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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2078

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

KRISTY ROSS, individually, and as officer of Innovative Marketing, Inc.,

Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, Senior District Judge. (1:08-cv-03233-RDB).

Argued: May 3, 2023 Decided: July 19, 2023

Before DIAZ, Chief Judge, RUSHING, Circuit Judge, and FLOYD, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Floyd wrote the opinion in which Chief Judge Diaz and Judge Rushing joined.

ARGUED: Robert P. Greenspoon, DUNLAP, BENNETT & LUDWIG, Chicago, Illinois, for Appellant. Matthew Michael Hoffman, FEDERAL TRADE COMMISSION, Washington, D.C., for Appellee. **ON BRIEF:** William W. Flachsbart, DUNLAP, BENNETT & LUDWIG, Chicago, Illinois, for Appellant. Anisha S. Dasgupta, General Counsel, Joel Marcus, Deputy General Counsel, Matthew M. Hoffman, Miriam R. Lederer, FEDERAL TRADE COMMISSION, Washington, D.C., for Appellee.

FLOYD, Senior Circuit Judge:

Defendant-Appellant Kristy Ross victimized over a million Americans by furthering a country-wide "scareware" scam that tricked innocent computer users into paying for unnecessary software to remedy entirely fabricated issues purported to plague their devices. An apparent fugitive—having sought for years to evade paying even a cent of the $163,167,539.95 in restitution ordered for her role in the scheme—Ross now seeks vacatur of that aging monetary judgment. For the reasons that follow, we affirm.

I.

In the early 2000s, Ross was a vice president of Innovative Marketing, Inc.—a company perpetrating a country-wide "scareware" scam that tricked more than one million Americans into purchasing unnecessary software to fix computer issues that did not exist. Ross helped to develop software advertisements and pop-ups that falsely represented to viewers that their

computers were infected by malicious software and viruses, contained illegal pornography, or were about to suffer critical system failures. The advertisements offered remedial software (for purchase) for the fraudulently represented issues. Costs of the remedial software ranged anywhere from $30 to $100. Once purchased by desperate device owners, not only did the software do nothing to fix the purported issues—those issues never existed—but reputable computer-security vendors considered the fraudsters' software to itself be harmful to purchasers' devices. In the course of the scam, Ross and her co-conspirators fraudulently accumulated more than $160 million. Reaping the fruits of her duplicitous scheme, Ross enjoyed a lavish life with scam proceeds, frequenting Four Seasons resorts abroad and shopping at luxury retailers.

In 2008, the Federal Trade Commission ("FTC") sued Ross, alleging that the scareware scam violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), which prohibits unfair or deceptive practices in or affecting commerce.[1] The FTC specifically sought relief via the FTC Act's injunctive provision, Section 13(b), 15 U.S.C. § 53(b). Under that provision, the agency may seek to enjoin any entity from conduct believed to be in violation of the Act. Tied to its request for statutory injunctive relief via

[1] Notably, the FTC also sued many of Ross's colleagues, but each either settled or defaulted. Ross is the only defendant who proceeded to trial.

Section 13(b), the FTC also sought an equitable monetary judgment to fund consumer redress.

In 2012, the case against Ross proceeded to a bench trial. *See Fed. Trade Comm'n v. Ross* (*Ross I*), 897 F. Supp. 2d 369 (D. Md. 2012). The district court entered judgment in favor of the FTC and against Ross. The court permanently enjoined and restrained Ross's participation in any "marketing [or] sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing." *Id.* at 389; J.A. 78. It also held her jointly and severally liable with her co-defendants for consumer redress in the amount of $163,167,539.95. *Ross I*, 897 F. Supp. 2d at 389.

Ross timely appealed. As relevant here, she argued that the district court lacked the authority to impose an equitable monetary judgment under the FTC Act's injunctive provision—Section 13(b). This Court affirmed in 2014, joining every other circuit to address the issue (including the First, Second, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh) by holding that Section 13(b) impliedly granted district courts the authority to award consumer redress as an equitable component of the injunctive provision. The Court reasoned that "[a] ruling in favor of Ross would forsake almost thirty years of federal appellate decisions and create a circuit split, a result that we will not countenance in the face of powerful Supreme Court authority pointing in the other direction." *Fed. Trade Comm'n v. Ross* (*Ross II*), 743 F.3d 886, 892 (4th Cir. 2014). The Court further reasoned that Ross's

argument "attempt[ed] to obliterate a significant part of the [FTC's] remedial arsenal." *Id.* Notably, since this Court's affirmance, Ross has not paid a penny toward satisfying the monetary judgment for consumer redress. Resp. Br. 5. Her whereabouts are unknown, and she is believed to have fled the United States. *Id.*

In April 2021—nearly a decade after the district court entered judgment against Ross—the Supreme Court decided *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021). There, the Court wiped out the almost entirely uniform approach of the federal circuits[2] to the question of whether Section 13(b) authorized equitable monetary relief. Rather, the Court held that Section 13(b) authorized only injunctive relief. *AMG*, 141 S. Ct. at 1349, 1352 ("[The FTC Act] does not grant the [FTC] authority to obtain equitable monetary relief."). Five months after the issuance of the Supreme Court's decision in *AMG*, Ross moved to vacate the restitution portion of the judgment against her. She argued that the equitable monetary judgment was void under Federal Rule of Civil Procedure 60(b)(4) because of a perceived post-*AMG* jurisdictional defect, and, additionally or alternatively, because "extraordinary circumstances" justified vacatur under Rule 60(b)(6).

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[2] In 2019—after this Court's decision in Ross's direct appeal but before *AMG*—the Seventh Circuit deviated from the rest of the federal circuits on the question of whether Section 13(b) permitted equitable monetary awards. *See Fed. Trade Comm'n v. Credit Bureau Ctr.*, 937 F.3d 764 (7th Cir. 2019).

The district court denied Ross's motion. *See Fed. Trade Comm'n v. Ross* (*Ross III*), No. RDB-08-3233, 2022 WL 4236339, at *4 (D. Md. Sept. 14, 2022). Regarding Rule 60(b)(4), the court held that the monetary judgment was not void because the remedial provisions of Section 13(b) are not jurisdictional in nature and because, at the time of judgment, an arguable basis existed for the monetary remedy given that other circuits uniformly permitted such a remedy under that provision. *Id.* at *3. Regarding Rule 60(b)(6), the court held that, in the Fourth Circuit, a subsequent change in law does not amount to an "extraordinary circumstance" justifying relief. *Id.* at *4. The court further declared that so much time had passed since the entry of judgment that the interest of finality weighed heavily against a finding of extraordinary circumstances. *Id.* Ross timely appealed.

II.

We review a district court's denial of a Rule 60(b)(4) motion de novo. *United States v. Welsh*, 879 F.3d 530, 533 (4th Cir. 2018) (citation omitted). Meanwhile, we review a district court's denial of relief sought under Rule 60(b)(6) for abuse of discretion. *Id.* (citation omitted).

Importantly, an appeal of a district court's denial of Rule 60(b) relief "does not bring up the underlying judgment for review." *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (en banc) (citation omitted). "[A] fundamental precept of [ ] adjudication is that an issue

once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. 605, 619 (1983) (citations omitted). This precept ensures "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). Consequently, new decisions are given retroactive effect in "all cases still open on direct review," *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993), but they "do not apply to cases already closed," *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). To be sure, Rule 60(b) allows district courts to reopen a judgment post-direct appeal in "a limited set of circumstances," and it is meant to "make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 528-29 (2005). But this exception to finality is not to be abused. *See Aikens*, 652 F.3d at 501 ("[A] very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved." (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting))). We consider Rule 60(b)(4) and (b)(6) in turn.

A.

Beginning with Rule 60(b)(4), Ross argues that the monetary relief portion of the district court's judgment should be deemed void in light of *AMG* because that decision deprived the FTC of Article III standing to seek such relief, thereby stripping the district court of subject matter jurisdiction. *See*, *e.g.*, Opening Br. 13

("[T]he district court lacked subject matter jurisdiction (for want of standing by the FTC) to order monetary relief."). In other words, Ross seems to contend that because *AMG* wiped out a particular remedy, the FTC had no right to pursue it as a form of redress—redressability being a necessary component of Article III standing, and standing being a necessary component of subject matter jurisdiction. She further argues that the arguable-basis test does not apply to excuse any jurisdictional defect, and, even if it did, that there was no arguable basis for the district court's decision to exercise jurisdiction here.

The FTC first disputes whether *AMG*'s novel interpretation of a statutory remedy even relates to jurisdictional or standing analyses in the manner that Ross claims. The FTC also responds that the district court properly exercised jurisdiction over the claim and properly recognized the FTC's standing to assert it. Finally, the FTC argues that even if the district court erred, and we perceive *AMG* as retroactively narrowing jurisdiction and/or standing, the arguable-basis test excuses any defect. Rather, according to the FTC, an arguable basis supported a finding of standing at the time of judgment, so Rule 60(b)(4) voidness cannot apply now.

Rule 60(b)(4) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment . . . [if] the judgment is void." "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *United*

Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270 (2010). But the list of "infirmities" triggering voidness "is exceedingly short[,] otherwise[ ] Rule 60(b)(4)'s exception to finality would swallow the rule." *Id.* For example, "[a] judgment is not void . . . simply because it is or may have been erroneous." *Id.* (simplified).

Certain jurisdictional defects do give rise to colorable voidness arguments. *See id.* at 271. But, as the Supreme Court commented in *Espinosa*, "[f]ederal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id.* (quoting *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)); *see also United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) ("[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a judgment void." (simplified)). Although the Supreme Court in *Espinosa* declined to reach precisely what constitutes a jurisdictional defect worthy of voidness relief under Rule 60(b)(4), and it did not itself expressly adopt the arguable-basis test, this Court seems to have done so. *See United States v. Welsh*, 879 F.3d 530, 533-34 (4th Cir. 2018); *see also Wendt v. Leonard*, 431 F.3d 410, 413 (4th Cir. 2005) ("[C]ourts must look for the rare instance of a clear usurpation of power [which is] only when there is a total want of jurisdiction and no arguable basis on

which it could have rested a finding that it had jurisdiction." (simplified)).

We preface our analysis of Ross's position with a clarification. Ross haphazardly invokes jurisdictional language throughout her briefing. For example, in her jurisdictional statement, she offers that "[t]he district court had jurisdiction over the FTC's request for injunctive relief under 13(b) of the FTC Act, 15 U.S.C. § 53(b), a federal question under 28 U.S.C. § 1331." Opening Br. 3. She then proceeds to declare that "the district court lacked subject matter jurisdiction (for want of standing by the FTC) to order monetary relief." *Id.* at 13. But the Supreme Court has declared that "the question [of] whether a court has jurisdiction to grant a particular remedy is different from the question [of] whether it has subject matter jurisdiction over a particular class of claims." *Biden v. Texas*, 142 S. Ct. 2528, 2540 (2022). It seems to us beyond reasonable dispute that the district court possessed subject matter jurisdiction given the FTC's allegations under 15 U.S.C. § 45(a)—i.e., a federal question. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."). Although constitutional standing certainly implicates federal jurisdiction given its cruciality to justiciability, we decline to construe Ross's position as implicating the district court's subject matter jurisdiction over claims brought under the FTC Act. Thus, we treat Ross's jurisdictional argument as only challenging the FTC's Article III standing to

pursue the equitable monetary remedy in the original action.

As relevant here, the "irreducible constitutional minimum" of Article III standing consists of three elements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted).

To begin, the parties dispute whether *AMG* truly implicates standing or instead represents only a merits consideration. *See* Resp. Br. at 15 (noting that the Supreme Court did not invoke standing or jurisdictional considerations in *AMG*). We need not decide this issue. Assuming, *arguendo*, that *AMG* would undermine the FTC's standing to pursue restitution in a similar case today, this Court applies the arguable-basis test, and an arguable basis clearly supported the FTC's standing when the court below decided Ross's case. *See Welsh*, 879 F.3d at 533-34; *Wendt*, 431 F.3d at 413.

This Court has previously held that the mere disagreement of multiple authorities on a given issue evinced that an arguable basis for the competing perspectives existed. *See Wendt*, 431 F.3d at 414. At the time of judgment in Ross's case, *every* circuit to consider whether Section 13(b) impliedly permitted a

district court to impose equitable monetary redress answered that question in the affirmative. *See*, *e.g.*, *Fed. Trade Comm'n v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *Fed. Trade Comm'n v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *Fed. Trade Comm'n v. Mag. Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011); *Fed. Trade Comm'n v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989), *overruled by Credit Bureau Ctr.*, 937 F.3d 764; *Fed. Trade Comm'n v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *Fed. Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Fed. Trade Comm'n v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *Fed. Trade Comm'n v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996).

It was not until 2019 that the first federal circuit, the Seventh, deviated from this approach, *see Credit Bureau Ctr.*, 937 F.3d at 786, and it was not until 2021 that the Supreme Court resolved the short-lived circuit split in the Seventh Circuit's favor, *AMG*, 141 S. Ct. at 1352. Thus, at the time of Ross's bench trial and on direct appeal—both having taken place many years before the split even arose between the Seventh Circuit and the overwhelming majority of its sister circuits—there was virtually no doubt that the approach eventually adopted by the Supreme Court in *AMG* was decidedly wrong.

Certainly, when perfect unanimity among the circuits supports a particular position, that position appears less arguable than it does unquestionable. Acknowledging that the Supreme Court did indeed alter the national approach to Section 13(b) in *AMG*—and we abide by that alteration absolutely—to have denied the FTC an equitable monetary remedy in 2012 would have seemed less a judgment call on an arguable issue, and more an abuse of discretion deviating from overwhelming national consensus. *See Fed. Trade Comm'n v. Hewitt*, 68 F.4th 461, 466 (9th Cir. 2023) (rejecting appellant's argument of jurisdictional voidness post-*AMG* because the prevailing national approach at the time of adjudication recognized a monetary remedy under Section 13(b), thus a "colorable basis" for jurisdiction existed).

Thus, regardless of how we perceive Ross's argument today—as implicating subject matter jurisdiction, standing, merits issues, or a combination of these—an arguable basis clearly supported the judgment imposed, and it cannot be said that there was a "total want of jurisdiction" or a "clear usurpation of

power" such that any defect renders the judgment void under Rule 60(b)(4).[3, 4, 5]

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[3] We decline to temporally couch our application of the arguable-basis test in the present as Ross implies we must. *See*, *e.g.*, Opening Br. 27 ("Because there is no unresolved circuit split *today*, there is no arguable basis for the error exposed by . . . *AMG*.") (emphasis added). This Court declared in *Welsh* that Rule 60(b)(4) voidness only applies "when there is a total want of jurisdiction and no arguable basis on which it *could have rested*." 879 F.3d at 533-34 (emphasis added) (simplified). Tellingly, *Welsh* did not declare that the arguable-basis test entails considering whether a basis exists on which jurisdiction *can* rest. Rather, its use of the modal past tense confirms the appropriateness of past perspective, and to apply the test with the benefit of either contemporary knowledge or a past presumption of perfect foresight would make little sense.

[4] This Court recently vacated an equitable monetary judgment in light of *AMG*, framing a portion of its analysis as it related to certain defaulted defendants under Rule 60(b). *See Fed. Trade Comm'n v. Pukke*, 53 F.4th 80, 106-07 (4th Cir. 2022). But despite this Court's invocation of Rule 60(b) as applied to the defaulted defendants, that matter was still open on direct appeal. *See id.* It did not implicate the same finality concerns present here, and we decline to find it controlling.

[5] Ross relies heavily on *Compton v. Alton S.S. Co., Inc.*, 608 F.2d 96 (4th Cir. 1979), for the proposition that we should not engage in an arguable-basis inquiry when considering Rule 60(b)(4) voidness. Setting aside our more recent decisions in *Wendt* and *Welsh, Compton* did not foreclose our application of the arguable-basis test. Rather, there, this Court concluded that vacatur of judgment was warranted "when unquestionably there was no basis whatsoever either in fact or in law for such a judgment." *Compton*, 608 F.2d at 107. In short, *Compton* vacated judgment based on an improper application of then-existing law—it did not consider the retroactive application of a novel interpretation ten years post-judgment.

B.

Ross alternatively seeks vacatur via Rule 60(b)'s catch-all provision, which permits relief when justified but not otherwise covered by an expressly enumerated portion of the rule. She contends that a change in controlling law justifies relief. She likewise argues that relief is warranted because she diligently raised the same arguments on direct appeal that *AMG* eventually vindicated. The FTC responds that a change in controlling law does not justify relief, nor does the fact that the Supreme Court eventually vindicated the position she took on direct appeal. The FTC concludes that her aggregated circumstances are not sufficiently extraordinary to warrant vacatur, and that the district court properly exercised its discretion in denying her motion.

Rule 60(b)(6) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment [for] . . . any [] reason that justifies relief." But relief under this catch-all provision is only available when a movant demonstrates "extraordinary circumstances." *Gonzalez*, 545 U.S. at 536. In evaluating whether circumstances are sufficiently extraordinary to justify relief, a district court must "delicately balance the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of all the facts." *Welsh*, 879 F.3d at 536 (simplified).

"It is hardly extraordinary" when the Supreme Court arrives "at a different interpretation" of a

particular issue than lower courts after a case is no longer pending. *Gonzalez*, 545 U.S. at 536; *see also Agostini v. Felton*, 521 U.S. 203, 239 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6). . . ."); *United States v. Salas*, 807 F. App'x 218, 229-30 (4th Cir. 2020) (applying *Gonzalez* and *Agostini* to affirm denial of vacatur under Rule 60(b)(6)). Further, "[i]t is not extraordinary for the Supreme Court to deny certiorari in a court of appeals case that it ultimately overrules in the review of a later similar case." *United States ex rel. Garibaldi v. Orleans Par. Sch. Bd.*, 397 F.3d 334, 339 (5th Cir. 2005).

Here, the Supreme Court's novel position in *AMG* is not sufficiently extraordinary to justify vacatur under the Rule 60(b) catch-all. A conclusion that such a circumstance justifies vacatur would effectively eviscerate finality interests and open the floodgates to newly meritorious 60(b)(6) motions each time the law changes. *See Moses v. Joyner*, 815 F.3d 163, 168-69 (4th Cir. 2016) ("[A] change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." (simplified)).

Further, the fact that Ross raised the arguments on direct appeal that the Supreme Court eventually vindicated in *AMG* similarly fails to justify vacatur. This position is effectively a repackaging of Ross's argument that a change in decisional law is sufficiently extraordinary. She offers no precedent of this Court suggesting that past advocates may benefit from post-judgment changes in decisional law simply because

those changes correspond with prior advocacy.[6] And, as above, such an approach would undermine bedrock finality interests. The approach could likewise generate strange post-judgment disparities between litigants based solely on litigation tactics—and without regard for the relationship between previously existing law and one's own culpability.

Ultimately, though, even if we concluded that Ross's advocacy on direct appeal warranted some favorable treatment for purposes of the Rule 60(b)(6) analysis, the district court did not abuse its broad discretion given the totality of the circumstances. To be sure, in the wake of *AMG*, we now know that restitution was not congressionally authorized under Section 13(b). But, as the Ninth Circuit has noted, "the fact that our understanding of Congress's will has changed is not itself extraordinary." *Hewitt*, 68 F.4th at 469. Furthermore, regardless of whether Congress intended Section 13(b) to impliedly authorize an equitable monetary remedy, the FTC could have pursued "materially similar relief under alternative remedial pathways" without resorting to that section. *Hewitt*, 68 F.4th at 470; *see also AMG*, 141 S. Ct. at 1348-52 (discussing other mechanisms within the FTC Act—including Sections 5 and 19—expressly facilitating consumer redress). Thus, Congress clearly contemplated

[6] Diligence on direct appeal has been recognized as a relevant consideration to Rule 60(b)(6). *See*, *e.g.*, *Gonzalez*, 545 U.S. at 537-38; *Hewitt*, 68 F.4th at 468-69; *Phelps v. Alameida*, 569 F.3d 1120, 1136-37 (9th Cir. 2009). But we have no reason to believe that diligence alone is sufficient to justify relief, nor that it outweighs other interests at play here.

the availability of monetary redress under the Act, and the FTC's use of Section 13(b) to effectuate that redress is not inconsistent with high-level congressional intent.

Moreover, although the monetary judgment here imposes crippling financial liability on Ross, the severity of her unlawful conduct and her culpability therefor also factor into our analysis. *Hewitt*, 68 F.4th at 470. Ross victimized over a million innocent consumers, defrauding them to the tune of $163,167,539.95. Discussing her role in the scheme, this Court previously explained that "Ross was actively and directly participating in multiple stages of the deceptive advertising scheme—she played a role in design, directed others to 'add aggression' to certain advertisements, was in a position of authority, had the power to discipline entire departments, and purchased substantial advertising space." *Ross II*, 743 F.3d at 895. Such considerations disfavor relief.

Finally, Ross's failure to abide by the monetary judgment—and her flight from the United States—weighs against a finding of extraordinary circumstances. By all accounts, it appears as though she never intended to abide by the monetary judgment affirmed by this Court nearly a decade ago. To now grant her relief would promote the conscious avoidance of judgments with which litigants disagree—an affront to justice that we cannot condone—in hopes of realizing some distant, future benefit. We will not reward Ross's defiance with a windfall.

Her aggregated circumstances are not extraordinary such that she is entitled to vacatur under the Rule 60(b) catch-all, and the district court soundly exercised its discretion in denying her such relief. This outcome is wholly consonant with our directive to "delicately balance the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done in light of all the facts." *Welsh*, 879 F.3d at 536 (simplified).

III.

An arguable basis supported the imposition of an equitable monetary judgment, and the district court did not abuse its discretion in finding Ross's circumstances unextraordinary. Thus, the court properly denied Ross's motion for vacatur under Rule 60(b)(4) and (b)(6). Ross remains liable for $163,167,539.95 in restitution—an amount that would justly recompense the victims of her deplorable scheme.

AFFIRMED

FILED: July 19, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2078
(1 :08-cv-03233-RDB)

FEDERAL TRADE COMMISSION

Plaintiff-Appellee

v.

KRISTY ROSS, individually, and as officer of Innovative Marketing, Inc.

Defendant-Appellant

JUDGMENT

(Filed Jul. 19, 2023)

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION,	*	
Plaintiff,	*	**Civil Action No.**
v.	*	**RDB-08-3233**
KRISTY ROSS,	*	
Defendant.	*	

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MEMORANDUM OPINION

(Filed Sep. 14, 2022)

Plaintiff Federal Trade Commission ("FTC" or "Plaintiff") brought this action in 2008 against eight Defendants, comprised of various corporate entities and individuals, for deceptive conduct in connection with software sales. (ECF No. 1.) Four of the Defendants settled with the FTC, three have had default judgments entered against them, and this Court held a two-day bench trial and found the remaining Defendant, Kristy Ross ("Ross"), liable for engaging in deceptive marketing. (ECF No. 262.) The Court permanently enjoined Ross from the marketing and sale of computer security software and any form of deceptive marketing; the Court also found her jointly and severally liable for consumer redress in the amount of $163,167,539.95. *Id.*

Presently pending before the Court is Defendant Ross's Motion to Vacate the damages portion of the

judgment against her. (ECF Nos. 275, 276.) The Court has reviewed the related filings (ECF Nos. 280, 285, 286) and finds that no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2021). For the reasons that follow, Defendant Ross's Motion is DENIED.

BACKGROUND

I. Defendant Ross's Case Background

This Court has detailed the factual background for this case in previous opinions. (ECF Nos. 139, 227, 262.) Nonetheless, the Court will reiterate those facts relevant to the instant dispute. On December 2, 2008, the FTC brought this case under Section 5(a) (15 U.S.C. § 45(a)) of the of the Federal Trade Commission Act ("FTC Act") which prohibits engaging in "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." (ECF No. 1.) The FTC sought redress under Section 13(b) (15 U.S.C. § 53(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 a Memorandum Opinion, Order, and Letter Order addressing FTC's Motion for Summary Judgment, this Court found that Ross's Co-Defendants violated Section 5(a) of the FTC Act, but denied summary judgment as to Ross due to dispute of material fact. (ECF Nos. 227, 228, 229.) The Court held a two-day bench trial concerning those claims against Ross from September 11, 2012, until September 12, 2012. (ECF Nos.

255, 257.)[1] Shortly thereafter, the Court issued a Memorandum Opinion explaining the findings of fact and conclusions of law. *F.T.C. v. Ross*, 897 F. Supp. 2d 369, 373 (D. Md. 2012), *aff'd*, 743 F.3d 886 (4th Cir. 2014). The Court found Ross liable for engaging in deceptive marketing in violation of Section 5(a) of the FTC Act and ordered damages under Section 13(b) in the form of injunctive relief and consumer redress amounting to $163,167,539.95.[2]

Defendant Ross appealed this Court's decision to the United States Court of Appeals for the Fourth Circuit. (ECF No. 264.) The Fourth Circuit affirmed this Court's decision and expounded on each of Ross's issues on appeal. *F.T.C. v. Ross*, 743 F.3d 886 (4th Cir. 2014), *cert. denied*, 574 US 819 (2014). Of particular importance now, the Fourth Circuit addressed Ross's contention that a district court lacked authority to award monetary relief in the form of consumer redress under Section 13(b) of 15 U.S.C. § 53(b). *Id.* at 891. In rejecting Ross's argument, the Fourth Circuit emphasized the previous longstanding precedent that "Congress presumably authorized the district court to exercise the full measure of its equitable jurisdiction." *Id.* The Fourth Circuit explicitly noted that at the time, "the court had sufficient statutory power to award 'complete relief,' including monetary consumer redress, which is a form of equitable relief." *Id.* (citing

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[1] Ross refused to actively participate in the case—she did not provide discovery or comply with any orders of the Court. Ross also failed to attend the bench trial.

[2] There has been no collection on this judgment against Ross.

Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946)). Interestingly, the Fourth Circuit found that a "ruling in favor of Ross would forsake almost thirty years of federal appellate decisions and create a circuit split, a result that we will not countenance in the face of powerful Supreme Court authority pointing in the other direction."[3] In its opinion, the Fourth Circuit cited to a string of cases illustrating the decades of precedent amongst the circuits, as cited in the analysis *infra* Section II. *Ross*, 743 F.3d at 892.

II. AMG Capital Management, LLC, et al. v. Federal Trade Commission

Years later, the United States Supreme Court "point[ed] in the other direction." On April 22, 2021, the Supreme Court held "that § 13(b)'s 'permanent injunction' language does not authorize the Commission directly to obtain court-ordered monetary relief." *AMG Cap. Mgmt., LLC v. F.T.C.*, 141 S. Ct. 1341, 1347 (2021). The Supreme Court noted several considerations in reaching this decision, and notably relied on congressional intent to deduce that the plain language of § 13(b) authorizes injunctive relief but not monetary relief. *Id.* at 1359.

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[3] The United States Court of Appeals for the Seventh Circuit only recently overruled its own precedent and created a circuit split in 2019, holding that "section 13(b) does not authorize restitutionary relief." *F.T.C. v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 766 (7th Cir. 2019).

Notably, the Supreme Court rejected the FTC's argument that, because United States Courts of Appeals have consistently affirmed district court decisions awarding monetary relief under § 13(b), Congress had "in effect twice ratified that interpretation in subsequent amendments to the Act." *AMG*, 141 S. Ct. at 1351. The Supreme Court expressly distinguished Congress's amendments, noting that they "simply revised § 13(b)'s venue, joinder, and service rules, not its remedial provisions. They tell us nothing about the words 'permanent injunction' in § 13(b)." *Id.* As a result, longstanding precedent has been overruled and courts are not authorized to award monetary damages under § 13(b) of the FTC Act.

III. Defendant Ross's Current Challenge

Defendant Ross now challenges this Court's Order finding that she is jointly and severally liable under § 13(b) for consumer redress in the amount of $163,167,539.95. (ECF No. 275.) Ross relies almost exclusively on *AMG* in arguing (1) this Court lacked statutory authority to enter a monetary judgment thereby rendering that part of the judgment void under Federal Rule of Civil Procedure 60(b)(4); or alternatively (2) the change in law equates to extraordinary circumstances necessary to vacate the monetary judgment under Federal Rule of Civil Procedure 60(b)(6). *Id.*

The FTC appropriately retorts that the remedial measures under § 13(b) were not jurisdictional and therefore the change in law does not render this

Court's previous Order void under Federal Rule of Civil Procedure 60(b)(4). (ECF No. 280 at 4.) FTC continues that even if application of § 13(b) was deemed jurisdictional, this Court had an arguable basis to assert jurisdiction in 2012. *Id.* at 8. Furthermore, FTC aptly notes that the change in law from *AMG* does not present extraordinary circumstances under Federal Rule of Civil Procedure 60(b)(6). *Id.* at 10. Accordingly, for the reasons explained below, Defendant Ross's Motion to Vacate (ECF No. 275) is DENIED.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 60(b) empowers this Court to "relieve a party or its legal representative from a final judgment, order, or proceeding." "Rule 60(b) provides extraordinary relief and may only be invoked under 'exceptional circumstances.'" *Mines v. United States*, No. WMN-10-520, 2010 WL 1741375, at *2 (D. Md. Apr. 28, 2010) (quoting *Compton v. Alton Steamship Co., Inc.*, 608 F.2d 96, 102 (4th Cir. 1982)). Ross seeks vacatur under Federal Rules of Civil Procedure 60(b)(4) and 60(b)(6).

I. Rule 60(b)(4)

A judgment is void under Rule 60(b)(4) if "the court rendering the decision lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process of law." *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005). The concept of "void" is narrowly construed such that "a lack of subject matter

jurisdiction will not always render a final judgment 'void' [under Rule 60(b)(4)]. Only when the jurisdictional error is 'egregious' will courts treat the judgment as void." *Id.* at 413 (quoting *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) (internal quotations omitted)). "Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010) (citation omitted).

II. Rule 60(b)(6)

Rule 60(b)(6) is a "catch-all provision" which permits the court to re-open a case for "any other reason that justifies relief." *Moses v. Joyner*, 815 F.3d 163, 167-68 (4th Cir. 2016). Relief under Rule 60(b)(6) is only appropriate "under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Gelin v. Balt. Cnty, Md.*, ADC-16-3694, 2019 WL 1546849, at *9 (D. Md. Apr. 9, 2019) (quoting *Trs. Of Painters' Tr. Fund of Washington, D.C. v. Clabbers*, DKC-02-4063, 2010 WL 2732241, at *5 (D. Md. July 9, 2010)).

ANALYSIS

Defendant Ross has failed to argue "exceptional circumstances" that warrant "extraordinary relief" under Federal Rule of Civil Procedure 60(b).

I. Rule 60(b)(4)

Ross argues that the Court's monetary judgment against her was a jurisdictional error which cannot be forgiven because this Court lacked even an arguable basis for jurisdiction. (ECF No. 276 at 4.) Ross's contention is unfounded. As the FTC properly states, application of § 13(b) is procedural, not jurisdictional. The Supreme Court categorized § 13(b) as a remedial provision. *AMG*, 141 S. Ct. at 1351. Our neighboring United States Court of Appeals for the District of Columbia Circuit found that the authority to impose certain remedies "is fundamentally different from a court's subject matter jurisdiction over a case and from its personal jurisdiction over the parties, both of which concern the power to proceed with a case at all." *United States v. Philip Morris USA Inc.*, 840 F.3d 844, 850 (D.C. Cir. 2016). That court held that "Rule 60(b)(4) does not permit relief where a court has exceeded its remedial authority" because "challenges to allegedly unauthorized remedies could produce an endless series of interlocutory appeals, especially in complex, long-running cases." *Id.* at 850-51.

This Court agrees with the United States Court of Appeals for the District of Columbia Circuit that remedial provisions are not jurisdictional for purposes of Rule 60(b)(4) relief. Here, the Court exercised subject matter jurisdiction over the case based on the United States' status as a plaintiff under 28 U.S.C. § 1345 and federal question jurisdiction under 283 U.S.C. § 1331. The Supreme Court's decision in *AMG* concerning the remedial provision, or lack thereof, in § 13(b) does not

strip this Court of subject matter jurisdiction over claims under 15 U.S.C. § 53(b) as necessary for a Rule 60(b)(4) challenge.

Furthermore, even if § 13(b) application is jurisdictional, this Court had an arguable basis for rendering a monetary judgment in 2012. In Ross's own appeal, the Fourth Circuit emphasized that district courts' authority to award consumer redress under § 13(b) in 2012 was guided by precedent. *Ross*, 743 F.3d at 891-92. (citing *F.T.C. v. Bronson Partners LLC*, 654 F.3d 359, 365-67 (2d Cir. 2011); *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564, 571 (7th Cir. 1989); *F.T.C. v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991); *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1101-02 (9th Cir. 1994); *F.T.C. v. Gem Merchandising Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996)); *see also F.T.C. v. J.K. Publ'n*, 99 F. Supp. 1176 (C.D. Cal. 2000); *F.T.C. v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282 (D. Minn. 1985); *see also F.T.C. v. AH Media Grp., LLC*, 339 F.R.D. 612, 618 (N.D. Cal. 2021) ("This is not a situation of a total want of jurisdiction, or one in which the Court lacked even an arguable basis in jurisdiction"); *F.T.C. v. Apex Cap. Grp.*, No. CV 18-9573-JFW(JPRX), 2021 WL 7707269, at *3 (C.D. Cal. Sept. 3, 2021) ("the Court also concludes that portion of the Stipulated Judgment was not void within the meaning of Rule 60(b)(4) because . . . there was plainly an 'arguable basis' for the Court's exercise of jurisdiction"); *F.T.C. v. John Beck Amazing Profits, LLC*, No. CV 9-4719-MWF (CWX), 2021 WL 4313101, at *2 (C.D. Cal. Aug. 19, 2021). The overwhelming precedent that

guided this Court's decision in 2012 provided a solid "arguable basis" for jurisdiction. Thus, because the judgment against Ross is not void under Federal Rule of Civil Procedure 60(b)(4) for lack of jurisdiction, her argument here fails.

II. Rule 60(b)(6)

Defendant Ross asserts that the change in law articulated in *AMG* and "other circumstances" amount to "extraordinary circumstances" for relief under Federal Rule of Civil Procedure 60(b)(6). Again, precedent dictates otherwise. "Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). In this Circuit, "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993).

The change in law from *AMG* and "other circumstances" do not amount to extraordinary circumstances necessary for relief under Rule 60(b)(6). First, the "other circumstances" presented by Defendant Ross include application of factors that guide the Ninth and Eleventh Circuits' analyses. (ECF No. 276 at 12.) The Fourth Circuit does not employ a similar factor analysis. Second, the Fourth Circuit has expressly stated that change in decisional law after a final judgment does not alone constitute rationale for relief under 60(b)(6). *Dowell*, 993 F.2d at 48.

Additionally, the amount of time that has passed since the judgment was entered—almost ten years—weighs unfavorable to a finding of extraordinary circumstance. In all, Defendant Ross has failed to present extraordinary circumstances that warrant vacatur under Federal Rule of Civil Procedure 60(b)(6) and her claim here fails.

CONCLUSION

Because both of Defendant's arguments failed for the reasons stated above, Defendant Ross's Motion to Vacate (ECF No. 275) is DENIED.

A separate Order follows.

Dated: September 14, 2022

/s/
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION,	*	
Plaintiff,	*	**Civil Action No.**
v.	*	**RDB-08-3233**
KRISTY ROSS,	*	
Defendant.	*	

* * * * * * * * * * * * * * * * *

ORDER

(Filed Sep. 14, 2022)

For the reasons stated in the Memorandum Opinion issued this date, IT IS this 14th day of September 2022, HEREBY ORDERED that Defendant Ross's Motion to Vacate (ECF No. 275) is DENIED.

/s/
Richard D. Bennett
United States District Judge

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12-2340

FEDERAL TRADE COMMISSION,

Plaintiff - Appellee,

v.

KRISTY ROSS, individually and as officer of Innovative Marketing, Inc.,

Defendant – Appellant,

and

INNOVATIVE MARKETING, INC., d/b/a Winsolutions FZ-LLC, d/b/a Billingnow, d/b/a Winpayment Consultancy SPC, d/b/a BillPlanet PTE Ltd., d/b/a Revenue Response Sunwell, d/b/a Globedat, d/b/a Winsecure Solutions, d/b/a Synergy Software BV, d/b/a Innovative Marketing Ukraine; BYTEHOSTING INTERNET SERVICES, LLC; JAMES RENO, d/b/a Setupahost.net, individually, and as an officer of ByteHosting Internet Services, LLC; SAM JAIN, individually and as an officer of Innovative Marketing, Inc.; DANIEL SUNDIN, d/b/a Vantage Software, d/b/a Winsoftware, Ltd., individually and as an officer of Innovative Marketing, Inc.; MARC D'SOUZA, d/b/a Web Integrated Net Solutions, individually and as an officer of Innovative Marketing, Inc.; MAURICE D'SOUZA,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:08-cv-03233-RDB)

Argued: October 31, 2013 Decided: February 25, 2014

Before DAVIS and FLOYD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge DAVIS wrote the opinion, in which Judge FLOYD and Senior JUDGE Hamilton joined.

ARGUED: Robert P. Greenspoon, FLACHSBART & GREENSPOON, LLC, Chicago, Illinois, for Appellant. Theodore Metzler, FEDERAL TRADE COMMISSION, Washington, D.C., for Appellee. **ON BRIEF:** William W. Flachsbart, FLACHSBART & GREENSPOON, LLC, Chicago, Illinois, for Appellant. David C. Shonka, Acting General Counsel, John F. Daly, Deputy General Counsel, FEDERAL TRADE COMMISSION, Washington, D.C., for Appellee.

DAVIS, Circuit Judge:

The Federal Trade Commission sued Kristy Ross in U.S. District Court for the District of Maryland for engaging in deceptive internet advertising practices. After a bench trial, the district court entered judgment enjoining Ross from participating in the deceptive practices and holding her jointly and severally liable for equitable monetary consumer redress in the amount of $163,167,539.95. F.T.C. v. Ross, 897 F. Supp. 2d 369, 388-89 (D. Md. 2012). On appeal, Ross challenges the district court's judgment on several bases: (1) the court's authority to award consumer redress; (2) the legal standard the court applied in finding individual liability under the Federal Trade Commission Act; (3) the court's prejudicial evidentiary rulings; and finally, (4) the soundness of the district court's factual findings. For the reasons set forth within, we affirm.

I

The Commission sued Innovative Marketing, Inc. ("IMI"), and several of its high-level executives and founders, including Ross, for running a deceptive internet "scareware" scheme in violation of the prohibition on deceptive advertising in Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a). The core of the Commission's case was that the defendants operated "a massive, Internet-based scheme that trick[ed] consumers into purchasing computer security software," referred to as "scareware." J.A. 29. The advertisements would advise consumers that a scan of their

computers had been performed that had detected a variety of dangerous files, like viruses, spyware, and "illegal" pornography; in reality, no scans were ever conducted. J.A. 29.

Ross, a Vice President at IMI, hired counsel and defended against the suit; the remaining defendants either settled or had default judgment entered against them.

The district court entered summary judgment in favor of the Commission on the issue of whether the advertising was deceptive, but it set for trial the issue of whether Ross could be held individually liable under the Federal Trade Commission Act, i.e., whether Ross "was a 'control person' at the company, and to what extent she had authority for, and knowledge of the deceptive acts committed by the company." J.A. 925.

After a bench trial, the district court found in favor of the Commission. Specifically, it found that Ross'

> broad responsibilities at IMI coupled with the fact that she personally financed corporate expenses, oversaw a large amount of employees and had a hand in the creation and dissemination of the deceptive ads prove[d] by a preponderance of the evidence that she had authority to control and directly participated in the deceptive acts within the meaning of Section 5 of the [Federal Trade Commission] Act.

Ross, 897 F. Supp. 2d at 384. The district court further concluded that Ross had actual knowledge of the

deceptive marketing scheme, or was "at the very least recklessly indifferent or intentionally avoided the truth" about the scheme. Id. at 386. It entered judgment against Ross in the amount of $163,167,539.95, and it enjoined her from engaging in similar deceptive marketing practices. Id. at 389. Ross timely appealed.

II

The Federal Trade Commission Act authorizes the Commission to sue in federal district court so 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). Ross contends that the district court did not have the authority to award consumer redress – a money judgment – under this provision of the statute.

Ross first takes the position, correctly, that the statute's text does not expressly authorize the award of consumer redress, but precedent dictates otherwise: the Supreme Court has long held that Congress' invocation of the federal district court's equitable jurisdiction brings with it the full "power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946). Once invoked by Congress in one of its duly enacted statutes, the district court's inherent equitable powers cannot be "denied or limited in the absence of a clear and valid legislative command." Id. Porter and its progeny thus articulate an

interpretive principle that inserts a presumption into what would otherwise be the standard exercise of statutory construction: we presume that Congress, in statutorily authorizing the exercise of the district court's injunctive power, "acted cognizant of the historic power of equity to provide complete relief in light of statutory purposes." Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960).

Applying this principle to the present case illuminates the legislative branch's real intent. That is, by authorizing the district court to issue a permanent injunction in the Federal Trade Commission Act, 15 U.S.C. § 53(b)(2), Congress presumably authorized the district court to exercise the full measure of its equitable jurisdiction. Accordingly, absent some countervailing indication sufficient to rebut the presumption, the court had sufficient statutory power to award "complete relief," including monetary consumer redress, which is a form of equitable relief. Porter, 328 U.S. at 399.

Ross insists that the text of the Federal Trade Commission Act is unlike that of the statutes at issue in Porter and Mitchell, and therefore argues that the interpretive principle of those cases is inapplicable in her case. In Porter, a case involving the Emergency Price Control Act of 1942, the statute authorized district courts to grant "a permanent or temporary injunction, restraining order, or other order." 328 U.S. at 397 (internal quotations and citation omitted). Ross contends that the "other order" language, absent from the instant provision of the Federal Trade Commission

Act, cabins Porter's applicability. See also United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1198 (D.C. Cir. 2005). In other words, her argument is that Porter was a "magic words" case – if Congress uses the magic words "other order," then Congress has invoked the full injunctive powers of the district court.

Ross' magic words argument fails because it ignores how the Supreme Court subsequently untethered its reasoning from the "other order" language of the Emergency Price Control Act and significantly expanded Porter's holding. The language of the statute at issue in Mitchell, the Fair Labor Standards Act, was different from the language of the statute in Porter, providing only that the district court had jurisdiction to "restrain violations of Section 15." Mitchell, 361 U.S. at 289 (internal quotation and citation omitted). Notwithstanding the silence of the Fair Labor Standards Act as to the district court's express power to award reimbursement of lost wages and the absence of the "other order" language, the Court held that ordering reimbursement was nevertheless permissible under the holding of Porter. 361 U.S. at 296. In comparing the language of the Fair Labor Standards Act with the Emergency Price Control Act, the Mitchell Court reasoned that the "other order" provision was merely an "affirmative confirmation" – icing on the cake – over and above the district court's inherent equitable powers. See id. at 291.

The point is that Mitchell broadened Porter's applicability, rendering the textual statutory differences irrelevant to the ultimate conclusion: because there is

no affirmative and clear legislative restriction on the equitable powers of the district court, ordering monetary consumer redress is an appropriate "equitable adjunct" to the district court's injunctive power. Porter, 328 U.S. at 399.

Ross makes a series of arguments about how the structure, history, and purpose of the Federal Trade Commission Act weigh against the conclusion that district courts have the authority to award consumer redress; her arguments are not entirely unpersuasive, but they have ultimately been rejected by every other federal appellate court that has considered this issue. F.T.C. v. Bronson Partners LLC, 654 F.3d 359, 365–67 (2d Cir. 2011); F.T.C. v. Amy Travel Service, Inc., 875 F.2d 564, 571 (7th Cir. 1989); F.T.C. v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1101–02 (9th Cir. 1994); F.T.C. v. Gem Merchandising Corp., 87 F.3d 466, 468–70 (11th Cir. 1996). We adopt the reasoning of those courts and reject Ross' attempt to obliterate a significant part of the Commission's remedial arsenal. A ruling in favor of Ross would forsake almost thirty years of federal appellate decisions and create a circuit split, a result that we will not countenance in the face of powerful Supreme Court authority pointing in the other direction.

III

The Federal Trade Commission Act makes it unlawful for any person, partnership, or corporation "to

disseminate, or cause to be disseminated, any false advertisement" in commerce, 15 U.S.C. § 52(a), and it authorizes the Commission to bring suit in federal district court when it finds that any such person, partnership, or corporation "is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any" false advertisement, 15 U.S.C. § 53(a)(1).

The district court ruled that one could be held individually liable under the Federal Trade Commission Act if the Commission proves that the individual (1) participated directly in the deceptive practices or had authority to control them, and (2) had knowledge of the deceptive conduct, which could be satisfied by showing evidence of actual knowledge, reckless indifference to the truth, or an awareness of a high probability of fraud combined with intentionally avoiding the truth (i.e., willful blindness). Ross, 897 F. Supp. 2d at 381.

Ross contends that the district court's standard was wrong and asks us to reject it. She proposes that we import a standard from our securities fraud jurisprudence that requires proof of an individual's (1) "authority to control the specific practices alleged to be deceptive," coupled with a(2) "failure to act within such control authority while aware of apparent fraud." App. Br. 35 (citing Dellastatious v. Williams, 242 F.3d 191, 194 (4th Cir. 2001)). Any other standard, argues Ross, would permit a finding of individual liability based on "indicia having more to do with enthusiasm for and skill at one's job [rather] than authority over specific ad campaigns, and allow fault to be shown without any

actual awareness of" a co-worker's misdeeds. App. Br. 36. Ross maintains that she would not have been held individually liable under her proposed standard.

Ross' proposed standard would permit the Commission to pursue individuals only when they had actual awareness of specific deceptive practices and failed to act to stop the deception, i.e., a specific intent/subjective knowledge requirement; her proposal would effectively leave the Commission with the "futile gesture" of obtaining "an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices" in the first place. Pati-Port, Inc. v. F.T.C., 313 F.2d 103, 105 (4th Cir. 1963).

We hold that one may be found individually liable under the Federal Trade Commission Act if she (1) participated directly in the deceptive practices or had authority to control those practices, and (2) had or should have had knowledge of the deceptive practices. The second prong of the analysis may be established by showing that the individual had actual knowledge of the deceptive conduct, was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning the truth.

Our ruling maintains uniformity across the country and avoids a split in the federal appellate courts. Every other federal appellate court to resolve the issue has adopted the test we embrace today. F.T.C. v. Direct Marketing Concepts, Inc., 624 F.3d 1, 12 (1st Cir. 2010);

Amy Travel Service, 875 F.2d at 573–74; F.T.C. v. Publishing Clearing House, Inc., 104 F.3d 1168, 1170 (9th Cir. 1997); F.T.C. v. Freecom Communications, Inc., 401 F.3d 1192, 1207 (10th Cir. 2005); Gem Merchandising Corp., 87 F.3d at 470. Ross' proposed standard, by contrast, invites us to ignore the law of every other sister court that has considered the issue, an invitation that we decline.

IV

Ross next mounts three evidentiary challenges. First, Ross contends that the district court improperly precluded her expert, Scott Ellis, from testifying about how "the advertisements linkable to Ms. Ross's responsibilities were nondeceptive." App. Br. 29. As the district court correctly ruled, however, Ellis' testimony was irrelevant because it had already decided the deceptiveness issue in favor of the Commission at summary judgment. The only issue held over for trial was whether Ross had the requisite degree of control necessary to hold her individually liable for the company's deceptive practices, i.e., whether she participated directly in the company's deceptive practices or had authority to control those practices and had or should have had knowledge of those practices. Because the individual liability standard does not require a specific link from Ross to particular deceptive advertisements and instead looks at whether she had authority to control the corporate entity's practices, Ellis' testimony was immaterial, and thus irrelevant, to the issue reserved for trial. Fed. R. Evid. 401.

Second, Ross challenges the admission of a 2004 to 2006 profit and loss statement that the district court relied on to calculate the amount of consumer redress. The documents were produced during discovery in corporate litigation involving some of Ross' co-defendants in Canada. Daniel Sundin and Sam Jain sued Marc D'Souza, all of whom were co-defendants of Ross in this case and executives at IMI. Jain submitted an affidavit along with a profit and loss summary for the company for the period of 2004 to 2006; the documents were "litigation-purpose financial summaries [of IMI's profits] described in [Jain's] affidavit as a Quickbooks printout." App. Br. 31, J.A. 1790, 1799.

Although the district court admitted the profit and loss statement under Federal Rule of Evidence 807, the residual exception to the rule against hearsay, F.T.C. v. Ross, 2012 WL 4018037, at *1-3 (D. Md. Sept. 11, 2012), we may affirm the district court "on the basis of any ground supported by the record even if it is not the basis relied upon by the district court," Ostrzenski v. Seigel, 177 F.3d 245, 253 (4th Cir. 1999), and we conclude that the profit and loss summary plainly was admissible as an adoptive admission by Ross. Fed. R. Evid. 801(d)(2)(B). Ross expressly adopted Jain's affidavit: she swore in her own affidavit produced during the Canadian litigation that she had read Jain's affidavit and was "in agreement with [its] contents." J.A. 1590. She did take some exceptions, but she did not object to the profit and loss statement attached to Jain's affidavit, nor did she object to the authenticity or reliability of the statements.

The third of Ross' evidentiary assignments of error also rests on the improper admission of hearsay evidence: an e-mail from Sundin to Jettis, a payment processor, listing Skype numbers and titles for a group of high-level company executives. Ross' telephone number is listed on the e-mail, as is her title, "Vice President." The district court admitted the e-mail pursuant to the hearsay exception for statements made by a coconspirator in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). Ross argues that there was insufficient evidence establishing as a predicate for the e-mail's admission the existence of the conspiracy, and that admission of the e-mail itself was improper "bootstrapping" of the existence of the conspiracy to the document's admissibility. See Bourjaily v. United States, 483 U.S. 171, 176–81 (1987).

We disagree. It is true, of course, that the proponent for admission of a coconspirator's out-of-court statement "must demonstrate the existence of the conspiracy by evidence extrinsic to the hearsay statements." United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976). But that requirement was satisfied in this case. There was independent evidence that established the existence of the conspiracy: Ross produced an affidavit during the corporate litigation in Canada in which she stated that she was a Vice President and one of the founders of IMI, and she adopted the affidavits of her co-defendants attesting to the same facts. The affidavits provided a sufficient basis upon which the district court could conclude, prima facie, see United States v. Vaught, 485 F.2d 320, 323 (4th Cir.

1973), the existence of a conspiracy. Moreover, the e-mail from Sundin to Jettis was a quintessential example of a statement made "in furtherance" of the conspiracy because its role was to maintain the logistics of the conspiracy and "identify names and roles" of members of the deceptive advertising endeavor. Michael H. Graham, Handbook of Federal Evidence 421 (7th ed. 2013).

In sum, we find no reversible error in the district court's evidentiary rulings that are challenged on appeal by Ross.

V

Ross' last contention is that the district court clearly erred in finding that she had "control" of the company, participated in any deceptive acts, and had knowledge of the deceptive advertisements. In a bench trial, we review the district court's factual findings for clear error and its legal conclusions de novo. Fed. R. Civ. P. 52; Helton v. AT & T, Inc., 709 F.3d 343, 351 (4th Cir. 2013). "In cases in which a district court's factual findings turn on assessments of witness credibility or the weighing of conflicting evidence during a bench trial, such findings are entitled to even greater deference." Helton, 709 F.3d at 351.

The district court did not clearly err in finding that Ross had "authority to control the deceptive acts within the meaning" of the Federal Trade Commission Act. Ross, 897 F. Supp. 2d at 383. In an affidavit in the Canadian litigation, she swore that she was a

high-level business official with duties involving, among other things, "product optimization," which the district court could reasonably have inferred afforded her authority and control over the nature and quality of the advertisements. J.A. 1589. Moreover, there was evidence that other employees requested Ross' authority to approve certain advertisements, and that she would check the design of the advertisements before approving them.

Nor did the district court clearly err in finding that Ross "directly participated in the deceptive marketing scheme." Ross, 897 F. Supp. 2d at 384. Ross' statements to other employees, as memorialized in chat logs between her and other employees were evidence that she served in a managerial role, directing the design of particular advertisements. J.A. 3580 ("anyway we have to get all this advertisement stuff off these ads can you please [make] sure it happens it needs to happen for all domains"); J.A. 1491 ("btw we have some 30 creatives for errclean [sic] not just 2–3 just add aggression tot hem [sic]"). Ross was a contact person for the purchase of advertising space for IMI, and there was evidence that Ross had the authority to discipline staff and developers when the work did not meet her standards. J.A. 1466 ("please ensure its [sic] going to be done or im [sic] going to fine the department and MCs for not finishing it"). Given these facts, the district court could have reasonably inferred that Ross was actively and directly participating in multiple stages of the deceptive advertising scheme – she played a role in design, directed others to "add aggression" to

certain advertisements, was in a position of authority, had the power to discipline entire departments, and purchased substantial advertising space.

The district court did not clearly err in finding that Ross "had actual knowledge of the deceptive marketing scheme" and/or that she was "at the very least recklessly indifferent or intentionally avoided the truth." Ross, 897 F. Supp. 2d at 386. There was evidence that she edited and reviewed the content of multiple advertisements. At one point, she ordered the removal of the word "advertisement" from a set of ads. J.A. 3580. Codefendant Sundin, the Chief Technology Officer of IMI and its sole shareholder and director, attested that Ross assumed some of his duties during his long-term illness. And although there was some indication that Ross acted in a manner suggesting that she personally did not perceive (or believe) that the advertisements were deceptive, Ross was on notice of multiple complaints about IMI's advertisements, including that they would cause consumers to automatically download unwanted IMI products.

All of this evidence paints a picture that the district court was wholly capable of accepting as a matter of fact: Ross made "countless decisions" that demonstrated her authority to control IMI. F.T.C. v. Bay Area Business Council, Inc., 423 F.3d 627, 637 (7th Cir. 2005). Although a different fact-finder may have come to a contrary conclusion from that reached by the experienced district judge in this case, the "rigorous" clear error standard requires more than a party's simple disagreement with the court's findings. PCS Nitrogen,

Inc. v. Ashley II of Charleston, LLC, 714 F.3d 161, 174–75 (4th Cir. 2013).

VI

The judgment of the district court is

AFFIRMED.

FILED: February 25, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2340
(1:08-cv-03233-RDB)

FEDERAL TRADE COMMISSION

Plaintiff - Appellee

v.

KRISTY ROSS, individually, and as officer of Innovative Marketing, Inc.

Defendant - Appellant

and

INNOVATIVE MARKETING, INC., d/b/a Winsolutions FZ-LLC, d/b/a Billingnow, d/b/a Winpayment Consultancy SPC, d/b/a BillPlanet PTE Ltd., d/b/a Revenue Response Sunwell, d/b/a Globedat, d/b/a Winsecure Solutions, d/b/a Synergy Software BV, d/b/a Innovative Marketing Ukraine; BYTEHOSTING INTERNET SERVICES, LLC; JAMES RENO, d/b/a Setupahost.net, individually, and as an officer of ByteHosting Internet Services, LLC; SAM JAIN, individually and as an officer of Innovative Marketing, Inc.; DANIEL SUNDIN, d/b/a Vantage Software, d/b/a Winsoftware, Ltd., individually and as an officer of Innovative Marketing, Inc.; MARC D'SOUZA, d/b/a Web Integrated Net Solutions, individually and as an officer of Innovative Marketing, Inc.; MAURICE D'SOUZA

Defendants

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION, PLAINTIFF, V. KRISTY ROSS, INDIVIDUALLY AND AS AN OFFICER OF INNOVATIVE MARKETING, INC., DEFENDANT.	* * * * * * * * * * * * *	CIVIL ACTION NO.: RDB-08-3233

* *

MEMORANDUM OPINION

(Filed Sep. 24, 2012)

The Federal Trade Commission ("FTC") brought this case under Sections 5(a) and 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 53(b), against a group of corporate entities and individuals for alleged deceptive conduct in connection with the sale of software. Specifically, the FTC alleged that two companies, Defendants Innovative Marketing, Inc. ("IMI") and ByteHosting Internet Services, LLC ("ByteHosting"), operated as a common enterprise (the "IMI Enterprise" or "Enterprise") to conduct a massive "scareware"[1] scheme that marketed a variety

[1] As noted in the FTC's Complaint, "scareware" is a common term that refers to a software-driven, Internet-based scheme that "exploits consumers' legitimate concerns about Internet-based threats like spyware and viruses by issuing false security or

of computer security software via deceptive advertising. The FTC alleged that several of the companies' officers and directors, namely, Sam Jain ("Jain"), Daniel Sundin ("Sundin"), Marc D'Souza ("D'Souza"), Kristy Ross ("Ross"), and James Reno ("Reno"), directed or participated in the IMI Enterprise. The FTC also named Maurice D'Souza, the father of Marc D'Souza, as a defendant in this suit. Of the original eight defendants, four have settled with the FTC, and three are in default and have had judgments entered against them for failure to appear and participate in this litigation. Defendant Kristy Ross is the only remaining defendant at issue.[2]

Jurisdiction over this case is based on the United States' status as a plaintiff under 28 U.S.C. § 1345 and federal question jurisdiction under 28 U.S.C. § 1331. After a two-day bench trial from September 11 to September 12, 2012, this Court has carefully considered the exhibits introduced into evidence, the testimony of the witness who testified in person, the testimony of the witnesses presented by deposition, the Proposed Final Pretrial Order, the written submissions of the parties, and the oral arguments of counsel. The following constitutes this Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. The accompanying Order enters

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privacy warnings to consumers for the sole purpose of selling software to fix the imagined problem." Compl. ¶ 15, ECF No. 1.

[2] While she has been served and has retained counsel, she has failed to answer and respond to any discovery requests and to appear for trial.

Judgment in favor of Plaintiff Federal Trade Commission against Defendant Kristy Ross individually, and as an officer of Innovative Marketing, Inc.

I. BACKGROUND

The FTC filed the present action on December 2, 2008 against Defendants Innovative Marketing, Inc. ("IMI"), Byte-Hosting Internet Services, LLC ("Byte-Hosting"), Sam Jain ("Jain"), Daniel Sundin ("Sundin"), Marc D'Souza ("D'Souza"), Kristy Ross ("Ross"), and James Reno ("Reno"), and later added Maurice D'Souza as a defendant. After a hearing was held on December 12, 2008, this Court entered a Preliminary Injunction that served to, *inter alia*, prohibit Defendants from continuing the alleged deceptive business activities, freeze Defendants' assets, and compel Defendants to turn over certain business records to the FTC. In February 2010, Defendants ByteHosting Internet Services, LLC, James Reno, Marc D'Souza and Maurice D'Souza settled with the FTC. That same month, default judgments were entered against corporate Defendant Innovative Marketing, Inc., and Defendants Sam Jain and Daniel Sundin for failure to appear and participate in this litigation.[3]

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[3] A criminal action was brought against Defendants Sundin, Jain and Reno in the U.S. District Court for the Northern District of Illinois in connection with their activities with IMI. *See USA v. Bjorn Daniel Sundin, Shaileshkumar P. Jain, a.k.a Sam Jain, and James Reno*, Criminal Action No. 1:10-cr-00452. This case was assigned to the Fugitive Calendar on June 7, 2012 with respect to Defendants Sundin and Jain. Additionally, two other

Ultimately, the FTC filed a Motion for Summary Judgment against Defendant Ross. The sole count of the Complaint against her alleges that in the course of marketing, offering for sale, and selling computer software, she and her co-defendants misrepresented, expressly or by implication, that they had conducted scans of consumers' computers and detected security or privacy issues, including viruses, spyware, system errors and pornography. The Complaint also alleges that since 2004 or earlier, Defendants had placed misleading advertisements for their software products with major Internet advertising networks, which serve as brokers that distribute advertisements to their website partners. The advertising networks contracted with their partners to display the Defendants' advertisements across the Internet. After the advertising networks, such as MyGeek, began to receive complaints, they stopped accepting Defendants' advertisements. At that point, in 2007, Defendants began creating a number of sham Internet advertising agencies that duped advertising networks and commercial websites into

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actions are presently pending against Defendant Jain. First, he is charged with Failure to Appear After Pre-Trial Release in the U.S. District Court for the Northern District of California in a case where he was charged with Criminal Copyright Infringement, Trafficking in Counterfeit Goods, as well as Mail and Wire Fraud. *See USA v. Shaleshkumar Jain, a/k/a/Sam Jain*, Criminal Action No. EXE-09-00137. Second, he was indicted on May 20, 2010 in the U.S. District Court for the Southern District of New York for International and Domestic Money Laundering with respect to a number of internet-based companies, including IMI, owned and operated by him. *See USA v. Shaileshkumar Jain, a/k/a Sam Jain*, Criminal Action No. NRB-10-00442.

accepting their misleading advertisements. Toward this end, Defendants falsely represented that they were authorized to place advertisements, and they used sophisticated program coding that concealed the exploitative nature of the ads in order to gain approval for distribution from the advertising networks. Once distributed and placed on popular Internet sites, the exploitative content of the ads was revealed to many of the consumers, who were thereupon redirected to the Defendants' websites that operated the bogus scans.

In her opposition to the FTC's Motion for Summary Judgment, Defendant Ross argued that she was merely an employee and not a "control person" at the company, she did not have the requisite knowledge of the misconduct at issue, and as a result she bore no individually liability under the Act. On June 11, 2012, 2012 WL 2126533, this Court denied the FTC's Motion for Summary Judgment and noted that despite the FTC's substantial evidence, it was unable, at this stage of the litigation, to conclusively determine "whether the FTC was entitled to summary judgment against Kristy Ross because to do so would require [it] to make credibility findings, inferences, and findings of fact that are more properly made in the context of a bench trial." (Mem. Op. at 8, ECF No. 227). However, the Court held that there was no genuine issue of material fact that Ms. Ross's co-defendants violated Section 5 of the FTC Act by making misrepresentations to consumers through Internet-based ads and software-generated reports that induced consumers to purchase

their computer security products. (Mem. Op. & Order, ECF Nos. 227 & 228; Ltr. Order, ECF No. 229).

Accordingly, a bench trial was scheduled. Prior to trial, this Court found that the total amount of consumer injury calculated by the FTC—$163,167,539.95—was a proper measure for consumer redress in this case. (ECF No. 246).[4] Additionally, this Court issued a ruling in which it granted Defendant Ross's Motion *in Limine* to Preclude Application of an Adverse Inference because of her assertion of the Fifth Amendment privilege. (ECF No. 254). Pursuant to the same order, this Court denied Defendant Ross's Motion *in Limine* to Exclude Hearsay (ECF No. 241). In this motion, Defendant Ross sought to exclude the out-of-court statements and documents made in connection with the lawsuit in Canada ("Canadian Litigation") in which Ms. Ross's co-defendants sued each other over the profits of IMI, the business at the center of the present case. This Court held these statements and documents admissible under Rule 807 of the Federal Rules of Evidence. Specifically, this Court determined that the statements were made by Innovative Marketing's high-ranking executives, and although they were not subject to cross-examination, they were made in anticipation that they would be evaluated and challenged in a court of law. Moreover, the Court concluded that

[4] This Order also denied Defendant Ross's Motion *in Limine* in support of calling Scott Ellis as an expert witness (ECF No. 236). Having already determined that IMI was engaged in deceptive marketing, this Court found Mr. Ellis's opinion that advertisements placed by Ms. Ross were neither false nor deceptive to be irrelevant. (Mem. Order at 4, ECF No. 246).

the challenged evidence was offered as evidence of a material fact and was more probative than other evidence that could reasonably be obtained as it related to the scope and nature of the alleged conspiracy, and served to illustrate a major element of the trial in this case—namely, the role Ms. Ross played while working at Innovative Marketing. (Mem. Op. at 5, ECF No. 254). As a result, the precise issues remaining in this case concerned the extent of Defendant Ross's control over or participation in IMI's deceptive marketing practices, and her knowledge of these practices.

On September 11 and 12, 2012, a bench trial was held, and Defendant Ross was tried *in absentia.* Consistent with its prior rulings, this Court has not applied an adverse inference against Defendant Ross for electing not to appear at trial and for asserting her Fifth Amendment privilege against self-incrimination. During trial, the FTC called one witness: Bhaskar Ballapragada, president of AdOn Network, an advertising network formally known as MyGeek. The Defendant did not call any witnesses, but each party entered large volumes of documents into evidence.

This Court, having considered the evidence presented at trial and having reviewed the parties' pretrial submissions, finds that Defendant Kristy Ross had authority to control the deceptive practices or acts of Innovating Marketing and that she participated directly in these deceptive practices. Additionally, the FTC has shown by a preponderance of the evidence that Defendant Ross had knowledge of the deceptive practices of Innovative Marketing, Inc. ("IMI") or that

alternatively she clearly acted with reckless indifference and intentionally avoided the truth. As a result, Kristy Ross is individually liable for IMI's unlawful practices and judgment shall be entered in favor of the Federal Trade Commission ("FTC") against her. The FTC shall be awarded injunctive relief and monetary relief in the form of consumer redress and disgorgement. Specifically, Defendant Ross shall be permanently restrained and enjoined from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing. Defendant Ross shall also be jointly and severally liable with the co-Defendants Innovative Marketing, Inc., Sam Jain and Daniel Sundin for the consumer redress amount of $163,167,539.95.

II. FINDINGS OF FACT

1. Formation of Innovative Marketing, Inc. ("IMI") & the Canadian Litigation

In November 2001, Defendant Daniel Sundin ("Sundin") started a business which he incorporated, in July 2002, as Innovative Marketing, Inc. ("IMI")[5] pursuant to the laws of Belize and with its headquarters in Ukraine. The aim of the business was to develop and market online consumer products on an international platform. In early 2002, Defendants Sam Jain ("Jain") and Kristy Ross ("Ross") were exploring new

[5] It is important to note that the Defendants also used the name Globedat to refer to IMI.

e-commerce opportunities for investment and collaboration. At the time, Ms. Ross was romantically involved with Mr. Jain and had previously held positions in companies held by him. In April 2002, Ms. Ross introduced Mr. Sundin, whom she had known since September 2000 through other business acquaintances, to Mr. Jain. Ms. Ross and Mr. Jain were interested in joining forces with Mr. Sundin as they perceived IMI to have "tremendous growth potential . . . [but] felt it lacked the marketing expertise that [Ross and Jain] would be able to bring to the venture." Jain Aff., Pl.'s Ex. 27 at 328, ¶ 3. After several meetings, Mr. Jain and Mr. Sundin both agreed to participate in this new business venture and to take lead roles in it. While the partnership agreement was never reduced to a writing, it was understood that Defendants Jain, Sundin and Ross would share in the profits of the business. Both Jain and Sundin recognized that Ms. Ross had valuable marketing expertise and while her percentage of the profits was to be smaller than theirs, there was no disagreement that she would be entitled to certain percentages of IMI's profits. Sundin Aff., Pl.'s Ex. 21 at 453-54, ¶ 7; Jain Aff., Pl.'s Ex. 27 at 330, ¶ 14 & at 402, 471-72; Marc D'Souza Aff., Pl.'s Ex. 24 at 146.

Upon joining IMI, Mr. Jain brought a number of employees with him. Defendant Marc D'Souza ("D'Souza") was one of these employees. Mr. D'Souza worked as a sales and marketing consultant to secure lucrative advertising and media buying deals and had been trained by Ms. Ross and Mr. Jain. At the time that IMI was being formed, Mr. D'Souza was renegotiating his contract

with Mr. Jain. The finalized negotiations were then proposed to Mr. Sundin who did not object. According to these terms, Mr. D'Souza was to receive "1% of the company's profits up to $200,000 a month and 20% of the company's profits in excess of $200,000 per month." Sundin Aff., Pl.'s Ex. 21 at 454, ¶ 8; Jain Aff., Pl.'s Ex. 27 at 330-32, ¶¶ 13-23. Again, this agreement was not reduced to a writing, but a partnership was formed between Defendants Jain, Sundin, D'Souza and Ross whereby each individual would receive a share of the profits of IMI. The shares were apparently not equal as Jain and Sundin had made initial monetary contributions to the business which Ross and D'Souza had not. As of 2002 and until 2008, IMI was formed and engaged in the business of selling web-based software such as antivirus software, anti-spyware software and registry cleaners which were marketed through IMI-owned and maintained websites. At trial the parties agreed that IMI was a corporation which grew to employ over six hundred (600) employees over several countries including, among others, the United States, Argentina, India and Ukraine.

On December 29, 2006, Mr. D'Souza contacted Ms. Ross, Mr. Jain and Mr. Sundin on behalf of Web Integrated Net Solutions, Inc. to inform them of the termination of their joint venture. Jain Aff., Pl.'s Ex. 27 at 475-78. In January of 2007, Mr. D'Souza again contacted Defendants Jain, Sundin and Ross to inform them of the termination of approximately forty (40) advertising contracts. *Id.* at 479. Later that year, Defendants Jain, Sundin and D'Souza were involved in a

lawsuit in Canada (the "Canadian Litigation"), in which Defendants Jain and Sundin sought to recover $48 million which Defendant D'Souza had allegedly embezzled from IMI. While Ms. Ross was neither named in that litigation nor included in the Settlement Agreement, she was the only other person, apart from Defendants Jain, Sundin and D'Souza, to submit an affidavit in the case. Ross Aff., Pl.'s Ex. 20; Settlement Agreement, Def.'s Ex. 2. Mr. D'Souza also made an attempt to settle the case by giving Ms. Ross, Mr. Jain and Mr. Sundin percentages of the business. In response to that proposal, Mr. Jain stated that "it was 'extortion for you [Marc] to hold hostage money belonging to me, Daniel & Kristy so as to force us to make a deal with you.' " Jain Aff., Pl.'s Ex. 27 ¶ 43. During the bench trial, Ms. Ross's counsel sought to explain her involvement in the Canadian Litigation by stating that at the time Ms. Ross had been romantically involved with Mr. D'Souza since 2006, and he had confided in her that he intended to "run off with the money." Bench Trial, Sept. 11, 2012, 2012 WL 4018037, ECF No. 255. Despite the best efforts of her counsel, Ms. Ross has presented no evidence to that effect nor is her lawyer's argument evidence in this case.

2. The IMI Deceptive Marketing Scheme

This Court has previously held that the conduct in this case violated Section 5 of the Federal Trade Commission Act as a result of representations being made to consumers through Internet-based ads and software-generated reports that induced consumers to

purchase their computer security products. (Mem. Op. & Order, ECF Nos. 227 & 228; Ltr. Order, ECF No. 229). Specifically, the Defendants—both corporate and individual—developed a series of software advertisements, in the form of popups and warnings, purporting to discover malicious software ("malware") on consumers' computers and provide a "cure" at a cost ranging from $30 to $100, depending on the software involved. Essentially, these deceptive advertisements, some of which included sham "system scans," had the effect of convincing internet users that their computers contained malicious software, "illegal" pornography, or critical system errors, and that to fix these problems they needed the Defendants' repair software. The repair software sold by IMI included WinFixer, WinAntiVirus, WinAntiVvirusPro, WinAntiSpyware, Popupguard, WinFirewall, InternetAntispy, WinPopupguard, ComputerShield, WinAntispy, PCsupercharger, ErrorSafe, SysProtect, DriveCleaner, SystemDoctor and Error-Protector. However, both the advertisements and the repair software were deceptive. In fact, the number of errors found on any given computer was pre-determined by the Defendants. Moreover, the Defendants sold scareware as these repair products did not in fact repair or clean consumers' computers. As a result, more than one million consumers purchased Defendants' products, and approximately three thousand customers filed complaints with the Federal Trade Commission

("FTC").[6] Consumer Compls., Pl.'s Ex. 40. Moreover, every major computer security vendor considered these products to be system threats.

3. Defendant Kristy Ross's Role at IMI

Having already determined that a deceptive marketing scheme existed, the remaining issue before this Court and addressed at the bench trial was the extent to which Defendant Ross was involved in this marketing scam and could be held responsible. After conducting a significant investigation into the IMI deceptive marketing scheme, Federal Trade Commission investigator Sheryl Drexler, now known as Sheryl Novick, specifically identified Ms. Ross as one of the "individuals [] responsible for the scheme." Drexler Decl., Def.'s Ex. 1 at ¶ 3.

Defendant Ross worked at Innovative Marketing, Inc. from 2002 to 2008. She was in charge of business expansion, sales and marketing, as well as product optimization. Although IMI did not use formal titles until late 2005, from 2006 to 2008 she essentially performed the same functions but held the position of Vice President of Business Development. She also intermittently replaced Defendant Sundin as Chief Operating Officer and Chief Technology Officer from 2004 to 2007. She assumed these roles because Mr. Sundin was suffering from bacterial overgrowth syndrome and because he

[6] In addition, the FTC submitted fifty-three (53) sworn customer declarations detailing consumer interactions with forty-seven (47) of Defendants' products. Consumer Decls., Pl.'s Ex. 39.

considered her "to be a savvy manager and technically knowledgeable in [his] areas of computer software and design as well as marketing skills." Sundin Aff., Pl.'s Ex. 21 ¶ 15. Moreover, at times she had access to his email account and was carbon copied on all emails sent to him. *See*, *e.g.*, Chat Log, Def.'s Ex. 9A; *see also* Email, Def.'s Ex. 3.

As part of her duties, Ms. Ross often approved and requested payment for expenses incurred by IMI, and on several occasions, used her personal credit card to pay for certain advertising and operating expenses. Specifically, she was one of seven people to approve expenses at IMI. Additionally, she was in charge of reorganizing IMI's operational structure and dealt with accounting, hiring and IMI product issues. Notably, a chat log[7] reveals that she and Defendants Jain and Sundin were to finalize the "todos [sic]" for the company reorganization prior to their distribution to the managers. Chat Log, Def.'s Ex. 3A at 365. In the same chat log, she instructs "James"[8] to provide her with a problem-solving matrix which would contribute to the reorganization of certain departments. *Id.* Another chat log indicates that on several occasions she attended meetings with a major venture capital firm

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[7] The parties have stipulated to the fact that Ms. Ross's username in the chat logs was "fuzzy." Prop. Final Pretrial Order at 15, ¶ 8, ECF No. 239.

[8] The parties agree that "James" in the chat logs refers to James Reno, one of the former Defendants in this case who settled with the FTC. As noted, Reno was indicted in Criminal Action No. 1-10-cr-00452 in the U.S. District Court for the Northern District of Illinois. *See supra* n. 3.

interested in doing business with IMI. Chat Log, Def.'s Ex. No. 11A at 3. Furthermore, the bulk of the IMI chat logs reveal that Ms. Ross routinely made executive-type decisions, demanding that employees fix problems and follow company procedures, and delegating IMI business projects. *See generally* Chat Logs, Def.'s Exs. 1A-16A. Ms. Ross even threatened to fine an entire department if it did not complete a project on schedule. Chat Log, Def.'s Ex. 1A at 323; *see also* Chat Log, Def.'s Ex. 7A. Additionally, she often demanded and obtained reports on web traffic, sales numbers, and click-through response rates for IMI's products and advertising campaigns. She also participated in strategic discussions regarding IMI's future, was actively involved in the daily operations of the company and had the authority to set prices for IMI's products. *See*, *e.g.*, Chat Log, Def.'s Ex. 14A.

With respect to the deceptive ads, Ms. Ross used her expertise in marketing and personally approved, developed, wrote, altered, reviewed, and contributed to a large number of them. In fact, she dictated the appearance and style of certain ads, suggested which words should or should not be included and how certain sentences should be translated, as well as decided the level of aggression to consumers that these ads should present. *See*, *e.g.*, Chat Log, Pl.'s Ex. 1 at 326; Chat Log, Pl.'s Ex. 2 at 351; Chat Log, Def.'s Ex. 1A at 322, 326, 331; Chat Log, Def.'s Ex 2A at 348, 351-52. On two occasions, Ms. Ross instructed ad developers to remove advertising disclaimers which would have indicated to consumers that these popups or warnings

were mere advertisements as opposed to real scanners. *See*, *e.g.*, Chat Log, Def.'s Ex. 2A at 352. In the company's chat logs, Ross is observed directing employees to make ads more aggressive because "aggression zero doesn't [sic] give sales." Chat Log, Def.'s Ex. 2A at 350. In another instance, she specifically instructs the developers to "add aggression" to certain creatives. Chat Log, Def.'s Ex. 2A at 347.

In October 2004, Ross opened fifty-four (54) individual password-protected accounts with MyGeek, an internet advertising company which would later become known as AdOn. She used these accounts until 2007 to place advertisements in the form of Flash ads[9] for IMI products including Winfixer, DriveCleaner, FreeRepair, WinAntivirus, WinAntispyware, System Doctor and others. These ads reached customers over 600 million times. She personally funded the advertisements placed at MyGeek for up to approximately $23,000 and then used Marc D'Souza and Daniel Sundin's credit cards as well as wire transfers from IMI's account to place additional advertisements. Pl.'s Ex. 35; Drexler Decl., Def.'s Ex 1, ¶¶ 106, 111. "In total, Kristy Ross placed $3.3 million of advertisements for Defendants' products with MyGeek." Drexler Decl., Def.'s Ex. 1 ¶ 111. Ms. Ross also possessed a password-protected account at ValueClick which allowed her to

[9] "A Flash object is a binary file that can contain multiple graphics and logic to animate those graphics. The file can then be opened by a Flash player plug-in within a consumer's browser much like a word document can be opened in Microsoft Word." Prop. Final Pretrial Order at 28, ¶ 22.

use ValueClick's adserver, Mediaplex, to store ads which were disseminated though the MyGeek ad network.

As the direct contact at IMI for MyGeek, Ms. Ross interacted daily with the MyGeek account manager, Geoff Gieron. Specifically, Mr. Gieron would get in touch with her when publishers and other ad networks complained about the Defendants' advertisements. In attempts to resolve the problems, publishers would contact MyGeek, who would in turn contact Ms. Ross, by forwarding screenshots of the problems and asking for an immediate fix. Ms. Ross was repeatedly informed that these ads violated company policy as they included download software without content. *See*, *e.g.*, Drexler Decl., Def.'s Ex. 1 ¶¶ 115-117. Accordingly, Ms. Ross routinely communicated with MyGeek regarding complaints that the company received pertaining to IMI ads, and approved and edited the contents of ads placed on the MyGeek network, but the problems continued to occur. *Id.* In one instance, MyGeek contacted Ms. Ross about a specific DryCleaner advertisement containing a popup window which read "DriveCleaner found 948 Dangerous Files in your system. Get rid of them?" Gieron Dep., Pl.'s Ex. 55 at 318. Upon reviewing this advertisement, Ms. Ross responded "This is not a popup, it is flash in the website . . . this is an example of the scanner . . . This is certainly not a popup or Active x." *Id.* at 36, lines 140:1-140:18.

Accordingly, Ms. Ross was aware that these advertisements purported to do more than they actually did. Additionally, other chat log conversations involving Ms. Ross indicate that she was aware that the ads were

"unpleasant" and that she knew that IMI's advertising was causing problems, including low customer retention and even lawsuits. *See*, *e.g.*, Chat Log, Pl.'s Ex. 11 at 3. On March 29, 2007, MyGeek terminated its relationship with IMI by informing Ms. Ross that it "'will no longer be running ads from any advertiser that sell products in the area of spyware, antivirus, registry cleaner, system doctor, evidence eraser and the like' because their relationships with 'traffic partners have been threatened and we just can't afford the risk any longer.'" Drexler Decl., Pl.'s Ex. 1 ¶ 118.

III. CONCLUSIONS OF LAW

The FTC has brought the present action under sections 5(a) and 13 of the FTC Act. Section 5(a) of the Act, 15 U.S.C. § 45(a)(1), prohibits engaging in "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Section 13, 15 U.S.C. § 53(b), authorizes the FTC to seek injunctive relief for section 5 violations. To succeed under section 5(a), the FTC must prove (1) that there was a representation; (2) that the representation was likely to mislead consumers; and (3) that the misleading representation was material. *See FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003).

Having established liability for Defendant IMI, Defendant Ross may be held individually liable upon a showing by the FTC that she "participated directly in the practices or acts or had authority to control them."

FTC v. Amy Travel Service, Inc., 875 F.2d 564, 573 (7th Cir. 1989); *see also*, *e.g.*, *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir.2005); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel*, 875 F.2d at 573. In addition, the FTC must show that Defendant Ross had some knowledge of the violative conduct. *See Publishing Clearing House*, 104 F.3d at 1170 (noting that corporate individuals are liable if they "had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type which a reasonable and prudent person would rely, and that consumer injury resulted"). In this regard the FTC need not make a showing of "intent per se"—instead the knowledge requirement may be "fulfilled by showing that the individual had 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Amy Travel*, 875 F.2d at 574 (quoting *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1282, 1292 (D. Minn. 1985)); *see also FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 311 (D. Mass. 2008) (noting that the FTC must prove "that the individual defendants either knew or should have known about the deceptive practices, but it is not required to prove subjective intent to defraud").

It has been Defendant Ross's position that she should not be held individually liable because the FTC has not satisfied its burden to prove by a preponderance of the evidence that she either had authority to control or directly participated in the deceptive acts. Moreover, Defendant contends that the FTC failed to demonstrate that she knew of the IMI deceptive marketing scheme. At trial, Defendant's counsel made much of the fact that at the time of the formation of IMI, Ms. Ross was a twenty-two-year-old woman romantically involved with one of the main partners of IMI. Her counsel further explained that she was not a corporate officer but that she held a position of favor due to her status as Mr. Jain's girlfriend. She contended that instead she held a type of administrative assistant's role, facilitated employee relations because she was kinder and easier to work with than Defendant Jain, and stepped up when necessary to help out when Mr. Sundin became too ill to fulfill his responsibilities. Ms. Ross's counsel repeatedly argued that she was a troubleshooter and introduced the idea, for the first time at trial, that her position was not that of a Vice President but more that of a media buyer which is considered to be a lower level employee. During the brief bench trial, Ms. Ross's counsel sought to paint the picture of a betrayed young woman who had made poor choices in both work and life partners.[10] Once again, the argument of counsel is not evidence in this case in

[10] Ms. Ross was romantically involved with both Defendants Jain and D'Souza at different times during the deceptive marketing scheme.

which Ms. Ross not only failed to respond to any discovery request but declined to appear for trial.[11]

1. Ms. Ross's Authority to Control or Her Direct Participation in the Deceptive Acts

To secure individual liability under the FTC Act, there must be a showing of participation or control in an enterprise's unlawful activity, which in turn may be indicated by an individual's assumption of duties as a corporate officer, involvement in business affairs, or role in the development of corporate policies. *See Publ'g Clearing House*, 104 F.3d at 1171; *Amy Travel*, 875 F.2d at 573; *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1117 (S.D. Cal. 2008); *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1207-08 (N.D. Ga. 2008); *FTC v. Wilcox*, 926 F. Supp. 1091, 1104 (S.D. Fla. 1995). On the one hand, authority to control is also evidenced by an individual's ability to review and approve advertisements as well as his or her ability to issue checks, make hiring decisions and personally finance or pay for corporate expenses. *See Kitco of Nevada, Inc.*, 612 F. Supp. at 1293; *FTC v. USA Financial*, No. 10-12152, 2011 WL 679430, at *3 (11th Cir. Feb. 25, 2011); *FTC v. Stefanchik*, No. C04-1852RSM, 2007 WL 1058579, at *6-7 (W.D. Wash. Apr. 3, 2007). The FTC need not show that the Defendant was the Chief Executive Officer ("CEO") of a company to demonstrate

[11] While this Court does not apply any adverse inference against Ms. Ross for her assertion of her Fifth Amendment privilege, her counsel cannot offer testimony on her behalf. The creative argument of counsel is not evidence in a case.

authority to control, active involvement in the affairs of the business and the deceptive scheme is sufficient. *See Kitco of Nevada, Inc.*, 612 F. Supp. at 1293; *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000).[12]

On the other hand, direct participation can be demonstrated through evidence that the defendant developed or created, reviewed, altered and disseminated the deceptive marketing materials. *See FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 310-11 (D. Mass. 2008); *Nat'l Urological Group, Inc.*, 645 F. Supp. 2d at 1207-08; *Kitco of Nevada, Inc.*, 612 F. Supp. at 1293; *J.K. Publ'ns*, 99 F. Supp. 2d at 1203; *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1088 (C.D. Cal. 1994). Active supervision of employees as well as the review of sales and marketing reports related to the deceptive scheme is also demonstrative of direct participation. *See Wilcox*, 926 F. Supp. at 1104; *FTC v. Consumer Alliance*, No. 02-C-2429, 2003 WL 22287364, at *6 (N.D. Ill. Sept. 30, 2003).

Although the FTC is only required to prove (a) that Ms. Ross had authority to control or (b) that she directly participated in the deceptive acts, the evidence

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[12] Defendant argued that the "control person" standard enunciated in *Dellastatious v. Williams*, 242 F.3d 191 (4th Cir. 2001) should be applied. However, that case involved the "control" standard enunciated in Section 20(a) of the Securities Exchange Act of 1934 ("SEC Act"), 15 U.S.C. § 78t(a). As the FTC correctly argued, the SEC Act's control standard is not applicable in FTC Act cases where FTC precedent is controlling and applies a different "control" standard.

in this case demonstrates that Defendant Ross had both the authority to control the deceptive acts within the meaning of the Section 5 of the FTC Act and that she directly participated in said acts. Although not explicitly labeled as a controlling shareholder or partner of IMI, the evidence reveals that Ms. Ross was an original founder of the company and was known by all three of the other main officers of the company as someone who would receive and who received shares of the profits. As far as IMI is concerned, none of the partnership agreements were reduced to a writing but Mr. D'Souza sent letters in late 2006 terminating the Joint Venture between himself, as a representative of Web Integrated Net Solutions, Inc., Mr. Jain, Mr. Sundin and notably Ms. Ross. Moreover, Ms. Ross herself identified herself as the IMI Vice President of Business Development and stated that she was responsible for business expansion, sales and marketing, as well as product optimization. Nowhere did she state that she was a media buyer. While she argued that her corporate title was meaningless because IMI did not operate under traditional corporate formalities, her role with the company, her adoption of Defendants Jain and Sundin's affidavits in the Canadian Litigation and the plethora of evidence in emails and chat logs indicate that she was a control person at IMI.

Out of the six hundred employees, Ms. Ross has been shown to be one of the founders, one of seven people to approve expenses, one of the four to receive percentages of the profits of IMI, and one of the main individuals to appear in a managerial role in chat logs,

emails and advertising contracts. Furthermore, in her affidavit, Ms. Drexler, now known as Ms. Novick, explicitly identified Ms. Ross as one of the individuals responsible for the deceptive marketing scheme at IMI. As such, the FTC demonstrated by a preponderance of the evidence that Ms. Ross had authority to control the deceptive marketing scheme at IMI.

Arguendo, even if Ms. Ross had not had authority to control the deceptive acts at IMI, compelling evidence establishes that she directly participated in the deceptive marketing scheme. First, her interactions with the staff and the developers indicate that she not only controlled the contents and appearance of the ads, but that she also reprimanded and disciplined departments when the work did not coincide with her standards. Her codefendants even acknowledged that they partnered with her because of her marketing expertise. Secondly, the chat logs also establish that she was involved in key company decisions such as partnership arrangements (e.g., Sundin and a major U.S. venture capital firm), how to reorganize the company and whom to hire. Furthermore, she also had access to company accounts and approved corporate expenses. On several occasions she even opened advertising accounts using her own personal credit card. While her counsel argued at trial that she only personally spent approximately $23,000 on accounts with MyGeek of the $3.3 million spent, Ross did not submit any evidence that other IMI employees funded those accounts. Moreover, the Drexler affidavit specifically states that "[t]o place these advertisements with MyGeek, she used credit

cards in the name of "M D" (which [Ms. Drexler] believe[d] to be Marc D'Souza . . .), "Daniel Sundin," and wire transfers from IMI's account." Drexler Aff., Def.'s Ex. 1 at ¶ 106. The FTC's evidence demonstrates that Ms. Ross was not just a staff member but that she supervised the ad developers, made changes and gave orders concerning the ads, and funded the dissemination of these ads, whether through her own personal account or other accounts such as those of IMI, Daniel Sundin and Marc D'Souza. As such, Ms. Ross directly participated in the deceptive marketing scheme.

Accordingly, Ms. Ross's broad responsibilities at IMI coupled with the fact that she personally financed corporate expenses, oversaw a large amount of employees and had a hand in the creation and dissemination of the deceptive ads proves by a preponderance of the evidence that she had authority to control and directly participated in the deceptive acts within the meaning of Section 5 of the FTC Act.

2. Knowledge

As mentioned previously, Defendant Ross contends that even if she is found to have had authority to control or directly participated in the deceptive acts, she did not know of the deceptive marketing scheme. To establish individual liability under section 5(a) the FTC must also establish that an individual defendant had some knowledge of the unlawful conduct. As previously mentioned, the knowledge requirement may be "fulfilled by showing that the individual had 'actual

knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Amy Travel*, 875 F.2d at 574 (quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985)); *see also FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 311 (D. Mass. 2008) (noting that the FTC must prove "that the individual defendants either knew or should have known about the deceptive practices, but it is not required to prove subjective intent to defraud."). "[T]he degree of participation in business affairs is probative of knowledge." *Amy Travel*, 875 F.2d at 574.

Courts have held that defendants have knowledge of the deceptive marketing scheme where they "wrote or reviewed many of the scripts that were found to be deceptive and [where] they were undoubtedly aware of the avalanche of consumer complaints." *Id.* at 575; *see also FTC v. Cyberspace.com, LLC*, No. C00-1806L, 2002 WL 32060289, at *5 (W.D. Wash. 2002) ("There is ample evidence in the record that defendant Eisenberg was directly involved in the development of the deceptive marketing scheme . . . that he reviewed at least some of the solicitation forms before they were mailed, that he knew very few subscribers used the internet services for which they were being billed, and that he was aware that some of the consumers . . . did not realize they had contracted for internet services."). In *FTC v. Direct Marketing Inc.*, two defendants were held to be "at least willfully blind or recklessly indifferent

to the deceptive" scheme because one was a co-owner of the company, and attended managerial meetings where he heard concerns about the product; and the other had a controlling position at the corporation and "procured placement" for the deceptive advertisements. 569 F. Supp. 2d 285, 311 (D. Mass. 2008). In *FTC v. J.K. Publications, Inc.*, involving credit card fraud scheme, the defendant's wife was held to be individually liable because her actions demonstrated intentional avoidance of the truth and reckless indifference. 99 F. Supp. 2d 1176, 1207 (C.D. Cal. 2000). She was a corporate officer of the company, had five years of experience as a bank teller and loan officer, was aware of her husband's criminal past, and personally signed for purchases and opened bank accounts used to perpetrate the deceptive acts. *Id.* at 1206-07. Moreover, the court made note of the fact that she accepted the large sums of money her husband brought into the household despite knowing that his previous business ventures were unsuccessful. *Id.* Conversely, the wife of the defendant in *FTC v. QT, Inc.*, a case which involved the marketing of a bracelet which falsely purported to cure arthritis, was not determined to have had knowledge of the deceptive scheme because she was only listed as a corporate secretary and her responsibilities "did not include the marketing of the Q-Ray bracelet or anything pertaining to the marketing of the Q-Ray bracelet." 448 F. Supp. 2d 908, 973 (N.D. Ill. 2006). Accordingly, when an individual (1) had some level of participation in the development, review, creation or editing of the deceptive marketing scheme, (2) disseminated the deceptive advertisements, and (3) was aware of complaints or

problems surrounding the marketed product or the advertisements, while he or she may not necessarily have actual knowledge of the unlawful acts, this individual is at best recklessly indifferent to the truth or intentionally avoids it.

At trial, Ms. Ross's counsel repeatedly argued that Ms. Ross was duped by Defendants Jain, D'Souza and Sundin. There is no evidence in this case to support this argument, and once again counsel cannot testify for her client. Another contention was that, unlike Mr. Jain and Mr. Sundin, she used her real personal information when opening accounts and that someone seeking to deceive would have used false identifiers. She also argued that some of the chat logs indicated that, if anything, she actually believed IMI was a legitimate company that provided "sound products" to its customers.

Nevertheless, the evidence presented in this case demonstrates by a preponderance of the evidence that Ms. Ross had actual knowledge of the deceptive marketing scheme. She wrote, edited, reviewed and participated in the development of multiple advertisements. She instructed developers to make the advertisements more aggressive and on at least two occasions ordered them to remove the term "advertisement" from certain ads. She funded the accounts through which the ads were disseminated to consumers. She was fully aware of the many complaints from consumers and ad networks and was in charge of remedying the problems. Moreover, she had the marketing expertise and was trusted by her partners because of that expertise.

Even if Ms. Ross, despite exercising significant control over the advertisements, had not had actual knowledge of their deceptive nature, the facts demonstrate that she was at the very least recklessly indifferent or intentionally avoided the truth. First, she was romantically involved with Defendant Jain since before the creation of IMI. Later on, in 2006, she became romantically involved with Defendant D'Souza and submitted an affidavit against him in the Canadian Litigation. Additionally, she had access to Defendant Sundin's email when she covered for him while he was dealing with his illness.

Second, the evidence demonstrates that she received shares of the business's profits and made large sums of money from it. Third, she received and was aware of the numerous consumer and ad network complaints. Notably, she knew that complaints concerned the fact that the advertisements purported to scan but that the ads themselves were not supposed to scan. She also knew that the ads were "unpleasant" and that customer retention was low. She purported to fix the problem, but the problem continued to occur and she continued to receive complaints. Additionally, MyGeek terminated the relationship with IMI by informing her that her advertisements were threatening MyGeek's reputation. Moreover, she actively participated in making the advertisements unpleasant and instructed her developers to increase their aggression level. Finally, she requested that the term "advertisement" be removed from certain ads thereby further contributing to the deception of customers. Consequently, the FTC

has demonstrated by a preponderance of the evidence that Ms. Ross had actual knowledge of the deceptive marketing scheme. Alternatively, her involvement with IMI and her participation in the deceptive marketing scheme as well as her awareness of consumer complaints demonstrate that she acted with reckless indifference and intentionally avoided the truth. As such, she is individually liable for the deceptive acts of IMI, and judgment shall be entered in favor of the Federal Trade Commission ("FTC").

3. Injunctive and Monetary Relief

Under Section 13(b) of the FTC Act, "in proper cases the Commission may seek, and after proper proof, the court may issue a permanent injunction." 15 U.S.C. § 53(b). This Court has previously held that "[t]he authority to grant such relief includes the power to grant any ancillary relief necessary to accomplish complete justice, including ordering equitable relief for consumer redress through the repayment of money, restitution, rescission, or disgorgement of unjust enrichment." *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005) (citing *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997)). "To insure that any final relief is complete and meaningful, the court may also order any necessary temporary or preliminary relief, such as an asset freeze." *Ameridebt*, 373 F. Supp. 2d at 562 (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996)). The court therefore possesses broad equitable authority which it must particularly exercise to protect the public interest. *Porter v. Warner Holding Co.*, 328

U.S. 395, 398 (1946) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). "Permanent injunctive relief is appropriate when there is 'some cognizable danger of recurring violation.'" *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 323 (S.D.N.Y. 2008). To make this determination a court can consider the following factors: "the defendants' scienter, whether the conduct was isolated or recurrent, whether defendants are positioned to commit future violations, the degree of consumer harm caused by defendants, defendants' recognition of their culpability, and the sincerity of defendants' assurances (if any) against future violations." *Id.* (citing *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 260-61 (E.D.N.Y. 1998)). "Moreover, the egregious nature of past violations is a factor supporting the need for permanent injunctive relief of a broad nature." *Kitco of Nevada*, 612 F. Supp. at 1296. Finally, the injunction must not "unduly harm the defendants . . . [by] put[ing] them out of business, but [must] simply ensure that they will conduct their business in a manner which does not violate Section 5 of the FTC Act, 15 U.S.C. § 45." *Id.*

In this case, the FTC seeks to permanently restrain and enjoin Ms. Ross from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing. Ms. Ross is found to be responsible for the deceptive marketing scheme at IMI which affected a large number of online consumers and led to the filing of three thousand consumer complaints with the FTC. The scheme

generated large sums of money, a portion of which went to Ms. Ross. Her expertise in marketing was touted by her partners and used to deceive and defraud a large number of consumers. As such, a permanent injunction prohibiting Ms. Ross from marketing computer security software and software that interferes with consumers' computer use is appropriate. Finally, this permanent injunction does not in any way harm her or deprive her of other employment opportunities. She may still utilize her marketing talents as long as they are used for legitimate products and ventures and do not contribute to deceiving the public.

As far as consumer redress is concerned, "[t]he power to grant ancillary relief includes the power to order repayment of money for consumer redress as restitution or recession." *Febre*, 128 F.3d at 534; *see also Ameridebt*, 373 F. Supp. 2d at 563. As a permanent injunction can be imposed on Ms. Ross she may also be liable for monetary damages. *Medical Billers Network, Inc.*, 543 F. Supp. 2d at 324. In order to obtain restitution under Section 13(b), however, the FTC must establish that "(1) the business entity made material misrepresentations likely to deceive consumers, (2) those misrepresentations were widely disseminated, and (3) consumers purchased the entity's products." *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005). "The proper measure of consumer restitution is the amount that will restore the victims to the status quo ante, not what defendants received as profit." *FTC v. Cyberspace.com, LLC, et al.*, No. C00-1906L, 2002 WL 32060289, at *5 (W.D. Wash. 2002).

Specifically, "allowing a damages determination based on gross receipts in a case arising directly under the FTC Act furthers the FTC's ability to carry out its statutory purpose." *FTC v. Kuykendall*, 371 F.3d 745, 765-66 (10th Cir. 2004); *see also Febre*, 128 F.3d at 535-36. As such the amount of consumer redress is the amount paid by consumers for the Defendants' products minus any refunds. Additionally, under section 13(b) a court may order disgorgement of a defendant's "unjust enrichment" when it is not possible to reimburse all of the consumers who have been injured by the defendant's misrepresentations. *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (citing *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 n. 34 (1994), *cert. denied*, 514 U.S. 1083 (1995)). Once the FTC has satisfied its burden, it is up to the defendant to show that the calculations are not accurate. *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 974 (N.D. Ill. 2006).

In this case, the FTC has satisfied its burden to show that the Defendants made material misrepresentations which were likely to deceive, that those misrepresentations affected a large number of consumers and that more than one million consumers bought Defendants' products. The FTC correctly notes that if Defendant Ross is found to be individually liable for the deceptive scheme, she is jointly and severally liable for the consumer redress amount of $163,167,539.95 calculated by the FTC.[13] Defendant Ross argued, however,

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[13] According to the FTC, this amount was calculated based on Defendants' profit and loss statements for 2004-2006, and Defendants' payment processor records for 2006-2007. Proposed

that this sum was grossly overinflated and that she should only be held liable for the ads and products she herself marketed at MyGeek. Specifically, counsel for Defendant Ross noted that "the FTC cannot disgorge from an individual defendant net revenue received by the Enterprise before or after the defendant directly participated in, or had authority to control, the deception." *FTC v. Wash. Data Res.*, 856 F. Supp. 2d 1247, 1281 (M.D. Fla. 2012). In response, the FTC has correctly noted that Ms. Ross had the opportunity to present financial information and to respond to discovery but has failed to do so.

It is well established that once a defendant is found to be individually liable for a corporate defendant's deceptive acts, he or she is jointly and severally liable for the total amount of consumer redress. *See*, *e.g.*, *FTC v. J.K. Publ'n*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282 (D. Minn. 1985). Ms. Ross participated and had authority to control the advertising scheme from its inception until it was interrupted by the FTC. Moreover, Ms. Ross was at least recklessly indifferent to or intentionally avoided the truth when it came to the deceptive marketing scheme, and the FTC satisfied its burden with respect to the imposition of consumer redress. Defendant Ross had sufficient time to challenge the amount of recovery proposed by the FTC by proposing

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Final Pre-Trial Order at 22, ECF No. 239. Moreover, the FTC has repeatedly stated that this amount represents a ceiling for monetary recovery and this Court has previously held that this amount was a reasonable approximation of the damages in this case.

her own calculation and amount but failed to do so. Having previously determined that the amount calculated by the FTC was a reasonable approximation of consumer redress, this Court finds that Defendant Ross is jointly and severally liable for $163,167,539.95 in this case. Accordingly, Defendant Ross shall be permanently restrained and enjoined from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing. Defendant Ross shall also be jointly and severally liable with co-Defendants Innovative Marketing, Inc., Sam Jain and Daniel Sundin for the consumer redress amount of $163,167,539.95.

IV. CONCLUSION

For the reasons stated above, Judgment is hereby entered in favor of Plaintiff Federal Trade Commission against Defendant Kristy Ross, individually and as an officer of Innovative Marketing, Inc. on all Counts contained in the FTC Complaint. Defendant Ross shall be permanently restrained and enjoined from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing. Defendant Ross shall also be jointly and severally liable with co-Defendants Innovative Marketing, Inc., Sam Jain and Daniel Sundin for the consumer redress amount of $163,167,539.95.

A separate Order and Judgment follows.

Dated: September 24, 2012 __/s/ _____
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION, PLAINTIFF, V. KRISTY ROSS, INDIVIDUALLY AND AS AN OFFICER OF INNOVATIVE MARKETING, INC., DEFENDANT.	* * * * * * * * * * * *	CIVIL ACTION NO.: RDB-08-3233

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ORDER & JUDGMENT

(Filed Sep. 24, 2012)

For the reasons stated in the foregoing Memorandum Opinion, this 24th day of September 2012, it is HEREBY ORDERED and ADJUDGED:

1. That Judgment is entered in favor of Plaintiff Federal Trade Commission ("FTC") against Defendant Kristy Ross, individually and as an officer of Innovative Marketing, Inc. on all Counts contained in the FTC Complaint;

2. That Defendant Kristy Ross shall be permanently restrained and enjoined from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing;

3. That Defendant Ross shall be jointly and severally liable with the co-Defendants Innovative Marketing, Inc., Sam Jain and Daniel Sundin for the consumer redress amount of $163,167,539.95;

4. That any and all prior rulings made by the Court disposing of any claims against any parties are incorporated by reference therein, and this Order shall be deemed to be a final Judgment within the meaning of Fed. R. Civ. P. 58;

5. That the Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel for the parties; and

6. That the Clerk of the Court CLOSE THIS CASE.

/s/
Richard D. Bennett
United States District Judge