NO. 18-15462

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

CONSUMER DEFENSE, LLC, *ET AL*.
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nevada
No. 2:18-cv-00030-JCM-PAL
Hon. James C. Mahan, U.S. Distr. J.

ANSWERING BRIEF
FOR THE FEDERAL TRADE COMMISSION

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INTRODUCTION

The Federal Trade Commission brought this enforcement action to halt a mortgage relief services scam. Defendants below are three individuals—a married couple and an attorney—and their network of corporations in Utah and Nevada operating as a single common enterprise. They extracted more than $11 million in unlawful fees from consumers in exchange for false promises (including expert legal assistance) to obtain loan modifications. They caused thousands of consumers to miss mortgage payments, with added interest and penalties; some faced foreclosure, bankruptcy, and even the loss of their homes.

The FTC sued to halt the scam and to secure financial redress for victims. It moved for preliminary relief, including a TRO, a preliminary injunction, and an asset freeze. In support of the motion, the FTC proffered numerous consumer declarations, bank records and marketing materials, and transcripts of undercover telephone calls with appellants' representatives. Appellants relied exclusively on a declaration of their principal owner, who claimed, with no verifiable support, that his companies secured loan modifications for nearly 94

percent of their customers. A court-appointed receiver, however, vigorously disputed that claim and corroborated the FTC's charges of deception. The receiver's report to the court also documented appellants' efforts to hide or dissipate their assets after the FTC filed this case. On that record, the district court issued a preliminary injunction and froze appellants' assets.

Before this Court, appellants do not seriously challenge whether an injunction and an asset freeze were warranted here, but contend mostly that the district court lacked personal jurisdiction over them, applied an incorrect standard for relief, and improperly froze their assets. As we show below, the district court's ruling was legally sound. The court plainly had personal jurisdiction, it applied the correct standard for preliminary relief in a government enforcement action, and it justifiably froze appellants' assets to prevent further dissipation and preserve meaningful relief.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345; 15 U.S.C. §§ 45(a), 53(b); and 12 U.S.C. § 5538(a)(3).[1] The district court entered a preliminary injunction against all defendants on February 20, 2018,[2] and appellants filed their Notice of Preliminary Injunction Appeal, pursuant to Ninth Circuit Rule 3-3, on March 21, 2018.

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

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[1] The FTC brought this action pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); and Section 626 of the 2009 Omnibus Appropriations Act, Pub. Law 111-8, 123 Stat. 524, 678 (Mar. 11, 2009) (2009 Omnibus Act), *as clarified by* Section 511 of the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. Law 111-24, 123 Stat. 1734, 1763-64 (May 22, 2009) (Credit Card Act), and *amended by* Section 1097 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law 111-203, 124 Stat. 1376, 2102-03 (July 21, 2010) (Dodd-Frank Act), 12 U.S.C. § 5538, for violating Section 5 of the FTC Act, 15 U.S.C. § 45, and the Mortgage Assistance Relief Services Rule, 16 C.F.R. Part 322, *recodified as* Mortgage Assistance Relief Services (Regulation O), 12 C.F.R. Part 1015.

[2] Defendants include two corporations named "Consumer Defense, LLC," a Nevada one (Consumer Defense-NV) and a Utah one (Consumer Defense-UT); Consumer Link, Inc., also a Nevada corporation; the Utah entities Preferred Law, PLLC; Brown Legal, Inc.; Consumer Defense Group, LLC f/k/a Modification Review Group; American Home Loan Counselors; American Home Loans, LLC; AM Property Management, LLC; FMG Partners, LLC; and Zinly, LLC; and three individuals, Jonathan Hanley, Sandra Hanley, and Benjamin Horton. All but Horton and the two Nevada entities are appellants.

QUESTIONS PRESENTED

1. Whether the district court properly issued a preliminary injunction before it ruled on a motion to dismiss for lack of personal jurisdiction, and whether there is cause to doubt the court's personal jurisdiction over appellants;

2. Whether the district court applied the proper standard for granting a preliminary injunction in a government enforcement case; and

3. Whether the district court properly exercised its discretion when it entered an asset freeze against appellants.

STATEMENT OF THE CASE

A. *Mortgage Relief Services and the MARS Rule*

In response to the 2008 housing and financial markets crisis, the U.S. Government initiated measures, such as the Home Affordable Modification Program (HAMP), to reduce the financial burden on those consumers most severely affected. *See Mortgage Assistance Relief Services*, 75 Fed. Reg. 75,092, 75,093-94 (Dec. 1, 2010). Congress then enacted legislation (including the 2009 Omnibus Act, *see supra* note 1) to further protect consumers in the financial sector. Most pertinent

here, Congress authorized the FTC to specifically regulate unfair and deceptive practices involving mortgage modification and foreclosure rescue services. 75 Fed. Reg. at 75,093. On December 1, 2010, the FTC promulgated its Mortgage Assistance Relief Services (MARS) Rule, 16 C.F.R. Part 322. *See* 75 Fed. Reg. 75,092. That rule is now known as the "Mortgage Assistance Relief Services (Regulation O)" and is codified at 12 C.F.R. Part 1015;[3] we refer to it here as the MARS Rule.

The MARS Rule (1) prohibits sellers and providers of MARS services from making certain representations or engaging in deceptive conduct, 12 C.F.R. § 1015.3; (2) requires providers to make specified disclosures, *id.* § 1015.4; (3) bars the collection of advance fees for MARS services, *id.* § 1015.5; (4) prohibits aiding or abetting others in violating the Rule, *id.* § 1015.6; and (5) imposes various recordkeeping and compliance requirements, *id.* § 1015.9. Attorneys who provide MARS services "as part of the practice of law" may be exempt from

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[3] The Dodd-Frank Act transferred the rulemaking authority under the 2009 Omnibus Act from the FTC to the newly formed Consumer Financial Protection Bureau (CFPB). The CFPB then re-codified the FTC's MARS Rule as its own. The FTC has concurrent authority with the CFPB to enforce the MARS Rule, 12 U.S.C. § 5538(a)(3)—in addition to its general authority to regulate unfair or deceptive acts or practices under the FTC Act, *see* 15 U.S.C. § 45.

some parts of the Rule if they satisfy specified conditions that include compliance with state licensing regulations. *Id.* § 1015.7. Violations of the MARS Rule constitute violations of the FTC Act. 12 U.S.C. § 5538(a)(1); 15 U.S.C. § 57a(d)(3). *See supra* note 3.

B. *Appellants' Violations of the FTC Act and the MARS Rule*

Since late 2011, the corporate appellants, acting as a common enterprise controlled and directed by the individual appellants,[4] marketed MARS services online and through mailers and radio ads. The FTC charged them with (1) using false and misleading representations to market their MARS services; (2) failing to make specified disclosures required by law in their marketing presentations; and (3) collecting illegal advance fees from consumers.

1. Appellants' Misrepresentations

Appellants lured distressed homeowners by promising expert legal help to obtain mortgage loan modifications with substantial reductions in monthly payment and interest rate. They used a website called

[4] Two of the companies and one individual that were defendants below are not appellants here, but as explained herein, they operated as an integrated common enterprise, so we refer to all the companies and individuals collectively as "appellants."

attorneyloanmodifications.com, which advised consumers that "[g]etting good legal representation is the best method for ensuring one's interests are protected in often tense negotiations" over loan modifications. PX22 Att. C at 117 [SER_790].[5]

Appellants *guaranteed* to consumers that they could secure loan modifications to reduce consumers' monthly payments by hundreds of dollars and substantially cut their interest rates. *See*, *e.g.*, PX01 ¶3 [SER_001]; PX02 ¶3 [SER_014]; PX03 ¶¶3-4 [SER_068]; *see* PX22 Att. J at 424:12-13, 425:24-25 [SER_814-15] (guarantee to FTC undercover investigator).[6] Often, appellants provided this guarantee *in writing*:

> Based on the past performance of American Home Loan Counselors with the assistance of Preferred Law's federal legal services, and our knowledge of your factual situation, MRB [defendant Modification Review Board] hereby GUARANTEES that a modification or home

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[5] "SER" refers to the FTC's Supplemental Excerpts of Record, filed herewith. "EOR" refers to appellants' Excerpts of Record. "DE.xxx" refers to the district court's Docket Entry Number.

[6] *See also* PX04¶¶ 4-5, 7 [SER_089-090]; PX05 ¶3 [SER_118]; PX06 ¶3 [SER_129]; PX07 ¶¶2, 4-5 [SER_173]; PX08 ¶3 [SER_198]; PX09 ¶¶3-5 [SER_236-37]; PX11 ¶¶3-4, 8, Att. A at 6 [SER_320-21, 325]; PX12 ¶¶3, 6 [SER_379-80]; PX13 ¶¶7, 11, Att. A at 15, Att. B at 19 [SER_390-92, 404, 408]; PX14 ¶¶12, 13, Att. A at 8 [SER_444-45, 450]; PX15 ¶¶4-5 [SER_499-500]; PX16 ¶¶3-4 [SER_536-37]; PX17 ¶4 [SER_556]; PX18 ¶¶6-8 [SER_562-63]; PX19 ¶3 [SER_587-88].

> foreclosure alternative pursuant to the HAFA program will be secured for you conditioned upon the following terms * * *.

PX03 ¶7, Att. A at 10-11 [SER_069, 077-78]; *see also* PX07 ¶5, Att. A at 6 [SER_173-74, 178]; PX08 ¶7, Att. B at 22 [SER_219]. The "terms" typically comprised timely return of accurate documents and payment of fees. *Id.*

Appellants most often failed to secure modifications that substantially reduced monthly payments and interest rates. *See, e.g.*, PX02 ¶23 [SER_019-20]; PX03 ¶¶14, 19 [SER_071-72]; PX04 ¶20 [SER_092]. After months of paying up-front fees, consumers learned that appellants sometimes had not even contacted the lenders, or that the lenders never received complete modification packages. *See, e.g.*, PX08 ¶¶11-12 [SER_200-01]; PX15 ¶12 [SER_501]; PX18 ¶¶11, 16 [SER_564-65]; PX20 ¶41 [SER_627]. In some instances, appellants' modification offers even contained *worse* terms than consumers' original loans. *See, e.g.*, PX12 ¶9 [SER_380-81]; PX23 ¶¶18, 23 [SER_829, 831].

As a result, many consumers fell further behind on their loans, and some fell into foreclosure or bankruptcy, or even lost their homes. *See* PX22 Table 2 at 6-7 [SER_764-65] (Summary). And despite

appellants' guarantees, they often refused refunds to the consumers who requested them. *See, e.g.*, PX04 ¶19 [SER_092]; PX13 ¶¶26-27, Att. J at 46-48 [SER_395, 435-37], Att. L at 52 [SER_441]; PX19 ¶¶11, 14, Att. B at 20-21 [SER_589-91, 606-07].

Appellants' promise of legal services was empty. Horton was the only attorney employed by them, and his only apparent "legal service" was sending lenders "Qualified Written Requests"—form letters soliciting loan information that do *not* have to be prepared or sent by an attorney, *see* 12 U.S.C. § 2605(e)(1)(A); 12 C.F.R. § 1024.36(a). *See, e.g.*, PX02 Att. B at 11-26 [SER_024-39]; PX04 ¶11 [SER_090-91].

Appellants peddled other misrepresentations to induce consumers to sign up with them. They falsely claimed that they were affiliated with widely publicized governmental programs, such as HAMP and the Making Home Affordable (MHA) program. They frequently referred to MHA and HAMP on their websites, and their representatives claimed in telemarketing calls with consumers that appellants were affiliated with these programs. *See, e.g.*, PX14 ¶12 [SER_444]; PX22 Att. A at 58-59 [SER_779-80], Att. C at 85 [SER_785]; PX24 at Att. A 19:16-21 [SER_876]. To reinforce that false claim, appellants sent follow-up

letters to consumers that displayed a doctored version of the official governmental program logo:

(Official MHA Logo)

(Appellants' Logo)

See, e.g., PX09 Att. A at 6 [SER_241]; PX13 Att. A at 15-16 [SER_404-05]; PX16 ¶8, Att. A at 11 [SER_539, 546]; PX19 ¶5, Att. A at 11 [SER_588, 597]. Consumers' impressions of appellants' correspondence or marketing material often led to their associating appellants with various governmental programs. *See, e.g.*, PX22 ¶35 [SER_769-70]; PX23 ¶6 [SER_825]; PX26 ¶¶22-23 [SER_898-99].

Appellants were neither affiliated with nor endorsed by any governmental entity or program that would give them leverage over

lenders. PX20 ¶¶22-23 [SER_619-20]. To the extent they did anything at all for consumers, they merely collected and forwarded to lenders standard documents to apply for modifications. *See, e.g.*, PX02 ¶14, Att. F at 41 [SER_017, 054]; PX12 ¶¶7, 11, 15 [SER_380, 382].

Finally, appellants explicitly told many consumers that they did not have to make their mortgage payments, and actually instructed some consumers to not pay their mortgages. *See, e.g.*, PX11 ¶¶4-5, Att. A at 6 [SER_320-21, 325]; PX20 Att. Y at 426:15-23, 443:29 to 444:9 [SER_693, 696-97]; PX24 Att. A at 23:8-9, 26:17-27:6 [SER_693].[7] Appellants also told many consumers not to contact or communicate with their lenders or loan servicers. PX03 ¶6 [SER_069]; PX12 ¶¶4, 8 [SER_379-80]; PX22 ¶36 [SER_770]. As a result of appellants' erroneous advice—which they provided to consumers unlawfully, *without* the disclosures required by law to accompany such statements,

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[7] To justify their suspect advice, appellants told consumers that lenders would not accept payments while modification was in process; or that consumers would not be eligible for loan modification unless they were behind on their mortgage payments. *See, e.g.*, PX07 ¶4 [SER_173]; PX22 Att. J at 420:15-24 [SER_810], 426:14-17 [SER_816]. In appellants' "Explanation of Why You Should Do the Modification," they claimed in writing: "You have to be 61 days behind on your mortgage to be eligible for any modification. You may continue to pay on your loan after that but it really will make no difference." PX26 Att. A at 16 [SER_909].

12 C.F.R. § 1015.4(c); *see infra* at 12-13—many consumers fell behind on their loans, accrued penalties and additional interest, and some went into, or were facing, foreclosure. *See, e.g.*, PX01 ¶16 [SER_005]; PX12 ¶¶14-15 [SER_382]; PX16 ¶¶22-23 [SER_543]; *see also* PX22 Table 2 [SER_764-65].

2. Appellants' Failure to Make the Required Disclosures

Appellants compounded the impact of their misrepresentations by failing to make the disclosures required by the MARS Rule. Under the Rule, all general commercial communications must clearly and prominently disclose the following statements:

> (1) "(Name of company) is not associated with the government, and our service is not approved by the government or your lender"; and
>
> (2) "Even if you accept this offer and use our service, your lender may not agree to change your loan."

12 C.F.R. § 1015.4(a). All consumer-specific commercial communications must state, in a clear and prominent manner, the following statements:

> (1) "You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us

> (insert amount or method for calculating the amount) for our services";
>
> (2) "(Name of company) is not associated with the government, and our service is not approved by the government or your lender";
>
> (3) "Even if you accept this offer and use our service, your lender may not agree to change your loan"; and
>
> (4) where the provider has represented that the consumer should temporarily or permanently discontinue payments, in whole or in part, on a dwelling loan, "If you stop paying your mortgage, you could lose your home and damage your credit rating."

12 C.F.R. §§ 1015.4(b)(1), (2), (3), 1015.4(c).

Appellants' websites either did not contain the required general disclosures at all, or—contrary to the Rule's requirements—buried them in fine-print footnotes at the bottom of the page or through a small hyperlink located at bottom of the page.[8] *See* PX22 ¶12, Att. C at 78, 360 [SER_761-62, 783, 792], Att. H at 403 [SER_795]. In many cases, appellants' representatives also did not provide the required consumer-

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[8] The Rule specifically defines "clear and prominent" to be "unavoidable, *i.e.*, visible to consumers without requiring them to scroll down a webpage." 12 C.F.R. § 1015.2(4)(iii).

specific disclosures during the consumer calls. *See, e.g.*, PX05 ¶3 [SER_118]; PX19 ¶14 [SER_590-91]; PX22 ¶¶24, 57 [SER_766, 775].

3. Appellants' Collection of Advance Fees

Despite the plain prohibition in the MARS Rule, 12 C.F.R. § 1015.5(a), appellants collected advance fees for their services in nearly all cases. Their service contracts typically required consumers to pay $3,900, usually in six monthly installments. *See, e.g.*, PX02 Att. A at 10 [SER_023]; PX04 Att. B at 24 [SER_112]; PX19 ¶3, Att. A at 10 [SER_587, 596]. Appellants extracted those payments from consumers before they presented the consumers with any loan modification offers (if they presented offers at all). PX04 ¶¶5, 9, 16, 20 [SER_089-92,]; PX12 ¶¶5, 8, 13, 15 [SER_380, 382]; PX14 ¶25, Att. G at 52-53 [SER_447, 494-95]. In a sick twist, appellants warned consumers against paying advance fees to other MARS providers, advising them to "run away" from "scammers" who require up-front payment. PX22 Att. J at 424:16-425:1 [SER_814-15]. Appellants claimed that their fees were not "up-front" because they purportedly began working on consumers' files soon after consumers signed up. On their credit card processing

applications, by contrast, appellants frankly admitted that they charged upfront fees. PX20 ¶78, Att. AAA at 1233 [SER_643-44, 752].[9]

4. Appellants' Practices Harmed Consumers

Appellants' bank records indicate that, from about 2012 until the district court halted their scheme in early 2018 by entering a temporary restraining order, appellants extracted more than $11 million in illegal advance fees from consumers. PX20 ¶¶58-59, Table 10 [SER_635-36]. And as described at pages 11-12 above, appellants' practices caused some borrowers to go into default and face foreclosure.

Hundreds of consumers complained to the FTC, the Better Business Bureau (BBB), state authorities, and consumer advocacy groups. PX22 ¶¶15-17 [SER_763-64]. These complaints are likely just the tip of the iceberg; the FTC estimates that only 8.4% of consumer

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[9] The MARS Rule exempts attorneys from the prohibition on advance fees under a strict limitation—*if* they provide MARS service as part of their "practice of law," and meet other conditions. 12 C.F.R. § 1015.7. That exemption is inapplicable here. Horton is the only defendant who is a licensed attorney—in Texas and Utah, although his Utah license is currently suspended. PX26 ¶¶4-5 [SER_894-95]. Appellants provided MARS service nationwide, not just in Texas and Utah, so Horton could not have provided MARS service as part of his practice of law. Horton also admitted in his bar suspension proceedings that he violated the Utah bar ethics rules, PX20 Att. FF at 1013-31 [SER_720-738], compliance with which is a requirement for the exemption. 12 C.F.R. § 1015.7(a)(3).

fraud victims complain to an "official source" such as the FTC or BBB. *See* Keith Anderson, *Consumer Fraud in the United States: An FTC Survey* 80 (Aug. 2004) (hereinafter *Anderson Survey*). Appellants have "F" ratings with the BBB. PX20 ¶¶47-48 [SER_630]. They also have faced private consumer lawsuits and state law enforcement proceedings. *See, e.g.*, PX20 Att. T at 182-201 [SER_668-87], Att. AA at 699-706 [SER_701-708]. Horton lost his Utah bar license for three years for violating bar ethics rules in connection with appellants' business practices. PX20 Att. FF at 1013-31 [SER_720-738]. Finally, at least one credit-card payment processor terminated appellants' merchant account because of a high percentage of consumer-requested chargebacks; another one closed their accounts because of "concerns with type of business." PX20 ¶¶62-63, 74-75 [SER_637, 642].

5. The Corporate Appellants Operated as a Common Enterprise Controlled by the Individual Appellants

The corporate appellants operated collectively as a "common enterprise." Payroll records indicate that the corporations shared numerous employees, who referred to themselves as employees of multiple corporate appellants—sometimes during a single interaction

with consumers. *See, e.g.*, PX03 ¶8 [SER_069]; PX20 ¶54, Table 7 [SER_632-33]; PX22 ¶13 [SER_762-63]. The corporate appellants used identical or nearly identical consumer contracts.[10] They also blurred corporate distinctions when interacting with consumers. Consumers might call one company, such as Preferred Law or Consumer Defense; receive contracts from another, such as Modification Review Board, American Home Loan Counselors, or Consumer Link; and make payments to yet another, such as AM Property or FMG Partners.[11] Bank records show routine commingling of corporate funds and transfers between the various companies' accounts. PX20 ¶¶93-94, Table 14 [SER_650-51].

Appellants Jonathan and Sandra Hanley controlled and directed the operations of the whole scheme. Jonathan Hanley was a principal or manager of Preferred Law, American Home Loan Counselors, American

[10] *Compare* PX02 Att. D at 30-37 [SER_043-50] (Preferred Law) *with* PX14 Att. B at 12-14 [SER_454-56] (Consumer Defense-NV), PX19 Att. A at 12-17 [SER_598-603] (American Home Loans); *compare also* PX13 Att. A at 17 [SER_406] (Consumer Link) *with* PX04 Att. B at 17 [SER_107] (American Home Loan Counselors).

[11] *See, e.g.*, PX01 ¶¶3, 6, 9, Att. A at 9-11, B at 13 [SER_001-03, 009-11, 013]; PX02 ¶¶15-16, Att. G at 44-45, Att. H at 47-54 [SER_017-18, 057-58, 060-67]; PX06 ¶8, Att. A at 12-13 [SER_131, 140-41].

Home Loans, Modification Review Board, both "Consumer Defense" entities, Consumer Link, Brown Legal, AM Property, and Zinly, and is listed on most corporate papers for the corporate appellants. *See* PX20 Table 1 [SER_611-12]. He was a signatory on many corporate merchant and bank accounts. *See id.* Table 9, 11-12 [SER_634, 646-49]. He was the contact point for many of appellants' service providers, such as web domains. *Id.* ¶44, Table 6 [SER_649]. He responded to BBB's consumer complaints on behalf of Consumer Defense, Preferred Law, and Modification Review Board. PX25 ¶4 [SER_884-85]. He also arranged and paid for the Nevada mail drop for defendants Consumer Defense-NV and Consumer Link, which were the latest consumer-facing iteration of appellants' MARS scheme. PX20 ¶¶26-28 [SER_621-22].

Sandra Hanley, Jonathan's wife, was a manager or director of Preferred Law, American Home Loan Counselors, Modification Review Board, both Consumer Defense entities, Consumer Link, AM Property, and Zinly. PX20 Table 2 [SER_612]. She was a signatory on many of appellants' corporate bank accounts, PX20 Tables 11-12 [SER_646-49], and was in charge of appellants' employee payroll, *id.* ¶¶50-51, Att. DD at 790:24-791:2 [SER_631, 715-16]. She responded to the payment

processors' chargebacks on many of appellants' merchant accounts. *Id.* ¶66, Att. RR at 1170-74 [SER_743-47]. She also appeared on numerous consumer contracts as appellants' representative who was authorized to negotiate with lenders or servicers for loan modifications. *See, e.g.*, PX02 Att. A at 9 [SER_022]; PX19 Att. A at 9 [SER_595].

The Hanleys used corporate bank accounts as their personal piggybanks. PX20 ¶¶95-96, Tables 8, 15 [SER_652-53, 633]. They transferred approximately $500,000 from corporate accounts to their personal accounts, and spent over $300,000 in corporate funds on personal credit card expenditures. PX20 Tables 14, 15 [SER_652-53]. They spent the money on home furnishings, luxury goods, and gambling sprees. PX20 ¶35, Table 15, Att. N at 148-49 [SER_624, 652-53, 666-67].

C. *The FTC Complaint and Preliminary Injunction Proceedings*

On January 8, 2018, the FTC filed an enforcement action seeking a permanent injunction and other equitable relief for violations of the FTC Act and the MARS Rule. *Complaint for Permanent Injunction and Other Equitable Relief* (DE.1) ¶¶1, 54-73; *see supra* note 1. The FTC alleged that appellants had already substantially harmed consumers

and, unless enjoined, were "likely to continue to injure consumers, reap unjust enrichment, and harm the public interest." *Id.* ¶74.

Together with its complaint, the FTC filed a motion, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, for an *ex parte* Temporary Restraining Order, seeking an asset freeze, the appointment of a receiver, immediate access to appellants' business premises, and other equitable relief. (DE.5). The district court entered a TRO on January 10, 2018. (DE.12).

The FTC also sought a preliminary injunction (PI), pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). (DE.5-6).[12] The FTC argued that it was likely to succeed on the merits and that the equities favored halting the unlawful conduct and preserving appellants' assets to redress consumer harm. *Id.* at 26-28. It argued that irreparable harm is presumed in a statutory enforcement action such as this one. *Id.* at 26-27 (citing *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344 (9th Cir. 1989); *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172

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[12] The FTC combined its motion for a preliminary injunction—which was noticed and opposed by appellants—with its Rule 65(b) motion for an *ex parte* TRO. The docket below shows two separate entries (DE.5 and DE.6) for that single filing, the former designated as a motion for a TRO, the latter as a motion for a preliminary injunction. EOR_553.

(9th Cir. 1987)). Nevertheless, the FTC argued that absent an injunction, "the public and the FTC will suffer irreparable harm from the continuation of [appellants'] scheme and the likely destruction of evidence and dissipation of assets," and like consumers who already faced foreclosure, "more are likely to face such financial disaster if [appellants'] scam is not halted." *Id*. at 27 n.20.

In response, appellants conceded several key matters. First, they conceded that they had charged unlawful advance fees and failed to make disclosures required by the MARS Rule. DE.44 at 6, 39; *see also* DE.44 Exh. D (Declaration of Jonathan Hanley) ¶7 [EOR_225]. Nor did they seriously dispute the FTC's allegations that they deceptively represented affiliation with the government and consumers' obligation to pay their mortgages. And they did not address the charge that they violated the MARS Rule by telling consumers not to communicate with their lenders or servicers.

The district court held a hearing on February 15, 2018. (DE.52). *See* Transcript of February 15, 2018 Proceedings before Hon. James C. Mahan (DE.100) (Tr.) [EOR_064-104]. The court determined—for purposes of the PI motion—that it had personal jurisdiction. Tr. 4

[EOR_067]. It ruled that irreparable harm is presumed in statutory enforcement actions. *Id.* It found that the balance of equities favored the public interest. *Id.* at 5 [EOR_068]. It agreed that the FTC's proffered evidence supported its allegations of common enterprise, with the Hanleys and Horton "the controlling forces behind" it. *Id.* at 6 [EOR_069]. And it found that the PI "would reserve the assets and the records pending the outcome of a * * * trial." *Id.* at 7 [EOR_070].

Appellants' principal argument was that they had not misled consumers because they in fact succeeded in negotiating loan modifications. Their lawyer claimed that they had completed 3,294 successful loan modifications out of 3,700 customers, for a success rate of 89 percent. Tr. 10-19 [EOR_073-082]. To support this figure, appellants relied solely on Jonathan Hanley's review of appellants' "LoanPost" customer-relations database.[13] *Id.* 22 [EOR_085]; *see* DE.44 Exh. D (Declaration of Jonathan Hanley) ¶3. Hanley himself did not

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[13] Oddly, Hanley's declaration stated that appellants had "approximately 3,500" customers, for an even higher purported success rate of 94 percent. DE.44 Exh. D ¶¶5, 7-8.

testify at the hearing, however, nor did he explain how he defined a "successful" loan modification.[14]

The court-appointed receiver contradicted their claims of success. Having reviewed appellants' records and interviewed their staff, he concluded that "the success rate was somewhere near 20 percent." Tr. 22 [EOR_085]. The receiver pointed out that Hanley's figures made little sense, because the FTC had identified at least 250 consumer complaints relating to appellants, which alone undermined Hanley's claim that 3,294 customers out of 3,500 received a successful modification. *Id*. at 22-23 [EOR_085-86]; *see Anderson Survey*, *supra*, at 80 (only about 8.4% of fraud victims make an official complaint). The receiver also reported that the LoanPost database showed 6,353 customer files, not the 3,500 identified in Hanley's declaration, or the 3,700 cited by counsel at the hearing. Tr. 35 [EOR_098].[15]

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[14] Appellants also argued that a preliminary injunction would harm nearly 200 customers whose loan modifications had not been completed. Tr. 10 [EOR_073]. The court-appointed receiver assured the court, however, that he had alerted both those customers and their lenders of the action pending against appellants and had taken steps to ameliorate any potential harm to them. *Id*. at 38-40 [EOR_101-03].

[15] The FTC, in its PI reply below (DE.49), noted that its "preliminary" analysis of appellants' customer data indicated that "at the very best,"

The receiver also testified that appellants' business could not be maintained lawfully as an ongoing concern, because "[t]he whole thing is [dependent] on the ability to take advanced fees, which is illegal under the MARS rule." Tr. 23 [EOR_086]. He added that "the whole mind-set of this business was fraudulent, permeated with fraud." *Id.*

After hearing that evidence, the district court offered to continue the PI hearing (and extend the TRO) for two weeks to allow appellants to garner additional evidence to support their success rate figures. Tr. 27 [EOR_090]. They rejected that offer, unless the court released additional funds for their counsel. *Id.*

Accordingly, on February 20, 2018, the district court entered a preliminary injunction. (DE.55) [EOR_001]. The court found "good cause to believe that it will have jurisdiction over all parties hereto." *Id.* at 2 [EOR_002]. It also found that "immediate and irreparable harm will result from [appellants'] ongoing violations of the FTC Act and the

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appellants' success rate was "slightly more than 30%." *Id.* at 5 [EOR_146]. The FTC cautioned, however, that its analysis employed "assumptions favorable to" the appellants and predicted that—just as the receiver later reported during the hearing—"further analysis will likely reduce [appellants'] possible success rate." *Id.* n.7 [EOR_146].

MARS Rule unless [appellants] are immediately restrained." *Id.* at 3 [EOR_003].

The court also froze appellants' assets. It found that "damage to the Court's ability to grant effective final relief * * * will result from the sale, transfer, destruction or other disposition or concealment by [appellants] of their assets or records, unless [appellants] are immediately restrained," and therefore "[g]ood cause exists for continuing the asset freeze." *Id.* Finally, the court found that its injunction "is in the public interest." *Id.*

All of the defendants below except Benjamin Horton and the two Nevada corporations now appeal the district court's grant of the preliminary injunction and asset freeze.

STANDARD OF REVIEW

"This Court only subjects a district court's order regarding preliminary injunctive relief to 'limited review'." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996)). The Court "will reverse a district court's issuance of a preliminary injunction only if the district court abused its discretion by basing its decision on an erroneous legal

standard or on clearly erroneous factual findings." *Id.*; *accord FTC v. EDebitPay, LLC*, 695 F.3d 938, 943 (9th Cir. 2012).

SUMMARY OF ARGUMENT

The district court properly exercised its discretion when it preliminarily enjoined appellants from continuing to engage in unlawful conduct and froze their assets to preserve the possibility of redress to their victims. Appellants show no error in the court's decision.

1. The court was not required to rule on appellants' motions to dismiss before it could issue a preliminary injunction. Appellants cite nothing that imposes such a requirement, and the rule they seek would be unworkable. Their sole case, *Zepeda v. I.N.S.*, 753 F.2d 719 (9th Cir. 1983), did not address a situation remotely similar to this matter. Here, the district court determined three times that it likely would have jurisdiction over the appellants. That is sufficient in the context of time-sensitive preliminary relief.

There is no reason to doubt the district court's personal jurisdiction. The FTC filed suit under Section 13(b) of the FTC Act, which grants district courts nationwide jurisdiction. In such circumstances, personal jurisdiction lies when a defendant has

sufficient contacts with the United States as a whole. Appellants admit outright that they have such contacts, and the Court need not proceed further. Recent decisions by the Supreme Court do not change the analysis. The cases on which appellants rely did not involve personal jurisdiction under federal statutes that confer personal jurisdiction by allowing nationwide service of process.

Even if the FTC Act did not resolve personal jurisdiction, appellants are plainly subject to jurisdiction in Nevada. They maintained substantial contacts with Nevada, availed themselves of the protection of its laws and courts, and employed Nevada corporations as key components of their deceptive scheme.

2. The district court employed the correct standard for granting a preliminary injunction. In a statutory enforcement action brought by a government agency, irreparable harm is presumed, and the court need not separately assess it. And in any event, the FTC showed, and the district court found, that denial of the PI would cause irreparable harm.

3. The district court rightly froze the assets of Jonathan and Sandra Hanley. Under the FTC Act, individuals may be liable for corporate misdeeds, including any equitable monetary relief, if they (a)

either participated in, or had the authority to control, the challenged corporate practices, and (b) knew or should have known of the corporate violations of law. The Hanleys satisfy those conditions and therefore may be held personally liable for any consumer redress the court ultimately deems appropriate. And the record showed that the Hanleys not only siphoned off corporate funds, but were also likely to waste unfrozen assets. The court therefore acted well within its discretion when it ensured that the assets would be available when needed.

That appellants may have secured modification of some consumers' mortgages does not undermine the propriety of the asset freeze. Appellants violated the law by collecting illegal advance fees and by pitching their services deceptively. Consumers may have accepted a less-than-promised modification because their only other choice was to abandon the fees they already paid—which is why the MARS Rule prohibits advance fees in the first place. Moreover, the court-appointed receiver estimated that at most 20 percent of appellants' customers had their loans modified. Appellants collected more than $11 million in unlawful fees, and redress for the other 80 percent would far exceed the value of the frozen assets.

ARGUMENT

Appellants do not contest the district court's finding that the FTC will likely succeed on the merits or its assessment that the equities strongly favor the FTC. They challenge only the issues of personal jurisdiction, irreparable harm, and the propriety of the asset freeze. All their challenges are insubstantial.

I. THE DISTRICT COURT PROPERLY RESOLVED APPELLANTS' CHALLENGE TO PERSONAL JURISDICTION

A. The District Court Made the Necessary Findings of Personal Jurisdiction Before Entering the Preliminary Injunction

Appellants claim that the district court erred when it "entered a preliminary injunction without first resolving personal jurisdiction." Br. 13. In fact, three separate times—in the TRO, at the preliminary injunction hearing, and in the preliminary injunction order—the district court found good cause to believe it had personal jurisdiction. *See* TRO (DE.12) at 2; Tr. 4 [EOR_067]; PI (DE.55) at 2 [EOR_002]. To be sure, the district court has not yet definitively resolved the issue and ruled on the motions to dismiss,[16] but it has made jurisdictional

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[16] Horton filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, for a change of venue. (DE.24). The others filed two

findings sufficient to grant time-sensitive preliminary relief. *See National Union Fire Ins. Co. of Pittsburgh v. Kozeny*, 19 Fed. Appx. 815, 822 (10th Cir. 2001) (preliminary injunction can be granted when personal jurisdiction is shown with "reasonable probability").

Appellants point to no authority that required the district court to definitively resolve the question of personal jurisdiction before considering time-sensitive preliminary relief. Their sole case, *Zepeda v. I.N.S.*, 753 F.2d 719 (9th Cir. 1983), does not support them. There, the Court considered the scope of a preliminary injunction in the context of an uncertified plaintiff class. The injunction applied to all members of the putative class, and this Court held that "the injunction must be limited to apply only to the [named] individual plaintiffs unless the district judge certifies a class of plaintiffs." *Id.* at 727. In other words, the district court could not enjoin non-parties. The Court did *not* hold, or even suggest, that a district court must definitively resolve disputed questions of personal jurisdiction over a named defendant before it may enter preliminary relief.

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separate motions to dismiss, for lack of personal jurisdiction (DE.40) and for *forum non conveniens* (DE.45).

The rule proposed by appellants would be unworkable. A litigant could stymie preliminary relief simply by challenging jurisdiction in a motion to dismiss, even after a PI motion has been filed. Under appellants' view, until the district court definitively resolved jurisdiction, it would be disabled from protecting the public from ongoing harm. Here, for example, the appellants would have remained free to continue deceiving consumers and to hide their assets from the reach of law enforcement. That cannot be the law.

B. There Is No Reason to Doubt the District Court's Personal Jurisdiction over Appellants

Appellants next contend that the district court in fact lacked personal jurisdiction over them because they lack sufficient contacts with Nevada. The claim fails because jurisdiction here turns not on appellants' contact with Nevada, but with the United States as a whole—and they concede that they have such contact. Even if contact with Nevada were the correct inquiry, appellants have sufficient contacts with that State to establish personal jurisdiction.

1. Contact with the United States as a whole is sufficient, but appellants also had significant contacts with Nevada

The FTC brought this action pursuant to Section 13(b) of the FTC Act, which provides for nationwide service of process: "In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found." 15 U.S.C. § 53(b). This Court has long held that "a federal statute which permits the service of process beyond the boundaries of the forum state broadens the authorized scope of personal jurisdiction." *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1414 (9th Cir. 1989). "Under such a statute, 'the question becomes whether the party has sufficient contacts with the United States, not any particular state.'" *Id.* (quoting *Sec. Inv'r Prot. Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985)).[17]

This Court has recently reaffirmed that principle in the context of a preliminary injunction and asset freeze under the FTC Act. *FTC v.*

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[17] Other courts have also adopted the "national contacts" jurisdictional analysis where a statute allows nationwide service of process. *See KM Enters., Inc. v. Global Traffic Techs., Inc.*, 725 F.3d 718, 724 (7th Cir. 2013); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 449 (6th Cir. 2012); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 298 (3rd Cir. 2004); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997).

Americans for Fin. Reform, No. 17-15552, 2017 WL 6629026 (9th Cir. Dec. 29, 2017). There, reviewing the district court's freezing of a defendants' asset in the possession of a *non-party*, the Court held that "pursuant to the FTC Act's nationwide service of process provision, the district court has nationwide personal jurisdiction over" the non-party. *Id.* at *2. It follows *a fortiori* that the rule would apply to a named party.

Appellants—all residents of either Utah or Nevada whose challenged activities took place entirely within the United States—squarely concede in their brief that "[i]t is undisputed" that they have sufficient "contacts with the United States as a whole" to satisfy the statutory requirements for personal jurisdiction under Section 13(b) of the FTC Act. Br. 23. The Court need not proceed further on this issue.

But even if the test for personal jurisdiction required assessing appellants' contact with Nevada, they would meet that test as well. Appellants maintained substantial contacts with Nevada and availed themselves of the protection of its laws and courts. Their service contracts contained a forum selection clause designating Clark County, Nevada, as the only forum in which both Nevada and non-Nevada

consumers can bring suits against them. *See, e.g.*, PX05 Att. A at 10 [SER_127]; PX09 Att. A at 12 [SER_247]; PX11 Att. B at 12 [SER_331]; PX13 Att. A at 13-14 [SER_402-03]. Having expressly invoked the jurisdiction of the Nevada state courts, appellants cannot plausibly contend (Br. 26-27) that they could not foresee litigation in Nevada.

Moreover, the record before the district court showed that the corporations—including the two Nevada entities that are not appellants here—operated as a unified common enterprise that was controlled and directed by the individuals. *See supra* at 16-19. And companies based in Nevada played a significant part in the scam. As the court-appointed receiver explained it, appellants attempted to "skirt the MARS Rule" by "promoting a pure fiction" that two Nevada-based companies provide separate services. In reality, the companies "are not independent or bona fide operating companies, they are just integrated pieces of a business selling loan modification services," using Nevada-based addresses "to provide consumers the false impression of separate operations." *Preliminary Report of Temporary Receiver* (DE.26) at 12, 15 [EOR_390, 393]; *see also* Tr. 23-24 [EOR_086-87] (same).

In addition, scores of appellants' customers resided in Nevada. *Second Supplemental Declaration of Elizabeth Feldstein* (DE.31-1) ¶16 [SER_617]. Nearly 30 percent of the total customer base, and almost 77 percent of new customers, were associated with the Nevada entities Consumer Defense-NV and Consumer Link. *Id.* ¶15 [SER_617]. Appellants also maintained mailing addresses in Nevada, PX20 ¶¶26-28 [SER_621-22], and represented to consumers that they were located at those Nevada addresses. *See, e.g.,* PX13 Att. A at 9-17 [SER_398-406]; PX16 Att. A at 11 [SER_546]; PX19 ¶12, Att. A at 9 [SER_590, 595]. And Jonathan and Sandra Hanley controlled the Nevada companies as corporate officers. PX20 Att. A at 48-53, Att. B at 56-57 [SER_656-61, 663-64]; PX28 Att. D at 40-48, Att. G at 90-96 [SER_931-939, 941-47].

2. Recent Supreme Court decisions do not change the analysis

Appellants rely on a purported "sea change" in the law of personal jurisdiction, allegedly brought about by several recent Supreme Court decisions. Br. 15-18. But the cases on which they rely do not affect the district court's jurisdiction.

For starters, none of the decisions involved a federal statute, like Section 13(b) of the FTC Act, with a nationwide service of process provision.[18] Instead, each decision concerned either the jurisdiction of a state court over foreign defendants for state law claims (*Goodyear Dunlop*; *J. McIntyre Mach.*; *Bristol-Myers*), or the jurisdiction of a court over claims based on activity that occurred *entirely* out-of-state (*Goodyear Dunlop*; *Daimler*; *Walden*; *BNSF*; *Bristol-Myers*). The central issue in each case concerned minimum contacts with the forum. To the degree the Supreme Court adopted any new restrictions on what

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[18] *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915 (2011), involved a North Carolina state court's jurisdiction over the foreign subsidiary of an out-of-state U.S. company in a wrongful death action resulting from an accident in France. *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011), involved a New Jersey state court's jurisdiction over a foreign company in a product liability action. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), involved a federal district court's jurisdiction in a suit by Argentinian plaintiffs against a German defendant, filed under the Alien Tort Statute and the Torture Victim Protection Act, for activities that occurred exclusively in Argentina. *Walden v. Fiore*, 134 S. Ct. 1115 (2014), was a *Bivens* action filed in a federal district court in Nevada against a Georgia police officer for actions that occurred entirely in Georgia. *BNSF Railway v. Tyrrell*, 137 S. Ct. 1549 (2017), involved a Montana state court's jurisdiction over an out-of-state defendant in a Federal Employers' Liability Act action filed by out-of-state plaintiffs and arising from an out-of-state accident. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), involved a California state court's jurisdiction over an out-of-state defendant in a product liability class action.

constitutes sufficient contacts with a State, they have no bearing here, where the question is whether appellants had contacts with the United States as a whole, as they admit they did.

To the contrary, one of the cases directly indicated that personal jurisdiction is appropriate in any federal court under a statute that allows nationwide service of process. In *BNSF Railway v. Tyrrell*, 137 S. Ct. 1549 (2017) (*see supra* note 18), the Court rejected the argument that a statutory venue provision gave the district court personal jurisdiction over defendant railway. 137 S. Ct. at 1555. The Court contrasted statutory language used to confer *venue* (a suit "may be brought") with statutory provisions that indicate *jurisdiction*: "Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process." *Id*. The Court singled out Section 13(b) of the FTC Act as an example of Congress' grant of personal jurisdiction through nationwide service of process. *Id.* at 1555-56. It also cited approvingly an earlier decision, *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106-07 (1987), which discussed "statutes that authorize (or fail to authorize) nationwide service of process." *BNSF*, 137 S. Ct. at 1556.

Similarly, this Court ruled just last year in a case brought under the FTC Act that "[i]n a statute providing for nationwide service of process, the minimum contacts analysis is whether the entity 'has acted within any district of the United States or sufficiently caused foreseeable consequences in this country.'" *Americans for Fin. Reform*, *supra*, 2017 WL 6629026 at *2 (quoting *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004)).

Having failed to undermine personal jurisdiction, appellants next raise a due process challenge, arguing that the district court's exercise of jurisdiction over them must satisfy a five-factor test for constitutional requirements of "traditional notions of fair play and substantial justice." Br. 21, 22-23 (citing out-of-circuit district court decisions).

The argument is misplaced because it confuses personal jurisdiction (*i.e.* the power of the district court to adjudicate the FTC's claims against appellants) with venue (whether there exists a more convenient forum for this case). This Court confronted the same issue in *Go-Video*, where the appellants similarly argued that the burden placed on them "by virtue of national contacts analysis" is "inherently violative of the 'fair play and substantial justice' elements of due process." 885

F.2d at 1416. The Court was "not persuaded," noting that "the concerns appellants raise are far more akin to a *forum non conveniens* argument than to a jurisdictional one." *Id*. "Considerations underlying a non-jurisdictional doctrine like *forum non conveniens*" the Court stressed, "must be kept separate from the constitutional and jurisdictional analyses." *Id*. (citing *Fitzsimmons v. Barton*, 589 F.2d 330, 334 (7th Cir. 1979) (declining to "import [*forum non conveniens* analysis] into determination of the constitutionality of exercises of personal jurisdiction")).[19]

But even the venue test would not help. As described above, appellants maintained substantial contacts with Nevada; availed themselves of its laws, and explicitly sought to litigate in its courts; and used Nevada entities as a central part of their scheme. *See supra* at 33-35. The idea that having to defend their deceptive practices in Nevada somehow violates "fair play and substantial justice" is laughable.

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[19] Appellants' Rule 12(b)(2) and *forum non conveniens* motions sought only dismissal and not a change of venue. DE.40; DE.45 [EOR_270]. They asked only that the district court "dismiss the action so that it may be brought in Utah." DE.45 at 5.

II. The District Court Applied the Correct Standard for a Preliminary Injunction

Appellants do not challenge the district court's findings that the FTC is "likely to prevail on the merits of this action," and that "[w]eighing the equities and considering the FTC's likelihood of ultimate success on the merits, [the preliminary injunction] is in the public interest." DE.55 at 2-3 ¶¶B, F [EOR_002-03]. But they contend that the court erred by failing to require the FTC to show irreparable harm. Br. 36-40. The claim is meritless.

The FTC is not required to establish irreparable harm when it seeks preliminary relief to enforce the FTC Act. This Court held years ago that in an FTC enforcement case "the district court is required (i) to weigh equities; and (ii) to consider the FTC's likelihood of ultimate success before entering a preliminary injunction." *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989). "Harm to the public interest," the Court emphasized, "is presumed." *Id.* (citing *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175-76 (9th Cir. 1987)).

The Court has explained further that "[t]he function of a court in deciding whether to issue an injunction authorized by a statute of the

United States to enforce and implement Congressional policy is a different one from that of the court when weighing claims of two private litigants." *Odessa Union Warehouse*, 833 F.2d at 174-75. "Where an injunction is authorized by statute, and the statutory conditions are satisfied * * *, the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury." *Id.* at 175.

Appellants' contrary argument is unavailing. This case was brought pursuant to the "second proviso" of Section 13(b).[20] Appellants contend that because the first part of Section 13(b), which authorizes preliminary injunctions in aid of administrative proceedings, expressly directs courts to consider only likelihood of success and the balance of equities, while the second proviso is silent on the issue, the standard under the second proviso must be more demanding. Br. 37-38.

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[20] The second proviso states 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). This Court has held that the district court's power to issue a permanent injunction gives it "authority to grant whatever preliminary injunctions are justified by the usual equitable standards." *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946)).

That claim collides with this Court's ruling in *World Wide Factors*. It also cannot be squared with the legislative history of Section 13(b), which shows that the first part of the statute simply makes explicit the standard that is already implicit in all government enforcement cases, like those brought under the second proviso. As the Conference Report explained, the first part of the statute:

> is not intended in any way to impose a totally new standard of proof different from that which is now required of the Commission. The intent is to maintain the statutory or "public interest" standard which is now applicable, and not to impose the traditional "equity" standard of irreparable damage, probability of success on the merits, and that the balance of equities favors the petitioner. This latter standard derives from common law and *is appropriate for litigation between private parties. It is not, however, appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.*
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> * * *
>
> The Conferees did not intend, nor do they consider it appropriate, to burden the Commission with the requirements imposed by the traditional equity standard which the common law applies to private litigants.

H.R. Rep. No. 93-624, at 31 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2533 (emphasis added). In other words, the standard in the first part of

Section 13(b) was meant merely to codify—not modify—existing law as it applied to government enforcement of statutes.[21]

Other courts take the same approach. The D.C. Circuit has ruled that the first part of Section 13(b) was "intended to codify the decisional law," under which a government agency enforcing a statute "was not held to the high thresholds applicable where private parties seek interim restraining orders," but faced a "lighten[ed] * * * burden" that eliminated "the need to show irreparable harm." *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1081-82 (D.C. Cir. 1981) (footnotes and citations omitted). The court thus recognized that the "more lenient standard" for preliminary injunctions applies to *all* FTC actions under either part of Section 13(b). Indeed, that standard *predates* the enactment of Section

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[21] In *Affordable Media*, the Court conflated the two parts of the statute. The FTC brought the case under Section 13(b)'s second proviso. *See* 179 F.3d at 1232. The Court upheld the preliminary injunction by relying on (and quoting) the *first* part of the statute, and it cited a case brought under the first part. *Id.* at 1233, citing *FTC v. Warner Commc'n, Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984). That analysis has apparently caused confusion in lower courts. *See, e.g.*, *FTC v. NAFSO VLM, Inc.*, No. 12-cv-0781, 2012 WL 1131573, at *1 n.3 (E.D. Cal. March 29, 2012) ("The *Affordable Media* case on its face appears to create an ambiguity in the law, in that it applies the lighter burden to a second proviso case."). In fact, *Affordable Media* applied the correct standard for a preliminary injunction because, as discussed above, irreparable harm is presumed in cases brought under either part of the statute.

13(b). *See, e.g.*, *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 544-45 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963); *SEC v. Globus Int'l, Ltd.*, 320 F. Supp. 158, 160 (S.D.N.Y. 1970).

But even if the more stringent private-party test applied, there was no error below because the FTC showed, and the district court found, that irreparable harm would result from denial of a preliminary injunction. In its motion, the FTC argued that it "also meets the Ninth Circuit's four-part test for private litigants to obtain injunctive relief." DE.5-6 at 27 n.20 [EOR_496] (citing *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1020 (9th Cir. 2016)). It explained that, without the requested relief, "the public and the FTC will suffer irreparable harm from the continuation of [appellants'] scheme and the likely destruction of evidence and dissipation of assets." *Id.* The FTC warned that "[m]any victimized consumers have already faced irreparable harm, such as foreclosure, and more are likely to face such financial disaster if [appellants'] scam is not halted." *Id.*

The district court agreed. It noted during the hearing that the "balance of harms favor[s] the public interest." Tr. 5 [EOR_068]. It then

made a formal finding in the preliminary injunction order that "[t]here is good cause to believe that immediate and irreparable harm will result from [appellants'] ongoing violations * * * unless [appellants] are immediately restrained and enjoined." DE.55 at 3 ¶C [EOR_003]; *see also id*. ¶D ("immediate and irreparable damage to the Court's ability to grant effective final relief * * * unless [appellants] are immediately restrained and enjoined").

III. THE DISTRICT COURT PROPERLY FROZE APPELLANTS' ASSETS

The FTC asked the district court to freeze appellants' assets to guard against dissipation and thus to preserve the court's ability to order effective and complete final relief. DE.5-6 at 31-35 [EOR_500-04]. In its motion, the FTC noted that appellants had tried to "obscure their true operating locations and hide their individual involvement" in the scheme, thus showing that they may hide assets or destroy evidence. *Id*. at 33-34 [EOR_502-03]. And in fact, the receiver reported to the court before the PI hearing that "[i]mplementation of the TRO ha[d] been *substantially* hindered and obstructed" by the Hanleys. *Preliminary Report of Temporary Receiver* (DE.26) at 5 [EOR_383]. The receiver detailed the Hanleys' refusal to cooperate, their interference with

receivership assets, and their attempts to hide—and even sell—various assets in contravention of the TRO. *Id*. at 6-10 [EOR_384-388].

The district court granted the FTC's request for an asset freeze, which appellants challenge in two respects. Both lack merit.

A. The District Court Rightly Preserved the Assets of Jonathan and Sandra Hanley

Appellants argue that the court could not properly freeze the personal assets of Jonathan and Sandra Hanley because they are "unrelated to the challenged conduct." Br. 8-9, 29-36. Appellants are mistaken.

First, the Hanleys' assets are *not* "unrelated to the challenged conduct." The Hanleys were named defendants and were the driving force behind the entire scam. As detailed above, the FTC alleged that the corporate appellants operated as a common enterprise in the deceptive marketing and sale of their services, with the Hanleys at the helm. *See supra* at 16-19. They could be personally liable for the corporate misdeeds, and their assets are thus directly pertinent to consumer redress.

Under the FTC Act, individuals are liable for corporate violations (and thus subject to injunctive relief) if they either participated directly

in the challenged conduct or had the authority to control it. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). Individuals are additionally liable for equitable monetary redress if they knew, or should have known, of the corporate violations. *Id.* at 1170. Status as a corporate officer or, in closely held corporations, authority to sign documents on behalf of the corporation, creates a presumption of control. *Id.* at 1170-71. "Knowledge" may be shown by reckless indifference to the truth or falsity of the corporate misrepresentations, or by awareness of a high probability of fraud with an intentional avoidance of the truth. *Id.* And "[t]he extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability." *Affordable Media*, 179 F.3d at 1235.

Both Hanleys amply meet the test for individual financial responsibility. They held positions of authority with one or more of corporations, including acting as officers, bank account signatories, and agents acquiring corporate services such as merchant accounts and web domains. *See supra* at 17-19. Both Hanleys also had actual knowledge of unlawful corporate practices: Jonathan responded to BBB consumer

complaints about misrepresentations; Sandra responded to payment processors' chargebacks on merchant accounts, triggered by consumer complaints. *Id.* Indeed, the Hanleys were personally named or referenced in consumer lawsuits. *See, e.g.*, PX20 Att. T at 183-201 [SER_669-687]. Those positions and that knowledge would be sufficient to impose an equitable monetary judgment on the Hanleys.

Second, the FTC proffered evidence that the Hanleys transferred nearly $500,000 from corporate bank accounts to their personal accounts, and spent over $300,000 in corporate funds on personal expenditures. PX20 Tables 14, 15 at 44-45 [SER_651-53]. The district court made a finding to that effect at the hearing. Tr. 7 [EOR_070]. In sum, the Hanleys' assets are anything but "unrelated" to the challenged practices, and the district court clearly did not abuse its discretion in including them in the asset freeze order.

Appellants' argument that the district court erred by not following Nevada law on the attachment of assets is specious. The district court had authority to enter the asset freeze against the Hanleys pursuant to the second proviso of Section 13(b) of the FTC Act, which "provides a basis for an order freezing assets." *H.N. Singer*, 668 F.2d at 1113;

accord World Wide Factors, 882 F.2d at 347; *Affordable Media*, 179 F.3d at 1232 & n.2. *See also FTC v. Pantron I Corp*., 33 F.3d 1088, 1102 (9th Cir. 1994) (Section 13(b) "gives the federal courts broad authority to fashion appropriate remedies for violations of the [FTC] Act").

Contrary to appellants' claim (Br. 29-30), Rule 64 provides them no help. To begin with, that Rule provides that "a federal statute governs to the extent it applies." Fed. R. Civ. P. 64(a). Because Section 13(b) of the FTC Act applies here, Rule 64 does not. More fundamentally, the argument cannot be squared with the Court's holding in *H.N. Singer*. There, the Court rejected the idea "that the asset freeze is in effect a pre-judgment attachment of their assets for the purpose of securing post-judgment recovery," that must "meet the requirement of F. R. Civ. P. 64." 668 F.2d at 1112. The argument failed because "[w]hile it is true that the asset freeze has an effect comparable to that of an attachment, it is not an attachment," which is "normally a remedy in actions at law." *Id*. Here, as in *H.N. Singer*, the freeze was an exercise of the district court's *equitable* authority, not its authority at law. As the Court explained, the PI and asset freeze are forms of "appropriate provisional remedy" issued under the court's "authority to

give final relief," which under the second proviso of Section 13(b) lies only in equity. *Id.*

B. The District Court Correctly Determined That the FTC's Reasonable Approximation of Consumer Harm Justified Freezing Appellants' Assets

Lastly, appellants claim that the district court's freezing of "100 percent" of their assets was unjustified because they "helped thousands of consumers obtain loan modifications or other mortgage relief." Br. 40. The argument boils down to the contention that a 100 percent freeze would be appropriate only if 100 percent of customers were defrauded. The claim is mistaken in two respects.

First, even if appellants' conduct could be excused to the extent some customers received satisfactory loan modifications, the harm to those who did not likely would far exceed the value of the frozen assets. The FTC submitted bank records evidence showing that appellants received more than $11 million in unlawful advance fees. PX20 ¶¶58-59, Table 10 at 27-28 [SER_635-36]. Even deeming the receiver's estimate of 20 percent of customers receiving offers of modification to be a "success rate," that would still leave over $8.8 million in advance fees collected from deceived and unsatisfied consumers. That figure exceeds

the highest estimates of the value of the frozen assets. *See Preliminary Report of Temporary Receiver* (DE.26) at 10-12 [EOR_388-90] (receivership's holdings include three cars, a recreational vehicle, two real estate properties with equity valued at about $800,000, and 25 mortgage loans with aggregate principal of $1.2 million); *Fourth Supplemental Declaration of Elizabeth Feldstein* (DE.66-1) at 1-4 (liquid assets estimated at a little over $600,000). Under these circumstances, the asset freeze was well within the district court's discretion.

Second, the evidence does not support the idea that thousands of consumers were helped, and even if it did, those consumers were still treated unlawfully because the MARS Rule prohibits much of appellants' conduct.

As discussed above (*supra* at 22-23), appellants claimed below that between 89 and 94 percent of their customers received successful loan modifications. That claim was based on Jonathan Hanley's own, unverified review of his customer database. DE.44 Exh. D (Declaration of Jonathan Hanley) ¶¶5-8 [EOR_224-26]. Hanley neither testified at the PI hearing nor provided any verifiable support for his success

figure.[22] But this Court has long recognized that a "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *Publ'g Clearing House*, 104 F.3d at 1171.

That is particularly true where the unsupported declaration runs counter to overwhelming contrary evidence. *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). The FTC and the court-appointed receiver both vigorously disputed Hanley's success rate claim. *See supra* at 15-16, 23. The receiver reported to the court that likely no more than 20 percent of appellants' customers received *any* offer of loan modification, let alone a "successful" modification in the sense of satisfying appellants' promises of substantially lower monthly

[22] Appellants submitted with their PI opposition a thumb drive purportedly containing 37,000 pages of exhibits—claimed to be "a copy of each successful loan modification located so far in the electronic data." DE.44 at 9 n.6 [EOR_195]. Their brief notably lacked even a single specific cite to that voluminous data, or a concrete example of a verifiably satisfied customer. Appellants may not shift to the court the burden of sifting through that thumb drive "to ferret out delectable facts buried in a massive record." *Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011) (citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

payments and interest rates. Appellants have thus failed to support their claim of helping thousands of consumers.

Moreover, the fact that a customer received or even accepted a modification offer does not prove her satisfaction with appellants' services. Victims had already paid thousands of dollars in advance fees. At that point, they faced a Hobson's choice of abandoning their entire investment or accepting any modification to their loan, however insignificant. There is no reason to believe that any customer would have accepted a loan modification offer had appellants complied with the MARS Rule and accepted payment only afterwards. *See* 12 C.F.R. § 1015.4(b)(1) (requiring disclosure that if consumer rejects lender's offer of loan modification, consumer does not owe MARS provider any money). That is precisely why the MARS Rule prohibits advance fees. 75 Fed. Reg. at 75,114, 75,116-120. Appellants' no-harm-no-foul argument does not hold water.

CONCLUSION

For the foregoing reasons, the district court's preliminary injunction order should be upheld.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, no other cases in this Court are deemed related to this appeal.

Respectfully submitted,

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May 16, 2018

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Date: May 16, 2018

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