cir. 2009). A reviewing court may not "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Rather, "[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74.

The district court's legal rulings are reviewed *de novo*. *Murray v. United States*, 215 F.3d 460, 463 (4th Cir. 2000).

Summary of the Argument

The district court's careful judgment in this case was fully supported by the record at trial and by well-established precedents applying the FTC Act. Ms. Ross's arguments against the district court's factual findings, the admission of evidence, and the legal basis for the court's judgment are not persuasive and should be rejected.

1.a. Ms. Ross first challenges the exclusion of her proffered expert on deceptiveness, but her entire argument hinges on the false premise that the district court had not summarily adjudicated the deceptiveness of Innovative Marketing's advertisements before trial. In fact, the district court's June 12, 2012 order specifically decided this issue, holding there was "no genuine issue of material fact with respect to the FTC Act violations perpetrated by Ms. Ross's codefendants in this case." (A000925.) Ms. Ross stunningly fails to even mention this order, though it completely undermines her argument that the expert should have been permitted to testify. *Infra*, part I.A.

b. Ms. Ross next challenges the admission of a document which she claims was the sole evidence she remained a corporate officer in 2008, arguing that it should not have been admitted as a coconspirator

statement because it cannot be used to "bootstrap" the existence of the conspiracy at a given time. But other evidence—adopted by Ms. Ross—established her membership in the conspiracy, which is presumed to continue until the conspirator affirmatively withdraws, which Ms. Ross never did. The district court thus did not err in admitting the document under the coconspirator exclusion. *Infra*, part I.B.

c. Ms. Ross's third evidentiary challenge involves documents showing Innovative Marketing's profits, which were attached to an affidavit in the Canadian litigation and were admitted under the residual exception to the hearsay rule. The district court's ruling was well within its discretion, and its preliminary findings were not clearly erroneous. The document was also admissible as a party admission in that Ms. Ross expressly adopted the affidavit and its description of the profit and loss statement. *Infra*, part I.C.

2. The district court's application of the legal standards for injunctive and monetary relief under Section 13(b) of the FTC Act is consistent with the holdings of this Court's sister circuits and virtually every other court to have considered those standards. The Court should

decline Ms. Ross's invitation to reject these courts' persuasive reasoning.

a. Under long-standing precedents of all the circuits who have considered the question, when a corporation's misrepresentations violate Section 13(b) the FTC Act, an individual may be held liable for injunctive relief with respect to those violations if the statements could be relied on by reasonable people, consumers were injured, and if the individual participated in the misrepresentations or had authority to control them. Control is evidenced by such actions as directing corporate affairs and policy or taking on the role of a corporate officer. The individual may be held liable for monetary relief if the FTC shows that she had some knowledge of the practices, including either actual knowledge, reckless indifference to the truth, or awareness of a high probability of fraud and intentional avoidance of the truth.

Ms. Ross asks the Court to adopt an impracticable standard that would require the FTC to prove that she participated in or controlled each one of the millions of deceptive ads, and that she failed to prevent it. The Court should decline the invitation. Ms. Ross's standard would

effectively immunize the type of large-scale internet false advertising she and Innovative Marketing engaged in. *Infra*, part II.A.

b. Ms. Ross next challenges the factual findings the district court made following the trial, but she offers little more than attorney argument—unsupported by evidence—as "explanations" for the findings, and facts that the district court supposedly "overlooked." That is not enough. The district court's findings must be affirmed so long as they are plausible in light of the record. Counsel's post-hoc gloss on the evidence cannot meet that standard.

c. Ms. Ross places her most ambitious challenge to the district court's ruling last, arguing that the Court should turn away from the consistent rulings of seven courts of appeals and numerous district courts, issued over more than 30 years, and hold that Section 13(b) of the FTC Act does not permit equitable monetary relief as an adjunct to an injunction. The Court should decline this invitation too.

As the Supreme Court explained in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), the power to issue an injunction—such as is granted under Section 13(b)—invokes the court's equitable jurisdiction, and all of its equitable powers are available for the complete exercise of

that jurisdiction. Those powers are even broader and more flexible when applied to an agency's action taken in the public interest, and include the authority to order equitable monetary relief such as restitution or disgorgement. The Supreme Court's reasoning in *Porter* has been consistently applied to the Section 13(b) of the FTC Act, along with numerous other federal statutes with similar grants of authority to enter an injunction.

Ms. Ross ignores this long line of authority, relying instead on a single decision of the D.C. Circuit, *United States v. Phillip Morris USA, Inc.,* 396 F.3d 1190 (D.C. Cir. 2005). But that decision is inapposite because it hinged on different statutory text—text that *did not* include the authority to enter an "injunction." Because the D.C. Circuit's decision rested an express limitation on the court's authority, it has no application to Section 13(b) of the FTC Act, which contains no such limitation. *Infra*, part II.C.1.

Ms. Ross also argues that another provision of the FTC Act, Section 19(b), limits the court's authority under Section 13(b) because the former section expressly authorizes monetary relief. This argument ignores that Section 19 was enacted *after* Section 13 and expressly

states that its remedies "are in addition to" other remedies provided under the Act, and that Section 19 "shall not be construed" to lessen the FTC's authority under any other section. 15 U.S. C. § 57b(e). Moreover, Congress later expanded portions Section 13(b), approvingly noting in a conference report the FTC's ability to seek monetary remedies under Section 13(b). Because that long-standing interpretation of the courts was thus fully presented to Congress and Congress did not seek to alter it, the interpretation is presumed to be correct. *Infra*, part II.C.2.

Argument

I. The District Court's Evidentiary Rulings Were Within Its Discretion.

A. Exclusion of Ms. Ross's Proffered Expert Testimony.

Ms. Ross's expert on deceptiveness was properly excluded because his testimony was not relevant to any trial issue. In its June 12, 2012 order, the district court unambiguously held that "there is no genuine issue of material fact with respect to FTC Act violations perpetrated by Ms. Ross' co-defendants in this case." (A000925.) That ruling was amply supported by 51 consumer declarations, the FTC's expert testimony, the testimony of its investigator, and the admissions contained in company emails, chat logs, and the sworn affidavits in the Canadian litigation.

(*See* A000286-87.) Having ruled the ads at issue to be deceptive in violation of the FTC Act, the court held that "the crux of the issue for trial concerns the scope of Ms. Ross' involvement with Innovative Marketing and whether she can be held individually liable." (*Id.*) The court expressly relied on this ruling when it later held that the proffered testimony on deceptiveness was "of no import." (A001103; A001101 & n. 3.)

Ms. Ross's brief inexplicably acts as if the June 12 order does not exist, jumping from a discussion of the court's order the day before (denying summary judgment on Ms. Ross's control of Innovative Marketing) to its August 28 order excluding Mr. Ellis, asserting that "nothing justified" the latter order. (Opening Br. 28.) Perhaps that would be so if the June 12 order did not exist, but it does.

Ms. Ross also seriously mischaracterizes the June 11 order as having "affirmatively and expressly told the parties that the issue of deceptiveness remained for trial." (Opening Br. 28.) The court said no such thing. Ms. Ross attempts to wrench this from the court's statement that it would "assume *arguendo* that the FTC Act violations did indeed occur." (A000917.) But the court made that assumption in the context of

focusing its analysis where Ms. Ross had focused her argument; namely her control of Innovative Marketing—the sole issue for which the court found a trial was appropriate. (*Id.*) Indeed, the court's June 12 order could have been no surprise to Ms. Ross, given its statement the day before that "Ross [did] not contest much of the FTC's evidence regarding the other defendants' alleged violations of the FTC Act." (*Id.*) To the extent that Ms. Ross did challenge deceptiveness at summary judgment, she did so through the report of the exact same expert. (*See* A000354-77, 595-96.) But the court's June 12 order determined that Mr. Ellis's opinions did not raise any "genuine issue" on any material fact precluding summary judgment on Innovative Marketing's deceptive conduct. The court's subsequent rejection of further testimony from Mr. Ellis was a logical consequence of the earlier ruling, as such evidence was irrelevant to the issues remaining for trial.

B. Admission of Evidence of Ms. Ross's Position During 2008.

Ms. Ross argues that an email written by Mr. Sundin, showing that she continued to be a vice president for Innovative Marketing in 2008 was hearsay and that it was improperly admitted under the coconspirator exclusion of Federal Rule of Evidence 801(d)(2)(E), which

applies to statements "made by the party's coconspirator during and in furtherance of the conspiracy." The crux of Ms. Ross's argument is that a statement may not "bootstrap" its own admissibility to prove the existence of the conspiracy. (Opening Br. 30-31.)

Contrary to Ms. Ross's argument, there no such rule in the Fourth Circuit,[12] but even if there were, the district court did not commit clear error in holding that there was a conspiracy and that Ms. Ross was a part of it. The conspiracy was shown not by the email in question, but by independent evidence in the affidavits of Ms. Ross and Mr. Sundin, describing their joint involvement in Innovative Marketing since its inception. (A001589, 1596-98.) In light of the substantial evidence that

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[12] In *Bourjaily v. United States*, the Supreme Court held that a district court may properly consider the proffered hearsay statement itself when determining the existence of a conspiracy under the coconspirator exclusion, but left open the question whether the statement *alone* could prove the conspiracy. 483 U.S. 171, 181 (1987). Ms. Ross argues that such bootstrapping was forbidden under earlier Fourth Circuit precedent, but those cases required a "preponderance of *independent* evidence," *i.e,,* separate from the challenged statement—to establish the conspiracy. *E.g.*, *United States v. Chindawongse*, 771 F.2d 840, 844 (4th Cir. 1985). To the extent that rule forbade any consideration of the proffered statement, it was abrogated by *Bourjaily*, and this Court has declined to decide whether any part of the rule has survived. *United States v. Shores*, 33 F.3d 438, 443 n.4 (4th Cir. 1994). Regardless, the rule has no application here because the challenged statement was not needed to prove the conspiracy.

Innovative Marketing illegally and pervasively used false advertising, the court had discretion to conclude that Ms. Ross and Mr. Jain were involved in a conspiratorial venture together. Ms. Ross's affidavit established that she had been performing the duties of Vice President of Innovative Marketing from 2002 until the date of that affidavit, March 6, 2007. (A001589, 1591.) And under settled law a party's "membership in the conspiracy is presumed to continue until he withdraws from the conspiracy by affirmative action." *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989). Ms. Ross presented no evidence that she withdrew from the conspiracy and thus her membership was presumed to continue until the 2008 email and beyond.

C. Evidence of Innovative Marketing's 2004-2006 Profits.

Ms. Ross's challenge to the admissibility of evidence demonstrating Innovative Marketing's profits is likewise without merit.

The district court rejected Ms. Ross's motion *in limine* to exclude a profit and loss summary for the period from 2004 to 2006 that was attached to Mr. Jain's affidavit in the Canadian litigation. (A001167-71, 1790, 1799.) As demonstrated below, the court did not abuse its discretion in relying on the residual exception of Rule 803(24) to admit

this evidence. Moreover, the evidence was also properly admissible as a party admission under Federal Rule of Evidence 801(d)(2)(B).

Mr. Jain's affidavit describes in detail how Innovative Marketing's accounting department created the profit and loss statement, describes the "voluminous" supporting data from which it was calculated, and summarizes its calculation of Innovative Marketing's income from 2004 to 2006. (A001790-91.) Ms. Ross expressly adopted Mr. Jain's affidavit in her own, stating that she had read the affidavit and that she was "in agreement with [its] contents." (A001590.) Having adopted Mr. Jain's narrative description of the profit and loss statement, which was intended to demonstrate its accuracy, and his summary of its findings, Ms. Ross necessarily adopted the profit and loss statement too.

The document was also properly admissible under the residual hearsay exception of Rule 807. That exception "exists" to admit "out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available." *Tome v. United States*, 513 U.S. 150, 166 (1995). "The most important element of Rule [807]'s requirements is that the district court properly determine

that 'equivalent circumstantial guarantees of trustworthiness' are present." *United States v. Dunford*, 148 F.3d 385, 393 (4th Cir. 1998), quoting 2 McCormick on Evidence § 324, at 362 (4th ed. 1992).

In its order admitting the profit and loss statement, the district court properly looked to "the totality of the circumstances surrounding the out-of-court statements," finding that they were made in connection with "a lawsuit in which Ms. Ross's co-defendants sued each other over the profits of Innovative Marketing, the business at the center of the present case." (A001170.) The statements were made "in anticipation that they would be evaluated and challenged in a court of law." (*Id.*) Moreover, three of the principals of Innovative Marketing, Mr. Jain, Ms. Ross, and Mr. Sundin—who were aligned in the litigation—all vouched for the document's accuracy in their affidavits. (A001590, 1615, 1790.)

In addition, the document was highly probative of a material issue—Innovative Marketing's profits—and was the best available evidence on that issue. Particularly where the defendants failed to produce *any* of Innovative Marketing's financial data, the district

court's decision to admit the profit and loss statement was well within its wide discretion to decide evidentiary matters.

Moreover, Ms. Ross's argument that the admission of this document affected her substantial rights ignores the order of proof adopted by the courts in consumer redress cases. In order to establish the amount of consumer redress, the FTC may rely upon a defendant's records to calculate injury, even if those records are incomplete or inaccurate. *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997). The "risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." *Id.* Once the FTC shows that its calculations reasonably approximate consumer injury, the burden shifts to the defendant to show that the figures are inaccurate. *Id.* Here, Ms. Ross had the right and opportunity to present evidence contrary to the FTC's calculations, but she chose not to do so. Accordingly, her complaint about the evidence the FTC used rings hollow.

II. The District Court Properly Held Ms. Ross Liable For Injunctive And Monetary Relief.

A. The District Court Applied The Correct Standard For Individual Liability For Corporate Violations.

Under Section 13(b) of the FTC Act, a district court is authorized to issue a permanent injunction to enjoin violations of the FTC Act. 15

U.S.C. § 53(b). The courts agree that Section 13(b) also empowers the FTC to seek ancillary relief, including equitable monetary relief, in addition to an injunction. *E.g.*, *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *see infra* part II.C.

The courts have likewise settled on the standards for holding individuals liable for corporate violations of the FTC Act. In order to find an individual liable for injunctive relief, the FTC must show (1) "that the corporation committed misrepresentations or omissions of a kind usually relied on by a reasonably prudent person, resulting in consumer injury" and (2) "that the individual defendants participated directly in the acts or practices or had authority to control them." *FTC v. American Standard Credit Sys.,* 874 F. Supp. 1080, 1087 (C.D. Cal. 1994); *see also, e.g.*, *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel*, 875 F.2d at 573.

To hold an individual liable for monetary relief, the FTC must also "demonstrate that the individual had some knowledge of the practices." *Id.* "The knowledge requirement may be fulfilled by showing that the individual had 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Id.*, quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985).

These standards have been widely adopted and applied for more than twenty-five years. *E.g.*, *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010); *FTC v. Freecom Communs., Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005); *Publ'g Clearing House*, 104 F.3d at 1170; *Gem Merchandising*, 87 F.3d at 470.

Ms. Ross asks the Court to ignore these cases and import an inapposite standard from a securities case that she asserts would require proof that she participated in or had authority to prevent *each deceptive ad* and that she failed to exercise that authority. (Opening Br.

35, quoting *Dellastatious v. Williams*, 242 F.3d 191, 194 (4th Cir. 2001).)[13]

The securities law, however, specifically includes a safe harbor for individuals who act in "good faith," 15 U.S.C. § 78t, whereas it is well established that good faith does *not* immunize a defendant from individual responsibility for misrepresentations under the FTC Act. *See, e.g., FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC* v. *Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1084 (C.D. Cal. 2012).

In any event, while Congress may have had good reason to afford such a safe harbor for circumstances like that in *Dellastatious*, involving specified documents filed with a regulatory body, the standard Ms. Ross attempts to pry from that case would be wholly inappropriate here. In this case the relevant deceptions occurred by the billion over the internet, the deceived consumers numbered over a million, and the harm exceeded $163 million. But the company through which the

[13] The only FTC case remotely close to Ms. Ross's proffered standard is an unpublished district court decision issued thirty years ago, which is contrary to the settled law in its circuit. (Opening Br. 34-35, discussing *FTC v. Int'l Diamaond Corp.*, 1983 U.S. Dist. LEXIS 11862 (N.D. Cal. Nov. 8, 1983); *cf.*, *e.g.*, *FTC v. Stefanchik*, 559 F.3d 924 (9th Cir. 2009).)

deception was perpetrated was subject to virtually no regulation; it was incorporated in a foreign jurisdiction; and it purposefully hid the roles and names of its corporate officers. When haled into court those officers refused to participate in discovery and claimed anything they said could incriminate them. It was only by happenstance that the defendants kept—and the FTC was able to obtain—chat logs showing how the principals of the company interacted with their subordinates. It was only those same principals' hubris and greed that led them to file sworn affidavits admitting to their roles and the extent of their ill-gotten profits. A requirement that individuals can only be liable if the FTC first proves their knowledge and control over each deceptive act would reward wrongdoers in proportion to how successful their deceptive acts were, and would give them a get-out-of-liability-free card for the opacity of their organizations.

The Court should reject Ms. Ross's unfounded standard and affirm the district court's sound decision to apply the standard for individual liability articulated in *Amy Travel* and widely adopted by so many of the Court's sister circuits.

B. The District Court's Findings Were Not Clearly Erroneous.

After conducting a two-day trial and weighing the voluminous evidence presented, the district court found that Ms. Ross participated in and had control over the deceptive conduct at Innovative Marketing, and that she knew about that conduct or at a minimum was recklessly indifferent or consciously avoided knowledge of it. These findings must be affirmed so long as they are "plausible in light of the record reviewed in its entirety." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Ms. Ross's token effort to contest these findings does not even approach this standard.

For each finding, Ms. Ross simply lists the facts that the district court found in support of the finding, followed by her own list of "explanations" for those facts and other purported facts that the district court supposedly "overlooked" or "ignored." (Opening Br. 39, 41 (control); 44 (participation); 46, 47 (knowledge).) Many of Ms. Ross's "explanations" and "facts" simply represent a contrary (often fantastical) view of the evidence which the district court was not required to accept.

For example, in response to the district court's finding that she "funded the accounts" she opened with MyGeek to place Innovative Marketing's deceptive advertisements, Ms. Ross argues that funding "may occur" without knowledge of the deceptive ads. (Opening Br. 45-46.) That may be so but the district court was within its role to weigh the evidence and conclude otherwise. Similarly, Ms. Ross claims that she was not a "founder" of Innovative Marketing, but does not attempt to explain her co-founders' affidavits to the contrary or her own affidavit adopting theirs. (Opening Br. 39.) She says that she only received "shares of the profits" because she was romantically involved with two of the other principals (*id.*), but that argument is not only irrelevant, it was advanced only in attorney argument—it was not supported by any evidence.

In short, Ms. Ross makes no effort to explain why the district court was required to accept her "explanations" or how her purported facts render the district court's findings less than plausible. In these circumstances the district court's findings must be affirmed.

C. The District Court Has Authority To Order Equitable Monetary Relief.

The district court correctly held Ms. Ross and her codefendants jointly and severally liable for equitable monetary relief as redress for consumers injured as a result of their conduct. The seven courts of appeals that have addressed this issue have uniformly held that when the FTC proves a defendant has violated Section 5(a) the FTC Act, the district court has broad authority under Section 13(b) of the Act to order not just injunctive relief, but also ancillary equitable remedies including equitable monetary relief. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366 (2d Cir. 2011); *FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1 (1st Cir. 2010); *FTC v. Freecom Communs., Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571 (7th Cir. 1989).[14] District courts in all the other circuits

[14] Ms. Ross includes the Fifth Circuit in her list of circuits that have accepted this argument, citing *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir. 1982). (Opening Br. 59 n.12.) Although the court in *Southwest Sunsites* agreed that Section 13(b) "carries with it the

have reached the same conclusion. *E.g.*, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 37 (D.D.C. 1999); *FTC v. Magazine Solutions, LLC*, 2010 U.S. Dist. LEXIS 108332 at 4 n.2 (W.D. Pa. Oct. 12, 2010); *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008); *FTC v. Solar Michigan, Inc.*, 1988-2 Trade Cas. (CCH) ¶ 68,339, p. 59,915-16 (E.D. Mich. 1988). The FTC is unaware of *any* case holding—as Ms. Ross would have the Court do—that the district court lacks jurisdiction to grant equitable monetary relief under Section 13(b).

The uniform holding of these courts is correct. 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). As the Supreme Court has explained, by granting the authority to enter a permanent injunction Congress invokes the court's equitable jurisdiction; "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Holding Co.*,

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authorization for the district court to exercise the full range of equitable remedies traditionally available to it," that case involved preliminary ancillary relief (including "the escrow of corporate assets") rather than a final order of monetary equitable relief. 665 F.2d at 716-17, 718.

328 U.S. 395, 398 (1946). The court's equitable powers, of course, include the power to order equitable monetary relief. *E.g.*, *id.* (discussing disgorgement); *Pantron I*, 33 F.3d at 1102 (discussing restitution). And when an agency has taken action in the public interest, "those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398. Here, of course, the Commission is acting on behalf of the public, and the full range of the court's equitable powers, including the power to order equitable monetary relief, is thus invoked.

Ms. Ross urges the Court to part ways with the consistent holding of seven of its sister circuits and numerous other courts, offering two reasons why these courts are wrong. *First*, Ms. Ross argues that the courts' reliance on the Supreme Court's decisions in *Porter v. Warner* and *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), is incorrect. *Second*, Ms. Ross argues that the availability of monetary relief under Section 19(b) of the FTC Act following administrative proceedings precludes finding that Section 13(b) allows equitable monetary relief. Neither of these arguments is persuasive.

1. Section 13(b) authorizes equitable monetary relief under the Supreme Court's decisions in *Porter* and *Mitchell*.

As explained above, in *Porter v. Warner* the Supreme Court held that when Congress grants the power to issue an injunction it invokes the court's equitable jurisdiction, and "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." 328 U.S. at 398. The Court reaffirmed this principle in *Mitchell v. DeMario*, adding that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." 361 U.S. at 291-92. Courts have applied this reasoning to approve the authority to enter equitable monetary relief not only under Section 13(b) of the FTC Act, but also under similar provisions of numerous other federal statutes. *E.g., United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 225-226 (3d Cir. 2005) (applying *Porter* to the Food, Drug, and Cosmetics Act and collecting cases

applying it to the Securities and Exchange Act, the Commodity Exchange Act, and the Motor Carrier Act).

Ms. Ross ignores these authorities, citing instead to a divided panel of the D.C. Circuit, which declined to apply *Porter* to the remedial provisions of RICO, based on its comparison of RICO's text to that of the statute considered in *Porter*. *See United States v. Phillip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005). Ms. Ross's reliance on *Phillip Morris* is misplaced, and she mischaracterizes *Porter*. Contrary to Ms. Ross's assertion, the remedial provision of RICO does not "parallel" Section 13(b). (Opening Br. 63.) Whereas Section 13(b) authorizes, in appropriate cases, an "injunction," RICO provides jurisdiction "to prevent and restrain violations" by issuing "appropriate orders, including, but not limited to" ordering divestitures, restrictions on future activities, and ordering an enterprise be dissolved or reorganized. 18 U.S.C. § 1964(a). Notably, RICO does not authorize an "injunction." This is important because the Supreme Court held in *Porter* that "[n]othing is more clearly a part of the subject matter of a suit for *an injunction* than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief."

Porter, 328 U.S. at 399 (emphasis added). The panel majority in *Phillip Morris* acknowledged that, once equity jurisdiction is "properly invoked" by statutory language, a court applying such a provision has authority to "award complete relief." 396 F.3d at 1193. But, focusing on the list of remedies "to prevent and restrain violations" that RICO does provide, the panel concluded that they were all forward-looking and thus represented an express limitation on the court's equitable jurisdiction. *Id.* at 1198-99. Here, in contrast, Congress invoked the court's full equitable jurisdiction by authorizing an injunction.

Ms. Ross's argument that the statute at issue in *Porter* authorized an "other order" in addition to an injunction is likewise unavailing, having been rejected by the Supreme Court itself. In *Mitchell*, the Court confirmed that *Porter* did not turn on the "other order" language: "The applicability of this principle is not to be denied . . . because, having set forth the governing inquiry, [the Court in *Porter*] went on to find in the language of the statute affirmative confirmation of the power to order reimbursement." *Mitchell*, 361 U.S. at 291.

2. Section 19(b) of the FTC Act does not limit the remedy available under Section 13(b) of the Act.

Ms. Ross also points to Section 19(b) of the FTC Act, arguing that because that section authorizes monetary relief after the Commission has brought an administrative action, equitable monetary relief under Section 13(b) is necessarily precluded, and permitting such relief would render Section 19(b) redundant.

Ms. Ross misapprehends the relationship between Sections 13(b) and 19 of the FTC Act. Those sections do not limit one another. Rather, the FTC Act gives the Commission a choice of enforcement mechanisms when it identifies unlawful conduct within its authority. Section 13(b) allows the FTC to directly challenge the illegal conduct in federal district court, whereas Section 5 (aided by Section 19) allows the FTC to challenge the conduct administratively.[15] Although overlapping in part, the relief available under the two sections is not the same. As explained above, by authorizing preliminary and permanent injunctions Section 13(b) invokes the full extent of the court's equitable powers. Section

[15] The FTC ordinarily uses its administrative enforcement authority in cases involving violations of the antitrust laws and in complex consumer protection cases. It ordinarily pursues cases (like this one) that involve straightforward deceptive or unfair conduct in district court.

19(b), on the other hand, is broader in that it authorizes legal remedies in addition to equitable remedies. 15 U.S.C. § 57b(2) (authorizing, *inter alia*, "damages" though not "punitive or exemplary damages").

Ms. Ross's argument that the existence of Section 19(b) precludes the award of equitable monetary relief under Section 13 ignores that when Congress enacted Section 19, it sought to *expand* the remedies available for violation of an administrative order or FTC rule, not to contract the remedies under Section 13(b). Ms. Ross correctly notes that Section 19 was enacted two years *after* Section 13, but ignores the import of Section 19(e), which states, "Remedies provided in this section are in addition to, and not in lieu of, any other remedy," and "Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e). This language precludes any interpretation that uses Section 19 to limit the court's authority under Section 13(b). *Security Rare Coin*, 931 F.2d at 1315; (rejecting argument that Section 19 restricts remedial authority under Section 13(b)); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (same). Congress did not intend, when it expanded the remedies available for administrative rule and order violations, to limit

the remedies available when the FTC pursues wrongdoers in federal court.

Indeed, Congress later recognized the authority to order equitable monetary relief under Section 13(b) when it expanded the venue and service of process provisions of that section. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10. The Senate Report accompanying the act recognized, when describing FTC testimony, that Section 13(b) authorizes the FTC to "go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. No. 103-130 at 15-16 (Aug. 24, 1993). The report likewise states "that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts." *Id.*

Contrary to Ms. Ross's assertion, this is not "post-enactment legislative history." (Opening Br. 64-65.) Rather, it is well settled that when the interpretation of a statute "has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly

discerned." *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). Here, the authority to obtain monetary relief under Section 13(b) was brought to the attention of Congress and the public when it was the subject of FTC testimony, and Congress did not seek to alter it when amending that section. Congress has thus acquiesced to the courts' interpretation.

Conclusion

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

Respectfully submitted,

June 5, 2013

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Certificate of Compliance

I, Theodore (Jack) Metzler, certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) in that it contains 11,194 words.

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Certificate of Service

I certify that the foregoing was filed using the Court's Appellate CM-ECF System on June 5, 2013. All counsel of record are registered CM-ECF users, and service will be accomplished by the EM-ECF system.

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