No. 20-55766

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

ELEGANT SOLUTIONS, INC., *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 8:19-cv-1333
Hon. James V. Selna

BRIEF OF THE FEDERAL TRADE COMMISSION

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JURISDICTION

This is an appeal from a final judgment in favor of the Federal Trade Commission. The FTC sued under 15 U.S.C. §§ 53(b) and 57b. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered a final judgment on July 17, 2020, and an amended final judgment on July 24, 2020. Defendants timely appealed on July 29, 2020.

INTRODUCTION

Rima Radwan, Mazen Radwan, Labiba Radwan (a.k.a. Labiba Velazquez), Dean Robbins, and their companies (collectively the "Radwans") operated a telemarketing scam that offered purported student loan debt relief services.[1] They promised to lower consumers' monthly loan payments to specific amounts and put borrowers on the path to loan forgiveness. But the Radwans never actually obtained new loan payments at the rates they quoted. Instead, they routinely falsified information to enroll consumers in income-driven repayment plans that temporarily reduced their monthly payments to $0 (even though interest was still accruing). The Radwans still charged consumers the quoted monthly rates, though, and they pocketed much of that money in the form of hefty—and illegal—advance fees. And even where there was money left over after the Radwans took their fees,

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[1] For clarity and convenience, we refer hereinafter to the three individual Radwans (Rima, Mazen, and Labiba) by their first names.

they generally never made any payments at all on consumers' loans, or at best made only sporadic ad hoc payments. Because the loans continued to accrue interest, borrowers later learned that their loan balances had actually increased, often by thousands of dollars. The Radwans continued to engage in these deceptive practices even after being charged with misconduct by three separate states and promising to change their ways.

The FTC sued the Radwans for violating both Section 5 of the FTC Act, 15 U.S.C. § 45, which outlaws deceptive acts or practices, and the FTC's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, which prohibits misrepresenting debt relief services offered via telemarketing and charging advance fees for them.[2] The district court entered a temporary restraining order, later superseded by a stipulated preliminary injunction, to shut down the scam, freeze the Radwans' assets, and appoint a Receiver to take possession of their business. Following discovery, it granted summary judgment for the FTC, entered a permanent injunction, and held the Radwans jointly and severally liable for $27,584,969 in consumer redress—the net amount they bilked from their victims.

The Radwans raise a slew of challenges to the district court's evidentiary rulings, its grant of summary judgment, and its remedy. For the reasons set forth

[2] The TSR was promulgated pursuant to the Telemarketing and Consumer Fraud and Abuse Act, 15 U.S.C. §§ 6101-6108.

below, all of those claims lack merit. In particular, the Radwans' assertion that the recent decision in *AMG Capital Management., Ltd. v. FTC*, 141 S. Ct. 1341 (2021), affects the outcome of this case is incorrect. In *AMG*, the Supreme Court held that the FTC cannot obtain monetary relief for consumers under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Contrary to the Radwans' assertion, *AMG* did not affect the district court's power to award *injunctive* relief, which Section 13(b) expressly authorizes. And the Supreme Court recognized that the FTC can obtain monetary relief under Section 19 of the FTC Act, 15 U.S.C. § 57b. *AMG*, 141 S. Ct. at 1352. Section 19 expressly authorizes courts to order consumer redress—including a "refund of money"—for violations of FTC consumer protection regulations such as the TSR. The district court cited Section 19 in issuing monetary relief, *see* 1-ER-3, 4, 6, and the award should be sustained on that basis.

QUESTIONS PRESENTED

1. Did the district court properly grant summary judgment for the FTC?

2. Did the district court properly enter a prospective injunction under Section 13(b)?

3. Did the district court properly award monetary relief under Section 19?

RELEVANT STATUTES

Relevant statutes and regulations are set forth in the addendum hereto.

STATEMENT OF THE CASE

A. The Radwans' Debt Relief Enterprise

The Radwans were in the student debt relief business from at least 2013 until July 10, 2019, when the FTC filed this action. 3-SER-574-79. Rima, Mazen, and Robbins originally did business as a general partnership, but in 2014 they dissolved the partnership and transferred its assets to a new company, D.O.R.M. Group, Inc. 3-SER-574-75. They later decided to "rebrand" because (in Rima's words) "D.O.R.M. Group had brought on a lot of liabilities and had bad accounts, so we had a bad image on the internet." 3-SER-575. They split the business between two new companies. Tribune Management, Inc. (doing business as "Student Loan Group" or "SLG"), solicited new customers, while Heritage Management Inc. (doing business as "National Secure Processing" or "NSP") managed previously existing accounts. 3-SER-575-76.

The Radwans' debt relief activities attracted scrutiny from law enforcement agencies in several states. In 2016, D.O.R.M Group entered into a consent decree with Washington to resolve charges that it failed to make required disclosures, engaged in false advertising, and failed to deliver promised services. 3-SER-576. In 2017, the Radwans entered into a consent decree that barred them from operating in North Carolina to resolve charges that they had engaged in unfair or deceptive practices and collected illegal advance fees. 3-SER-576-77. D.O.R.M.

Group also entered into an "Assurance of Voluntary Compliance" with Oregon to settle charges that it operated an unlawful debt management service. 3-SER-577.

In the wake of these law enforcement actions, the Radwans decided to "rebrand" again in November 2017. 3-SER-577. They transferred the assets and operations of Tribune and Heritage, including several employees, to two new companies. Elegant Solutions, Inc. (doing business as "Federal Direct Group" or "FDG") solicited new business, while Trend Capital, Ltd. (doing business as "Mission Hills Federal" or "MHF") serviced "legacy clients" signed up by the predecessor companies. 3-SER-578.

Notwithstanding the change in corporate names, the ownership and management structure of the Radwans' debt relief business remained the same. All four companies (Heritage, Tribune, Elegant, and Trend) were jointly owned by Rima, Mazen, and Robbins, with Rima serving as CEO, Mazen as chief financial officer, and Robbins as chief technology officer. 1-SER-65-68; 3-SER- 579-80. Labiba's job title at all four companies was "HR Manager Director," and she also identified herself as "director of operations." 1-SER-65-68, 217; 3-SER-572. The business and financial affairs of the companies were closely interrelated. Heritage and Tribune shared an office building. 2-SER-290-91; 3-SER-550-51. Elegant and Trend shared a different office building, with Trend paying the rent. 2-SER-301; 3-SER-547-48; 16-ER-4115-16. And funds were routinely transferred from one

company to another and to Rima, Mazen, and Robbins personally. 3-SER-580, 822-23.

Rima, Mazen, and Robbins were also joint owners and officers of Dark Island Industries, Inc. which operated a classic car business ("Radwan Classic Cars" or "RCC") in the same building as Elegant and Trend. 1-SER-84; 3-SER-579-80. Dark Island's finances were intertwined with and dependent upon the student loan debt relief business. 3-SER-580-81, 746. Among other things, as the Radwans concede (Br. 20), Trend paid Dark Island's rent, while Dark Island was supposedly responsible for renovating the office building. 3-SER-581. Dark Island also provided some services to the debt relief business, including setting up internet services and signing a contract with a payment processing company. 3-SER-581-82.

B. Operation of the Scam

The Radwans preyed on consumers with substantial student loan debts via telemarketing, both inbound (receiving calls) and outbound (placing calls). Telemarketers represented that the business was a student loan management company that would help borrowers save money by consolidating their federal student loans, enrolling them in an income-based repayment program, or qualifying them for a loan forgiveness program. 3-SER-587. The telemarketers quoted a monthly payment significantly lower than what consumers were paying,

and led them to believe that most or all of the reduced amounts would be applied to their loans. 3-589-93, 598. They did not disclose in this initial sales pitch that the new payments included hefty management and processing fees. 3-SER-595-97. Sometimes, they also represented that consumers' loan balances would be forgiven if they made the new, lower payments for a specific period of time, such as three, seven, ten, or fifteen years. 3-SER-588-89. They also led consumers to believe that the Radwans would be purchasing, taking over, or handling servicing of the loans. 3-SER-599-602.

After consumers agreed to sign up, the telemarketers emailed them a pre-filled enrollment packet to sign electronically. 3-SER-602-03. Buried in the middle of the lengthy packet was a statement of fees, along with various other disclaimers. 3-SER-605. Customers had to electronically sign or initial in the application several places, but rather than requiring the customer to scroll through the document, the application jumped automatically from one signature block to the next. 2-SER-319-28; 3-SER-606. Once the documents were signed (but before actually providing any services), the Radwans began making electronic withdrawals from consumers' bank accounts. 2-SER-498; 3-SER-624-25. Consumers were instructed that the Radwans would handle all communications with lenders and that they should stop making payments to their "previous" servicers. 3-SER-600-01.

Virtually all of the representations made during these telemarketing calls were false. The Radwans were not federal student loan servicers, and did not take over or manage their customers' loans. 3-SER-608-09. Nor did they obtain new loan payments at the rates quoted to consumers. 3-SER-611-12. Instead, they routinely falsified information to enroll their victims in income-driven repayment plans—*e.g.*, by falsely claiming that an applicant was unemployed and had no income. 3-SER-613-16, 730-75; 1-SER-111-13. These plans temporarily suspended the consumer's obligation to make monthly payments (or reduced the monthly payment to $0), but did not stop interest from continuing to accrue.

Furthermore, even when customers were placed in a $0 monthly plan, the Radwans still charged them the amounts quoted in the initial telemarketing call. Although consumers were led to believe that most or all of these payments would go toward paying down their loans, a substantial portion—and in many cases the entire payment—consisted of fees. The Radwans charged a "management fee" (typically $599-$799 for the first year and $492 for later years, broken into monthly installments), a "processing fee" ($10 to $15 each month), and sometimes a "down payment" or "initiation fee" (between $30 and $6,600). 3-SER-625.

Any money left over after the Radwans took their fees was placed in what they called a "trust" account—actually just an ordinary business account the Radwans controlled. 3-SER-617, 628. While the money in the "trust" account was

supposed to be paid to lenders, the Radwans routinely failed to make any such payments or made them only sporadically, on an ad hoc basis. 3-SER-618-20. The Radwans also sometimes took additional fees out of the "trust" account or transferred money from that account to their operating or personal accounts. 3-SER-619-21. The funds in the "trust" account were not segregated by customer, consumers could not withdraw money from the account, and the Radwans did not pay interest on the "trust" balances. 3-SER-628.

Because the Radwans were not making payments to lenders (or at best were doing so only sporadically), consumers' loan balances did not decline. And in the meantime, the loans continued to accrue interest—sometimes running to thousands of dollars—which was added to the loan balance. 3-SER-629-30. The Radwans hid these effects by changing consumers' sign-in and contact information with their servicers, making it difficult for consumers to access their account information. Consequently, many consumers did not know of the true status of their loans for months or years. 3-SER-621-22.

The telemarketers' representations about loan forgiveness were also untrue, or at best misleading. Some consumers were told they would be eligible for loan forgiveness in three or seven years (*see, e.g.*, 19-ER-5214; 20-ER-5356), but there are no such programs for federal loans. 3-SER-608. The federal loan forgiveness programs that do exist are limited in scope and have strict employment

requirements, such as working full-time in government or public service and making payments under a qualified repayment plan for 120 months, or working full time as a teacher in low-income schools for five consecutive years.[3] Most consumers are not eligible. 3-SER-582-84, 608. Moreover, some consumers who were eligible lost months or years of qualifying payments toward forgiveness as a result of the Radwans' actions. 3-SER-631.

The experience of one of the Radwans' victims, Yuliya Sanker, is typical. The telemarketer's initial sales call with Sanker was recorded, and the FTC submitted a transcript of the call (along with a declaration from Sanker) in support of its summary judgment motion. 15-ER-3959-4005. The telemarketer told Sanker she could lower her payments from more than $500 a month to just $130.93, plus an initial payment of $200, and that doing so would put her on a path to loan "forgiveness" after 20 years. 15-ER-3966, 3972, 3981-82, 4001-02. Using a pitch laid out in one of the sales scripts the Radwans provided to telemarketers, she stated that the "main goal" of the program was "to eliminate the middle lender and get you back on track with paying the main source, which is going to be the Department of Education." 15-ER-3972-73; 3-SER-761. She did not mention that the $130.93 payment included a $44.97 management fee and a $10 processing fee.

[3] *See* https://studentaid.gov/manage-loans/forgiveness-cancellation.

The telemarketer collected a variety of personal information, including Sanker's address, date of birth, email address, drivers' license number, bank account information, and answers to security questions. 15-ER-3963, 3967, 3969, 3978-79, 3984-85, 3991-93. She then e-mailed Sanker an enrollment packet, and went through it in cursory fashion. 15-ER-3996-97. Although the packet disclosed the fees, the telemarketer did not explain them. She simply told Sanker that there were "fee disclosures for you to review. Please keep in mind they are all included in you[r] monthly payments. There are not additional fees." 15-ER-3996-97. This language was also drawn from the Radwans' sales scripts. 16-ER-4232. Finally, once Sanker electronically signed the document, the telemarketer told her that "I'm going to be your loan manager from here on out"—suggesting that the Radwans would be taking over servicing of the loan. 15-ER-3998. That statement too came from a telemarketing script. 16-ER-4233.

After signing up, Sanker received welcome e-mails and payment reminders confirming the initial payment of $200 and subsequent monthly payments of $130.93, with no mention of fees. 20-ER-5472, 5474. Funds were automatically withdrawn from her bank account. Sanker did not learn for more than two years that $54.97 of her monthly payment went to fees. 20-ER-5455. After further sleuthing, she learned that even though $76.46 of her payment was supposed to go toward her loan, the Radwans had paid nothing to her lender. Instead, they had

falsely certified that she had no income to qualify her for a $0 monthly payment. 20-ER-5454-56. The Radwans had also given the servicer their own telephone number and a fake e-mail address as Sanker's contact information. 20-ER-5455. Sanker paid the Radwans $3,211 over more than two years, nothing was paid on her loans, and she incurred significant additional interest. 20-ER-5457.

Numerous other consumers had the same experience—they were promised a specific lower monthly payment, only to learn months or years later that little or nothing had been paid on their loans and they actually owed more money than they did before they signed up with the Radwans. All told, the Radwans collected more than $27 million from consumers (after deducting consumer refunds and amounts paid to lenders) between April 2014 and July 2019. 3-SER-629. This figure represents only the net amount consumers paid, and does not include the consequential harms (such as increased interest payments or damaged credit history) from the Radwans' actions.

C. Proceedings In This Case

The FTC filed this action in 2019. Count I of the complaint charged that the Radwans engaged in deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. 45. Count II alleged that the Radwans violated the TSR by charging illegal advance fees for debt relief services offered via telemarketing. *See* 16 C.F.R. § 310.4(a)(5)(i). Count III alleged that they violated the TSR by making

misrepresentations in connection with debt relief services offered via telemarketing. *See id.* § 310.3(a)(2)(x). Relying on controlling precedent, *see, e.g.*, *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598-600 (9th Cir. 2016), the FTC sought an injunction and equitable monetary relief in the nature of restitution on all counts under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). It also sought the same monetary relief for the TSR violations under Section 19, 15 U.S.C. § 57b.

Following discovery, both sides moved for summary judgment. The FTC presented overwhelming evidence that the Radwans' purported debt relief service was a scam from start to finish. That evidence included the Radwans' written discovery responses, deposition testimony from the individual defendants, and hundreds of pages of internal business documents such as financial records, marketing materials, telemarketing scripts, and dozens of customer complaints. Additionally, the FTC submitted declarations from its case investigators summarizing the evidence obtained from the Radwans and from an assistant general counsel for the Higher Education Loan Authority of Missouri ("MOHELA"), a state agency that services student loans, describing an investigation into the Radwans' activities conducted by MOHELA. That investigation revealed numerous improprieties, including impersonation of borrowers, forging borrowers' signatures, and altering demographic information on borrowers' accounts. *See* 18-ER-4938-49. Finally, the FTC submitted declarations

from nineteen of the Radwans' victims, with extensive supporting documentation, and transcripts of two recorded calls (the initial call with Sanker and a follow-up call with another consumer). *See* 19-ER-5031 to 21-ER-5744.

By contrast, the Radwans did not submit so much as a single declaration from a satisfied customer. The declarations they did submit did not contradict the FTC's declarants, and actually confirmed many key details of their testimony. In particular, Rima Radwan's declaration purported to respond to each of the nineteen declarants, *see* 16-ER-4152-4206, but Rima did not dispute either the amount of fees the Radwans charged the declarants or the fact that little or nothing was paid on the declarants' loans. For example, in response to Sanker's testimony that nothing was paid on her loan, Rima conceded that this "could possibly be so." 16-ER-4188. More generally, she acknowledged that payments frequently were not paid to lenders (though she attempted to place the blame on third-party payment processors). 16-ER-4139-40.

The district court considered all evidence timely submitted by either side on either motion. 1-ER-54; *see Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). After resolving various procedural and evidentiary issues raised by the Radwans, 1-ER-56-60, the court granted the FTC's motion for summary judgment and denied the Radwans' motion. 1-ER-61-65. The court also found no genuine dispute that the corporate

defendants formed a common enterprise and that the individual defendants were personally liable. 1-ER-65-68. It entered a permanent injunction and ordered the Radwans to pay $27,584,969 to the FTC, to be placed in a fund for distribution to victims. 1-ER-16-17, 69.

SUMMARY OF ARGUMENT

1. The district court properly granted summary judgment to the FTC and denied it to the Radwans. None of the Radwans' procedural or evidentiary objections has merit. The district court did not abuse its discretion when it (i) struck late-filed declarations where the Radwans never submitted a motion demonstrating excusable neglect, (ii) denied additional discovery under Rule 56(d) where the Radwans' failed to act diligently during the discovery period, and (iii) overruled the Radwans' boilerplate evidentiary objections to certain FTC declarations where the evidence was admissible for summary judgment purposes.

On the merits, the district court properly granted summary judgment to the FTC. Undisputed evidence showed that the Radwans engaged in deceptive practices by falsely representing that consumers would be enrolled in a repayment plan that would reduce their monthly payments to specific lower amounts, that most or all of the new payments would go toward the loans, and that the Radwans would assume responsibility for servicing their loans. The same evidence shows that the Radwans violated the TSR by materially misrepresenting a debt relief

service sold through telemarketing. Undisputed evidence also shows that the Radwans violated the TSR by charging illegal advance fees—*i.e.*, collecting money from consumers before providing the promised services, and holding the money in bank accounts that did not meet the TSR's strict requirements. The undisputed evidence shows that the corporate defendants were all part of a common enterprise, since they were owned and controlled by the same individuals, they shared office buildings and employees, and their finances were intertwined. And it also shows that the each of the individual defendants participated in the deceptive acts or had the ability to control them and that they knew about (or at the very least were recklessly indifferent to) the deception.

2. The Radwans' argument that Section 13(b) does not authorize district courts to issue a permanent injunction unless the FTC has filed an administrative complaint is wrong. This Court has long rejected that reading of the statute, which would nullify the permanent injunction proviso. *See FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982). Contrary to the Radwans' assertion, the recent *AMG* decision does not compel a different conclusion. *AMG* involved *monetary* relief under Section 13(b), not *injunctive* relief, and the Court expressly recognized that the language of the statute permits the FTC to obtain a permanent injunction without initiating administrative proceedings. *AMG*, 141 S. Ct. at 1348. Because there is no conflict between *AMG* and *Singer*, the Court must follow *Singer*'s

holding that the district court had authority to issue a permanent injunction. Given the Radwans' recidivist history and their repeated repackaging of their debt relief scheme into new corporate entities, the district court did not abuse its discretion in granting an injunction.

3. The district court properly awarded monetary relief under Section 19, which explicitly authorizes consumer redress, including the "refund of money," for violations of FTC consumer protection regulations like the TSR. 15 U.S.C. § 57b(b). The *AMG* Court made clear that its holding with respect to Section 13(b) did not preclude the FTC from obtaining monetary relief under Section 19. *AMG*, 141 S. Ct. at 1352. The Radwans have waived any argument that Section 19 does not authorize monetary relief here by failing to make that argument in their opening brief.

The Radwans' argument that the principles set forth in *Liu v. SEC*, 140 S. Ct. 1936 (2020), apply to the calculation of monetary relief here is wrong because *Liu* involved a very different statute. The statute in *Liu* authorizes the Securities and Exchange Commission to obtain "equitable relief," but Section 19 authorizes *any* form of consumer redress and expressly provides for the "refund of money." The district court thus was not required to deduct the Radwans' expenses incurred in conducting the debt relief scam. Because Section 19 gives the district court broad discretion to award any relief necessary to redress consumer injury, the court

also did not err in imposing joint-and-several liability. In any event, joint liability would be appropriate even under the standard set forth in *Liu* because the Radwans were partners in concerted wrongdoing. *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), does not apply because it deals only with statute of limitations issues applicable to the SEC statute, whereas Section 19 has its own statute of limitations. See 15 U.S.C. § 57b(d). Finally, the Radwans' argument that the FTC did not adequately disclose its monetary relief calculations is waived because they did not raise it below; in any event, the FTC disclosed that it was seeking a consumer refund and provided the Radwans with its monetary relief calculation.

STANDARDS OF REVIEW

Different standards of review apply to the different issues presented. The district court's procedural and evidentiary rulings are reviewed for abuse of discretion. *SEC v. Stein*, 906 F.3d 823, 833 (9th Cir. 2018); *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011). The summary judgment rulings themselves are reviewed de novo. *Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011). Whether the district court had authority to grant injunctive or monetary relief is a question of law reviewed de novo, but the grant of injunctive and monetary relief is reviewed for abuse of discretion. *Sandpiper Vil. Condo. Ass'n v. Louisiana-Pacific Corp.*, 428 F.3d 831, 840 (9th Cir. 2005) (injunction); *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (monetary relief).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE FTC AND DENIED SUMMARY JUDGMENT TO THE RADWANS.

The Radwans raise a smorgasbord of procedural, evidentiary, and substantive challenges to the district court's grant of summary judgment. None of their arguments holds water. The district court properly granted summary judgment to the FTC and denied the Radwans' motion.

A. The Radwans' Procedural and Evidentiary Objections Lack Merit.

The Radwans assert three procedural or evidentiary challenges to the summary judgment ruling. None has merit.

1. The District Court Properly Struck the Late-Filed Declarations of Rima Radwan and Dean Robbins.

The district court struck late-filed declarations of Rima and Robbins submitted in opposition to the FTC's summary judgment motion, citing a pattern of the Radwans' disregarding deadlines and prejudice to the FTC.[4] 1-ER-79. The Radwans contend that the late filing was attributable to excusable neglect, but never submitted a motion demonstrating that as required by Rule 6(b).[5] And "[t]he

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[4] Rima's declaration was filed two days late; Robbins's was filed five days late (and the same day the FTC's reply brief was due). 1-ER-77-78.

[5] Rule 6(b)(1) provides in relevant part that "When an act may or must be done within a specified time, the court may, for good cause, extend the time … *on motion made* after the time has expired if the party failed to act because of excusable neglect." (emphasis added)

Supreme Court has held that it is never an abuse of discretion for a district court to exclude untimely evidence when a party fails to submit that evidence pursuant to a motion, as Rule 6(b) expressly requires." *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958, 966 (9th Cir. 2011) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 895-98 (1990)). The Radwans do not address *Fleischer Studios*, even though it was cited by the district court, and the cases they do cite (Br. 48-49) are not remotely on point because they do not address Rule 6(b) or untimely submission of evidence.[6] It was not an abuse of discretion to strike these untimely declarations.

Even if there had been an error, it would have been harmless. The Radwans concede that Rima's declaration was "virtually the *same*" as her declaration filed in support of the Radwans' motion for summary judgment and that "the trial court considered each party's evidentiary showing regardless for which motion the evidence was tendered." Br. 47. The exclusion of a duplicative declaration submitted in opposition to the FTC's motion therefore could not have caused harm.

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[6] *See*, *e.g., Ctr. for Env. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1009 (9th Cir. 2011) (agency's consideration of cumulative effects satisfied requirements of NEPA); *In re Plata*, 958 F.2d 918, 922 (9th Cir. 1992) (in bankruptcy case, no reason to distinguish between dismissals and chapter 7 conversions for purpose for determining disposition of certain funds); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1364 (9th Cir. 1990) (en banc) (creating an artificial "safe harbor" for frivolous allegations or claims would enable a party to evade Rule 11 sanctions by joining them with non-frivolous allegations in the same pleading).

The exclusion of Robbins's declaration was also harmless. The Radwans contend that it showed that the FTC's investigator, Rufus Jenkins, improperly omitted $14 million in lender payments and refunds from his calculation of consumer harm. Br. 42-43. Robbins made the same assertions in a reply declaration, 2-ER-194, but the argument fails in any case because it is based on an apples-to-oranges comparison. Jenkins calculated net revenue (*i.e.*, gross revenue minus refunds and payments to lenders) primarily using the Radwan companies' own tax returns and profit-and-loss statements. 2-SER-541. For the most part, the "gross revenues" reported in those documents did not include payments to lenders or refunds to consumers because such payments had already been deducted from the reported gross revenue figure. *Id*. The only exception was in Tribune's 2016 tax return, which reported $28,981 in refunds, and Jenkins deducted this amount from gross revenue for that period. 2-SER-541-43. Because neither tax returns nor profit-and-loss statements were available for Trend, Jenkins used bank statements to determine that company's gross revenue, and deducted refunds and payments to lenders to arrive at net revenue. *Id.*

The Robbins declaration was based on different documents. Robbins looked only at bank statements for all four companies and identified amounts that he claimed represented refunds or payments to lenders. 2-ER-202-39. That does not show that Jenkins's calculations based on the tax returns and profit-and-loss

statements for Elegant, Heritage, and Tribune were wrong.[7] Notably, for Trend, where both Jenkins and Robbins used bank statements to determine net revenue, they reached essentially the same results.[8]

2. The District Court Properly Denied the Radwans' Request for Additional Discovery Under Rule 56(d).

The Radwans contend that the district court should have granted additional discovery under Rule 56(d)—specifically, recordings of sales calls stored on the Receiver's server—before deciding the FTC's summary judgment motion. Br. 49-53. The district court did not abuse its discretion in denying this request. When a district court denies relief under Rule 56(d), this Court will find an abuse of discretion only if (among other things) "the movant diligently pursued its previous discovery opportunities." *Big Lagoon Rancheria v. California*, 789 F.3d 947, 955 (9th Cir. 2015). "The failure to conduct discovery diligently is grounds for the denial of a Rule 56([d]) motion." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002).

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[7] The Radwans incorrectly state that the FTC "*admitted*" to this Court that "there was a $14,000,000 overstatement of consumer loss." Br. 55. Of course, the FTC said no such thing. It said just the reverse: that Jenkins properly calculated the Radwans' net revenues. FTC Opp. to Appellant's Mot. For Summary Reversal, Dkt. 25, at 18-19.

[8] Jenkins figures show a total of $3,526,993 in refunds and payments to lenders for Trend (2-SER-543), while Robbins's show a total of $3,592,538 (2-ER-223).

That rule governs here because the Radwans did not exercise diligence to obtain additional call recordings during the discovery period. The Radwans requested discovery of recordings of initial sales calls from the FTC and the Receiver. The FTC produced all electronic data that it collected, including two hard drives, one of which contained call recordings. 1-ER-56; 1-SER-7-8. The Radwans had the opportunity to obtain copies of electronic data held by the Receiver, who told their counsel that "[i]f you wish to image the servers in storage, we are happy to make arrangements to allow your computer forensics expert access to do so." 1-SER-24. The Radwans' counsel even acknowledged in his Rule 56(d) declaration that the Receiver "offered to make the servers available for review." 5-ER-940. The Radwans visited the Receiver's facilities and reviewed evidence there, but did not file any motions challenging the sufficiency of the FTC's or the Receiver's discovery responses. 1-SER-7-8. As the district court properly held, 1-ER-56, these failures negated any right to further discovery under Rule 56(d).

3. The District Court Properly Overruled the Radwans' Evidentiary Objections.

The Radwans complain that the district court improperly overruled their objections to several of the FTC's declarations. They first argue that these declarations are irrelevant insofar as they address Heritage and Tribune because those companies are no longer operating. Br. 53. There is generally no need to

address relevance objections on summary judgment "because they are duplicative of the summary judgment standard itself." *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 665 (9th Cir. 2021) (citation and internal quotation marks omitted). If evidence is irrelevant, it will not affect the ultimate summary judgment ruling. In any event, evidence relating to Heritage and Tribune is highly relevant. Among other things, (1) those defendants were alleged to be part of a common enterprise with the other defendants, (2) Trend continued to service Heritage and Tribune's legacy customers, and (3) evidence relating to Heritage and Tribune is relevant to determining the individual defendants' liability.

The Radwans' arguments as to specific declarations are equally meritless.

a. Connor Geiran and Rufus Jenkins. Geiran is an FTC data analyst. His declaration summarizes voluminous customer relationship management data the Radwans maintained in electronic form. Among other things, it shows the range of fees charged by the Radwans and demonstrates that a substantial majority of their customers were enrolled in plans with $0 payments, even though many of them reported incomes too great to qualify for such plans. 15-ER-3821-30. The district court found no serious dispute as to the authenticity of this data and held that Geiran's declaration was admissible as a summary of voluminous business records. 1-ER-58-59; *see* Fed. R. Evid. 1006.

As discussed above, Jenkins is an FTC investigator who calculated the Radwans' net revenue. 2-SER-540-43. The district court held that this evidence was also admissible as a summary of business records. 1-ER-59.

The Radwans argue that Geiran and Jenkins should have been disclosed and qualified as experts. Br. 54-55. But this Court has squarely held that a witness who is simply summarizing business records he has personally reviewed need not be certified as an expert. *United States v. Aubrey*, 800 F.3d 1115, 1129-30 (9th Cir. 2015).[9] The court did not abuse its discretion in admitting these declarations as non-expert summaries.

b. Emilie Saunders. Saunders was an FTC paralegal. Her declaration attached copies of documents obtained from the inspection of the Radwans' business premises. *See* 15-ER-3831-4016. The Radwans objected on authentication and hearsay grounds, but the court overruled the objection because it was "made in a boilerplate fashion, does not identify the specific documents that lack adequate

[9] The Radwans' cases (Br. 54) are not to the contrary. *United States v. Morales*, 720 F.3d 1194 (9th Cir. 2014), addresses the foundation necessary for a government agent to testify about the results of a search of a government database, *id.* at 1203, not a summary of records produced by a defendant. *Corona Regional Medical Center v. Sali*, 139 S. Ct. 1651 (2019), is an order dismissing a petition for a writ of certiorari. The Radwans quote from an earlier district court decision in that case, but the witness in that case did more than merely summarize data, and the decision was reversed on appeal in any event. *See Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004-07 (9th Cir. 2018).

authentication, and does not specifically explain what about [Saunders's] testimony is hearsay." 1-ER-58.

The Radwans reiterate their relevance objection, which is meritless for the reasons discussed above (at 23-24). Br. 56. They also assert that documents attached to Saunders's declaration are "[a]t bottom … all unauthenticated hearsay." *Id.* But this Court has made clear that boilerplate objections of this type are inadequate on summary judgment. *See Sandoval*, 985 F.3d at 666. In any case, Saunders authenticated the documents by explaining that they were materials the FTC collected during its inspection of the Radwans' businesses. 15-ER-3832-33. The Radwans do not assert that their business documents are not what they purport to be. As to hearsay, "[i]f the contents of a document can be presented in a form that would be admissible at trial—for example, through live testimony by the author of the document—the mere fact that the document itself might be excludable hearsay provides no basis for refusing to consider it on summary judgment." *Sandoval*, 985 F.3d at 666. The Radwans do not argue that the content of any of the documents attached to Saunders' declaration could not be presented in an admissible form at trial. The court did not abuse its discretion in admitting Saunders's declaration or the attachments thereto.

c. <u>Scott Lause</u>. Lause is assistant general counsel for MOHELA, which (as noted above) is a Missouri state agency that services student loans. His

declaration describes MOHELA's investigation into the Radwans' activities and the various improprieties it revealed.18-ER-4938-49. The Radwans objected to this declaration as hearsay and argued that Lause was rendering expert opinions. The district court disagreed, finding that Lause's testimony was based on his personal knowledge. 1-ER-57. The Radwans now complain that Lause did not identify particular consumers or attach documents relating to particular consumers. Br. 56-57. But Lause was not required to do so. He simply testified as to the results of an investigation conducted under his supervision as part of the course of MOHELA's business. The district court did not abuse its discretion in admitting this evidence for summary judgment purposes.

B. The District Court Properly Granted Summary Judgment to the FTC.

On the merits of the summary judgment motions, the district court's decision must be upheld if there were no genuine disputes of material fact and "the district court correctly applied the relevant substantive law." *Szajer*, 632 F.3d at 610; Fed. R. Civ. P. 56(a). In applying that standard, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-248 (1986). Moreover, "bald assertions or a mere scintilla of evidence in [a party's] favor are both insufficient to withstand summary judgment." *Stefanchik*, 559 F.3d at 929.

Rather, the party opposing summary judgment "must show a genuine issue of material fact by presenting affirmative evidence from which a jury could find in [the party's] favor." *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Although the evidence must be viewed in the light most favorable to the non-moving party, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Applying these standards, the district court properly granted summary judgment to the FTC and held each of the defendants liable for violations of Section 5 of the FTC Act and the TSR.

1. There Is No Genuine Dispute That the Radwans Violated the FTC Act By Engaging In Deceptive Acts or Practices.

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). The undisputed evidence showed that the Radwans violated Section 5 by making materially false representations about their services.

An act or practice is deceptive if it involves (1) a representation, omission, or practice that (2) is "likely to mislead consumers acting reasonably under the

circumstances" and (3) is material. *Stefanchik*, 559 F.3d at 928. The FTC is not required to provide "[p]roof of actual deception." *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979). It need show only that the "net impression" of the representation would be likely to mislead—even if the representation "also contains truthful disclosures." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006). A misrepresentation is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Id.* at 1201. Express claims are "presumed to be material." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994).

The district court properly found no genuine dispute that the Radwans made at least three materially false representations through their telemarketers.

a. The evidence showed no genuine dispute that the Radwans falsely represented that consumers would be enrolled in a repayment plan that would reduce their monthly payments to specific lower amounts and (at least in some cases) result in their loan balances being forgiven. 1-ER-61. Rima's declaration expressly acknowledges that each of the FTC's nineteen declarants was offered a specific monthly payment significantly lower than what they had been paying. 16-ER-4152-4206. Several of the FTC's declarants testified that they were told that their loans would be forgiven, or that they would be eligible for forgiveness, if they

made payments at the lower rate for a specific period of years.[10] The Radwans produced no contrary evidence; at most, Rima claimed that after 2017, telemarketers were told not to discuss loan forgiveness, and that in some cases customers were told they were not eligible for forgiveness after they had already signed up for the Radwans' services. 16-ER-4135-36, 4156, 4176, 4190.

There is also no genuine dispute that these representations were untrue. The Radwans did not obtain new payment terms at the rates the telemarketers quoted. Instead, they enrolled most of their customers in $0 repayment plans—often by falsely representing their income or family and employment status—but continued to charge customers the quoted rates. The FTC's summary of the Radwans' records showed that numerous account holders whom the Radwans placed in repayment plans with $0 active lender payments reported incomes and family sizes that should have disqualified them from receiving $0 payments under federal guidelines. 15-ER-3824-27; SER-616. And Rima admits in her declaration that many of the FTC's declarants were placed in $0 repayment programs. 16-ER-4156, 4162, 4169, 4173, 4179, 4194, 4196, 4202.

As to the promises of loan forgiveness, there is no genuine dispute that federal loan forgiveness programs have strict eligibility requirements that most of

[10] *See* 19-ER-5214 (seven years), 5249 (ten years); 20-ER-5308 (ten years), 5356 (three years), 5546 (fifteen years); 21-ER-5653 (ten years), 5689 (twenty years).

the Radwans' victims did not meet. *See supra* n.3. Rima acknowledged these strict requirements in her declaration and conceded that several of the declarants did not qualify. 16-ER-4156, 4172, 4190.

b. The evidence showed no genuine dispute that the Radwans falsely represented that most or all of the reduced monthly payments would be applied to the loans. 1-ER-61. All nineteen of the FTC's declarants testified that after speaking with the Radwans' telemarketers, they understood that most or all of their future payments would go toward their loans.[11] The Radwans produced no contrary evidence. This representation was also untrue. Fifteen of the FTC's declarants testified that no payments were ever made on their loans.[12] The other four testified that only one or two payments were made.[13] Rima's declaration does not dispute these assertions.[14] To the contrary, she acknowledged that payments frequently

[11] *See also* 19-ER-5035, 5107, 5177, 5214, 5249, 5267; 20-ER-5308, 5315, 5359, 5384, 5425, 5455, 5546, 5593; 21-ER-5605, 5653, 5689, 5714.

[12] *See* 19-ER-5109-10, 5180, 5217, 5269-70; 20-ER-5309-10, 5317, 5358-59, 5429, 5457, 5548, 5586, 5595, 21-ER-5607-08, 5692, 5717.

[13] *See* 19-ER-5038, 5250-51; 20-ER-5387; 21-ER-5655.

[14] The few minor discrepancies between Rima's declaration and the FTC's declarants are not material. For example, one consumer testified that he paid more than $3,300 to the Radwans but only one payment of $1944.96 was made on his loan. 20-ER-5387. Rima asserts that a second payment of $232 was made. 16-ER-4182. Another consumer testified that she paid over $1,800 and that only $385 was applied to her loans. 21-ER-5655. Rima asserts that only $285 was sent to the lender. 16-ER-4201.

were not made to lenders, though she tried to blame third-party payment processors for the problem. 16-ER-4139-40. The Radwans even acknowledge in their brief that "3rd party payment processors … fail[ed] to timely make payments to clients' student loan lenders." Br. 10.

c. Finally, the evidence showed without genuine dispute that the Radwans represented that they would assume responsibility for consumers' loans. 1-ER-61. For example, in a recorded call with one of the FTC's declarants, the telemarketer stated that the Radwans were "a servicer" and that "we service your loans directly through the Department of Education." 15-ER-4010. In the recorded call with Sanker, the telemarketer stated that "the main goal is to eliminate your middle lender and get you back on track with paying the main source, which is going to be the Department of Education." 15-ER-3972. And when Sanker signed the contract, the telemarketer told her that "I'm going to be your loan manager from here on out, so if you ever have any questions, concerns, anything like that, go ahead and feel free to give me a ring." 15-ER-3998. These statements were not isolated occurrences; they closely mirrored the Radwans' sales scripts. 16-ER-4233; 3-SER-761. As the district court correctly noted, the Radwans do not dispute that they are not federal loan servicers and did not take over or purchase consumers' loans. 1-ER-62.

d. The Radwans' attempts to justify these misrepresentations are unavailing. First, they assert that their fees were disclosed in the contracts that consumers signed. Br. 12, 17, 41-42. This argument largely misses the point because in many cases, the contracts did not disclose that little or nothing would actually be paid to the lenders. To the contrary, many of the contracts expressly indicated that money would be paid toward their loans. For example, Sanker's contract stated that $76.46 was her "new federal loan payment," when in actuality, nothing was being paid on the loan. 17-ER-4539.

It is true that the contracts generally did disclose the Radwans' fees, and in some cases, indicated that the "new federal loan payment" would be $0. *See, e.g.*, 17-ER-4439. But this Court has recognized that "[a] solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." *Cyberspace*, 453 F.3d 1200; *see also Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (FTC Act violated if defendant "induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract"). Here, as the district court found and as the record plainly shows, the contracts were not e-mailed to the consumers until after they had already been quoted a price and agreed to accept services. Furthermore, as Robbins testified, although customers had to electronically sign the contracts in several places, once they clicked "sign" in one

place, the application would automatically jump to the next signature block. 2-SER-327-28.[15] This made it less likely that customers would actually review and understand the fees or, in the case of a $0 loan payment, understand that all of the new payment represented fees and nothing would go toward the loan.

The Radwans also argue that the telemarketers carefully went over the terms of the contract with consumers and discussed the fees with them. The transcript of the recorded sales call with Sanker clearly shows otherwise; the telemarketer (who was following the Radwans' sales scripts) never explained the fees, much less disclosed that no payments at all would be made to the lender. *See supra* at 10-12. All of the FTC's other declarants likewise testified that based on their conversations with the telemarketers, they understood that most or all of their payments would go toward their loans, and that they did not realize what the fees were until months or years later. Clearly, the telemarketers did not adequately disclose either the amount of the fees or the fact that little or nothing would be paid on their loans. The Radwans have produced no contrary evidence, and in any event, this Court "do[es] not credit a party's version of events that the record, such as an unchallenged video recording of the incident, quite clearly contradicts." *Rice*

[15] The Radwans take issue with this assertion (Br. 14-15) but cite no contrary evidence. In his declaration, Robbins asserts that by default, the software he used automatically jumps to from one signature block to the next, but that he placed signature blocks on every page. 2-ER-190-91.

v. Morehouse, 989 F.3d 1112, 1120 (9th Cir. 2021) (internal quotation marks omitted); *see also Scott v. Cnty. of San Bernardino*, 903 F.3d 943, 952 (9th Cir. 2018) (defendants' assertions belied by audio record of encounter).

The Radwans also argue that even though Heritage and Tribune routinely failed to make payments to lenders (supposedly because of problems with payment processors) they rectified these problems by setting up Elegant and Trend in November 2017, bringing payment processing in-house, and having Trend conduct an "audit of legacy clients to assure all funds paid by clients to were paid to Lenders." Br. 10; 16-ER-4118. This is effectively an acknowledgement that before November 2017, payments were not being made to lenders.

The undisputed evidence shows that the new companies engaged in the same deceptive practices as their predecessors anyway. Two of the FTC's declarants signed up for debt relief services with Elegant in 2018. One was charged $91.58 a month; she paid more than $1,000 over twelve months, but nothing was ever applied to her loans and she continued to accrue interest. 20-ER-5308-10. The other was charged $81.25 a month, none of which was applied to her loan. 20-ER-5585-86. The FTC's other declarants originally signed up with one of the predecessor entities and all but one were transferred to Trend in late 2017 or early 2018. Trend continued to charge fees without making payments on their loans, just like the predecessor entities.

As for Trend's "audit," the company's records showed at least $2.7 million in "trust" supposedly to be paid to lenders. 15-ER-3825; 3-SER-618. Documentary evidence and testimony shows that the Radwans decided on an ad hoc basis whether to make payments to lenders and, if so, how much to pay. For example, in one case, after determining that a consumer had $18,000 in "trust," the Radwans sent a payment of just $5,000. 2-SER-506-08, 534. In another case, the consumer had more than $10,000 in "trust" because no lender payments had been made, but the Radwans decided to pay only $5,000. 1-SER-149. In some cases, the Radwans took out additional fees before making payments. 16-ER-4140; 1-SER-128-30; 3-SER-619. As the district court held, far from showing a good faith effort to reform, the "audit" simply provides further evidence that the Radwans knew payments had not been timely made to lenders on a regular basis. 1-ER-66-67.

The Radwans' attempts to blame various scapegoats for their business practices fail. They claim, for example, that third-party processors are responsible for their failure to make regular payments to lenders and that rogue employees were responsible for actions like falsifying consumers' income and employment status or misrepresenting the nature of the Radwans' services. Br. 10, 19. To the extent any evidence supports these allegations, it creates no genuine issue of fact. The question here is whether the Radwans made false or misleading

representations to consumers, and the undisputed evidence shows they did. Whether third parties or employees also engaged in misconduct is beside the point.

2. There Is No Genuine Dispute That the Radwans Violated the TSR.

The district court also properly found no genuine dispute that the Radwans violated two separate provisions of the TSR.

a. The TSR prohibits sellers from "misrepresenting, directly or by implication … any material aspect of any debt relief service." 16 C.F.R. § 310.3(a)(2)(x). The district court properly found that the same undisputed evidence that showed a violation of Section 5 also established that the Radwans violated this provision of the TSR. 1-ER-64

b. The TSR also prohibits sellers of debt relief services via telemarketing from "[r]equesting or receiving payment of any fee or consideration" until they have "renegotiated, settled, reduced, or otherwise altered the terms of" at least one debt pursuant to an agreement executed by the customer and the customer has made at least one payment pursuant to the new loan terms. 16 C.F.R. § 310.4(a)(5)(i). Customer funds may be placed in an escrow account to be used for fees and payments to creditors or debt collectors, but such accounts are subject to strict requirements. Among other things, the funds must be held in an account at an insured financial institution, the customer must own the funds and be paid the accrued interest on the accounts; the entity administering the account may not be

owned or controlled by, or in any way affiliated with, the debt relief service, and the customer must have the right to withdraw the money at any time without penalty. *Id.* § 310.4(a)(5)(ii).

The district court properly found no genuine dispute that the Radwans' banking arrangements did not comply with the TSR's requirements and that their collection of advance fees was therefore illegal. 1-ER-64-65, 71. Rima testified at deposition that Elegant maintained three bank accounts. 2-SER-483-84. When a customer payment was received, the funds were initially placed in a "holding" account. 2-SER-486. From there, management fees were disbursed to an "operating account," which was used for operational expenses, and the remaining funds were transferred into what Rima described as a "trust" account, which was supposed to be used to make payments to lenders. 2-SER-486-87. The Radwans conceded below that this account "was not a formal 'trust' account but was simply a 'business' account." 5-ER-905. Rima, Mazen, and Robbins were the signatories on the account, and customers had no access to the money. 2-SER-489-90.

These arrangements, on their face, do not comply with the TSR's strict requirements for escrow accounts. To begin with, the accounts were all owned and controlled by the Radwans, and consumers lacked any access to the money. The Radwans concede as much, acknowledging that "the funds in this case were not held in an escrow account with free access to the consumer." Br. 66. Moreover,

Rima testified that the funds in the "trust" account were not segregated into separate accounts and that the Radwans did not pay interest on the accounts. 2-SER-490. On top of that, the Radwans also transferred money from the "trust" account to the operating account or used it for personal expenses. Rima admitted in her declaration that some $1.2 million was "partially transferred from trust to [the Radwans'] operating account. 16-ER-4140. In March 2018, Mazen wrote himself a $60,000 check from the "trust" account. 2-SER-412-13; 3-SER-741. In July 2018, the Radwans transferred $600,000 from the "trust" account to pay Rima, Mazen, and Robbins's taxes. 3-SER-741-42. The Receiver calculated that the Radwans misappropriated at least $1,280,000 from the account. 3-SER-743.

The Radwans assert that they did not actually "receive payment of fees"—*i.e.*, transfer the fees into the operating account—until they had actually performed services, and thus that they "substantially complied" with the TSR. Br. 66. In fact, as discussed above, in most cases the Radwans never provided the services they promised to provide—instead, they enrolled consumers in $0 payment plans and pocketed the money they received. In any case, the TSR sets forth precise requirements for escrow accounts for good reason: to protect consumers from unscrupulous telemarketers peddling debt relief services. Strict compliance is required, and there is no dispute that the Radwans did not comply. "Close enough" is insufficient.

The Radwans also argue that they could not violate the TSR because they were not offering "debt relief services," but instead were offering only a "document preparation service." Br. 64. The TSR defines a "debt relief service" as "any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." 16 C.F.R. § 310.2(o). The evidence discussed above, including the FTC's consumer declarations, the transcript of the call with Sanker, and Rima's own declaration and deposition testimony, makes it beyond dispute that the Radwans meet the regulatory definition.

The Radwans' assertion that they merely "put together paperwork" for their customers (Br. 65) is "blatantly contradicted by the record." *Scott*, 550 U.S. at 380. No evidence shows that any of Radwans' telemarketers said anything to customers about document preparation. They offered a reduction in loan payments, plain and simple. And the Radwans' own business documents make clear that they were not simply engaged in document preparation. Elegant's website stated that "[w]e offer a service to manage your loans from start to finish, taking on your burden and letting you focus on the more important things in life," and listed services including "loan consolidation." 16-ER-4326. A presentation prepared for Elegant's

telemarketers said "We are a Student Loan Management Company," and that "We help people move their student loans from their current lenders into a more beneficial program." 16-ER-4253, 4256. Promising to help borrowers lower their monthly loan payments through consolidation or otherwise renegotiating or changing the loan terms falls squarely within the definition of "debt relief services." The Radwans' claim that they were merely providing "document preparation services" is "so utterly discredited by the record that no reasonable jury could have believed [it]." *Scott*, 550 U.S. at 380.

3. There Is No Genuine Dispute That the Corporate Defendants Formed a Common Enterprise.

Where corporate entities operate together as a common enterprise, each may be held liable for the deceptive acts and practices of the others. *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014). This Court has held that "entities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010); *see also FTC v. John Beck Amazing Profits LLC*, 865 F. Supp. 2d 1052, 1082 (C.D. Cal. 2012) ("Factors in determining common enterprise include: (1) common control; (2) sharing office space and offices; (3) whether business is transacted through a 'maze of interrelated companies'; and (4) commingling of funds"). For

example, in *Network Services*, the Court affirmed a summary judgment determination that different corporate entities formed a common enterprise where it was undisputed that they "pooled resources, staff and funds," were all owned and managed by the same defendant and his wife, and all "participated to some extent in a common venture." 617 F.3d at 1143.

The district court properly found no genuine dispute that the five corporate defendants (Elegant, Trend, Dark Island, Tribune, and Heritage) constituted a common enterprise. As discussed above (at 5-6), Rima, Mazen, and Robbins jointly owned and were officers of all five companies; Heritage and Tribune shared the same office building; and Elegant, Trend, and Dark Island also shared an office building (with Trend paying the rent for Dark Island). The companies also shared staff. Labiba served as director of operations or "HR Manager Director" for Heritage, Tribune, Elegant, and Trend, and also did some work for Dark Island. 1-SER-65-68, 84, 217. Multiple employees came over from Tribune and Heritage to Elegant and Trend. 1-SER-105-06, 198; 3-SER-578, 580, 803-04. Assets were transferred between companies. 3-SER-822-23. And the customers of Tribune and Heritage were transferred to Trend. 2-SER-369. None of this evidence is in dispute, and it clearly shows that while the companies may have been separately incorporated, they operated together as a common enterprise.

The Radwans argue that Heritage and Tribune could not have been part of the common enterprise because they were no longer operating at the time the complaint was filed (although both companies continued to exist as corporate entities).[16] In reality, those companies had simply "rebranded" by transferring their operations, including customers and staff, to new entities controlled by the same individuals and engaging in the same business. 1-SER-105-06, 198; 2-SER-293, 369, 453-54; 3-SER-578. That is exactly why all the companies are properly deemed part of a common enterprise—they are all part a single ongoing business venture operated through various corporate shells.

In a related vein, the Radwans argue (Br. 34-35) that the claims against Heritage and Tribune should have been dismissed because Section 13(b) of the FTC Act allows the FTC to sue for an injunction only where it has reason to believe the defendant "is violating, or is about to violate" the law, yet both companies had ceased activity well before the FTC sued. 15 U.S.C. § 53(b). The claim fails on multiple fronts. First of all, Section 13(b) does not govern the FTC's claims for monetary relief under Section 19, which is not limited to conduct that "is … or is about to" occur. Section 19 provides simply that if a person, partnership

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[16] Although Tribune filed a certificate of dissolution with the Nevada Secretary of State in November 2017, under Nevada law it continued to exist for purposes of winding up its affairs, including prosecuting and defending actions, and could be sued for a period of two years after the dissolution. Nev. Rev. Stat. § 78.585. This action was brought within the two-year period.

or corporation violates an FTC rule respecting to unfair or deceptive acts or practices, the FTC may sue for redress. 15 U.S.C. § 57b(a). Heritage and Tribune violated the TSR, and the FTC was thus authorized to (and did) sue them under Section 19.

As to Section 13(b), this Court has interpreted the phrase "is … or is about to" to mean that "an injunction will issue only if the wrongs are ongoing or likely to recur." *FTC v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985). The FTC properly sued all defendants under Section 13(b) because the agency alleged conduct by a common enterprise that was ongoing when the complaint was filed.

The Radwans next argue that Trend, Elegant, and Dark Island were not part of a common enterprise. Br. 37-38. They do not dispute that all three corporate entities were jointly owned and managed by the same three individuals, that they operated out of the same building, and that Labiba served as director of operations for both Trend and Elegant (and also worked for Dark Island). Nor do they dispute that the financial affairs of the companies were closely intertwined. For example, as Rima testified (and the Radwans acknowledge in their brief), Trend paid the rent for the building used by all three companies, while Dark Island was paying to remodel the entire building. 16-ER-4115-16; 18-ER-4778-79. The Radwans assert that Dark Island's operations were limited to the classic car business, but after examining the company's books and records, the Receiver concluded that Dark

Island was "inextricably linked with, and dependent upon, the student loan debt relief business for funding and facilities." 3-SER-746. Dark Island also was involved in at least some aspects of the debt relief business, including setting up internet services used by the other entities. 3-SER-582, 778-79; 14-ER-4945-46. The district court properly concluded based on the undisputed evidence that all five companies—Heritage, Tribune, Elegant, Trend, and Dark Island—operated as a common enterprise.

4. There Is No Genuine Dispute That the Individual Defendants Are Personally Liable.

An individual defendant is liable for injunctive relief based on a corporate entity's violations of the FTC Act if "(1) the corporation committed misrepresentations of a kind usually relied on by a reasonably prudent person and resulted in consumer injury, and (2) individuals participated directly in the violations or had authority to control the entities." *Grant Connect*, 763 F.3d at 1101. To hold the individual liable for monetary relief based on the corporate violations, the FTC "must also show that the individual had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that consumer injury resulted." *Id.* (cleaned up). To satisfy the knowledge requirement, the FTC must show "that [a defendant] had actual knowledge of material misrepresentations, [was] recklessly indifferent to the truth

or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.* at 1101-02. The FTC "need not show that a defendant intended to defraud consumers in order for that individual to be personally liable," and "the extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability." *Id.* at 1102 (cleaned up). Applying this standard, the district properly found each of the individual defendants personally liable.

There is no genuine dispute that each of the individual defendants participated in the deceptive acts or had the ability to control them. As noted above, Rima, Mazen, and Robbins were all joint owners and officers of all five corporate entities. They were also signatories on their bank accounts, and held corporate credit cards. 3-SER-552, 561, 571. Labiba identified herself as the director of operations and also held a corporate credit card. 3-SER-572.

All four individual defendants directly participated in the affairs of the debt relief business. Rima was (in Robbins's words) "the brains [of] the operations." 2 SER-281; 3-SER-561-62. She ran the entire business, including drafting sales scripts, training customer service representatives, creating the content for websites, and setting prices. 3-SER-563-65. Robbins handled the technical aspects of the business, *e.g.*, developing the software used to manage the operation, creating and maintaining websites, and setting up virtual offices. 3-SER-569-72. Mazen handled

financial tasks such as tax filings, applying for payment processing services and managing the relationship with one of the processors, and arranging for internet services. 3-SER-555-57. He also flew to North Carolina to meet with a state attorney prosecuting the Radwans. 3-SER-557. Labiba, who shared an office with Rima, oversaw many aspects of the business. Among other things, she made decisions about whether and how much to pay lenders, handled issues with payment processors, hired sales representatives, and received sales reports from the floor manager. 3-SER-572-74. Additionally, as the Radwans concede in their brief, Rima "relied on Labiba Radwan to pass along messages and directives to management." Br. 22.

There is also no genuine dispute that all of the individual defendants knew about the misrepresentations on which the debt relief enterprise was based. For one thing, they all knew about the North Carolina, Oregon and Washington lawsuits, which alleged violations of state consumer protection laws through practices substantially the same as those at issue here. 3-SER-557, 565, 571-72, 574. They all also knew of the many complaints from customers that nothing had been paid on their loans. 3-SER-558, 566, 572, 574, 632. Indeed, one of the Radwans' training documents indicated that among the most common questions from consumers were "Why aren't my loans being repaid?/Nothing has been paid to my loans?/You're a scam where's my $?" 3-SER-632-33. Another indicated that

among the top five consumer complaints were "I didn't know I was paying fees, I thought the money I pay you goes toward my loans," and "My Loan Manager lied to me." 3-SER-633. Based on the undisputed evidence, the district court properly concluded that all four individual defendants participated in the deceptive acts or had the ability to control them and that they knew about (or at the very least were recklessly indifferent to) the deception.

C. The District Court Properly Denied the Radwans' Summary Judgment Motion.

For all the reasons stated above, the district court properly concluded that there was no genuine issue of material fact and that summary judgment for the FTC was proper. But even if there were some material factual dispute that could preclude summary judgment for the FTC, there is certainly ample evidence that the defendants engaged in misleading and deceptive practices and collected illegal advance fees—more than enough to justify the district court's denial of the Radwans' summary judgment motion.

II. THE DISTRICT COURT PROPERLY GRANTED INJUNCTIVE RELIEF UNDER SECTION 13(B).

The district court entered a permanent injunction against the Radwans under Section 13(b) of the FTC Act, which expressly authorizes such relief. 15 U.S.C. § 53(b). The Radwans argue that Section 13(b) does not authorize a permanent injunction where the FTC did not also file an administrative complaint seeking the

same relief, Br. 25, and alternatively that the court abused its discretion in issuing an injunction, Br. 57-70. Both arguments are wrong.

A. Under Section 13(b), the FTC Need Not File an Administrative Complaint Where It Seeks a Permanent Injunction in Court.

The Radwans' argument that Section 13(b) requires the FTC to file an administrative complaint before the district court can issue a permanent injunction is wrong and foreclosed by Circuit precedent. *See FTC v. H N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982). And contrary to the Radwans' contention, the Supreme Court's recent decision in *AMG*, holding that Section 13(b) does not authorize *monetary* relief, does not undermine this longstanding precedent regarding the availability of *injunctive* relief.

The FTC Act provides two avenues for enforcement of Section 5's prohibition on unfair or deceptive acts or practices. First, the Commission may initiate an administrative proceeding, in which the Commission itself acts as factfinder and, if it finds a violation, may issue a cease-and-desist order. *See* 15 U.S.C. § 45(b). Alternatively, the Commission may dispense with administrative proceedings and sue in district court for a permanent injunction. These standalone actions are authorized by a proviso to Section 13(b), which 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). In *Singer*, the Court carefully examined

the text and legislative history of the statute and concluded that Section 13(b) "gives the Commission the authority to seek, and gives the district court the authority to grant, permanent injunctions in proper cases even though the Commission does not contemplate any administrative proceedings." *Id.* at 1111.[17] Other courts have agreed. *See United States v. JS & A Grp., Inc.*, 716 F.2d 451, 456 (7th Cir. 1983); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984).

Singer is binding, and in any case, its reading of Section 13(b) is correct. The Radwans' argument is based not on the permanent injunction proviso, but on the earlier portion of Section 13(b) authorizing the Commission to sue in district court for a *preliminary* injunction or TRO to block illegal conduct during the pendency of an administrative proceeding. In that situation, the Commission must commence an administrative proceeding no later than 20 days after the issuance of a preliminary injunction or TRO or the court's order will be dissolved. 15 U.S.C. § 53(b). The Radwans contend that the 20-day rule also applies where the Commission sues under the *permanent* injunction proviso, and that the district court could not issue a permanent injunction because the FTC did not file an administrative complaint. Br. 24-25. But under that reading of the statute, the permanent injunction proviso would be useless. There is need for the Commission

[17] The Radwans mistakenly assert that this holding comes from *Evans Products*.

to seek a permanent injunction when it proceeds administratively, because an administrative cease-and-desist order serves the same function as an injunction—*i.e.*, it bars a party from doing something (or compels it to do something). The only reading of Section 13(b) that gives meaning to the entire statute is that it authorizes standalone actions for permanent injunctions.

The fact that the permanent injunction language appears in a proviso *after* the portions of Section 13(b) dealing with preliminary injunctions confirms this interpretation. As the Supreme Court has explained, "[a] proviso may refer only to things covered by a preceding clause, but it can also state a general, independent rule." *Alaska v. United States*, 545 U.S. 75, 106 (2005). Thus for example, in *Republic of Iraq v. Beatty*, 546 U.S. 848 (2009), the Court held that the principal clause of a statute "granted the President a power," while a proviso " purported to grant him an *additional* power" and "was not, on any fair reading, an exception to, qualification of, or restraint on the principal power." *Id.* at 858. The same logic applies here. The principal clause of Section 13(b) and the first proviso authorize the FTC to seek and the district court to grant a preliminary injunction in aid of an administrative proceeding, and require the FTC to commence the administrative proceeding within 20 days of the issuance of the issuance of a TRO or preliminary injunction. The second proviso grants an *additional* power, authorizing the FTC to seek and the court to issue a permanent injunction. This is the only reading that

gives meaning to the entire statute. Moreover, legislative history confirms that Congress viewed the proviso as authorizing standalone actions for injunctive relief, explaining that Section 13(b) would give the Commission "the ability … to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order." S. Rep. No. 93-151 at 31 (1973).

The Radwans argue that *AMG* effectively overruled decisions recognizing the FTC's authority to file standalone actions for permanent injunctions under Section 13(b). But this Court recently rejected the identical argument in *FTC v. Hoyal & Assocs.*, *Inc.*, No. 19-35668, 2021 WL 2399707 (9th Cir. June 9, 2021), following *Singer* and reaffirming that "the FTC can obtain injunctive relief without initiating administrative proceedings." *Id.* at *2. That decision was correct. *Singer* remains a binding precedent unless it is "clearly irreconcilable" with an intervening Supreme Court decision. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). *AMG* is not clearly irreconcilable with *Singer*; if anything *AMG* ratifies this Court's conclusion in *Singer* that the FTC need not file an administrative complaint when it seeks a permanent injunction. The Supreme Court recognized that the permanent injunction proviso can "be read … as granting authority for the Commission to go one step beyond the provisional and ('in proper cases') dispense with administrative proceedings to seek what the words literally say (namely, an

injunction)." *AMG*, 141 S. Ct. at 1348. It further stated that "the Commission may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, *or* when it seeks only injunctive relief." *Id.* (emphasis added). Thus the Court contemplated that the FTC could obtain injunctive relief when administrative proceedings are not "foreseen or in progress." There is no conflict between *AMG* and *Singer*, let alone an irreconcilable one.

B. The Court Did Not Abuse Its Discretion In Issuing an Injunction.

The Radwans' argument that the district court abused its discretion in issuing an injunction (Br. 67-70) also falls flat. An injunction is proper when there is a "cognizable danger of recurrent violations." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). To determine the scope of an injunction, the court must consider "(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations." *Grant Connect*, 763 F.3d at 1105 (brackets omitted). The district court properly applied these standards. It found that "there is a reasonable likelihood of future violations of the FTC Act and TSR." 1-ER-69. The court elaborated that "[t]he uncontroverted facts illustrate a pattern of [the Radwans'] corporate packaging and repackaging of the same fraudulent scheme" and that "[d]espite investigations in multiples states they continued to

engage in violations" of the FTC Act and TSR. *Id.* These findings are amply supported by the record and more than sufficient to justify a permanent injunction.

III. THE DISTRICT COURT PROPERLY GRANTED MONETARY RELIEF UNDER SECTION 19.

The FTC sought monetary relief under both Section 13(b) and Section 19 of the FTC Act, and the district court relied on both provisions in granting that relief. 1-ER-3, 4, 6; 18-ER-4908, 4933. The Radwans assert in passing that *AMG* bars all monetary relief. Br. 1. That is plainly wrong. *AMG* held that Section 13(b) does not allow monetary relief, but the Court made clear that "[n]othing we say today … prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers." *AMG*, 141 S. Ct. at 1352. Alternatively, the Radwans argue that the district court improperly calculated monetary relief. That too is wrong; the district court had express authority under Section 19 to order a "refund of money" to the Radwans' victims.

A. Section 19 Authorizes Monetary Relief for Violations of FTC Regulations, Including the TSR.

The Radwans' brief does not even mention Section 19, even though the FTC directed their attention to this issue in its post-*AMG* status report (Dkt. No. 40, filed Apr. 22, 2021), and the Radwans referenced it in their response (Dkt. No. 41, filed Apr. 28, 2021). They have thus waived any argument that Section 19 does not authorize monetary relief. *See, e.g.*, *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.

1999) ("[A]rguments not raised by a party in its opening brief are deemed waived.").

In any event, the plain language of Section 19 authorizes monetary relief for violations of the TSR. Section 19(a) provides in relevant part that "[i]f any person, partnership, or corporation violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices … then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court." 15 U.S.C. § 57b(a)(1). Section 19(b) provides that the court "shall have jurisdiction to grant such relief as [it] finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation," including but not limited to "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation," but excluding any "exemplary or punitive damages." 15 U.S.C. § 57b(b). The Telemarketing Act, which gave the FTC authority to issue the TSR, provides that any violation of the rule "shall be treated as a violation of a rule under [15 U.S.C. § 57a] regarding unfair or deceptive acts or practices." *See* 15 U.S.C. § 6102(c)(1). The FTC

therefore has authority under Section 19 to seek consumer redress, including "the refund of money," for the Radwans' violations of the TSR.[18]

B. The District Court Properly Calculated Monetary Relief Under Section 19.

The Radwans also contend that the manner in which the district court calculated monetary relief is inconsistent with *Liu v. SEC*, 140 S. Ct. 1936 (2020), which placed limits on monetary judgments awarded as "equitable relief," and *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which held that SEC disgorgement remedies are subject to a five-year statute of limitations. Neither case undermines the judgment here.

Liu involved a provision of the securities laws authorizing courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors" in actions brought by the Securities and Exchange Commission. 15 U.S.C. § 78u(d)(5). The Court held that that statute authorized the equitable remedy of disgorgement, subject to certain conditions. *Liu*, 140 S. Ct. at 1940.

[18] Monetary relief under Section 19 is subject to a three-year statute of limitations. 15 U.S.C. § 57b(d). But "[t]he statute of limitations is an affirmative defense and, generally, is waived if not raised in the trial court." *United States v. Wilbur*, 674 F.3d 1160, 1177 (9th Cir. 2012). Federal Rules of Civil Procedure 8(c) and 12(b) require a party to "raise the statute of limitations in its first responsive pleading to avoid waiving the defense." *Nardi v. Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004). In this case, the Radwans did not assert a statute of limitations defense in their answers to the original answer and amended complaints, or in opposition to the FTC's summary judgment motion. 3-SER-677-80, 709-11; 5-ER-887-922. Any statute-of-limitations defense is therefore waived.

Specifically, the award must be for the benefit of investors; joint liability may be imposed only against "partners engaged in concerted wrongdoing"; and the award may not exceed the wrongdoer's legitimate net profits. *Id.* at 1940, 1947-50.

The Radwans argue that under *Liu*, the district court could only award monetary relief based on their net profits, rather than the losses suffered by consumer. Br. 27, 33. But *Liu* does not help the Radwans because Section 19 is fundamentally different from the securities statute at issue there. Section 19 expressly authorizes "the refund of money." 15 U.S.C. § 57b(b). That is the remedy the court ordered here: a refund of the money consumers paid to the Radwans, minus payments to lenders and amounts previously refunded. Because Section 19 authorizes a refund, the court was not required to deduct the expenses that the Radwans incurred in conducting their debt relief scam.

The Radwans also appear to be arguing that under *Liu*, the district court erred in imposing joint-and-several liability. Br. 30. But the plain text of Section 19 allows the district court to grant *any* relief it finds "necessary to redress injury to consumers" 15 U.S.C. § 57b(b). Thus if the court determines that joint-and-several liability is necessary to redress consumer injury, it may impose it.[19] In any

[19] The holding in *Liu* rested on the fact that the securities law statute was limited to "equitable relief," and equity generally does not permit joint liability except against partners engaged in concerted wrongdoing. But Section 19 does not limit courts to granting equitable relief—it expressly authorizes both equitable remedies

case, joint liability would be proper here even under the standard articulated in *Liu.* The Court held that in equity, collective liability may be imposed on "partners engaged in concerted wrongdoing." *Liu*, 140 S. Ct. at 1949. Since the Radwans were engaged in concerted wrongdoing, collective liability was proper even under the traditional equitable standard.

The Radwans' reliance on *Kokesh* is even more misplaced. *Kokesh* involved the statute of limitations applicable to SEC disgorgement claims. *Kokesh* has no bearing on claims under Section 19, which is governed by its own statute of limitations. *See supra* n.18; 15 U.S.C. § 57b(d).

As a final twist on their *Liu* and *Kokesh* arguments, the Radwans also argue that in light of those decisions, the FTC did not provide an adequate computation of damages as part of its initial disclosures under Fed. R. Civ. P. 26(a)(1)(A). Br. 30-34.[20] They waived this argument by failing to raise it either in their summary judgment motion or opposition to the FTC's motion or moving to exclude the

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and "damages," which are "the classic form of *legal* relief." *Mertens v. Hewitt Assocs*., 508 U.S. 248, 255 (2020).

[20] Courts are divided as to whether the requirement that the plaintiff disclose a computation of "damages" as part of its initial disclosures applies where the plaintiff seeks other forms of monetary relief, such as disgorgement. *See* 6 *Moore's Federal Practice-Civil* § 26.22(c)(ii) (2021) (citing cases).

FTC's monetary relief calculations.[21] In any event, the argument lacks merit. The FTC disclosed that it was seeking a refund of money paid by consumers, and once it gained access in discovery to the Radwans' financials, it fully disclosed its monetary relief calculation and the documents upon which it was based. *See* 2-SER-540-43 (Jenkins declaration).

CONCLUSION

The judgment of the district court should be affirmed.

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[21] The Radwans made a glancing reference to Rule 26(a)(1)'s computation requirement in a notice of supplemental authority after summary judgment briefing was complete, 2-ER-128, but such belated filings do not preserve new substantive arguments.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 20-55766

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Signature /s/ Matthew M. Hoffman_____________ **Date** __July 30, 2021______
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STATUTORY ADDENDUM

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United States Code, 2019 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2 - FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION
SUBCHAPTER I - FEDERAL TRADE COMMISSION

§45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

* * *

§53. False advertisements; injunctions and restraining orders

* * *

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. * * *

* * *

§57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(1) If any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available

The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c) Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then

the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 45(g)(1) of this title, in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

(d) Time for bringing of actions

No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 45(b) of this title which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

Code of Federal Regulations (2020)
Title 16 - Commercial Practices

§ 310.2 Definitions.

* * *

(o) *Debt relief service* means any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.

* * *

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices*. It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

* * *

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

* * *

(x) Any material aspect of any debt relief service, including, but not limited to, the amount of money or the percentage of the debt amount that a customer may save by using such service; the amount of time necessary to achieve the represented results; the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors or debt collectors or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt; the effect of the service on a customer's creditworthiness; the effect of the service on collection efforts of the customer's creditors or debt collectors; the percentage or number of customers who attain the represented results; and whether a debt relief service is offered or provided by a non-profit entity.

* * *

§ 310.4 Abusive telemarketing acts or practices.

(a) Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

* * *

(5)(i) Requesting or receiving payment of any fee or consideration for any debt relief service until and unless:

(A) The seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer;

(B) The customer has made at least one payment pursuant to that settlement agreement, debt management plan, or other valid contractual agreement between the customer and the creditor or debt collector; and

(C) To the extent that debts enrolled in a service are renegotiated, settled, reduced, or otherwise altered individually, the fee or consideration either:

(*1*) Bears the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount. The individual debt amount and the entire debt amount are those owed at the time the debt was enrolled in the service; or

(*2*) Is a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration. The percentage charged cannot change from one individual debt to another. The amount saved is the difference between the amount owed at the time the debt was enrolled in the service and the amount actually paid to satisfy the debt.

(ii) Nothing in § 310.4(a)(5)(i) prohibits requesting or requiring the customer to place funds in an account to be used for the debt relief provider's fees and for payments to creditors or debt collectors in connection with the renegotiation, settlement, reduction, or other alteration of the terms of payment or other terms of a debt, provided that:

(A) The funds are held in an account at an insured financial institution;

(B) The customer owns the funds held in the account and is paid accrued interest on the account, if any;

(C) The entity administering the account is not owned or controlled by, or in any way affiliated with, the debt relief service;

(D) The entity administering the account does not give or accept any money or other compensation in exchange for referrals of business involving the debt relief service; and

(E) The customer may withdraw from the debt relief service at any time without penalty, and must receive all funds in the account, other than funds earned by the debt relief service in compliance with § 310.4(a)(5)(i)(A) through (C), within seven (7) business days of the customer's request.

* * *