No. ________

IN THE

Supreme Court of the United States

PUBLISHERS BUSINESS SERVICES, INC., ED DANTUMA ENTERPRISES, INC., EDWARD DANTUMA, DRIES DANTUMA, DIRK DANTUMA, JEFF DANTUMA, and BRENDA SCHANG,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two months ago the Seventh Circuit split with eight circuits over a crucial issue that has transformed Federal Trade Commission ("FTC") enforcement actions. The court held the plain text of the FTC Act's injunction statute, § 13(b), excludes implied remedies for monetary relief. *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019).

The *Credit Bureau* decision openly acknowledged the circuit split it caused. All other circuits to address the issue read § 13(b)'s specifically delineated remedies of forward-looking injunctions as implicit authorization to award equitable monetary relief. Though supposedly grounded in the courts' inherent equity powers, these monetary awards have proved to be exceedingly punitive, almost unlimited in amount, often imposed jointly and severally, and untethered to procedures, notions of proximate causation, and limitations Congress required elsewhere in the FTC Act. In this case, the Ninth Circuit affirmed a joint and several disgorgement award of almost $24 million, though the individual Petitioners received only a minute fraction of that amount. In a companion FTC action argued and decided by the Ninth Circuit with this case, *FTC v. AMG Capital Mgt., et al.*, 16-17197 (9th Cir.), the joint and several award was nearly $1.3 *billion*. App., *infra*, 8a.

The questions presented are:

1) Whether a district court can award monetary relief under § 13(b) of the FTC Act, consistent with separation-of-powers principles; and

2) Whether a monetary disgorgement award under § 13(b) of the FTC Act is a penalty and therefore outside a district court's inherent equity powers.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners are Publishers Business Services, Inc., Ed Dantuma Enterprises, Inc., Dries Dantuma, Dirk Dantuma, Jeff Dantuma, Brenda Schang, and Edward Dantuma (deceased), who were defendants in the district court proceedings and appellants in the Ninth Circuit appeal. The Respondent is the Federal Trade Commission, the plaintiff in the district court proceeding and the appellee in the Ninth Circuit appeal.

Publishers Business Services, Inc. and Ed Dantuma Enterprises, Inc. have no parent company, and no publicly held company owns 10% or more of their stock.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Publishers Bus. Services, Inc., et al. v. FTC*, No. N19A255 (U.S.) (application for extension of time to file petition for certiorari, granted September 5, 2019)

2. *FTC v. Dirk Dantuma, et al.,* No. 17-15600 (9th Cir.) (judgment entered August 31, 2018)

3. *FTC v. Publishers Bus. Services, Inc.*, No. 2:08-cv-00620-APG-GWF (D. Nev.) (judgment entered on remand February 2, 2017)

4. *Publishers Bus. Services, Inc., et al. v. FTC*, No. 13-1405 (U.S.) (petition for certiorari, denied June 9, 2014)

5. *FTC v. Publishers Bus. Services, Inc., et al.*, No. 11-17270 (9th Cir.) (judgment entered September 19, 2013, vacating original district court judgment)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Publishers Business Services, Inc., Ed Dantuma Enterprises, Inc., Edward Dantuma (deceased), Dries Dantuma, Dirk Dantuma, Jeff Dantuma, and Brenda Schang (collectively "PBS") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-7a, is unreported but available at 748 F. App'x 735. The decision of the court of appeals in the companion *AMG* decision, argued on the same day as this case and decided by the same panel, App., *infra*, 8a-44a, is reported at 910 F.3d 417. The Ninth Circuit's order denying panel rehearing and rehearing *en banc*, App., *infra*, 63a, is unreported. The district court order granting judgment for the FTC, App., *infra*, 45a-62a, is unreported but available at 2017 WL 451953.

JURISDICTION

The Ninth Circuit issued its judgment affirming the district court's final judgment on August 31, 2018. The Ninth Circuit denied PBS's timely petition for panel rehearing and rehearing *en banc* on June 19, 2019. On September 5, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 18, 2019. *Publishers Bus. Services v. FTC,* No. 19A255. This Court has jurisdiction over the Ninth Circuit's judgment pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 13, 19, and 5 of the FTC Act are reproduced in Appendix F, *infra*, 65a-81a.

STATEMENT OF THE CASE

Since 1982, federal courts have at the urging of FTC enforcement staff recognized implied remedies, including monetary relief, under the FTC Act's injunction statute, § 13(b). That statute speaks of only a single remedy—an injunction to stop an ongoing or imminent violation of the FTC Act. However, relying on this Court's 1946 decision in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the FTC claimed authority to request additional implied monetary and other remedies. *Porter* held that a district court's full equity powers are available unless Congress specifically excludes them. *Id.* at 397-98. This Court applied that reasoning to the Fair Labor Standards Act in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960), and circuit decisions, at the FTC's urging, extended the reasoning to § 13(b) of the FTC Act.

Skepticism brewed over these decisions from the beginning, for good reason. The plain text of § 13(b) limits remedies to injunctions and restraining orders to prevent ongoing or imminent violations of the Act. The statute says nothing about monetary relief or reserved equity powers. The FTC Act provides those remedies in a different statute, § 19, together with detailed procedural requirements and a 3-year limitations period conspicuously missing from § 13(b).

Moreover, the principle courts drew from *Porter* and *Mitchell*, that implied equitable remedies may be added to what Congress provided expressly in an elaborate statutory scheme, was abrogated by this Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). *Meghrig* reversed the presumption—courts are *not* to assume a statute with "elaborate enforcement provisions" implicitly authorizes other

remedies. *See id.* at 487. This Court's decision in *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017) undid another assumption of circuit decisions allowing implied monetary remedies under § 13(b). *Kokesh* held that disgorgement in analogous SEC enforcement actions is a penalty. *Id.* at 1643. Since the power to provide for penalties lies solely with Congress, *Kokesh*'s implication was unmistakable—disgorgement is unavailable in equity.

But the view that equitable remedies can be implied from the text of § 13(b) persisted and, until the Seventh Circuit's decision in *Credit Bureau*, was precedent in every circuit addressing the question. Circuits uncritically adopted other circuit decisions, with little or no meaningful attention to § 13(b)'s text or to Congress's carefully constructed statutory framework in the FTC Act. Courts that did endeavor to justify monetary relief under § 13(b) invariably expanded court-made "equity powers" even further, beyond anything resembling "equity."

The Ninth Circuit has been at the leading edge of this "equity power" creep. In place of the express remedies in § 19 of the FTC Act, the Ninth Circuit, urged on by FTC enforcement staff, has legislated its own comprehensive disgorgement remedy under § 13(b). Virtually automatic joint and several liability was created out of whole cloth; limitations periods do not exist; the difference between consumer losses and unjust gains has been erased to ensure maximum punishment; strict liability calculated from net revenue is almost always mandatory. *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600-04 (9th Cir. 2016). Deviation from the Ninth Circuit's asymmetrical rules for calculating § 13(b)

disgorgement is grounds for vacatur and remand. App., *infra*, 2s-5a; 22a-23a.

The case against PBS is the perfect illustration. PBS originally prevailed on monetary relief. After conducting a trial and assessing the credibility of witnesses and experts, a seasoned district judge rejected the FTC's request for $34 million in disgorgement and instead awarded the FTC about $191,000 against four defendants, who promptly paid the judgment. The Ninth Circuit vacated the ruling, finding the district court violated controlling rules for calculating § 13(b) disgorgement by using an unchallenged economic expert's opinion to determine the alleged unjust gains of PBS rather than supposed customer losses. The Ninth Circuit also held it was error to consider whether customers were actually misled, and whether customers valued PBS's product—popular magazines that all customers admittedly received. *FTC v. Publishers Bus. Services, Inc.* ("*PBS I*"), 540 F. App'x 555, 556–58 (9th Cir. 2013). After remand, a new district judge awarded the FTC $ 24 million, more than a *12,500%* increase. Now, the Ninth Circuit has affirmed, finding the award comfortably within its judicially created framework for disgorgement. App., *infra*, 2a-7a.

Congress authorized none of this. As the Seventh Circuit's *Credit Bureau* decision recounts, circuit decisions have veered drastically from the plain text of § 13(b) and the careful structure of the FTC Act. Two Ninth Circuit judges in the companion *AMG* decision made the same point, using a "concurring" opinion to dismantle the Ninth Circuit's "unfortunate interpretation" of § 13(b) and call for an *en banc* reversal of precedent. *See* App., *infra*, 26a-41a. The concurring opinion was not enough to persuade the

Ninth Circuit's other judges, however. The petitions for *en banc* review in this case and *AMG* were denied on consecutive days. App., *infra*, 62a, 63a.

The circuit split must be resolved. The Ninth Circuit has aggressively assumed the legislative role of Congress, in violation of separation-of-powers principles. The FTC is being awarded billions of dollars in judgments under § 13(b) without any Congressional authorization and few, if any, procedural requirements or limitations. This Court's intervention is therefore needed to resolve the circuit split and correct decades of regulatory "creep" by the FTC and misinterpretation of the FTC Act.

A. The path to court-made implied remedies under § 13(b).

Congress created the FTC and declared its powers under the FTC Act in 1914. *See FTC v. Gratz*, 253 U.S. 421, 422 (1920), *overruled in part by FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966). The purpose "was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice." *See Gratz*, 253 U.S. at 441–42 (Brandeis, J., dissenting). The FTC had no authority "to inflict punishment" or compensate "for any injury alleged to have resulted from the matter charged." *Id.* at 432, 434. Rather, its powers under § 5 of the Act were to declare methods of competition unfair and, after an administrative hearing, to order a violator to cease and desist. *See Brown Shoe*, 384 U.S. at 320-22; 15 U.S.C. § 45(a), (b) at App., *infra*, 70a-72a.

That meant a defendant could continue engaging in unfair or deceptive practices in violation of the FTC Act until completion of an administrative hearing. Congress began to remedy the gap in 1938. The

original version of § 13 limited the FTC's authority to preliminary (not permanent) injunctions for violations of § 12, which concerned specific types of deceptive advertising. *See* Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111,115 (codified as amended at 15 U.S.C. § 53(a)). This was the only injunctive remedy the FTC had until 1973, when Congress enacted § 13(b).

Section 13(b) gave the FTC authority to bring district court actions to obtain a restraining order or preliminary injunction to stop ongoing or imminent § 5 violations. The purpose was to "bring an *immediate halt* to unfair or deceptive acts or practices when to do so would be in the public interest." *See* S. Rep. No. 93-151, at 30 (1973) (emphasis added). The statute requires the FTC to bring an administrative action within 20 days. Otherwise the order or injunction dissolves. 15 U.S.C. § 53(b)(2). The restraining order or preliminary injunction lasts until an administrative order becomes final, or is set aside or reversed. Congress included a proviso authorizing a "permanent injunction" in "proper cases" after "proper proof." *See id.*

In 1974, the Ninth Circuit held the FTC had no power to obtain restitution through an administrative cease-and-desist order. *See Heater v. FTC,* 503 F.2d 321, 323-24 (9th Cir. 1974). That prompted Congress, in 1975, to pass § 19 of the FTC Act. Section 19 gave the FTC a host of monetary and other backward-looking remedies, including "rescission … the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(b). The remedies were subject to specific elements and a 3-year statute of limitations. The statute expressly excluded "the imposition of any exemplary or punitive damages." *Id.*; *see generally* Peter Ward, *Restitution for*

Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions, 41 AM. U. L. REV. 1139 (1992).

The procedural hurdles Congress imposed under § 19 were substantial. Unless the FTC first used its rulemaking authority to ban a particular "unfair or deceptive" act or practice, *see* 15 U.S.C. § 57b(a)(1), the FTC could only obtain money damages through a multi-step process. First, the FTC needed a cease-and-desist order. 15 U.S.C. § 57b(a)(2). The order was subject to judicial review in a federal circuit court of appeals. 15 U.S.C. § 45(c). If the order became final, the FTC could only recover monetary relief if it proved a reasonable person would understand the conduct to be dishonest or fraudulent. 15 U.S.C. § 57b(a)(2); *see FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 722 (5th Cir. 1982).

Seeking to sidestep the requirements of § 19, the FTC began urging courts to read "equitable monetary relief" into the injunctive provisions of § 13(b). The FTC wanted a "shortcut." *See* David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, at 12 (Sept. 23, 2004).[1] This Court's decisions in *Porter* and *Mitchell* supplied that "shortcut."

Porter by that time was already three decades old and had never been used to support implied remedies under the FTC Act. The decision interpreted § 205(a) of the Emergency Price Control Act of 1942, which provided for "a permanent or temporary injunction, restraining order, *or other order*." *See Porter*, 328 U.S.

[1]Available at https://www.ftc.gov/sites/default/files/documents/publicevents/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf (last visited Oct. 16, 2019).

at 397 (emphasis added). This Court found these express remedies implicitly authorized restitution of illegally high rent, reasoning that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Id.* at 398. This language, repeated with approval in *Mitchell*, 361 U.S. at 291, became the cornerstone of the FTC's efforts to claim implied remedies under § 13(b).

The Fifth Circuit was the first to accept the FTC's arguments for reading expanded equity powers into § 13(b) under *Porter* and *Mitchell*. The court held that an asset freeze was "ancillary relief … well within the jurisdiction of the district court under Section 13(b)." *Sw. Sunsites*, 665 F.2d at 720. But for "consumer redress," the Fifth Circuit hewed to Congress's statutory scheme. The court contemplated a separate § 19 civil action and a "two-step process" to monetary relief: first, an "injunction preserving property" would issue under § 13(b); second, a "subsequent" FTC administrative adjudication would decide "the rights of parties in the property." *See id.* at 719.

Months after *Southwest Sunsites*, the Ninth Circuit decided *Federal Trade Commission v. H. N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), and the Fifth Circuit's text-based procedure for a separate § 19 action for monetary relief faded away. *Singer* held that § 13(b)'s permanent injunction provision implicitly authorized preliminary injunctions and asset freezes. *Id.* at 1111-13. The FTC succeeded in getting other circuits to expand on *Singer*. The Seventh Circuit read § 13(b) as implicitly authorizing the rescission of a contract, reasoning the statutory "power to issue a preliminary injunction carries with it the power to issue whatever ancillary equitable

relief is necessary to the effective exercise of the granted power." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989) (Posner, J.). The same year, the Seventh Circuit applied its "whatever ancillary equitable relief is necessary" standard to affirm a $6.6 million joint and several restitution award as purported "ancillary equitable relief" to a § 13(b) permanent injunction. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 570–72 (7th Cir. 1989).

Amy Travel became the standard, and eight other circuits adopted its holding. *See Credit Bureau*, 937 F.3d at 779. Some circuit decisions provided analysis. *See Commerce Planet,* 815 F.3d at 598–604 (authorizing joint and several disgorgement under § 13(b) notwithstanding § 19); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (relying on *Porter*). Most simply adopted *Amy Travel* and its progeny with little or no discussion. *See FTC v. Ross*, 743 F.3d 886, 891 (4th Cir. 2014) (allowing restitution because of *Porter*, *Mitchell*, and uniform circuit practice); *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (following "Our sister Courts of Appeals" in allowing § 13(b) monetary relief); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011) (joining courts holding that "Section 13(b) of the FTC Act permits courts to grant ancillary equitable relief, including equitable monetary relief."); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 18 (1st Cir. 2010) (stating without analysis "[t]he district court has discretion to determine a reasonable approximation of damages"); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202-03 n.6 (10th Cir. 2005) (adopting other circuit reasoning); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991) (same).

In *Credit Bureau,* the Seventh Circuit reversed its 30 year-old decision in *Amy Travel*, creating an explicit circuit split. The court determined that circuit decisions authorizing implied remedies had ignored § 13(b)'s plain text and the FTC Act's statutory scheme (if they considered them at all), and overlooked modern Supreme Court jurisprudence, led by *Meghrig*, rejecting *Porter*'s and *Mitchell*'s permissive rules on implied remedies. *See Credit Bureau*, 937 F.3d at 771-86.

B. Factual and procedural background.

PBS was a small family-owned business that, for over five decades, sold popular magazines, often through telemarketing. The FTC sued PBS, its founder Ed Dantuma (now deceased), his wife, and their four children, alleging some aspects of a certain telemarking campaign violated § 5(a) of the FTC Act and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310. The district court ruled on summary judgment that while PBS disclosed all the material terms of its offer, the timing and manner of the disclosures supposedly left a misleading "net impression," in violation of § 5(a) and the TSR. *FTC v. Publishers Bus. Services, Inc.*, 821 F. Supp. 2d 1205, 1224–25 (D. Nev. 2010).

The district court convened a separate trial to decide monetary relief. In the district court's words, the summary judgment had made no findings "that Defendants' customers did not receive the magazines ordered, nor did it find that most of the complaining customers ever paid any money to Defendants." *FTC v. Publishers Bus. Services, Inc.*, 08-CV-00620, 2011 WL 7462205, at *2 (D. Nev. July 25, 2011). The FTC proved nothing to the contrary at trial and generally failed to establish any link between purported

customer losses and the alleged § 5 "net impression" violations. Nonetheless, the FTC demanded $34 million in what it called "net revenue"—gross revenue less refunds—arguing the joint and several remedy was available within the court's inherent equity powers under § 13(b).

The district court, after hearing live testimony and having the opportunity to assess credibility, found the vast majority of customers suffered no injury from the violations and awarded the FTC $191,219, which PBS promptly paid. App., *infra*, 2a. The FTC appealed the final judgment, and the Ninth Circuit vacated the award, deciding that the district court had improperly considered a number of factors. *PBS I*, 540 F. App'x at 556-58. The Ninth Circuit held the district court had applied an incorrect legal standard in focusing on the defendants' unjust gain rather than losses to customers. The court also found the district court erred in relying on the defendant's expert. The Ninth Circuit found the expert had wrongly assumed customers who heard all of the disclosures were not misled, and had improperly discounted customers who valued their subscriptions. *Id.*

On remand, the FTC asked for about $ 24 million, counting all first-time payments from every customer—even clearly satisfied customers who later added magazines to existing subscriptions or renewed. A new district judge adopted wholesale the FTC's proposal and entered judgment against PBS in the amount of $23,773,147.78. App., *infra*, 2a.

PBS timely appealed the final judgment under 28 U.S.C. § 1291. PBS asked the Ninth Circuit to revisit and reverse its case law authorizing implied disgorgement under § 13(b). This Court's decision in *Kokesh* issued during the appeal. *Kokesh* held that

disgorgement in SEC cases was in substance a penalty and therefore had to be brought within the 5-year limitations period of 28 U.S.C. § 2462. *Kokesh*, 137 S. Ct. at 1639. PBS urged the Ninth Circuit to follow *Kokesh* to its logical conclusion—since disgorgement is a penalty, and thus a legal remedy only Congress may prescribe, the district court lacked authority to award it as implied *equitable* relief under § 13(b). PBS also argued the district court failed to make any proximate cause ruling and neglected to apply the 3-year limitations period Congress imposed for monetary relief under § 19. App., *infra*, 3a-6a.

Another FTC action against companies offering short-term, high-interest loans, the *AMG* case, raised similar issues, including the same threshold challenge to § 13(b) monetary relief, though with a substantially greater amount at stake. The district court in *AMG* awarded disgorgement under § 13(b) in the amount of almost $1.3 billion. App., *infra*, 8a.

The same Ninth Circuit panel heard back-to-back oral arguments in this case and *AMG* the same day. The court affirmed both judgments. The Ninth Circuit held that arguments against implied monetary remedies under § 13(b) were "foreclosed by our precedent," and determined that *Kokesh* "has not abrogated this long-standing precedent." App., *infra*, 2a-3a; 19a-21a.

The Ninth Circuit also rejected PBS's statute of limitations defense, holding that since § 13(b) does not contain a limitations period, none applies to § 13(b) monetary claims. The Ninth Circuit further rejected PBS's proximate cause challenge. The court reasoned that a "presumption of reliance" arises when allegedly deceptive representations are "widely disseminated,"

and proximate cause is satisfied when a transaction occurs. App., *infra*, 4a-6a.

Two judges in the *AMG* decision took the unusual step of filing a concurring opinion that argued the § 13(b) Ninth Circuit precedent to which they were bound should be overturned *en banc*. App., *infra*, 26a-41a (O'Scannlain, J., concurring). The judges found the "text and structure of the statute unambiguously foreclose such monetary relief," App., *infra*, 26a. The PBS and AMG defendants petitioned for *en banc* review, highlighting Judge O'Scannlain's concurrence. The Ninth Circuit denied the petitions on consecutive days. App., *infra*, 62a-63a.

REASONS FOR GRANTING THE PETITION

I. The decision below presents an acknowledged, direct circuit split.

The Seventh Circuit acknowledged its decision in *Credit Bureau* "departs from the consensus view of our sister circuits." *Credit Bureau*, 937 F.3d at 785. That the Seventh Circuit caused the split by reversing its landmark ruling in *Amy Travel* is significant. *Amy Travel* was instrumental in advancing the "creep" toward barely-disguised money damages that § 13(b) implied remedies have become, as the outsized awards against PBS and AMG demonstrate. The court's reversal of the very precedent other circuits adopted leaves the law on § 13(b) implied remedies in disarray.

The "consensus" *Credit Bureau* refers to did not develop independently. As the Seventh Circuit described that development, "most circuits adopted their position by uncritically accepting our holding in *Amy Travel*, which expanded on *Elders Grain*, which expanded on *Singer*, which expanded on *Porter* and *Mitchell*." *See id*. *Credit Bureau* represents a sea

change, away from blind acceptance of § 13(b) monetary remedies.

But *Credit Bureau* was hardly the first opinion to criticize § 13(b) implied remedies. In 1981, before *Singer*, the D.C. Circuit affirmed an order under § 13(b) for the defendant to "hold separate a portion of the assets" of the company it was merging with, though the evidence failed to support an injunction barring the merger outright. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1074 (D.C. Cir. 1981) (Ginsburg, J.). The court decided a hold-separate order was consistent with "the requirements of equity practice" and "not outside the range of relief a 13(b) application may warrant." *Id.* at 1084. A dissenting opinion argued that even this modest extension through implied equity powers conflicted with § 13(b)'s text. The "plain meaning of section 13(b) does not warrant or allow such a result," the dissent reasoned, for "[w]hen the FTC satisfies the requirements of 13(b), the statute permits *only the issuance of a temporary restraining order or a preliminary injunction*…." *Id.* at 1093, 1096 (Mikva, J., dissenting) (emphasis added).

A more recent decision anticipated *Credit Bureau*'s textualist approach to § 13(b). The Third Circuit this year rejected "the FTC's invitation to stretch Section 13(b) beyond its clear text," holding that § 13(b) bars injunction claims based solely on past conduct since the statute reaches only "existing or impending conduct." *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 150, 154-57 (3d Cir. 2019). *Shire* contrasted § 5, providing for administrative cease-and-desist orders based on *past* conduct, with § 13(b)'s goal "to quickly enjoin ongoing or imminent illegal conduct." The Third Circuit reasoned Congress never intended § 13(b) to enjoin "long-past conduct," as that

would duplicate what § 5 already provides. *See id.* *Shire* did not address the question of implied remedies under § 13(b). A Third Circuit decision in a footnote recognized authority to award § 13(b) monetary relief. *See Magazine Sols.,* 432 F. App'x at 158 n.2. But the textualist approach in *Shire* necessarily rejects that conclusion. The circuit split after *Credit Bureau* will surely become more fractured.

Without this Court's intervention, the split will remain. The Ninth Circuit restated its aggressive position on implied remedies just three years ago in *Commerce Planet*, 815 F.3d 598-604. The Ninth Circuit has shown no inclination to revisit that precedent, not even after the explicit call of two Ninth Circuit judges for *en banc* review in a four thousand-word concurrence. App., *infra*, 26a-41a. The split is entrenched and unsolvable within the circuit courts. This Court should resolve the split now.

II. The circuit split raises fundamental separation-of-powers issues.

The FTC has for decades been able to recover monetary and other forms of implied relief under § 13(b) while eluding express procedures and limitations Congress wrote into § 19 and § 13(b). The results for the FTC have been staggering. In this case and the companion *AMG* decision alone, the FTC was awarded nearly $1.5 billion under § 13(b). Just in the last few years, the FTC obtained district court judgments totaling over *$17.5 billion* in "disgorgement and redress."[2]

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[2] FTC 2018 Annual Highlight Report, available at https://www.ftc.gov/reports/annual-highlights-2018/stats-and-data (last visited Oct. 15, 2019); FTC 2017 Annual Highlight Report, available at https://www.ftc.gov/reports/annual-

But the stakes involved are not simply a matter of money. As this Court observed, "[w]hen federal agencies or courts infer purported remedies from a federal statute, it has major Constitutional implications, as it disrupts the separation of powers." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). That disruption has rarely been more pronounced than in cases expanding implied remedies under § 13(b).

The Ninth Circuit's *Singer* decision, which sparked the drive to expansive court-made § 13(b) remedies, effectively nullified § 13(b)(2)'s 20-day deadline for the FTC to bring an administrative action. *See Singer*, 668 F.2d at 1111. The careful interplay Congress intended between district court injunction proceedings and corresponding FTC administrative actions gave way to FTC convenience and court-made expedience. The FTC need not bother with an administrative action when preliminary injunctions can issue as "ancillary" equitable relief from § 13(b)'s *permanent* injunction exception. *See id.*

Elders Grain in turn inferred from § 13(b)'s *preliminary* injunction relief an implied remedy of rescission, though § 19 explicitly provides for "rescission," with a number of procedural requirements absent from § 13(b). *See Elders Grain, Inc.*, 868 F.2d at 907. The judicial rewriting of the FTC Act continued from this premise. Courts relegated § 13(b)'s express remedies to secondary importance, behind a supposed main role not as remedies but as gateways to implied "ancillary" relief unconstrained

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highlights-2017/stats-and-data (last visited Oct. 15, 2019); FTC 2016 Annual Highlight Report, available at https://www.ftc.gov/node/1205233 (last visited October 15, 2019).

by procedure, statutory safeguards, or limitations periods.

This case perfectly illustrates how courts, at the FTC's urging, have subverted Congress's role. The FTC was awarded enormous sums having proved little more than a calculation of net revenue (revenue less refunds). App., *infra*, 55a-57a. Under the onerous burden-shifting regime the Ninth Circuit developed, PBS in theory had the chance to show the FTC's net revenue figures was overstated. App., *infra*, 57a-61a. But the Ninth Circuit's "net revenue" formula makes the burden impossible to meet. *See id*. Reliance is presumed for supposedly widely disseminated misrepresentations—meaning any advertising or promotional campaign, or any website. And the court equates reliance with proximate cause. App., *infra*, 3a. The Ninth Circuit bars courts from considering the actual value customers received from purchases. The Ninth Circuit *requires* courts to count as part of the net revenue calculation payments from satisfied or happy customers—even those who returned for additional purchases. App., *infra*, 4a, 22a-23a.

These "rules," created entirely by the FTC and adopted by the Ninth Circuit, have hardened into a form of strict liability for § 5 violations. The case against PBS demonstrates this reality. The Ninth Circuit vacated the original $191,000 disgorgement award, achieved after a five-day trial on the merits by a seasoned trial judge, where the district court weighed the credibility of customers, defendants, and experts, to find very few customers were actually misled or proximately injured by the alleged § 5(a) violations. Though the district court was in theory exercising broad "equitable" powers in fashioning a fair award, the Ninth Circuit vacated the award for

not adhering to its strict rules for calculating § 13(b) disgorgement. *See PBS I*, 540 F. App'x at 556-58. After remand, the Ninth Circuit affirmed a new disgorgement award of almost $24 million, issued by a new district judge who heard no evidence, observed no witness, made no credibility assessments, and held no evidentiary hearing of any kind. App., *infra*, 2a-7a.

This Court has admonished, "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers." *I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983). The punishing award against the PBS defendants embodies that principle. Having arrogated to itself authority to infer new remedies from § 13(b), the Ninth Circuit legislated a super-structure of alternative relief, all court-made, bearing no relationship to § 13(b), and existing wholly independent of § 19's defendant-oriented procedural requirements, safeguards, and limitations.

Consider the Ninth Circuit's decision that the 3-year limitations period Congress wrote into § 19 does not apply to § 13(b) disgorgement. *See* App., *infra*, 6a. A 3-year limitations period would have made a substantial difference in the award against PBS. Instead, the Ninth Circuit ruled that since § 13(b) does not contain any limitations period, *none* applies to § 13(b) equitable disgorgement. *See id.* For the Ninth Circuit, the absence of a limitations period is not evidence of a statute limited by design to halting *ongoing or imminent* violations, in which a 3-year limitations period would scarcely make sense. *See Shire*, 917 F.3d at 156 ("Simply put, Section 13(b) does not permit the FTC to bring a claim based on long-past conduct"). It is a sign that the FTC is free to bring

§ 13(b) claims for monetary relief at any time in the future.

The same goes for § 19's "reasonable man" requirement. In Congress's careful structure under § 19, proof that a "reasonable man would have known under the circumstances [his conduct] was dishonest or fraudulent" acts as a crucial check on the FTC's ability to recover monetary relief for practices not clearly identified as unfair or deceptive, either through formal rule-making procedures or cease and desist actions. *See* 15 U.S.C. § 57b(a)(2). The "reasonable man" element plays no part in a § 13(b) monetary award in the Ninth Circuit.

The Seventh Circuit stands alone in adhering to this Court's instruction from *Ziglar*: "separation-of-powers principles are or should be central to the analysis" of implied remedies. *Ziglar*, 137 S. Ct. at 1857. "The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts… The answer most often will be Congress." *Id.* The answer in the Ninth Circuit is most definitely *not* Congress when it comes § 13(b).

The circuit split thus leaves a jarring discrepancy. In the Seventh Circuit, the FTC could have recovered no more than injunctive relief under § 13(b). Claims for monetary relief could only have been brought under § 19, which cuts off the time period for recovery at 3 years and includes elements and prerequisites the FTC would have faced substantial challenges to prove. *See* 15 U.S.C. § 57b(a) and (d). In the Ninth Circuit, and those circuits still inferring monetary remedies from § 13(b), monetary relief is unlimited, and the procedures and limitations Congress required are irrelevant. The difference between an FTC action in the Seventh Circuit and those circuits still recognizing

implied remedies under § 13(b) is life-altering. This Court's intervention is urgently needed to end decades' worth of FTC and court intrusion into Congress's constitutional role.

III. The decision below conflicts with this Court's decision in *Kokesh.*

Kokesh has confounded the circuits. This Court's thorough analysis identifying SEC disgorgement as a "penalty" under the federal statute of limitations, 28 U.S.C. § 2462, would seem to have sounded the death knell for disgorgement as "ancillary" equitable relief. Penalties are not equitable relief, as equity seeks to restore the status quo and not punish a wrongdoer. *See Tull v. U.S.*, 481 U.S. 412, 424 (1987) (finding "a court in equity … may not enforce civil penalties."); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) (explaining that equity is an "instrument for nice adjustment and reconciliation," not punishment); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 270-72 (1993) (White, J., dissenting) (reviewing scholarship and precedent that determined "courts of equity would not … enforce penalties or award punitive damages"); *see also* Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies* § 4.3, at 397 (3d ed. 2018) (discussing the aim of equity).

Moreover, § 13(b) disgorgement in the Ninth Circuit easily fits within this Court's "penalty" definition. *Kokesh* identified three characteristics. A penalty "is imposed by the courts as a consequence for violating . . . public laws." *Kokesh*, 137 S. Ct. at 1643. The Ninth Circuit has stressed this very point as justification for expansive § 13(b) remedies. *See Commerce Planet*, 815 F.3d at 599 (reasoning § 13(b) actions involve the "public interest" rather than a "private controversy"). Second, disgorgement is

"punitive" rather than "remedial." Ninth Circuit disgorgement must be "ordered without consideration of a defendant's expenses that reduced the amount of illegal profit," so it "does not simply restore the status quo [but] leaves the defendant worse off." *Id.* at 1644–45; *see* App., *infra*, 34a, 36a. Under the Ninth Circuit's rules, joint and several liability (nowhere mentioned or implied in §13(b)) is required, and awarding "net profits" rather than "net revenue" is reversible error. *See PBS I*, 540 F. App'x at 556. The individual PBS defendants received only a small fraction of the $24 million award, yet each of them is jointly and severally liable for the entire judgment. Third, disgorgement is "not compensatory" because funds are often paid "to the United States Treasury" rather than alleged victims. *Id.* at 1644. In this case, the FTC was awarded the disgorgement, and it is under no requirement to disburse any funds to PBS customers. App., *infra*, 61a.

Despite these characteristics, the decision below dismissed *Kokesh* for having "expressly restricted" itself to the statute of limitations, 28 U.S.C. § 2462, the same reasoning offered in the majority opinion in *AMG*. App., *infra*, 3a, 21a. The Ninth Circuit relied on *Kokesh*'s footnote 3, that "nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Id.* (quoting *Kokesh*, 137 S. Ct. at 1642 n. 3). In the Ninth Circuit's view, *Kokesh* did not "definitive[ly] enough" reject Ninth Circuit "interpretations of section 13(b) to cause us to depart from our long-standing precedent." App., *infra*, 3a.

Yet two of the panel judges who reached this conclusion filed a concurring opinion in *AMG* finding that *Kokesh* "undermines a premise in our reasoning"

and requires reversal of Ninth Circuit precedent. App., *infra*, 33a-35a (O'Scannlain, J., concurring). That conclusion has been echoed by other judges. Before his elevation to this Court, then-Judge Kavanaugh found "[t]he Supreme Court's reasoning in *Kokesh* was not limited to the specific statute at issue there…." *Saad v. SEC*, 873 F. 3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J., concurring). Judge Merritt in the Sixth Circuit similarly observed that, after *Kokesh*, "the theory [of equitable disgorgement] may not even be applicable in SEC contexts for much longer," and he doubted whether the implied remedy ever had any basis, as "Lord Coke, Blackstone, Justice Story, and other distinguished lawyers … would never have heard of 'equitable disgorgement.'" *Osborn v. Griffin*, 865 F.3d 417, 471 n.1 (6th Cir. 2017) (Merritt, J., dissenting) (citing Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577, 1598–1600 (2002)).

Most recently, the Third Circuit applied *Kokesh* to hold that an obey-the-law SEC injunction could not be subject to § 2462 because "a properly issued and framed SEC injunction" can never be a "penalty" as defined by *Kokesh*, since "injunctions must be intended to deter the violator from further infractions (and thereby protect the public), not punish past misconduct." *SEC Gentile*, 18-1242, 2019 WL 4686251, at *7 (3d Cir. Sept. 26, 2019). The Third Circuit wrestled with the "puzzle" *Kokesh* had in the court's view left behind—if "disgorgement is both an equitable remedy and a § 2462 penalty, could an injunction be both too?" *See id*. at *9.

In fact, this Court conspicuously did not decide whether SEC disgorgement is properly an "equitable remedy" within a district court's inherent powers. *See*

Kokesh, 137 S. Ct. at 1642 n. 3. Footnote 3 reserves that question, though several members of this Court asked it directly at oral argument:

> JUSTICE KENNEDY: [I]s there specific statutory authority that makes it clear that the district court can entertain this remedy?
>
> MR. UNIKOWSKY (for Kokesh): There's no specific statutory authority….
>
> JUSTICE SOTOMAYOR: Can we go back to the authority? 78u, which is the only authority I can imagine, says, "A court may grant any equitable relief that may be appropriate or necessary for the benefit of investors." If they are not doing—if they're not doing restitution, how could that be the basis of disgorgement?
>
> MR. UNIKOWSKY: So that statute was enacted 30 years after the SEC already started seeking disgorgement….
>
> JUSTICE SOTOMAYOR: Well, I'll let your adversary tell me what the source of their power is, but I—I—it is unusual.
>
> . . .
>
> CHIEF JUSTICE ROBERTS: One reason we have this problem is that the SEC devised this remedy or relied on this remedy without any support from Congress. If Congress had provided, here's a disgorgement remedy, you would expect them, as they typically do, to say, here's a statute of limitations that goes with it…
>
> Chief Justice Marshall said it was utterly repugnant to the genius of our laws to have a penalty remedy without limit…. [T]he

> concern, it sees seems to me, is multiplied when it's not only no limitation, but it's something that the government kind of devised on its own.
>
> . . .
>
> JUSTICE ALITO: [I]n order to decide whether this thing is a penalty or a forfeiture, we need to understand what this thing is. And in order to understand what it is, it would certainly be helpful and maybe essential to know what the authority for it is.
>
> . . .
>
> JUSTICE GORSUCH: Well, here we don't know, because there's no statute governing it. We're just making it up.
>
> MS. GOLDENBERG (for the SEC): Well, I wouldn't say that, Your Honor. There are almost 50 years of precedents on how this should work, and I think the way it worked is—
>
> JUSTICE GORSUCH: Not in this Court.

Oral Arg. Tr., *SEC v. Kokesh*, No. 16-529, 2017 WL 1399509 at *7-9, 13, 31-32, 52 (U.S. April 18, 2017).

What *Kokesh* did decide appears to answer these questions. That SEC disgorgement is a penalty under § 2462 necessarily cancels its availability as equitable relief. *See, e.g.*, *Tull*, 481 U.S. at 424, *Hecht*, 321 U.S. at 329-30. Nothing in footnote 3 restricts the decision's penalty analysis to § 2462. And disgorgement hardly sheds its penalty characteristics outside of § 2462's limitations period. The footnote speaks loudest by what it does not say: it does not endorse existing case law authorizing implied equitable disgorgement. *See*

Gentile, 2019 WL 4686251 at *9 (finding that "though the *Kokesh* Court was careful to reserve the issue … we note its skepticism that SEC disgorgement is applied in conformity with traditional equitable principles"); Chad M. Clamage, Esq., *Supreme Court's SEC Decision Could Limit Other Federal Agencies*, 33 No. 1 Westlaw J. Corp. Officers & Directors Liability 1, 2017 WL 2935836, at *4 (July 10, 2017) (observing "[in] the Supreme Court's vernacular, [the footnote] is a strong signal that the court doubts whether the SEC may obtain disgorgement at all.").

The circuits need this Court's guidance on how to apply *Kokesh*. Its analysis has clear application outside the confines of § 2462, as two of the three panel judges below persuasively argue in the *AMG* concurrence. App., *infra*, 33a-35a. Unfortunately, the same judges reached exactly the opposite conclusion in the majority decisions. App., *infra*, 2a-3a; 19a-21a. The circuits are confused. This Court should grant this petition to ensure that *Kokesh* is correctly and uniformly applied.

IV. The decision below is wrong.

The Seventh Circuit's decision in *Credit Bureau* and Judge O'Scannlain's concurrence in *AMG* are correct in finding the case law approving § 13(b) implied remedies fundamentally wrong. The opening lines of the subsection require that the FTC have a well-founded belief that a "person, partnership, or corporation *is violating, or is about to violate*, any provision of law enforced by the [FTC]…." 15 U.S.C. § 53(b)(1) (emphasis added). The statute limits remedies to a restraining order or preliminary injunction. *Id*. A provision is made for "a permanent injunction" after "proper proof." 15 U.S.C. § 53(b). There is no suggestion in this text that Congress

intended any other remedy. A forward-looking injunction neither *is* nor *implies* a backward-looking monetary remedy, or any of the other broad "ancillary relief" courts have for decades been reading into the statute.

Nor are there any procedures or limitations in § 13(b) suited for monetary relief. The Ninth Circuit viewed § 13(b)'s lack of procedures and limitations as an invitation to write its own rules for disgorgement. App., *infra*, 5a-6a. This is Constitutionally wrong. The correct reading is not to infer that § 13(b) is liberated of procedures and limitations periods for monetary relief, but that § 13(b) does not provide that relief to begin with. As Chief Justice Roberts alluded to at the *Kokesh* oral argument, it would be "utterly repugnant to the genius of our laws" that, "[i]n a country where not even treason can be prosecuted after a lapse of three years … an individual would remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. 336, 342 (1805) (Marshall, C.J.).

There is also no need to imply equity remedies in § 13(b). Section 19 contemplates the customer redress and damages that courts have instead freely imposed in the purported name of "equity" under § 13(b). Section 19 specifies "customer redress," "rescission," and "damages," but is built around a reserve clause for "such relief as the court finds necessary to redress injury to consumers or other persons" resulting from rule violations or unfair or deceptive acts or practices. 15 U.S.C. § 57b(b). A fundamental rule "of equity jurisprudence [is] that courts of equity should not act … when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) (citations omitted). Under the FTC Act, § 13(b)

injunctions prevent "irreparable injury," while § 19 provides the legal relief. The circuits inferring broad equitable monetary and other remedies in § 13(b) have disregarded the first rule of equity.

They have also disregarded "the notable change in the Court's approach to recognizing implied causes of action." *Ziglar*, 137 S. Ct. at 1857. Assuming vast implied remedies under § 13(b) in reliance on *Porter* and *Mitchell* is no longer viable, if it ever was. This Court has soundly repudiated presumptions favoring implied remedies from statutes whose only invitation to equity remedies is that the statutes do not explicitly exclude them. The prevailing rule in this Court is that "where Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute … it cannot be assumed that Congress intended to authorize by implication additional judicial remedies…." *Meghrig*, 516 U.S. at 487-88.

Meghrig may have directed that instruction to "private citizen" suits, *see id.*, but this Court has since applied it to an array of statutory civil actions, including government actions. *See Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017) (finding remedies in the "carefully crafted and detailed enforcement scheme" of the Biologics Price Competition and Innovation Act exclusive, as "Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly") (citation omitted); *Honeycutt v. U.S.*, 137 S. Ct. 1626, 1634 (2017) (rejecting Government arguments that in criminal forfeiture statutes, Congress "legislated against the background principles of conspiracy liability" since "[t]he plain text and structure of § 853 leave no doubt that Congress did not incorporate those background principles."); *Ziglar*, 137 S. Ct. at 1857

(discussing implied remedies in *Bivens* actions); *Great–W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (refusing to infer monetary remedies in ERISA).

At its heart, the decision below reflects years of disregard for Constitutional separation-of-powers principles. *See Ziglar*, 137 S. Ct. at 1857. The Ninth Circuit's regime of joint and several "net revenue" disgorgement stands in stark contrast to any procedure authorized by the FTC Act. Ninth Circuit disgorgement is punishment, complete with daunting procedural burdens and outrageously punitive monetary awards. *See Kokesh*, 137 S. Ct. at 1643-45. It is the very sort of punishment the FTC Act expressly forbids. *See* 15 U.S.C. § 57b(b) ("nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.").

That Ninth Circuit disgorgement reflects every characteristic of a penalty under *Kokesh* is no coincidence. The FTC advocated for these standards, specifically to avoid § 19. The Ninth Circuit precedent the decision below followed cannot stand as a valid interpretation of § 13(b) or of the FTC Act.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 18, 2019

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15600

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

DIRK DANTUMA; DRIES DANTUMA; EDWARD FRED DANTUMA; JEFFREY DANTUMA; ED DANTUMA ENTERPRISES, INC., DBA Publishers Business Services, DBA Publishers Direct Services; PUBLISHERS BUSINESS SERVICES, INC.; BRENDA DANTUMA SCHANG,

Defendants-Appellants,

MEMORANDUM[*]

Argued and Submitted August 15, 2018
San Francisco, California

Filed: August 31, 2018

Before: O'SCANNLAIN and BEA, Circuit Judges, and STEARNS, District Judge

This case concerns a telemarketing scheme to sell magazine subscriptions. From 2004 to 2008, Publisher Business Services, Inc. ("PBS") used a collection of deceptive telemarketing scripts to sell magazine subscriptions to consumers on the pretense that PBS was conducting a "survey." In 2008, the Federal Trade

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Commission ("FTC") filed suit against PBS, alleging that PBS's actions violated section 5 of the FTC Act, 15 U.S.C. § 45(a), and requesting equitable relief from the district court under section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

On cross-motions for summary judgment, the district court found that PBS had violated the FTC Act, but held that a further hearing on monetary relief was required. After an evidentiary hearing, the district court entered judgment against PBS in the amount of $191,219. The FTC appealed the district court's calculation of monetary relief, but PBS did not file a cross-appeal regarding liability. We reversed the district court and remanded for further proceedings on monetary relief. *See FTC v. Publishers Bus. Servs., Inc.*, 540 F. App'x 555, 556–58 (9th Cir. 2013) ("*PBS I*").

On remand, a new district court judge awarded the FTC nearly $24 million in equitable monetary relief. PBS appeals, raising a number of arguments.

We review a district court's order granting equitable relief under the FTC Act "for abuse of discretion or the erroneous application of legal principles." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010). A district court Abuses its discretion when it fails to identify and apply "the correct legal rule to the relief requested," or if its application of the legal standard was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

1. PBS first argues that the district court lacked the authority to enter equitable monetary relief under section 13(b) of the FTC Act. This argument is

foreclosed by our precedent. We have repeatedly held that section 13(b) of the FTC Act grants district courts the power to impose equitable remedies, including restitution and disgorgement of unjust gains. *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598–99 (9th Cir. 2016); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159–60 (9th Cir. 2010); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994).

Contrary to PBS's argument, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), has not abrogated this long-standing precedent. The *Kokesh* Court itself expressly restricted its ruling to whether the SEC's power to seek equitable disgorgement was subject to a five-year statute of limitations and specifically stated that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." 137 S. Ct. at 1642 n.3. *Kokesh* is far from definitive enough regarding our interpretations of section 13(b) to cause us to depart from our long-standing precedent. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

2. The district court did not abuse its discretion when it applied a presumption that consumers who bought PBS's products relied on PBS's deceptive tactics and representations. We have previously held that "proof of individual reliance by each purchasing customer is not needed" to establish liability under section 13(b). *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). Rather, "[a] presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Id.* at 605–06. Here, the district court did not abuse its

discretion in concluding that all three factors were present.[1]

The district court also did not err in rejecting PBS's argument that evidence of "satisfied" customers who renewed their subscriptions did not rebut the presumption of reliance. We have previously held that there is "no authority" for the proposition that equitable monetary awards in the consumer protection context should be reduced by amounts paid by customers who were "satisfied" or obtained a benefit from the defendant's services. *See FTC v. Gill*, 265 F.3d 944, 958 (9th Cir. 2001); *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1196 (9th Cir. 2016). Additionally, as the district court found, the fact that a consumer later decided to renew his or her subscription "does not necessarily mean [his or her] original decision to purchase was free from the taint of [PBS's] deceptive sales practices." This conclusion makes sense. The fact that a customer was satisfied months or years after the fact does not mean that the customer did not rely on PBS's deceptive sales techniques *at the time of the original purchase.*

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[1] Contrary to PBS's argument, the district court's application of the presumption of reliance did not absolve the FTC of its responsibility to prove that the harm to the consumer was proximately caused by PBS's wrongful conduct. Nothing in the district court's ruling or reasoning runs afoul of the Supreme Court's decision in *Bank of America Corporation v. City of Miami*, 137 S. Ct. 1296 (2017). The relationship between PBS's wrongful conduct and the harm to the consumer was not attenuated or merely "foreseeable," it was direct: consumers were induced to enter into the transaction as a result of PBS's deceptive tactics and representations. Similarly, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 339–40 (2005), is inapposite because, in this case, the FTC sought relief only for those consumers who were damaged when they actually paid PBS after being induced to enter into the transaction because of PBS's deceptive tactics.

Without other evidence, PBS's arguments to the contrary are speculative. The district court's findings on this issue were not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1263.

3. PBS also argues that the district court erred on remand by considering evidence that was submitted at the summary judgment stage of the proceedings, including declarations from PBS customers and former PBS employees. PBS did not raise this argument in the district court and, as a result, has waived the argument on appeal. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000) ("Since the district court did not have an opportunity to consider this argument, it is waived.").

Further, PBS's argument is barred by the invited error doctrine. Not only did PBS fail to argue that the district court should not consider declarations submitted at summary judgment, its own briefing contains a number of references to the very material it claims the district court erred by considering. For instance, PBS repeatedly directed the district court to the customer declarations it now seeks to exclude, arguing that those declarations showed that very few customers were actually deceived or damaged. We have long held that a party "may not complain on review of errors below for which he is responsible." *See Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1336 (9th Cir. 1985) (quoting *Hudson v. Wylie*, 242 F.2d 435, 448 (9th Cir. 1957)). Here, any error committed by the district court in considering evidence from the summary judgment record was invited by PBS's briefing, which specifically asked the district court to consider that evidence.

4. Next, PBS argues that the FTC's claims are subject to the three-year statute of limitations

contained in section 19 of the FTC Act. This argument is meritless. The FTC brought its claims under section 13(b) of the FTC Act, which contains no statute of limitations. Section 19 of the FTC Act does not provide that its statute of limitations applies to actions under section 13(b). "In the absence of a federal statute expressly imposing or adopting one, the United States is not bound by any limitations period." *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993).

5. Finally, PBS attempts to argue that the district court's original summary judgment ruling regarding liability was erroneous. PBS has waived any challenge to the district court's rulings on liability. During *PBS I*, PBS did not cross-appeal the district court's ruling that PBS was liable under the FTC Act. We have repeatedly held that we "need not and do[] not consider a new contention that could have been but was not raised on the prior appeal." *See Munoz v. Imperial Cty.*, 667 F.2d 811, 817 (9th Cir. 1982). We have also previously held that even parties who were satisfied with the district court's judgment must file a cross-appeal to preserve issues for review in subsequent appeals following a remand. *See Alioto v. Cowles Commc'ns, Inc.*, 623 F.2d 616, 618 (9th Cir. 1980).[2] As a result, PBS waived any arguments regarding the district court's liability ruling when it

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[2] Contrary to PBS's argument that it should be excused for the failure to file a protective cross-appeal because they are "disfavored," we have previously endorsed the use of protective cross-appeals. *See Alioto*, 623 F.3d at 617; *see also Warfield v. Alaniz*, 569 F.3d 1015, 1019 (9th Cir. 2009) ("A protective cross-appeal is permissible once an initial appeal is filed, raising the possibility of reversal.

failed to raise those arguments by way of a cross-appeal in *PBS I*.

In light of the above, the district court's judgment is **AFFIRMED**.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-17197

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

AMG CAPITAL MANAGEMENT, LLC; BLACK CREEK CAPITAL CORPORATION; BROADMOOR CAPITAL PARTNERS, LLC; LEVEL 5 MOTORSPORTS, LLC; SCOTT A. TUCKER; PARK 269 LLC; KIM C. TUCKER,

Defendants-Appellants.

Argued and Submitted August 15, 2018
San Francisco, California

Filed December 3, 2018

Before: Diarmuid F. O'Scannlain and Carlos T. Bea, Circuit Judges, and Richard G. Stearns, District Judge.

Opinion by Judge O'Scannlain; Concurrence by Judge O'Scannlain; Concurrence by Judge Bea.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the Federal Trade Commission Act can support an order compelling a defendant to pay $1.27 billion in equitable monetary relief.

I

A

Scott Tucker controlled a series of companies that offered high-interest, short-term loans to cash-strapped customers. He structured his businesses to offer these payday loans exclusively through a number of proprietary websites with names like "500FastCash," "OneClickCash," and "Ameriloan." Although these sites operated under different names, each disclosed the same loan information in an identical set of loan documents. Between 2008 and 2012, Tucker's businesses originated more than 5 million payday loans, each generally disbursing between $150 and $800 at a triple-digit interest rate.

The application process was simple. Potential borrowers would navigate to one of Tucker's websites and enter some personal, employment, and financial information. Such information included the applicant's bank account and routing numbers so that the lender could deposit the funds and—when the bill came due—make automatic withdrawals. Approved borrowers were directed to a web page that disclosed the loan's terms and conditions by hyperlinking to seven documents. The most important of these documents was the Loan Note and Disclosure ("Loan Note"),[1] which provided the essential terms of the loan as mandated by the Truth in Lending Act ("TILA"). *See* 15 U.S.C. § 1601 *et seq*. Borrowers could open the Loan Note and read through its terms if they chose, but they could also simply ignore the document, electronically sign their names, and click a big green button that said: "I AGREE Send Me My Cash!"

[1] An example of the Loan Note is reproduced in the Appendix.

B

In April 2012, the Federal Trade Commission ("Commission") filed suit against Tucker and his business in the District of Nevada.[2] The Commission's amended complaint alleged that Tucker's business practices violated § 5 of the Federal Trade Commission Act's ("FTC Act") prohibition against "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).[3] In particular, the Commission alleged that Tucker violated § 5 because the terms disclosed in the Loan Note did not reflect the terms that Tucker actually enforced. Thus, the Commission asked the court permanently to enjoin Tucker from engaging in consumer lending and to order him to disgorge "ill-gotten- monies."

In December 2012, the parties agreed to bifurcate the proceedings in the district court into a "liability phase" and a "relief phase." During the liability phase, the Commission moved for summary judgment on the FTC Act claim, which the district court granted. In the relief phase, the court enjoined Tucker from assisting

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[2] As is relevant on appeal, Tucker's businesses include defendants-appellants AMG Capital Management, LLC; Black Creek Capital Corporation; Broadmoor Capital Partners, LLC; and Level 5 Motorsports, LLC. Tucker is the sole owner of these corporations, and we refer to them collectively as "Tucker." The Commission's complaint also alleged that defendants-appellants Kim Tucker (Scott Tucker's wife) and Park 269 (a limited liability corporation that Kim Tucker owns) "received funds" that could be "traced directly to [Tucker's] unlawful acts or practices."

[3] The Commission also claimed that such practices violated TILA's "Regulation Z," which requires disclosures to be made "clearly and conspicuously." 12 C.F.R. § 1026.17(a)(1). These formally independent legal theories are largely duplicative, however, because TILA states that a violation of its provisions "shall be deemed" a violation of the FTC Act. 15 U.S.C. § 1607(c).

"any consumer in receiving or applying for any loan or other extension of Consumer Credit," and ordered Tucker to pay approximately $1.27 billion in equitable monetary relief to the Commission. The district court instructed the Commission to direct as much money as practicable to "direct redress to consumers," then to "other equitable relief . . . reasonably related to the Defendants' practices alleged in the complaint," and then to "the U.S. Treasury as disgorgement." Tucker timely appeals and challenges both the entry of summary judgment and the relief order.

II

Tucker first argues that the district court wrongly granted the Commission's motion for summary judgment finding Tucker liable for violating § 5 of the FTC Act.

A

Section 5 of the FTC Act prohibits "deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). To prevail, the Commission must show that a representation, omission, or practice is "likely to mislead consumers acting reasonably under the circumstances." *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (internal quotation marks omitted). This consumer-friendly standard does not require the Commission to provide "[p]roof of actual deception." *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979). Instead, it must show only that the "net impression" of the representation would be likely to mislead—even if such impression "also contains truthful disclosures." *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).

1

In this case, the Commission argues that Tucker violated § 5 because the Loan Note was likely to mislead borrowers about the terms of the loan. The top third of such Loan Note contained the so-called TILA box, which disclosed the "amount financed," the "finance charge," the "total of payments," and the "annual percentage rate." The "amount financed" portion of the box was the amount borrowed, and the "finance charge" was equal to 30 percent of the borrowed amount. The final two figures were calculated by summing the principal and the finance charge ("total of payments") and then determining the "annual percentage rate." By way of illustration, suppose that a customer wanted to borrow $300. The Loan Note's TILA box would state that the "amount financed" was $300, that the "finance charge" was $90, and that the "total of payments" was $390. The "annual percentage rate" would vary based on the date the first payment was due.

But the fine print *below* the TILA box was essential to understanding the loan's terms. This densely packed text set out two alternative payment scenarios: (1) the "decline-to- renew" option and (2) the "renewal" option. Beneath the TILA box, the Loan Note stated: "Your Payment Schedule will be: 1 payment of [the 'total of payments' number] . . . if you decline* the option of renewing your loan." The asterisk directed the reader to text five lines further down the page, which read: "To decline this option of renewal, you must select your payment options using the Account Summary link sent to your email at least three business days before your loan is due." Tucker would send this "Account Summary link" three days after the funds were disbursed. With this email, borrowers hoping to exercise the decline-to- renew

option had to navigate through an online customer-service portal, affirmatively choose to "change the Scheduled" payment, and agree to "Pay Total Balance." All of this had to be done "at least three business days" before the next scheduled payment. Thus, the borrower had to take *affirmative action* within a specified time frame if he hoped to pay only the amount listed in the TILA box as the "total of payments."

By contrast, the "renewal" option would end up costing a borrower significantly more. Importantly, renewing the loan did not require the borrower to take any affirmative action at all; it was the default payment schedule. On the third line below the TILA box, the Loan Note read: "If renewal is accepted you will pay the finance charge . . . only." And with each "renewal," the borrower would "accrue new finance charges"—that is, an additional 30-percent premium. After the fourth renewal, Tucker would begin to withdraw the "finance charge plus $50," and he would withdraw another such payment each subsequent period until the loan was paid in full.

To illustrate, consider again the example of the customer who wanted to borrow $300. The Loan Note's TILA box would indicate that his "total of payments" would be $390, equaling $300 in principal plus a $90 finance charge. But he would be required to pay much more than that, unless he took the affirmative steps to "decline" to renew the loan. Once again, these steps required him to wait three days after getting the cash, follow a link in a separate email, and agree at least three days before the due date to pay the full balance. If he failed to perform this routine, then he would owe yet another finance change (equaling another 30 percent of the borrower's remaining balance) at the next due date. And if he

simply let Tucker automatically withdraw the payments for the course of the loan, he would owe the $300 principal, plus *ten* separate finance charges, each equaling 30 percent of the borrower's remaining balance. Altogether, a borrower following the default plan would pay $975 instead of $390.

2

We agree with the Commission that the Loan Note was deceptive because it did not accurately disclose the loan's terms. Most prominently, the TILA box suggested that the value reported as the "total of payments"—described further as the "amount you will have paid after you have made the scheduled payment"—would equal the full cost of the loan. In reliance on this information, a reasonable consumer might expect to pay only that amount. But as we have described, under the default terms of the loan, a consumer would be required to pay much more. Indeed, under the terms that Tucker actually enforced, borrowers had to perform a series of affirmative actions in order to decline to renew the loan and thus pay only the amount reported in the TILA box.

The Loan Note's fine print does not reasonably clarify these terms because it is riddled with still more misleading statements. First, the explanation of the process of declining to renew the loan is buried several lines below where the option to decline is first introduced. Second, nothing in the fine print explicitly states that the loan's "renewal" would be the *automatic* consequence of inaction. Instead, it misleadingly says that such renewal must be "accepted," which seems to require the borrower to perform some affirmative action. Third, between the sentence that introduces the decline-to-renew option and the sentences that explain the costly

consequences of renewal, there is a long and irrelevant sentence about what happens if a pay date falls on a weekend or holiday. Thus, the fine print's oblique description of the loan's terms fails to cure the misleading "net impression" created by the TILA box.

3

Tucker suggests, however, that the Loan Note is not deceptive because it is "technically correct." But the FTC Act's consumer-friendly standard does not require only technical accuracy. In *Cyberspace*, we held that a solicitation was deceptive even though "the fine print notices . . . on the reverse side of the" solicitation contained "truthful disclosures." 453 F.3d at 1200. Indeed, *Cyberspace* held that it was irrelevant that "most consumers [could] understand the fine print on the back of the solicitation when that language [was] specifically brought to their attention." *Id.* at 1201. Just as in *Cyberspace*, consumers acting reasonably under the circumstances—here, by looking to the terms of the Loan Note to understand their obligations—likely could be deceived by the representations made there. Therefore, we agree with the Commission that the Loan Note was deceptive.

B

Tucker further contends that the district court erred because its narrow focus on the Loan Note fails to capture the "net impression" on consumers. The district court found that "any facts other than the terms of the Loan Note . . . and their presentation in the document are immaterial to a summary judgment determination." But according to Tucker, the court should have considered all of his loan disclosures and all of his communications regarding those disclosures.

Tucker's argument wrongly assumes that non-deceptive business practices can somehow cure the

deceptive nature of the Loan Note. The Act prohibits deceptive "acts *or* practices," 15 U.S.C. § 45(a)(1) (emphasis added), so it gives the Commission flexibility to bring suit either for particular misleading representations, or for generally deceptive business practices. *Cf. FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 243 (1972) ("Congress [did not intend] to confine the forbidden methods to fixed and unyielding categories." (citation omitted)). In this case, the Commission must show only that a specific "representation" was "likely to mislead." *Stefanchik*, 559 F.3d at 928; *see also Cyberspace*, 453 F.3d at 1200–01 (basing liability on deceptive solicitations without resorting to defendant's other practices); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496–97 (1st Cir. 1989) ("Each advertisement must stand on its own merits; even if other advertisements contain accurate, non-deceptive claims, a violation may occur with respect to the deceptive ads."). Under this standard, the district court's focus on the Loan Note—that is, on this particular deceptive "representation"—was perfectly permissible.

C

Tucker next argues that summary judgment was also inappropriate because he demonstrated a genuine issue of material fact by presenting affirmative evidence from which a jury could find in his favor. Tucker cites a host of evidence in support of this point, but only two of his arguments merit our attention.

First, Tucker claims that the Commission introduced evidence that "contradicted" its theory of deception because four deposed consumers "had not read the loan disclosures" and "understood the disclosures upon reading them at their depositions." Thus, Tucker argues that there is some evidence that

consumers may not have regularly *read* the supposedly deceptive Loan Note. And if customers were not likely to read the Loan Note in the first place, the argument goes, then it cannot be likely to deceive them.

But Tucker once again misunderstands the consumer- friendly standards of § 5 of the FTC Act. We have held that "[p]roof of actual deception is unnecessary to establish a violation," and thus Tucker can be liable if the Loan Note itself "possess[es] a tendency to deceive." *Trans World Accounts, Inc.*, 594 F.2d at 214. Thus, we held in *Cyberspace* that the terms of a solicitation alone were deceptive such that "no reasonable factfinder could conclude that the solicitation was not likely to deceive consumers acting reasonably under the circumstances." 453 F.3d at 1201. True enough, we also stated in *Cyberspace* that proof of actual deception is "highly probative," but we did so only to "bolster[]" our conclusion that the solicitation itself "created [a] deceptive impression." *Id.* at 1200–01. In this case, however, Tucker points to no evidence that consumers who *did* read the Loan Note understood its terms. Tucker therefore fails to show that a genuine issue of material fact exists.

Second, Tucker claims that the expert testimony offered by Dr. David Scheffman demonstrated an "absence of confusion or deception." Tucker's counsel retained Dr. Scheffman, who earned his doctorate in economics at the Massachusetts Institute of Technology, to "opine on whether the economic evidence regarding borrower behavior" was consistent with the Commission's theory of liability. He designed his analysis "to test for any material difference in the behavior of inexperienced consumers that would indicate their understanding of the loan terms was different from highly experienced consumers." In

other words, he wanted to determine whether first-time borrowers behaved like those who took out multiple loans. If first-time borrowers behaved just like the repeat borrowers, Dr. Scheffman reasoned, then the first-time borrowers could not have been misled about the loan terms. Because there was a "near- perfect . . . correlation between payoff behavior" among borrowers, Dr. Scheffman concluded that the data were "inconsistent with the allegation that borrowers were misled."

But Dr. Scheffman's reasoning begs the question. Consistent payoff patterns among classes of consumers show, at best, that the consumers were similarly aware of their obligations. While Dr. Scheffman concludes that first- time borrowers were just as well informed as the repeat ones, it is equally plausible that the repeat borrowers were just as confused as those taking out their first loans. As the district court noted, the expert's analysis simply assumed that repeat borrowers "plainly understood the loan terms." He did not, however, offer any evidence "that repeat borrowers across loan portfolios knew they were dealing with the same enterprise." To survive summary judgment, Tucker must identify some specific factual disagreement that could lead a fact-finder to conclude that the Loan Note was not likely to deceive. *See Stefanchik*, 559 F.3d at 929. Dr. Scheffman's testimony offers only speculative analysis that could cut either way. *See McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016) ("Arguments based on conjuncture or speculation are insufficient . . . ." (internal quotation marks omitted)).

Therefore, Dr. Scheffman's testimony does not raise a genuine issue of material fact.[4]

D

We conclude that the Loan Note was likely to deceive a consumer acting reasonably under the circumstances. We are therefore satisfied that the district court did not err in entering summary judgment against Tucker as to the liability phase.

III

Tucker next challenges the relief phase determination that he must pay the Commission $1.27 billion. He urges that the district court did not have the power to order equitable monetary relief under § 13(b) of the FTC Act. Alternatively, he argues that the order to pay $1.27 billion overstates his unjust gains.

A

Tucker contends that the Commission "improperly use[d] Section 13(b) to pursue penal monetary relief under the guise of equitable authority." After all, he points out, § 13(b) provides only that district courts may enter "injunction[s]." 15 U.S.C. § 53(b). According to Tucker, an order to pay

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[4] We need not address Tucker's objections that the admission of the Commission's consumer complaint database violated Federal Rule of Evidence 807 and Federal Rule of Civil Procedure 37. Such evidence was irrelevant to the district court's determination that the Loan Note itself was deceptive. Even if Tucker were correct, any error is harmless. *See Dowdy v. Metro. Life Ins. Co.*, 890 F.3d 802, 807 (9th Cir. 2018). Likewise, we need not address the Commission's alternative theory that Tucker is liable because he "independently violated the Truth in Lending Act." The finding of liability under § 5 of the FTC Act is independently sufficient to affirm the judgment against Tucker.

"equitable monetary relief" is not an injunction, so he concludes that the statute does not authorize the court's order.

Tucker's argument has some force, but it is foreclosed by our precedent. We have repeatedly held that § 13 "empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) (internal quotation marks omitted); *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) ("[T]he authority granted by section 13(b) . . . includes the power to order restitution."). Our precedent thus squarely forecloses Tucker's argument.

Tucker responds that we should revisit *Commerce Planet* in light of the Supreme Court's recent decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). In *Kokesh*, the Court determined that a claim for "disgorgement imposed as a sanction for violating a federal securities law" was a "penalty" within the meaning of the federal catch-all statute of limitations. 137 S. Ct. at 1639. Much like the equitable monetary relief at issue in this case, disgorgement in the securities-enforcement context is "a form of restitution measured by the defendant's wrongful gain." *Id.* at 1640 (citing Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. A, at 204 (2010)); *see also Commerce Planet*, 815 F.3d at 599 (describing restitution under § 13(b) as the power to "deprive defendants of their unjust gains"). The Court held that disgorgement orders are penalties because they "go beyond compensation, are intended to punish, and label defendants wrongdoers as a consequence of violating public laws." *Id.* at 1645 (internal quotation marks omitted).

Tucker suggests that *Kokesh* severs the line of reasoning that links "injunctions" to "equitable monetary relief." We said in *Commerce Planet*, for instance, that by "authorizing the issuance of injunctive relief," the statute "invoked the court's equity jurisdiction." 815 F.3d at 598 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)). Therefore, we concluded, § 13(b) "carries with it the inherent power to deprive defendants of their unjust gains from past violations, unless the Act restricts that authority." *Id.* at 599. Tucker contends, however, that *Kokesh*'s reasoning compels the conclusion that restitution under § 13(b) is in effect a penalty—not a form of equitable relief.

A three-judge panel may not overturn prior circuit authority unless it is "clearly irreconcilable with the reasoning or theory of intervening higher authority," *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc), and such threshold is not met here. First, *Kokesh* itself expressly limits the implications of the decision: "Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Kokesh*, 137 S. Ct. at 1642 n.3. Second, *Commerce Planet* expressly rejected the argument that § 13(b) limits district courts to traditional forms of equitable relief, holding instead that the statute allows courts "to award complete relief even though the decree includes that which might be conferred by a court of law." *Commerce Planet*, 815 F.3d at 602 (internal quotation marks omitted). Because *Kokesh* and *Commerce Planet* are not clearly irreconcilable, we remain bound by our prior interpretation of § 13(b).

B

Tucker next argues that the district court abused its discretion in calculating the amount of the award. Under our case law, we apply a burden-shifting framework. *See Commerce Planet*, 815 F.3d at 603–04. The Commission "bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gain," which is measured by "the defendant's net revenues . . . , not by the defendant's net profits." *Id.* at 603. If the Commission makes such showing, the defendant must show that the Commission's approximation "overstate[s] the amount of the defendant's unjust gains." *Id.* at 604. Any "risk of uncertainty at this second step falls on the wrongdoer." *Id.* (internal quotation marks omitted).

Tucker argues that the $1.27 billion judgment overstates his unjust gains. The court arrived at such figure based on the calculations of one of the Commission's analysts. The analyst relied on data from Tucker's loan management software to determine how much money Tucker received from consumers in excess of the principal disbursed plus the initial 30-percent finance charge. This surplus represented the amount of money that Tucker had received over-and- above the amount disclosed in the TILA box, which the Commission argued represented Tucker's ill-gotten gains. The district court agreed, so the final sum it ordered Tucker to pay was calculated as follows: the sum of each consumer's payments to Tucker, minus the sum of each consumer's "total of payments" as disclosed in the TILA box, and minus certain other payments already made or to be made by other defendants.

Tucker responds that the district court erred because it ignored evidence of non-deception that

should have reduced the award. Once again, Tucker reiterates the argument that repeat customers could not have been misled by the loan's terms. Therefore, he concludes, these customers should have been excluded from the calculation. As we said above, however, Tucker has not pointed to specific evidence that indicates one way or another whether repeat customers were actually deceived. *See supra* Part II.C. Further, Tucker has not offered "a reliable method of quantifying what portion of the consumers who purchased [the product] did so free from deception." *Commerce Planet*, 815 F.3d at 604. Therefore, the district court did not abuse its discretion when calculating the amount it ordered Tucker to pay.[5]

IV

Finally, Tucker challenges the district court's decision to enjoin him from engaging in consumer lending. The text of § 13(b) limits injunctive relief to "proper cases," 15 U.S.C. § 53(b), and Tucker argues that the "proper case" language confines district courts to cases of "routine fraud." But we rejected this very argument in *FTC v. Evans Products Co.*, 775 F.2d

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[5] The district court's relief order also required Kim Tucker and Park 269 to disgorge more than $27 million because Tucker had "diverted millions of dollars" from himself to them. Kim Tucker and Park 269 challenge this order. We have held that the FTC Act gives district courts the power to reach fraudulently obtained property "in the hands of any subsequent holder," unless "the transferee purchases ill-gotten assets for value, in good faith, and without actual or constructive notice of the wrongdoing." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141– 42 (9th Cir. 2010) (internal quotation marks omitted). Here, the district court found that Kim Tucker and Park 269 did not provide any consideration for their money transfers from Tucker. They do not dispute this core finding, and therefore we hold that the district court did not err when it ordered Kim Tucker and Park 269 to disgorge ill-gotten gains.

1084, 1086–87 (9th Cir. 1985). We thus cannot find fault with the district court's decision to enter a permanent injunction.

V

The judgment of the district court is **AFFIRMED**.

APPENDIX

The following is an example of the Loan Note:

LOAN NOTE AND DISCLOSURE

Borrower's Name: ████████ **Date: 08/03/2011 ID#: OneClickCash-1953793314**

Parties: In this Loan Note and Disclosure ("Note") you are the person named as Borrower above. "We" OneClickCash are the lender (the "Lender").
All references to "we", "us" or "ourselves" mean the Lender. Unless this Note specifies otherwise or unless we notify you to the contrary in writing, all notices and documents you are to provide to us shall be provided to OneClickCash at the fax number and address specified in this Note and in your other loan documents.
The Account: You have deposit account, No. ████ ("Account"), at ████████ ("Bank"). You authorize us to effect a credit entry to deposit the proceeds of the Loan (the Amount Financed indicated below) to your Account at the Bank.
DISCLOSURE OF CREDIT TERMS: The information in the following box is part of this Note.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate (e) **782.14%**	**FINANCE CHARGE** The dollar amount the credit will cost you. **$150.00**	**Amount Financed** The amount of credit provided to you or on your behalf. **$500.00**	**Total of Payments** The amount you will have paid after you have made the scheduled payment. **$650.00**

Your **Payment Schedule** will be: 1 payment of **$650.00** due on **2011-08-18** , if you decline* the option of renewing your loan. If your pay date falls on a weekend or holiday and you have direct deposit, your account will be debited on the business day prior to your normal pay date. If renewal is accepted you will pay the finance charge of $150.00 only, on 2011-08-18 You will accrue new finance charges with every renewal of your loan. On the due date resulting from a fourth renewal and every renewal due date thereafter, your loan must be paid down by $50.00. This means your Account will be debited the finance charge plus $50.00 on the due date. This will continue until your loan is paid in full. *To decline the option of renewal, you must select your payment options using the Account Summary link sent to your email at least three business days before your loan is due. **Security:** The loan is unsecured.
Prepayment: You may prepay your loan only in increments of $50.00. If you prepay your loan in advance, you will not receive a refund of any Finance Charge.(e) The Annual Percentage Rate is estimated based on the anticipated date the proceeds will be deposited to or paid on your account, which is 8-4-2011.
Itemization Of Amount Financed of $500.00; Given to you directly: $500.00; Paid on your account $0
See below and your other contract documents for any additional information about prepayment, nonpayment and default.

Promise To Pay: You promise to pay to us or to our order and our assignees, on the date indicated in the Payment Schedule, the Total of Payments, unless this Note is renewed. If this Note is renewed, then on the Due Date, you will pay the Finance Charge shown above. This Note will be renewed on the Due Date unless at least three Business Days Before the Due Date either you tell us you do not want to renew the Note or we tell you that the Note will not be renewed. Information regarding the renewal of your loan will be sent to you prior to any renewal showing the new due date, finance charge and all other disclosures. As used in the Note, the term "Business Day" means a day other than Saturday, Sunday or legal holiday, that OneClickCash is open for business. This Note may be renewed four times without having to make any principal payments on the Note. If this Note is renewed more than four times, then on the due date resulting from your fourth renewal, and on the due date resulting from each and every subsequent renewal, you must pay the finance charge required to be paid on that due date and make a principal payment of $50.00. Any payment due on the Note shall be made by us effecting one or more ACH debit entries to your Account at the Bank. You authorize us to effect this payment by these ACH debit entries. You may revoke this authorization at any time up to three Business Days prior to the date any payment becomes due on this Note. However, if you timely revoke this authorization, you authorize us to prepare and submit a check drawn on your Account to repay your loan when it comes due. If there are insufficient funds on deposit in Your Account to effect the ACH debit entry or to pay the check or otherwise cover the Loan payment on the due date, you promise to pay Us all sums You owe by another form of payment other than personal check. We do not accept personal checks, however, if You send Us a check, You authorize Us to perform an ACH debit on that Account in the amount specified.

O'SCANNLAIN, Circuit Judge, specially concurring, joined by BEA, Circuit Judge:

I write separately to call attention to our circuit's unfortunate interpretation of the Federal Trade Commission Act. We have construed § 13(b)'s authorization of "injunction[s]" to empower district courts to compel defendants to pay monetary judgments styled as "restitution." *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

I respectfully suggest that such interpretation is no longer tenable.

Because the text and structure of the statute unambiguously foreclose such monetary relief, our invention of this power wrests from Congress its authority to create rights and remedies. And the Supreme Court's recent decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), undermines a premise in our reasoning: that restitution under § 13(b) is an "equitable" remedy at all. Because our interpretation wrongly authorizes a power that the statute does not permit, we should rehear this case en banc to relinquish what Congress withheld.

I

A

I would begin (and end) with the statute's text. Section 13(b) states that "the Commission may seek, and after proper proof, the court may issue, a permanent *injunction*." 15 U.S.C. § 53(b) (emphasis added). An injunction is "a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing." 2 J. Story,

Commentaries on Equity Jurisprudence § 1181, at 549 (14th rev. ed. 1918); *see also* 1 D. Dobbs, *Law of Remedies* § 1.1, at 7 (2d ed. 1993) (similar). Injunctions might either "prevent violation of rights," or compel the defendant to "restore the plaintiff to rights that have already been violated." 1 Dobbs, § 2.9(2), at 227. But an order to pay money "as reparation for injury resulting from breach of legal duty" is essentially a *damages* remedy—not a form of "specific relief" like an injunction. *Bowen v. Massachusetts*, 487 U.S. 879, 913–14 (1988) (Scalia, J., dissenting). Indeed, any other interpretation would be absurd: if "injunction" included court orders to pay monetary judgments, then "a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002). If such text were not plain enough, the rest of § 13(b) reaffirms that "injunction" means only "injunction." The statute states, for example, that the Commission must believe that a person "is violating" or "is about to violate" the Act in order to request injunctive relief. 15 U.S.C. § 53(b)(1). Thus, § 13(b) anticipates that a court may award relief to prevent an *ongoing* or *imminent* harm—but not to deprive a defendant of "unjust gains from *past* violations." *Commerce Planet*, 815 F.3d at 599 (emphasis added). Indeed, § 13(b) expressly instructs courts to consider the traditional prerequisites for preliminary injunctive relief. The court must "weigh[] the equities," consider the Commission's "likelihood of ultimate success," and determine whether the preliminary injunction is "in the public interest." 15 U.S.C. § 53(b); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (listing these requirements along with "irreparable harm"). Further, the statute expressly dispenses with

the normal rule that a plaintiff must post a bond as security before the district court will grant preliminary relief. *Compare* 15 U.S.C. § 53(b) ("[A] preliminary injunction may be granted without bond . . . ."), *with* Fed. R. Civ. P. 65(c) (requiring plaintiffs seeking preliminary injunctions to give "security"). Section 13(b) thus not only provides for injunctions, but it also references the constellation of legal rules that make sense only with reference to such relief.

Further, "injunction" cannot reasonably be interpreted to authorize *other* forms of equitable relief, because Congress would have said so if it did. For example, the Employee Retirement Income Security Act (ERISA) authorizes litigants to seek *both* "to enjoin any act or practice" *and* "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). Indeed, in the Dodd-Frank Act, Congress felt compelled to amend the Commodity Exchange Act to allow courts to impose "equitable remedies including . . . restitution . . . [and] disgorgement of gains"—even though the statute *already* allowed it to impose "a permanent or temporary injunction." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 744, 124 Stat. 1376, 1735 (2010) (codified at 7 U.S.C. § 13a-1). Similar examples abound, as a brief glance through the Statutes at Large shows. *See* Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, § 201, 123 Stat. 1632, 1639 (codified at 15 U.S.C. § 1639a) (stating that certain persons "shall not be subject to any injunction, stay, or other equitable relief"); Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 315, 122 Stat. 4145, 4167 (codified at 38 U.S.C. § 4323(e)) ("The court shall use . . . its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders"); Class Action Fairness Act of

2005, Pub. L. No. 109-2, § 3(a), 119 Stat. 4, 6 (codified at 28 U.S.C. § 1712) ("equitable relief, including injunctive relief").

If Congress could have used a broader phrase but "chose instead to enact more restrictive language," then "we are bound by that restriction." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991). Interpreting § 13(b)'s authorization of "injunctions" to empower courts to award so-called equitable monetary relief is, to say the least, strained.

B

1

Such sensible interpretation—that "injunction" means only "injunction"—makes good sense in the context of the "overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2490 (2015) (internal quotation marks omitted). While § 13(b) empowers the Commission to stop *imminent* or *ongoing* violations, an entirely different provision of the FTC Act allows the Commission to collect monetary judgments for *past* misconduct. In particular, § 19 authorizes the Commission to seek "such relief as the court finds necessary to redress injury to consumers," which "may include, but shall not be limited to, rescission or reformation of contracts, the *refund of money or return of property*, the payment of *damages*, and public notification respecting . . . [such] unfair or deceptive act or practice." 15 U.S.C. § 57b(b) (emphasis added).

Read together, §§ 13(b) and 19 give the Commission two complementary tools—one forward-looking and preventive, the other backward-looking and remedial—to satisfy its statutory mandate. Injunctive relief in § 13(b) therefore functions as a simple stop-gap measure that allows the Commission to act quickly to prevent harm. Indeed, the

congressional findings regarding § 13(b) state that the "purpose of th[e] Act" is to "[e]nsure prompt enforcement of [the FTC Act] by granting statutory authority . . . to seek preliminary injunctive relief." Trans-Alaska Pipeline Authorization Act, § 408(b), Pub. L. No. 93-153, 87 Stat. 576, 591 (1973). Buttressing § 13(b)'s preventive relief, § 19 allows the Commission later to seek retrospective relief to punish or to remediate *past* violations. 15 U.S.C. § 57b; *see FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 603 (1993) ("The redress remedy [in § 19] relates to past conduct"). Our misguided interpretation of § 13(b), therefore, fundamentally misunderstands § 13(b)'s function within the FTC Act's "overall statutory scheme." *Burwell*, 135 S. Ct. at 2490.

Worse still, awarding monetary relief under § 13(b) circumvents § 19's procedural protections. Before the Commission can collect ill-gotten gains under § 19, it must surmount one of two procedural hurdles. First, it may prove to the district court that the defendant "violate[d] any rule" promulgated through the Commission's rulemaking procedures. 15 U.S.C. § 57b(a)(1); *see also id.* § 57a (granting the Commission's rulemaking authority). If the Commission has not promulgated such a rule, however, it must first pursue an administrative adjudication, issue a "final cease and desist order," and then prove to the district court that the defendant's conduct was such that a "reasonable man" would know it was "dishonest or fraudulent." *Id.* § 57b(a)(2); *see also id.* § 45 (granting the Commission authority to issue cease and desist orders). Thus, before the Commission can make someone pay, it must have already resorted to the FTC Act's administrative processes.

Doubtless, Congress included § 19's procedural rules with good reason. "No statute yet known pursues its stated purpose at all costs," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (alterations and internal quotation marks omitted), and § 19 prevents the Commission from imposing significant monetary burdens simply by bringing a lawsuit in federal court. Instead, § 19 requires the Commission either to promulgate rules that define unlawful practices *ex ante*, or first to prosecute a wrongdoer in an administrative adjudication that culminates in a cease and desist order. Indeed, the very same statute that included § 19 significantly expanded both the Commission's rulemaking authority and its authority to seek civil penalties through § 5's cease-and-desist procedures. *See* Magnuson- Moss Warranty—Federal Trade Commission Improvement Act, tit. II, §§ 202, 205, Pub. L. No. 93-637, 88 Stat. 2183, 2193, 2200 (1975) (codified as amended 15 U.S.C. §§ 45, 57a). Our circuit's flawed interpretation of § 13(b) in *Commerce Planet* therefore wrongly allows the Commission to avoid the administrative processes that Congress directed it to follow.

2

Commerce Planet's attempt to reconcile its interpretation of § 13(b) with § 19 is entirely unpersuasive. The decision suggests that § 19 "precludes a court from awarding *damages*" under § 13(b), but "does not eliminate the court's inherent equitable power to order payment of *restitution*." 815 F.3d at 599 (emphasis added). But *Commerce Planet*'s interpretation of § 13(b) fails to give unique effect to the series of remedies *besides* damages that § 19 authorizes. Specifically, § 19 expressly allows federal courts to impose certain equitable remedies like

"refund of money or return of property" and the "rescission or reformation of contracts." 15 U.S.C. § 57b(b); *see* 1 D. Dobbs, § 4.3(1), at 587 (characterizing "rescission in equity" and "reformation of instruments" as "important equitable remedies"); Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 555–58 (2016) (same). According to *Commerce Planet*, however, these very same remedies were *already available* under § 13(b) when Congress subsequently enacted § 19.[1] Because *Commerce Planet*'s interpretation renders § 19 almost entirely redundant, it violates the "cardinal rule that, if possible, effect shall be given to every clause and part [of] a statute." *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932).

II

I would end the inquiry here, for "[w]hen the words of a statute are unambiguous," the "judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal quotation marks omitted). But even assuming *arguendo* that the word "injunction" authorizes "equitable relief," that still does not answer the question.

The Supreme Court has held that statutes authorizing equitable relief limit federal courts only

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[1] Congress passed § 13(b) in 1973 and § 19 in 1975. *See* Trans-Alaska Pipeline Authorization Act, § 408(F), Pub. L. No. 93-153, 87 Stat. 576, 592 (1973) (codified as amended 15 U.S.C. § 53(b)); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, tit. II, § 206, Pub. L. No. 93-637, 88 Stat. 2183, 2193 (1975) (codified as amended 15 U.S.C. § 57b); *see also* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions*, 41 Am. U. L. Rev. 1139 (1992) (reviewing the legislative history of §§ 13(b) and 19).

"to those categories of relief that were *typically* available in equity during the days of the divided bench." *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016) (internal quotation marks omitted).[2] And as the Supreme Court has noted, "not all relief falling under the rubric of restitution is available in equity." *Great-West*, 534 U.S. at 212; *see also* Restatement (Third) of Restitution and Unjust Enrichment § 4, cmt. a (2011) ("The most widespread error is the assertion that a claim in restitution or unjust enrichment is by its nature equitable rather than legal."). In this case, because restitution under § 13(b) is not a form of equitable relief, I would conclude that we lack the authority to impose it.

A

Under the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), restitution under § 13(b) would appear to be a penalty—not a form of equitable relief. In *Kokesh*, the Court held that SEC disgorgement, which it described as "a form of restitution measured by the defendant's wrongful gain," is a *penalty*. *Id.* at 1640 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51, cmt. a, at 204 (2011)). The Court described three characteristics that render disgorgement a penalty.

[2] These cases have arisen because the Court must interpret ERISA's authorization of "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). *See generally* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 1014–23 (2015) (discussing the Court's use of history to demarcate equitable and legal remedies). But "statutes addressing the same subject matter" should be construed *in pari materia*, *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315 (2006), so the Court's analysis in these ERISA cases should apply whenever we must determine which equitable remedies a statute authorizes.

First, it "is imposed by the courts as a consequence for violating . . . public laws." *Id.* at 1643. Second, disgorgement is "punitive" rather than "remedial." *Id.* at 1644. With respect to this second characteristic, the Court elaborated that it is "ordered without consideration of a defendant's expenses that reduced the amount of illegal profit," so it "does not simply restore the status quo [but] leaves the defendant worse off." *Id.* at 1644–45. Third, disgorgement is "not compensatory" because some "funds are dispersed [sic] to the United States Treasury." *Id.* at 1644.

Restitution under § 13(b) shares each of these three characteristics with SEC disgorgement. First, in *Commerce Planet*, we noted that the Commission sought "to enforce a regulatory statute like § 13(b)," rather than to resolve a "private controversy." 815 F.3d at 602 (internal quotation marks omitted). And like suits for disgorgement in *Kokesh*, suits under § 13(b) "may proceed even if victims do not support or are not parties to the prosecution." *Kokesh*, 137 S. Ct. at 1643. Second, restitution under § 13(b) is "punitive" rather than "remedial." *Id.* at 1643–44. *Commerce Planet* holds that the wrongdoer's unjust gains must be measured by "net revenues" rather than "net profits." 815 F.3d at 603. Thus, restitution under § 13(b)—just like SEC disgorgement—"does not simply restore the status quo [but] leaves the defendant worse off." *Kokesh*, 137 S. Ct. at 1645. Third, it is not compensatory. Funds can be paid to victims, but they need not be. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 n.34 (1994). In this case, for instance, the Commission was instructed to give refunds to consumers, then to use any remaining money in a way "reasonably related to the Defendants' practices alleged in the complaint," then to deposit the balance in "the U.S. Treasury as disgorgement."

Restitution under § 13(b) therefore "bears all the hallmarks of a penalty." *Kokesh*, 137 S. Ct. at 1644. As the Supreme Court has already stated, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Tull v. United States*, 481 U.S. 412, 422 (1987). Because penalties were not "available in equity during the days of the divided bench," *Montanile*, 136 S. Ct. at 657 (internal quotation marks omitted), we should not be able to impose such penalty here—even if we (wrongly) assume that § 13(b)'s use of "injunction" authorizes "equitable relief."

B

Nor does restitution under § 13(b) have much resemblance to equitable forms of restitution. Historically, courts sitting in equity could impose a series of distinct restitutionary remedies, including the "constructive trust," the "equitable lien," "subrogation," "accounting for profits," "rescission in equity," and "reformation of instruments." 1 Dobbs, § 4.3(1), at 587; *see also* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 553–57 (2016) (similar). The general thread connecting these remedies was that they did not "impose *personal liability* on the defendant, but . . . restore[d] to the plaintiff *particular* funds or property in the defendant's possession." *Great- West*, 534 U.S. at 214 (emphasis added). The constructive trust, for instance, is "only used when the defendant has a legally recognized right in a particular asset"—e.g., a "trademark" or a "fund of money like a bank account." 1 Dobbs, § 4.3(2), at 591. But if such property is "dissipated," then a plaintiff may not "enforce a constructive trust of or an equitable lien upon other property of the defendant." *Great- West*, 534 U.S. 213–

14 (quoting Restatement of Restitution § 215, cmt. a, at 867 (1937)) (brackets omitted).

Commerce Planet, however, refused to limit restitution under § 13(b) to the recovery of "identifiable assets in the defendant's possession." 815 F.3d at 601. But without such a tracing requirement, the remedy authorized by *Commerce Planet* loses its resemblance to the traditional forms of equitable restitution. In this case, for instance, the Commission's complaint makes no effort to identify a specific fund that the defendant wrongfully obtained. Therefore, the requested relief is indistinguishable from a request "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money"— essentially an "action[] at law." *Great-West*, 534 U.S. at 213 (quoting Restatement of Restitution § 160, cmt. a, at 641–42 (1937)).

The only traditional equitable remedy to which restitution under § 13(b) is plausibly analogous is the "accounting for profits." Such remedy "order[s] an inquiry into the defendant's handling of money or property, usually to ascertain the defendant's gains so they may be paid to . . . the plaintiff." Bray, *The System of Equitable Remedies*, *supra*, at 553; *see also Great-West*, 534 U.S. at 214 n.2 (discussing accounting for profits). An accounting for profits also dispenses with the requirement that the plaintiff "seek a particular *res* or fund of money." 1 Dobbs, § 4.3(1), at 588. Nevertheless, restitution under § 13(b) is still inapposite. Generally, a suit for an accounting was proper only if (1) "the legal remedy was inadequate because of the complexity of the accounts" or (2) "there was a pre-existing equitable duty to account" because of some fiduciary relationship. 1 Dobbs, § 4.3(5), at 609; *see also* 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1421, at 1077–78 (5th ed. 1941).

Neither is true here: the borrowers defrauded by Tucker could establish precisely how much they lost simply by producing bank statements, and the defendant was not in a "fiduciary relationship" with such borrowers. More fundamentally, however, the Commission cannot possibly claim that it seeks to recover "monies owed by the fiduciary or other wrongdoer . . . which in equity and good conscience belong[] to the *plaintiff*"—here, the Commission. 1 Dobbs, § 4.3(b), at 608 (emphasis added). In sum, restitution under § 13(b) bears little resemblance to historically available forms of equitable relief, and therefore we should lack the authority to impose it.

C

Commerce Planet wholly avoided the historical analysis required by cases like *Great-West* and *Montanile*. Relying on the Supreme Court's decision in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), we reasoned that § 13(b)'s use of the word "injunction" invoked the "the court's equity jurisdiction." 815 F.3d at 598. Such equity jurisdiction, we continued, brought with it "all the inherent equitable powers of the District Court" to afford "complete rather than truncated justice." *Id.* at 598–99 (internal quotation marks omitted). According to *Commerce Planet*, then, § 13(b) granted a broader set of powers than what is authorized in statutes (like ERISA) that use the phrase "other appropriate equitable relief." *Id.* at 602. Thus, we concluded that the "interpretive constraints" that guided the Supreme Court in cases like *Great-West* and *Montanile* did not control our construction of § 13(b). *Id.*

But such reasoning conflicts with the Supreme Court's repeated admonitions that the equitable powers of federal courts must be hemmed in by

tradition. For instance, in *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, the Court interpreted the scope of the equitable jurisdiction of the federal courts under the Judiciary Act of 1789. 527 U.S. 308 (1999). There, the Supreme Court squarely rejected the dissenting Justices' argument that the "grand aims of equity" allowed "federal courts [to] rely on their flexible jurisdiction in equity to protect all rights and do justice to all concerned." *Id.* at 342 (Ginsburg, J., dissenting) (internal quotation marks omitted). In "the federal system," the majority reasoned, "that flexibility is confined within the broad boundaries of traditional equitable relief." *Id.* at 322. Indeed, the Court has reiterated similar concerns in other recent cases. *E.g.*, *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) ("Relief in redistricting cases is fashioned in the light of well-known principles of equity." (internal quotation marks omitted)); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006) ("[Equitable] discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards."). Such cases show that we may not simply incant "equity" and thereby conjure the boundless power to afford "complete rather than truncated justice."

III

I acknowledge that several other federal courts have agreed with our circuit's interpretation of § 13(b), but their numbers do not persuade me that they are correct on the law, especially in light of *Kokesh*. The only decisions that engage with the issue at any length rely on the same faulty reasoning as *Commerce Planet*. *See FTC v. Ross*, 743 F.3d 886, 890– 92 (4th Cir. 2014); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468–70 (11th Cir. 1996); *FTC v. Security Rare Coin &*

Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571–72 (7th Cir. 1989).[3] But none of these decisions cogently explains how restitution under § 13(b) fits with § 19. None undertakes the historical analysis that *Montanile* and *Great-West* seem to require. And in any event, the Court's decision in *Kokesh*— which casts serious doubt on restitution's equitable pedigree—postdates every single one of them. These past errors, even if common, do not justify our continued disregard of the statute's text and the Supreme Court's related precedent.

IV

Just last year, Justice Kennedy explained in *Ziglar v. Abbasi* that the Supreme Court once "followed a different approach to recognizing implied causes of action than it follows now." 137 S. Ct. 1843, 1855 (2017). Under this "*ancien regime*," the Court described, it was assumed "to be a proper judicial function to provide such remedies as [were] necessary to make effective a statute's purpose." *Id.* (internal quotation marks omitted). Since those days, however,

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[3] The remaining decisions uncritically adopt the analysis of the other federal courts. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005). And though the Fifth Circuit reasoned that § 13(b) invoked the district court's "inherent equitable jurisdiction," the actual remedy in the case was an order to place assets into an escrow account "to preserve the status quo" and "assure the possibility of complete relief following administrative adjudication." *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 716–21 (5th Cir. 1982). Such an order is quite unlike the order to pay a sum of money as restitution, so it says little about the question here.

the Court has "adopted a far more cautious course before finding implied causes of action." *Id.* at 1855. Under *Ziglar*, if "a party seeks to assert an implied cause of action under the Constitution itself" or "under a federal statute, separation-of- powers principles are or should be central to the analysis." *Id.* at 1857. So too here, the principle that must guide our analysis is that Congress—not the courts—should dictate rights and remedies in our federal system. *See id.* ("The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress." (internal quotation marks and citation omitted)); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create . . . a private remedy.").

Heedless of such instruction, we have implausibly construed the word "injunction" in § 13(b) to authorize the extensive power to order defendants to repay ill-gotten gains—never mind that such interpretation makes nonsense out of § 19, and never mind that it ignores the Court's statements that our equitable powers must be hemmed in by tradition. I submit that our interpretation of § 13(b) is thus an impermissible exercise of judicial creativity, and it contravenes the basic separation-of-powers principle that leaves to Congress the power to authorize (or to withhold) rights and remedies. Our decision in *Commerce Planet* is therefore a relic of that *ancien regime* that the Court over the last few decades has expressly and repeatedly repudiated.

We should rehear this case en banc to revisit *Commerce Planet* and its predecessors.

BEA, Circuit Judge, specially concurring:

I concur in the opinion because our precedent[1] compels me to, but I write separately to acknowledge that the question whether something is "likely to deceive" is inherently factual and should not be decided at the summary judgment stage.

Summary judgment is proper only when there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A dispute of a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. In other words, in this case, to affirm the district court's grant of summary judgment, we must conclude from the proofs presented that no reasonable juror could find other than that a reasonable consumer would likely be deceived by the Loan Note. This is difficult to do when the whole of the Loan Note is read. It is undisputed that a careful reading of the Loan Note and its fine print reveals the automatic renewal feature, whereby borrowers' loans would be automatically renewed unless they navigated to a link sent to their email and chose to pay their total balance. Because the Loan Note includes truthful disclosures, we can say it is "likely to deceive" as a matter of law only by positing two scenarios: (1) it is unreasonable as a matter of law to expect the average consumer to read all the words of the Loan Note, including the fine print, or (2) as a matter of law, it is unreasonable to expect the average consumer to understand all the words of the Loan Note in the manner in which they are displayed.

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[1] *See FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).

As to the first point, I know of no authority that says consumers need not read the fine print of their contracts; such a holding would certainly imperil the validity of many insurance contracts. And as to the second point, to say it is unreasonable to expect the average consumer to understand the words of the Loan Note in the manner in which they are displayed, we would have to recognize either that the three judges of this panel are better text readers than is the average consumer or that judges are not average consumers. I don't know of any authority for recognizing either assertion.

Indeed, we, a panel of three judges, have read and understood the terms of the Loan Note. We have not been deceived. Yet, we hold that the Loan Note is likely to deceive the average consumer *as a matter of law*.

Under this court's precedent, I accept that we may decide that the Loan Note is deceptive as a matter of law under § 5 of the FTC Act. *See FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006). What is determinative under *Cyberspace* is whether the "net impression" of the questioned text is likely to deceive. *Id.* This rule seems to require a judge consciously to blur his eyes as to the actual print to gain an "impression," or perhaps to see the print as French impressionist masters of the late Nineteenth Century saw objects. But whether we are guided by impressions from words or words themselves, *Cyberspace* defies logic when the words are actually understood by the judge to state something other than the "net impression" that is claimed "likely to deceive."

If something is "likely to deceive," it means it will more probably than not deceive. To predict what is "likely" to happen is to predict an event. An event is a fact, yet to occur. It did not occur when we read the

Loan Note. I am at a loss to understand how we can find it would ineluctably occur in the case of an average reasonable consumer. It seems the event may occur or may not occur. If so, whether it occurs in every case can be disputed. Disputed factual questions are reserved for juries, not for district judges acting alone nor for a panel of appellate judges. Thus, while our precedent obliges me to concur in this case, I think our precedent is wrong. Courts should reserve questions such as whether the Loan Note is "likely to deceive" for the trier of fact.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 2:08-cv-00620-APG-GWF

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PUBLISHERS BUSINESS SERVICES, INC., *et al.*;

Defendants.

ORDER (1) GRANTING FEDERAL TRADE COMMISSION'S MOTION FOR JUDGMENT AND (2) DENYING AS MOOT THE PARTIES' MOTIONS TO EXCLUDE EXPERTS

(ECF Nos. 297, 312, 315)

The Federal Trade Commission (FTC) filed this enforcement action seeking injunctive and other equitable relief based on the defendants' unfair and deceptive practices when selling magazine subscriptions, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310. Judge Philip Pro entered summary judgment in favor of the FTC on liability and issued a permanent injunction. ECF Nos. 151, 152. He also awarded $191,219.00 in equitable relief against some of the defendants. ECF No. 248. The FTC appealed the monetary award and the Ninth Circuit reversed and remanded for a recalculation of monetary equitable relief. ECF No. 266. Following Judge Pro's retirement, the case was assigned to me. ECF No. 273.

The parties have briefed their respective positions on the proper amount of monetary equitable relief. They also move to exclude each other's experts. I award monetary equitable relief in favor of the FTC and against defendants Publishers Business Services, Inc.; Ed Dantuma Enterprises, Inc.; Edward Dantuma; Brenda Dantuma Schang; Dries Dantuma; Dirk Dantuma; and Jeffrey Dantuma in the amount of $23,773,147.78.

I. BACKGROUND

The facts are laid out extensively in the summary judgment order. ECF No. 151. In brief, the defendants operated a magazine subscription service. The defendants would telephonically contact individuals at their place of business and tell them that they would get a "surprise" if they participated in a survey. The surprise was that the defendants were selling the consumer magazine subscriptions. The full details of the transaction were spread out over three stages: the initial call with the sales representative, who then transferred the consumer to a shift supervisor, and a later verification call. The transaction was presented in a confusing and misleading manner by fast-talking sales representatives, resulting in a net impression that the consumer was receiving free magazines while having to pay only a nominal shipping and handling fee. In fact, the consumer was agreeing to pay hundreds of dollars in magazine subscription fees. At summary judgment, these practices were found as a matter of law to create a net impression likely to mislead the consumer in a material way.

In addition to the deceptive initial sales practices, the defendants also engaged in misleading and abusive collections practices when consumers refused to pay. The defendants would falsely tell consumers their accounts could not be canceled because the

defendants had already paid the publishers for the full subscription when in fact the defendants had not done so. They also sent misleading collection letters from their "legal department" even though they had no legal department. Finally, the defendants made harassing and threatening phone calls.

Judge Pro entered summary judgment in favor of the FTC on liability and issued a permanent injunction. ECF Nos. 151, 152. The parties then presented evidence regarding monetary equitable relief during a multi-day evidentiary hearing. ECF Nos. 239-41, 252-53, 255. Judge Pro ruled that the FTC had not shown that complete disgorgement of profits was necessary to redress consumer injury. ECF No. 248 at 3. He considered full reimbursement to complaining customers but concluded it would be impossible or impracticable to locate and reimburse those customers. *Id.* at 3-4. He thus concluded disgorgement of net revenues the defendants received as a result of their violations was the proper remedy, and he adopted the analysis of the defendants' expert, Dr. Gregory Duncan, to impose monetary equitable relief in the amount of $191,219.00. *Id.* at 4. Finally, Judge Pro ruled that there was insufficient evidence to hold defendants Persis Dantuma, Brenda Dantuma Schang, Dirk Dantuma, and Jeffrey Dantuma individually liable. *Id* He therefore entered judgment in the amount of $191,219.00 against defendants Publishers Business Services, Inc.; Ed Dantuma Enterprises, Inc.; Edward Dantuma; and Dries Dantuma. *Id.* at 4-5.

The FTC appealed the monetary award and the Ninth Circuit reversed and remanded. ECF No. 266. As to individual liability, the Ninth Circuit directed that individual liability be imposed on Dirk, Brenda, and Jeff, as well as Edward and Dries. *Id.* at 8. As to

the amount of monetary relief, the Ninth Circuit ruled that Judge Pro "applied an incorrect legal standard when [he] focused on the defendants' gain rather than the loss to the consumers." *Id.* at 3. Judge Pro also erred by relying on the fact that it may be impossible to locate and reimburse individual customers. *Id.* at 4.

The Ninth Circuit found further error in the reliance on the defendants' expert, Dr. Duncan, because his report was based on two flawed assumptions. *Id.* at 5. First, Duncan assumed most customers heard all the terms of the magazine subscriptions so they were not misled. *Id.* But the defendants' "fraud . . . was not simply the failure to disclose all pertinent terms." *Id.* Rather, they violated Section 5 "by the misrepresentations that launched the process, among other reasons." *Id.* Second, Duncan assumed the magazine subscriptions were not valueless. *Id.* But the Ninth Circuit stated this "assumption is not relevant even if true" because restitution may be appropriate where the consumer injury "arises out of misrepresentations made in the sales process, which lead to a tainted purchasing decision." *Id.* at 5-6 (quotation omitted). Thus, consumers are entitled to a full refund where, as here, the "fraud is in the selling, not in the value of the thing sold . . . ." *Id.* (quotation omitted).

The Ninth Circuit vacated the award and remanded for recalculation. *Id.* at 6. In doing so, the Ninth Circuit stated that the court "should base its calculation on the injury to the consumers, not on the net revenues received by defendants." *Id.* But "[t]hat does not mean that the district court must accept the calculation proposed by the FTC":

> PBS has argued, for example, that a customer who renewed subscriptions necessarily knew the actual terms of the transaction at the time

> of renewal. A similar argument was made regarding customers who added on to a subscription order. The district court may consider these and other arguments in determining the appropriate amount of damages to be awarded.

Id.

Following remand, the parties attempted to settle, and when that failed they engaged in another round of expert discovery and briefing on the issue of monetary equitable relief. In relation to that briefing, the FTC moves to exclude the defendants' expert, Dr. Armando Levy. The defendants move to exclude the FTC's psychological expert, Dr. Alan D. Castel. The parties also filed competing analyses of how the monetary equitable relief ought to be calculated.

II. ANALYSIS

The FTC contends I should enter judgment in the amount of $23,773,147.78 based on the presumption that all first-time orders were made in reliance on the deceptive practices. The FTC argues it is entitled to the presumption that every first-time customer relied on the deceptive sales practices because the summary judgment order established the defendants' deceptive practices were material and widely disseminated. The FTC excluded from its calculation payments by customers who renewed or added on to their subscriptions, consistent with the Ninth Circuit's remand order. However, the FTC did not exclude those same customers' initial subscriptions because it takes the position that all first-time orders were tainted by the misleading practices, even for those customers who later renewed or added on.

The defendants argue this court is not authorized to award monetary relief. The defendants also assert

the FTC is not entitled to a presumption of consumer reliance because the FTC has not shown the defendants' revenues were the result of widespread deception. Rather, the defendants contend, they had many satisfied customers. Alternatively, the defendants argue their expert has provided three different formulas for determining relief that more accurately reflect consumer injury resulting from the violations.

A. Authority to Grant Monetary Equitable Relief

District courts have the authority under Section 13(b) of the FTC Act to "grant any ancillary relief necessary to accomplish complete justice, including restitution." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) (quotation omitted), *cert. denied sub nom. Gugliuzza v. FTC*, 2017 WL 69198 (U.S. Jan. 9, 2017); *see also FTC v. Stefanchik*, 559 28 F.3d 924, 931 (9th Cir. 2009). The defendants' argument that I lack authority to enter monetary equitable relief is foreclosed by controlling authority.

Moreover, the defendants waived this argument in this case. They did not appeal Judge Pro's prior order entering a monetary award against them. Nor did they raise the issue in their briefs opposing the FTC's appeal before the Ninth Circuit. *See FTC v. Publishers Business Services, Inc., et al.*, No. 11-17270, ECF Nos. 22 (Answering Br.), 24 (Answering Br.), 57 (Pet. for R'hrg En Banc). Consequently, I have authority to enter monetary equitable relief in this case.

B. Reliance

The defendants argue that to order relief redressing consumer injury, there must be proof that customers were injured by the deceptive practices,

meaning the customers relied on the deceptive practices in making their decision to purchase the magazines. The defendants acknowledge that under certain circumstances, the FTC is entitled to a presumption of consumer reliance. However, they contend the FTC has not met its burden of showing it is entitled to the presumption, and, even if the presumption arises, the defendants argue they have rebutted it.

The FTC responds that it is entitled to the presumption of consumer reliance because the summary judgment order established that the defendants' deceptive practices were material and widespread. Additionally, the FTC contends that the presumption was not rebutted, as the evidence showed consumers were confused about the transaction.

"[P]roof of individual reliance by each purchasing customer is not needed" under Section 13 of the FTC Act. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). Requiring a showing of individual reliance in FTC enforcement actions "would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section." *Id.* (quotation omitted). Thus, in such cases, the FTC is entitled to a "presumption of actual reliance" once it "has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Id.* at 605-06. If the FTC 27 makes this showing, "the burden shifts to the defendant to prove the absence of reliance." *Id.* at 606.

1. The FTC is Entitled to the Presumption

There is no dispute that consumers purchased the defendants' magazine subscriptions and that the

misleading practices were material. The summary judgment order made a specific materiality finding. ECF No. 151 at 30. The defendants contend, however, that the FTC has not shown the misleading practices were widespread.

The summary judgment order, which the defendants did not appeal, describes the widespread nature of the misleading practices. The evidence showed the defendants made approximately 25 million calls during the relevant period. ECF No. 151 at 11. The defendants' sales representatives, shift supervisors, and verifiers were directed to follow scripts for these calls and those scripts comprised the misleading sales pitch. *Id.* at 3-5, 7-8, 27-30. Although some employees deviated from the scripts, the evidence showed those deviations made the sales pitches more misleading, not less so. *Id.*; *see also* ECF No. 94 at 25 (former employee stating that when representatives deviated from the script, they "said whatever they felt they needed to say in order to make a sale" and no employees were disciplined for deviating); *id.* at 31-32 (former employee stating some telemarketers went off script to increase sales, telemarketers were not disciplined for going off script, and even when off script, "the basic message of the script remained the same"); *id.* at 38-39 (former employee stating it was "an open secret" that "supervisors subtlety [sic] encouraged the experienced telemarketers to go off script in order to increase sales"). The defendants do not point to any evidence that the deviations cured the misleading statements in the scripts or that the deviations were the norm. Indeed, when it suited them, the defendants argued at summary judgment that the deviations were rare. ECF No. 131 at 8. The FTC thus is entitled to a presumption that all consumers who purchased

magazine subscriptions did so in reliance on the misleading sales practices.

2. The FTC Has Shown Reliance

The defendants argue that even if the FTC is entitled to the presumption, they have rebutted that presumption through evidence that some customers were satisfied. The FTC responds that even those customers who testified they were satisfied were still confused about the terms of the transaction.

Under Federal Rule of Evidence 301, "[i]n a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." The Ninth Circuit has adopted the "so-called 'bursting bubble' approach to presumptions" in some contexts. *See Nunley v. City of L.A.*, 52 F.3d 792, 796 (9th Cir. 1995) (finding bursting bubble approach appropriate in the context of Federal Rule of Appellate Procedure 4(a)(6) in relation to the presumption that a document that was mailed was received). Under the bursting bubble approach, "a presumption disappears where rebuttal evidence is presented." *Id.* Upon presentation of evidence rebutting the presumption, the district judge "must then weigh the evidence and make a considered factual determination . . ., rather than denying the motion out of hand . . . ." *Id.* I may find consumer reliance, despite the presentation of rebuttal evidence, based on all the evidence including the very facts that support the presumption. *Id.*

Assuming the bursting bubble theory would apply to the presumption of consumer reliance in an FTC enforcement action, it is questionable the defendants'

evidence even rebuts the presumption. The fact that some customers were ultimately satisfied with the magazines they purchased does not necessarily mean their original decision to purchase was free from the taint of the defendants' deceptive sales practices. "The injury to a consumer occurs at the instant of a seller's misrepresentations, which taint the consumer's subsequent purchasing decisions." *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 244 (2d Cir. 2014); *see also Figgie Int'l, Inc.*, 994 F.2d at 606 (stating the "seller's misrepresentations tainted the customers' purchasing decisions" and the "fraud in the selling . . . is what entitles consumers . . . to full refunds").

Even if the presumption bubble has burst, the FTC has met its burden of showing consumer reliance. The evidence underlying the presumption supports the conclusion that every initial order was tainted by the defendants' Section 5 violations. The defendants made millions of sales calls using scripts that were materially misleading as a matter of law. The FTC has presented evidence from consumers that they were misled into giving money to the defendants by the misleading sales pitch. *See* ECF Nos. 5 at 10-11, 35-40[1]; 5-2 at 1-3; 96 at 39-43, 69-70, 87-91; 241 at 4, 7-16, 90. The defendants' witnesses who testified they were satisfied nevertheless appeared to be confused about, or unaware of, the terms of the transaction.[2]

[1] This customer made payments but received a refund. Her injury therefore would not be part of the monetary relief award, but her testimony supports the conclusion that consumers relied on the Section 5 violations to make payments.

[2] *See* ECF Nos. 241 at 147-54 (customer Benjamin Ryne testifying he understood the defendants were selling magazines, the magazines were not free, he was a satisfied customer, but he was unaware of the total price of the magazines); *id.* at 162-77 (customer Jodi Cairo testifying she understood she would have to

The FTC therefore has shown reliance on the Section 5 violations to support an award of monetary equitable relief.

C. Calculation of the Restitution Amount

Following the remand in this case, the Ninth Circuit adopted a "two-step burden-shifting framework . . . for calculating restitution awards under § 13(b)." *Commerce Planet, Inc.*, 815 F.3d at 603. "Under the first step, the FTC bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains, since the purpose of such an award is 'to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction.'" *Id.* (quoting 1 Dobbs, Law of Remedies § 4.1(1), at 552). Unjust gains "are measured by the defendant's net revenues (typically the amount consumers paid for the product or service minus refunds and chargebacks), not by the defendant's net profits." *Id.* Unjust gains are not measured by "the consumers' total losses" because "that would amount to an award of damages, a remedy . . . precluded under § 13(b)." *Id.* However, in many cases, like this one, "the

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pay for the magazines and she was a satisfied customer, but she did not know how many months or years she had agreed to pay); 253 at 116-25 and Evid. Hrg. Ex. 48 (customer Wendy Goken testifying she understood she would have to pay and she was satisfied but she did not know how much the payments were for, she did not know for how long the payments would need to be made, and she did not understand what the total cost was); Recording of Hrg. from June 8, 2011, testimony of Shannon Meehan (testifying she knew how much she was paying and thought she was getting a good deal but she did not comparison shop and could not identify on what basis she thought the defendants' magazines were a good deal; she just liked the convenience).

defendant's unjust gain will be equal to the consumer's loss because the consumer buys goods or services directly from the defendant," without a middleman. *Id.* (quotation omitted).

If the FTC meets its burden, "the burden then shifts to the defendant to show that the FTC's figures overstate the amount of the defendant's unjust gains." *Id.* at 604. "Any risk of uncertainty at this second step fall[s] on the wrongdoer whose illegal conduct created the uncertainty." *Id.* (quotation omitted).

1. The FTC Has Met Its Initial Burden

The parties agree the defendants collected \$24,038,392.03 from first-time orders. ECF Nos. 312-5 at 12; 316-1 at 5-6, 16-17. The parties also agree that the defendants issued \$265,244.25 in chargebacks and refunds. ECF Nos. 132-2 at 19; 312 at 14-15. Under *Commerce Planet*, the defendants' net revenues of \$23,773,147.78 reasonably approximate the defendants' unjust gains (\$24,038,392.03 paid by consumers minus refunds and chargebacks of \$265,244.25, equaling \$23,773,147.78).

In light of the Ninth Circuit's remand order, the FTC has not requested any revenues from renewal or add-on orders. The defendants argue the initial order for any customer who later renewed or added on to their orders should also be removed from the restitution amount. However, the fact that a customer was satisfied with the product or service does not mean that customer's initial purchasing decision was not induced by the defendants' misleading practices. Indeed, the Ninth Circuit suggested that renewals or add-ons may be excluded from restitution if those customers "necessarily knew the actual terms of the transaction at the time of renewal." ECF No. 266 at 6. The Ninth Circuit did not suggest that those

customers necessarily knew the terms at the time of the original purchase, nor did it suggest that the defendants' misleading tactics did not taint the initial purchase decision for these customers. To the contrary, the Ninth Circuit noted that the defendants violated Section 5 "by the misrepresentations that launched the process, among other reasons." *Id.* at 5. The FTC's calculation thus reasonably approximates the defendants' unjust gains by including the first-time orders for all customers. As discussed above, the FTC has met its burden of showing that all first-time orders were tainted by the defendants' Section 5 violations.

2. The Defendants Have Not Shown the Amount is Overstated

The burden thus shifts to the defendants to show that the FTC's requested amount overstates the amount of their unjust gains. The defendants rely on their expert, Dr. Levy. In response, the FTC seeks to exclude Dr. Levy under *Daubert* because his opinions contradict the Ninth Circuit's remand order and unjustifiably exclude large numbers of consumers from the restitution calculation.

Dr. Levy gives three alternative amounts by which to measure monetary equitable relief. First, he proposes that the amount of economic harm suffered by misled consumers is approximately $465,000. ECF No. 316-1 at 16-17, 24-25. I reject this proposed calculation because it conflicts with the Ninth Circuit's remand order in this case. This calculation involves an assumption that consumers valued the magazines they received and discounts consumer injury by approximately ninety-five percent based on the magazines' value. *See* ECF No. 316-1 at 9, 21-24. The Ninth Circuit's remand order specifically rejected the prior expert's opinion because he assumed the

magazine subscriptions had value. ECF No. 266 at 5. The Ninth Circuit stated this "assumption is not relevant even if true" because restitution may be appropriate where the consumer injury "arises out of misrepresentations made in the sales process, which lead to a tainted purchasing decision." *Id.* at 5-6 (quotation omitted). Thus, consumers are entitled to a full refund, with no discount for the value of the magazines, where, as here, the "fraud is in the selling, not in the value of the thing sold . . . ." *Id.* (quoting *Figgie Int'l, Inc.*, 994 F.2d at 606).

Dr. Levy also does not adequately support his assumption that 67.5 percent of customers who were unhappy called the defendants to cancel or complained to a third party. *See* ECF No. 316-1 at 24. Although Dr. Levy extrapolated from studies on complaint rates, those studies had rather unhelpful complaint-rate ranges from 10 to 84 percent. *Id.* at 14-15. Dr. Levy explained that he leaned toward the high end because the defendants offered a service component and because the deception involved the price to be paid, which was the core of the bargain between the parties. *Id.* at 15. But he does not explain why this leads to the assumption of 67.5 percent as opposed to some other number. Dr. Levy also confined his group of complaining customers to those who complained to a third party or called the defendants to cancel. ECF No. 316-1 at 16. He does not explain why he did not attempt to capture complaints unaccompanied by a request to cancel. *See* ECF No. 102 at 138-66 (first payment coupons from customers showing complaints that consumers preferred not to be called at work, sales representatives talked too fast, consumers were rushed into the decision, were "forced into buying," and did not understand or received a poor explanation of the transaction's

terms). Nor does he explore whether the defendants' deceptive sales practices themselves contributed to a lower cancellation rate from unhappy customers where customers were told they could not cancel. ECF No. 151 at 17, 30-31 (part of deceptive practices was telling customers they could not cancel).

Moreover, Dr. Levy assumes a certain percentage of the defendants' customers were "satisfied" and thus suffered no or *de minimis* injury. ECF No. 316-1 at 17. But the mere fact that some customers renewed or added on does not show that the initial purchasing decision for these customers was not induced by the Section 5 violations. The defendants bear the risk of uncertainty as to whether there were some customers who were not deceived and did not have their original purchasing decision tainted by the defendants' misleading practices. They have not provided me a reliable method of determining how many customers fall into this category. I therefore make no deduction from first-time orders based on so-called "satisfied" customers.[3]

Dr. Levy's second proposal suggests the amount of relief be bounded by the defendants' profits of $698,446 based on Dr. Duncan's prior analysis. ECF No. 316-1 at 12-13. I reject this analysis because the Ninth Circuit's remand order makes clear that relying

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[3] The Ninth Circuit has suggested there is no authority to reduce an equitable restitution award for "satisfied" customers. *See Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1195-96 (9th Cir. 2016) ("Gordon argues that the district court should not have included fees paid by 'satisfied' consumers. There is no precedent for this proposition."). Even if I interpret "satisfied" to mean the customer was neither misled nor had their purchasing decision tainted, the defendants have not presented a reliable method for determining how many customers fall into this category.

on Dr. Duncan's profits analysis is error. ECF No. 266 at 3.

Finally, Dr. Levy estimates the defendants' revenues from the Section 5 violations amounts to $1.15 million. I reject this analysis because Dr. Levy assumes misled customers would seek to cancel before making any payment and he thus excludes from this number revenue from customers who never contacted the defendants to cancel and never complained to a third party. ECF Nos. 316-1 at 17-18, 20; 297-3 at 25-26. Dr. Levy does not provide an adequate basis for this assumption and it contradicts his own statement elsewhere in his report that he "expect[s] that there are customers who were unhappy but nevertheless failed to complain." ECF No. 316-1 at 15; *see also* ECF No. 297-3 at 32 (Dr. Levy's deposition testimony in which he cites no studies or literature to support his assumption that dissatisfied customers would cancel before their first payment). Moreover, it contradicts the evidence in this case, which shows some consumers complained but still paid the defendants without canceling or complained after they made payments. *See* ECF Nos. 5 at 10-11, 35-40; 5-2 at 1-3; 96 at 39-43, 69-70, 87-91; 102 at 138-66.

Thus, even if I consider Dr. Levy's report, the defendants have not met their burden of showing the FTC's calculation overstates their unjust gains. Accordingly, I will award the FTC $23,773,147.78 in monetary equitable relief against defendants Publishers Business Services, Inc.; Ed Dantuma Enterprises, Inc.; Edward Dantuma; Brenda Dantuma Schang; Dries Dantuma; Dirk Dantuma; and Jeffrey Dantuma. Because I reach this conclusion while considering Dr. Levy's report and without considering Dr. Castel's report, I deny the parties' respective motions to exclude as moot.

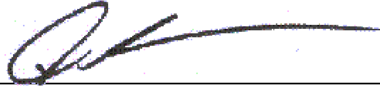
III. CONCLUSION

IT IS THEREFORE ORDERED that plaintiff Federal Trade Commission's motion for judgment **(ECF No. 312) is GRANTED**. Plaintiff Federal Trade Commission is awarded the sum of $23,773,147.78 as monetary equitable relief against defendants Publishers Business Services, Inc.; Ed Dantuma Enterprises, Inc.; Edward Dantuma; Dries Dantuma; Brenda Dantuma Schang; Dirk Dantuma; and Jeffrey Dantuma, joint and several. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that plaintiff Federal Trade Commission's motion to exclude the testimony of Dr. Armando Levy **(ECF No. 297) is DENIED as moot**. IT IS FURTHER ORDERED that the defendants' motion to exclude putative expert Alan Castel **(ECF No. 315) is DENIED as moot**.

IT IS FURTHER ORDERED that unless a motion to seal is filed by any party within 21 days of the date of this order, plaintiff Federal Trade Commission's motion to exclude testimony of Dr. Armando Levy (ECF No. 297) shall be unsealed. If any party determines that any portion of the filing should remain sealed, that party must file a renewed motion to seal along with a proposed redacted version of the filing. Any motion to seal must set forth compelling reasons to support sealing those portions.

DATED this 1st day of February, 2017.



ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15600

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

DIRK DANTUMA; et al.,

Defendants-Appellants,

ORDER

FILED: June 19, 2019

Before: O'SCANNLAIN and BEA, Circuit Judges, and STEARNS, District Judge.

The panel has voted to deny Appellants' petition for panel rehearing. Judge Bea votes to deny Appellants' petition for rehearing en banc, and Judges O'Scannlain and Stearns recommend that en banc rehearing be denied. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-17197

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

AMG CAPITAL MANAGEMENT, LLC; BLACK CREEK CAPITAL CORPORATION; BROADMOOR CAPITAL PARTNERS, LLC; LEVEL 5 MOTORSPORTS, LLC; SCOTT A. TUCKER; PARK 269 LLC; KIM C. TUCKER,

Defendants-Appellants.

ORDER

FILED: June 20, 2019

Before: O'SCANNLAIN and BEA, Circuit Judges, and STEARNS,* District Judge.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

Appendix F

§ 13 of the FTC Act (15 U.S.C. §53)

(a) Power of Commission; jurisdiction of courts

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in

which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

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

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

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

section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

* * *

§ 19 of the FTC Act (15 U.S.C. § 57b)

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

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

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the

act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available

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

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

(1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist

order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 45(g)(1) of this title, in which case such finding shall be conclusive if supported by evidence.

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

(d) Time for bringing of actions

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

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

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this

section shall be construed to affect any authority of the Commission under any other provision of law.

§ 5 of the FTC Act (15 U.S.C. § 45)

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

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

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

* * *

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a

complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within

such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing

in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation,

if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and

the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final--

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by--

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed--

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such

rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) “Mandate” defined

As used in this section the term “mandate”, in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice--

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be

treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence.

Such public policy considerations may not serve as a primary basis for such determination.