No.

IN THE

Supreme Court of the United States

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

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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QUESTION PRESENTED

The Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§41 *et seq.*), generally "empower[s] and direct[s]" the Federal Trade Commission "to prevent" persons from using "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a)(2). By its terms, §13(b) of the Act authorizes the Commission to seek "preliminary injunction[s]" and, "in proper cases," "permanent injunction[s]." 15 U.S.C. §53(b). The question presented is:

Whether §13(b) of the Act, by authorizing "injunction[s]," also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners AMG Capital Management, LLC, Black Creek Capital Corporation, Broadmoor Capital Partners, LLC, Level 5 Motorsports, LLC, Scott A. Tucker, Park 269 LLC, and Kim C. Tucker were defendants in the district court and appellants in the court of appeals.

Respondent Federal Trade Commission was the plaintiff in the district court and the appellee in the court of appeals.

AMG Services, Inc., Red Cedar Services, Inc. d/b/a 500FastCash, SFS, Inc. d/b/a OneClickCash, LeadFlash Consulting, LLC, Partner Weekly, LLC, Muir Law Firm, LLC, Timothy J. Muir, Don E. Brady, Robert D. Campbell, Troy L. LittleAxe, MNE Services, Inc. d/b/a Ameriloan d/b/a UnitedCashLoans d/b/a USFastCash d/b/a Tribal Financial Services, and Nereyda M. Tucker *ex rel.* Blaine A. Tucker were defendants in the district court.

ETS Ventures, LLC, El Dorado Trailer Sales, and Dale E. Becker were interested parties in the district court.

Americans for Financial Reform, Deborah Moss, and First Premier Bank were intervenors in the district court.

First International Bank & Trust was an objector in the district court.

Thomas W. McNamara was a receiver in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners AMG Capital Management, LLC, Black Creek Capital Corporation, Broadmoor Capital Partners, LLC, Level 5 Motorsports LLC, and Park 269 LLC hereby certify that each has no parent corporation and that no public company holds 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition within the meaning of Rule 14.1(b)(iii) are:

- *McNamara* v. *Hallinan, et al.*, No. 2:17-cv-02966-GMN-NJK (D. Nev.), currently ongoing;
- *McNamara* v. *Hallinan, et al.*, No. 2:17-cv-02967-GMN-BNW (D. Nev.), currently ongoing;
- *McNamara* v. *Patten, et al.*, No. 2:17-cv-02968-GMN-NJK (D. Nev.), currently ongoing;
- *McNamara* v. *Selling Source, LLC, et al.*, No. 2:17-cv-02969-GMN-DJA (D. Nev.), currently ongoing;
- *McNamara* v. *Whamtech, Inc.*, No. 2:18-cv-01336-JCM-CWH (D. Nev.), administratively closed on May 23, 2019;
- *McNamara* v. *Stealth Power, LLC*, No. 2:18-cv-01813-GMN-NJK (D. Nev.), currently ongoing;
- *McNamara* v. *Intercept Corp., et al.*, No. 2:18-cv-02281-GMN-VCF (D. Nev.), currently ongoing;
- *FTC* v. *AMG Services, Inc., et al.*, No. 14-16468 (9th Cir.), judgment entered on October 30, 2014; and
- *FTC, et al.* v. *E.T.S. Ventures, LLC, et al.*, No. 18-15401 (9th Cir.), judgment entered on August 15, 2018.

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PETITION FOR A WRIT OF CERTIORARI

The Federal Trade Commission Act generally "empower[s] and direct[s]" the Federal Trade Commission "to prevent" persons from using "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). By its terms, § 13(b) of the Act authorizes the Commission to seek "preliminary injunction[s]" and, "in proper cases," "permanent injunction[s]." 15 U.S.C. § 53(b). This case concerns whether that provision, by authorizing "injunction[s]," also authorizes the Commission to demand monetary relief, such as restitution.

There is a square circuit split on that issue. The courts of appeals agree that the text of § 13(b) "mentions only injunctive relief." *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016). But many courts of appeals have held that it implicitly authorizes the Commission to seek monetary relief as well. Invoking this Court's 1946 decision in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946)—which did not involve the FTC Act—eight circuits had held that, "by authorizing the issuance of injunctive relief," § 13(b) also "empowers district courts to grant any ancillary relief necessary to accomplish complete justice," including monetary relief such as "restitution." *Commerce Planet*, 815 F.3d at 598 (quotation marks omitted). The decision below followed that approach. App., *infra*, 15a-17a.

The Seventh Circuit, however, has now rejected that position. It has held that "section 13(b)'s grant of authority to order injunctive relief does not implicitly authorize an award of restitution." *FTC* v. *Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). The Seventh Circuit recognized that its decision "creates a circuit split." *Id.* at 767 n.1. But it was compelled to reject the "consensus view of [its] sister circuits" given its "clear incompatibilities with the FTCA's text and structure." *Id.* at 785-786.

The Commission has acknowledged that "the question whether monetary relief is available under Section 13(b) is a recurring one of great public importance." Federal Trade Commission's Motion To Stay the Mandate at 5, *FTC* v. *Credit Bureau Ctr., LLC*, No. 18-2847, ECF No. 61 (7th Cir. Sept. 17, 2019). It has explained that seeking "equitable monetary relief" pursuant to § 13(b)'s provision for injunctive relief is now "a cornerstone of the FTC's enforcement program." *Ibid.* The circuit split, it

states, casts "doubt on the future availability of that remedy." *Ibid.* The Commission thus has expressed the view that "[t]here is a reasonable probability" this Court would "grant certiorari" to review the § 13(b) issue. *Id.* at 4.

This case provides an ideal vehicle to address the issue. "[B]ound by [its] prior interpretation of § 13(b)," App., *infra*, 17a, the Ninth Circuit in this case affirmed a judgment that requires petitioners to pay the Commission *$1.27 billion* in supposedly "equitable monetary relief" "styled as 'restitution.'" *Id.* at 4a, 23a. Two of the three panel members joined a special concurrence to urge that the Ninth Circuit's "interpretation" of § 13(b) as authorizing monetary relief is "no longer tenable," and "wrongly authorizes" the Commission to wield "a power that the statute does not permit." *Id.* at 23a. This Court should grant the petition for a writ of certiorari and resolve the circuit split over the proper interpretation of § 13(b).

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-40a) is reported at 910 F.3d 417. The district court's opinion on liability (App., *infra*, 41a-73a) is reported at 29 F. Supp. 3d 1338, and its opinion on monetary relief (App., *infra*, 74a-116a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment (App., *infra*, 1a-40a) on December 3, 2018, and denied rehearing (App., *infra*, 118a-119a) on June 20, 2019. On September 3, 2019, Justice Kagan extended the time to file a petition for a writ of certiorari to October 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, are set forth in the Appendix (App., *infra*, 120a-139a).

STATEMENT

I. Statutory Framework

Enacted in 1914, the Federal Trade Commission Act ("FTC Act"), Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41 *et seq.*), created the Federal Trade Commission ("Commission") and gave it the power to "prevent" persons from "using unfair methods of competition in commerce." *Id.* ch. 311, 38 Stat. at 719. Congress later broadened the Commission's mandate. Current § 5 of the FTC Act "empower[s] and direct[s] [the Commission] to prevent" persons from using "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). Section 5 has been construed to encompass any practices " 'likely to mislead consumers acting reasonably under the circumstances.' " *FTC* v. *Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009).

The FTC Act gives the Commission administrative tools for carrying out its mission. Section 5 authorizes the Commission to conduct an administrative adjudication if it "ha[s] reason to believe" that someone has violated or is violating the prohibition on unfair or deceptive acts or practices. 15 U.S.C. § 45(b). If, after a hearing, the Commission decides that "the act or practice in question is prohibited" under § 5, it must make a written report and issue a "cease and desist" order. *Ibid.* The FTC Act also grants the Commission rulemaking authority to "define with specificity acts or practices which are unfair or deceptive" within the meaning of § 5, *id.* § 57a(a)(1)(B), and provides procedures for the Commission to exercise that authority, see *id.* § 57a(b).

Congress later amended the FTC Act to give the Commission authority to enforce its orders in district court, and to seek relief in district court in the first instance. See Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(c), 87 Stat. 584, 591 (1973); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, tit. II, § 206, 88 Stat. 2183, 2201-2202 (1975).

Section 5(*l*). In 1973, Congress amended § 5(*l*) of the FTC Act to authorize the Commission to enforce its final cease-and-desist orders in district court. See 87 Stat. at 591 (codified as amended at 15 U.S.C. § 45(*l*)). It provides that the Commission may bring a "civil action" to recover "penalt[ies]" from anyone who "violates" a final order of the Commission. *Id.* § 45(*l*). It further provides that, "[i]n such actions," district courts may "grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." *Ibid.*

Section 13(b). In the same 1973 legislation, Congress also enacted § 13(b)—the provision at issue here. Titled "Temporary restraining orders; preliminary injunctions," § 13(b) gives the Commission authority to seek judicial relief to prevent acts that violate the Act or rules promulgated thereunder. 15 U.S.C. § 53(b). Section 13(b) provides that, where the Commission "has reason to believe" a person "is violating, or is about to violate" a law enforced by the Commission, and that "enjoining" such act "pending the issuance" and resolution "of a complaint by the Commission" is in the public interest, it may seek "a temporary restraining order or a preliminary injunction" in district court. 87 Stat. at 592 (codified as amended at 15 U.S.C. § 53(b)). The Commission must show that, "weighing the equities and considering the Commission's

likelihood of ultimate success, such action would be in the public interest." *Ibid.* Section 13(b) also states that, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *Ibid.*

Critically here, the text of § 13(b) "mentions only injunctive relief." *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016). Thus, for the first "eight years" after it was enacted, § 13(b) was scarcely employed by the Commission for any purpose beyond seeking preliminary injunctions. D. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, 18 Antitrust 43, 43 (Summer 2004).

<u>Section 19</u>. In 1975—two years after enacting § 13(b)—Congress amended the FTC Act again to grant the Commission further enforcement powers. It added a new provision, § 19, authorizing the Commission to seek relief in federal court "to redress injury to consumers" from certain past misconduct. See Pub. L. No. 93-637, 88 Stat. at 2201-2202 (codified as amended at 15 U.S.C. § 57b). Section 19 authorizes a court "to grant such relief as [it] finds necessary," including, but not limited to, "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(b).

Relief under § 19, however, is not available based on a mere showing of a § 5 violation. It is available only (1) where the Commission shows that the conduct violates an existing Commission rule identifying the conduct as an "unfair or deceptive act[ ] or practice[ ]," 15 U.S.C. § 57b(a)(1); or (2) where the Commission has previously issued a "cease and desist order" to the defendant and then proves in court that a "reasonable man would have known under the circumstances" that the conduct "was

dishonest or fraudulent," *id.* § 57b(a)(2). Actions under § 19 are subject to a three-year statute of limitations in most circumstances. *Id.* § 57b(d).

II. PROCEEDINGS BELOW

A. Proceedings in the District Court

Scott Tucker managed businesses that provided short-term loans to consumers over the Internet. See App., *infra*, 4a, 42a-43a. For over a decade, those businesses offered so-called "Delaware Model" loans—loans that authorized automatic renewal without a borrower taking any affirmative action. C.A. App. 1362, 1534-1535, 1660. That loan product was not unique to the businesses Mr. Tucker managed. *Id.* at 1660. Hundreds of online lenders offered loans that included the same automatic-renewal feature. See *id.* at 1658-1662. And they provided borrowers with the same disclosures Mr. Tucker provided regarding the loans' terms. See *id.* at 1788-1849.

The Commission initiated an investigation into Mr. Tucker and the businesses' lending practices in late 2002. See C.A. App. 2120. For 10 years, the Commission took no action. During that time, it did not inform Mr. Tucker of any specific concerns. In 2012, however, the Commission filed suit against Mr. Tucker and the businesses he managed, alleging violations of § 5 of the FTC Act. App., *infra*, 5a-6a. According to the Commission, the terms of the loans were not being disclosed to consumers with sufficient clarity. *Id.* at 6a. Invoking § 13(b) of the FTC Act, the Commission sought preliminary and permanent injunctions. C.A. App. 223. The Commission also sought "restitution" and "disgorgement" as remedies. *Ibid.* It did so, however, not under § 19 (which explicitly provides means to "redress injury to consumers"). The Commission instead invoked § 13(b), *ibid.*, as Ninth Circuit prece-

dent permitted, see *FTC* v. *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994).

The complaint was the first time the Commission specified to the defendants the conduct it found objectionable. The defendants promptly agreed to cease the allegedly offending practices, stipulating to a preliminary injunction. See D. Ct. Dkt. 293 & 293-1. But they contested liability under § 5 and the further relief requested under § 13(b). See C.A. App. 197-199.

The district court bifurcated the case into a liability phase and a relief phase. App., *infra*, 6a. It granted the Commission summary judgment on liability, finding that the defendants' loan disclosures violated § 5. *Id.* at 6a, 72a. While the disclosures were technically accurate, the court ruled as a matter of law that the "net impression" was misleading. *Id.* at 56a-62a.

At the relief phase, the district court entered a permanent injunction barring defendants from engaging in similar lending activities. App., *infra*, 97a-98a. It also found Mr. Tucker, the businesses he managed, and his wife, Kim Tucker (collectively, "petitioners"), "liable for restitution." *Id.* at 104a. Purporting to provide "monetary relief in the full amount lost by consumers," the court held petitioners "jointly and severally liable for restitution in the amount of $1,266,084,156." *Id.* at 103a-104a. It further ruled that the Commission is not required to pay the funds to consumers—it can deposit the money in the Treasury instead—if it "decides that direct redress" is "impracticable." *Id.* at 108a.

B. The Court of Appeals' Decision

The Ninth Circuit affirmed. App., *infra*, 19a. It first held that the district court properly granted summary judgment on liability under § 5. *Id.* at 14a. It concluded

that "the Loan Note was likely to deceive a consumer acting reasonably under the circumstances." *Ibid.* Judge Bea, however, filed a special concurrence regarding liability. He stated: "[W]e, 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*." *Id.* at 39a. In his view, "precedent" permitting that result is "wrong." *Id.* at 40a. "Courts should reserve questions such as whether the Loan Note is 'likely to deceive' for the trier of fact." *Ibid.*

Petitioners challenged the monetary relief ordered. They urged (among other things) that § 13(b) provides only that district courts may enter "'injunction[s],'" and thus does not authorize the Commission to seek "'equitable monetary relief.'" App., *infra*, 15a (brackets in original). The court of appeals acknowledged that "Tucker's argument has some force," but explained that "it is foreclosed by our precedent." *Ibid.* The Ninth Circuit had "repeatedly held that," "by 'authorizing the issuance of injunctive relief,'" "§ 13 'empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.'" *Id.* at 15a-16a (quoting *Commerce Planet*, 815 F.3d at 598).

Petitioners also invoked this Court's recent decision in *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017), which held that "disgorgement imposed as a sanction for violating a federal securities law" is a "'penalty'" for statute-of-limitations purposes. *Id.* at 1639. Under *Kokesh*, they urged, "restitution under § 13(b) is in effect a penalty," and "not a form of equitable relief." App., *infra*, 16a. The panel held that *Kokesh* was not dispositive, because Ninth Circuit precedent "expressly rejected the argu-

ment that § 13(b) limits district courts to traditional forms of equitable relief." *Id.* at 17a.

Two members of the panel—Judge O'Scannlain joined by Judge Bea—concurred specially "to call attention to [the Ninth Circuit's] unfortunate interpretation of the Federal Trade Commission Act." App., *infra*, 23a. They urged that the court's interpretation of "§ 13(b)'s authorization of 'injunction[s]' to empower district courts to compel defendants to pay monetary judgments styled as 'restitution'" "is no longer tenable." *Ibid.* (brackets in original). The "text and structure of the statute," they observed, "unambiguously foreclose such monetary relief." *Ibid.* The Ninth Circuit's "invention of this power wrests from Congress its authority to create rights and remedies." *Ibid.* Finally, the concurring judges agreed with petitioners that *Kokesh* "undermines" the Ninth Circuit's rationale for allowing restitution under § 13(b), casting doubt on whether it "is an 'equitable' remedy at all." *Ibid.* Like disgorgement in *Kokesh*, the putative "restitution" under § 13(b) "'bears all the hallmarks of a penalty.'" *Id.* at 31a.

The concurring judges urged the Ninth Circuit to "rehear this case en banc." App., *infra*, 23a. Rehearing en banc, however, was denied on June 20, 2019. *Id.* at 118a-119a.

REASONS FOR GRANTING THE PETITION

There is a square and acknowledged circuit conflict on "whether monetary relief is available under Section 13(b)"—a provision that, by its terms, mentions only injunctive relief. Federal Trade Commission's Motion To Stay the Mandate at 5, *FTC* v. *Credit Bureau Ctr., LLC*, No. 18-2847, ECF No. 61 (7th Cir. Sept. 17, 2019) ("FTC *Credit Bureau* Mot."). The Commission agrees the conflict exists. *Ibid.* And it agrees that the issue "is a

recurring one of great public importance." *Ibid.* That is because the Commission has made pursuing monetary relief under § 13(b) a "cornerstone" of its "enforcement program." *Ibid.* It has extracted billions of dollars from defendants through such suits, and it files dozens of new cases under § 13(b) each year. *Ibid.* Whether the Commission can obtain such relief against defendants should not vary based on their geographic location.

This case provides an ideal vehicle for resolving the circuit conflict. The issue is squarely presented. And the facts cast into stark relief the consequences of allowing the Commission to obtain monetary remedies under § 13(b). Here, the Commission sought and obtained an unprecedented award of $1.27 billion in "restitution"—in fact, a cash payment to the government that it may keep if distribution is "impracticable"—without satisfying the more rigorous standards that Congress imposed in § 19 of the FTC Act, which expressly authorizes monetary remedies. The Commission did so, moreover, without regard to any statute of limitations. It waited 10 years after it first initiated an investigation into petitioners' practices to bring suit. And never once in that time did it identify to petitioners the conduct it considered objectionable. The petition should be granted.

I. The Courts Of Appeals Are Divided Over Whether § 13(b) Authorizes The Commission To Seek Monetary Relief

Section 13(b) of the FTC Act, by its terms, authorizes the Commission to "bring suit * * * to enjoin" certain acts or practices where it has "reason to believe" someone "is violating, or is about to violate, any provision of law" the Commission enforces. 15 U.S.C. § 53(b). The Commission can seek, upon a proper showing, "temporary restraining order[s]," "preliminary injunction[s]," and "per-

manent injunction[s].” *Ibid.* There is an acknowledged circuit split concerning whether, in addition to the relief expressly identified, § 13(b) *also* authorizes the Commission to seek monetary relief—indeed, monetary awards payable to the government itself. That conflict warrants this Court’s review. See Sup. Ct. R. 10(a). Whether a defendant can be liable for restitution and other forms of monetary relief under § 13(b) should not vary with the happenstance of geography.

1. Seven courts of appeals—the First, Second, Fourth, Eighth, Ninth, Tenth, and Eleventh—hold that, although § 13(b) by its terms authorizes “injunctions,” it should be read to authorize the Commission to seek monetary relief, including restitution. See *FTC* v. *Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC* v. *Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014); *FTC* v. *Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); *FTC* v. *Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996).[1]

For example, in *Commerce Planet*, the Ninth Circuit acknowledged that § 13(b) “mentions only injunctive relief.” 815 F.3d at 598. Nonetheless, citing this Court’s decision in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946)—a case that did not involve the FTC Act, see pp. 22-23, *infra*—the Ninth Circuit ruled that § 13(b)’s “au-

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[1] The Third Circuit has reached the same conclusion in a non-precedential, unpublished opinion. See *FTC* v. *Magazine Sols., LLC*, 432 F. App’x 155, 158 n.2 (3d Cir. 2011).

thoriz[ation] * * * of injunctive relief * * * invoked the court's equity jurisdiction, which carries with it 'all the inherent equitable powers of the District Court.'" *Commerce Planet*, 815 F.3d at 598 (quoting *Porter*, 328 U.S. at 398). The Ninth Circuit thus held that § 13(b), by mentioning injunctions, implicitly "empowers district courts to grant 'any ancillary relief necessary to accomplish complete justice,'" including ordering monetary relief such as "restitution." *Ibid.* In the decision below, the panel concluded it was "bound by" the Ninth Circuit's "prior interpretation of § 13(b)" in *Commerce Planet*. App., *infra*, 17a.

The Second, Fourth, Eighth, and Eleventh Circuits have likewise invoked *Porter* for the same result. See *Bronson Partners*, 654 F.3d at 365-367; *Ross*, 743 F.3d at 890-892; *Sec. Rare Coin & Bullion Corp.*, 931 F.2d at 1314-1315; *Gem Merch. Corp.*, 87 F.3d at 469-470. The First and Tenth Circuits adopted the same view without independent analysis. See *Direct Mktg. Concepts*, 624 F.3d at 15; *Freecom Commc'ns, Inc.*, 401 F.3d at 1202 n.6.

2. The Seventh Circuit has now expressly rejected that prevailing interpretation of § 13(b). In *FTC* v. *Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989), the Seventh Circuit initially had agreed with "other circuits" that § 13(b) authorizes monetary relief. *Id.* at 571. The "statutory grant of authority to the district court to issue permanent injunctions," it stated, "includes the power to order any ancillary equitable relief," including "monetary equitable relief," whenever "necessary to effectuate the exercise of the granted powers." *Id.* at 571-572.

The Seventh Circuit, however, has now reversed course, overruling *Amy Travel Service* as contrary to clear and unambiguous statutory text. In *FTC* v. *Credit*

Bureau Center, LLC, 937 F.3d 764 (7th Cir. 2019), the court held that "section 13(b)'s grant of authority to order injunctive relief does not implicitly authorize an award of restitution." *Id.* at 767.[2] Hewing carefully to the statutory language, the Seventh Circuit reasoned that "nothing in the text or structure of the FTCA supports an implied right to restitution in section 13(b), which by its terms authorizes only injunctions." *Id.* at 775.

The Seventh Circuit also traced the history of "[l]ower-court interpretations of section 13(b) built on *Porter*," and found them unpersuasive. 937 F.3d at 777. *Porter*, the court noted, was the product of a time when this Court "assumed that the judiciary could freely craft remedies to fully enforce whatever rights Congress had recognized." *Ibid.* This Court's "understanding of implied remedies," the Seventh Circuit explained, has "evolved after *Porter*." *Id.* at 779. Discussing *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), in particular, the Seventh Circuit explained that this Court now "adhere[s] to [a] more limited understanding of judicially implied remedies." 937 F.3d at 781. Under that view, courts no longer have "license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure." *Id.* at 782.

The Seventh Circuit thus rejected the "starkly atextual" view that § 13(b) authorizes monetary relief. 937 F.3d at 767. The court recognized that its decision "creates a circuit split." *Id.* at 767 n.1. But it was compelled to re-

[2] *Credit Bureau* invoked a Seventh Circuit rule under which a three-judge panel may overrule circuit precedent. See 937 F.3d at 767 n.1; 7th Cir. R. 40(e).

ject the "consensus view of [its] sister circuits" given its "clear incompatibilities with the FTCA's text and structure," as well as this Court's post-*Porter* "refinement of its implied remedies jurisprudence." *Id.* at 785-786.

II. The Majority's Interpretation Of § 13(b) As Authorizing Monetary Relief Is Incorrect

Any effort to read § 13(b) as authorizing monetary relief cannot be reconciled with § 13(b)'s text, the FTC Act's broader statutory scheme, amendments to that Act, or this Court's precedent.

A. The Text of § 13(b) Authorizes Injunctions—Not Monetary Relief

Here, statutory construction "must begin with the words of the statute creating the Commission and delineating its powers." *Nat'l Petrol. Refiners Ass'n* v. *FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973). The text of § 13(b) is straightforward—it grants the Commission authority to obtain various types of *injunctions*. Nowhere does it purport to grant the Commission the power to seek monetary relief such as restitution. That should be dispositive: "When the words of a statute are unambiguous," the "'judicial inquiry is complete.'" *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992).

1. Section 13(b)'s heading states its subject matter: "Temporary restraining orders; preliminary injunctions." 15 U.S.C. § 53(b). The body of § 13(b) likewise mentions only the Commission's authority to obtain "temporary restraining order[s]," "preliminary injunction[s]," and "permanent injunction[s]." *Ibid.* Those phrases are unambiguous. 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 & W.H. Lyon, *Commentaries on Equity Jurisprudence* § 1181, at 549

(14th ed. 1918). Injunctions typically are entered for the purpose of "prevent[ing] violation of rights" on a going-forward basis. 1 D. Dobbs, *Law of Remedies* § 2.9(2), at 227 (2d ed. 1993); see also *Warth* v. *Seldin*, 422 U.S. 490, 515 (1975) (describing an injunction as a "form of prospective relief").

Section 13(b) as a whole confirms that it authorizes the Commission to obtain, and sets forth standards for obtaining, injunctive relief—it does not address recovery of money. See App., *infra*, 24a-25a. First, § 13(b) authorizes the Commission to "bring suit * * * to enjoin" acts or practices where it has "reason to believe" that a person "is violating, or is about to violate" the FTC Act. 15 U.S.C. § 53(b). The statute thus authorizes suits for injunctions directed to ongoing or prospective violations—not relief that is directed to past violations. *Warth*, 422 U.S. at 515.

Section 13(b) is focused solely on injunctions. It specifies forms of injunctive relief—*e.g.*, "temporary restraining order[s]," "preliminary injunction[s]," and "permanent injunction[s]." 15 U.S.C. § 53(b). It sets forth traditional considerations, authorizing particular forms of injunctive relief upon a "proper showing," including considerations such as "the interest of the public," the "equities," and "likelihood of ultimate success." *Ibid.* But it nowhere suggests any standards or criteria for monetary remedies.

2. In fact, § 13(b) nowhere mentions monetary relief generally, or restitution specifically. It "mentions only injunctive relief." *Commerce Planet*, 815 F.3d at 598. And while most any claim for 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), the fact is that "[r]estitution isn't

an injunction," *Credit Bureau*, 937 F.3d at 771. Restitution—at least in its equitable form—is a separate doctrine by which a court may "restore to the plaintiff particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 214. Perhaps for that reason, no court of appeals has ever construed § 13(b)'s reference to "injunction[s]" as *expressly* authorizing restitution or other monetary relief on the ground that they are one and the same.

Nor does the concept of awarding monetary relief, such as restitution, otherwise "sit comfortably" within the framework of § 13(b). *Credit Bureau*, 937 F.3d at 772. Section 13(b) authorizes the Commission to bring suit when it believes a person "is violating, or is about to violate," a provision of the FTC Act. 15 U.S.C. § 53(b)(1). Section 13(b) thus addresses a defendant's ongoing or prospective conduct—it does not authorize the Commission to seek redress solely for past harms. See *FTC* v. *Shire Viropharma, Inc.*, 917 F.3d 147, 156 (3d Cir. 2019). Restitution, however, is an inherently backward-looking remedy—it is a "*return* or *restoration* of what the defendant *has gained* in a transaction." 1 Dobbs, *supra*, § 4.1(1), at 551 (emphasis added). If Congress had intended § 13(b) to encompass purely retrospective monetary relief, such as restitution, then it would not have keyed § 13(b) relief to cases of ongoing or imminent violations. The terms § 13(b) imposes on the Commission do not square with the nature of retrospective monetary relief, because § 13(b) was never meant to encompass retrospective monetary relief.

3. If there is "one, cardinal canon" of statutory construction, it is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank*, 503 U.S.

at 253-254. As this Court has explained, when Congress makes specific "reference" to "injunction[s]" in delineating the relief available under a statutory scheme, that should be understood as "a statutory *limitation* to injunctive relief" as that concept is "typically" understood in "equity." *Great-West*, 534 U.S. at 211 n.1 (emphasis added). An "injunction" is not "typically" understood to encompass "restitution." Construing the term "injunction" in § 13(b) to encompass claims by the Commission for monetary relief renders "meaningless" the limits that Congress imposed through its use of that term. *Ibid.*

B. Allowing the Commission To Obtain Monetary Relief Under § 13(b) Defies the FTC Act's Broader Statutory Scheme

The contrary reading of § 13(b) makes hash of the overall statutory scheme, rendering express provisions redundant and rendering statutory protections impotent.

1. When Congress intended to authorize the Commission to seek relief beyond injunctions—equitable or otherwise—it said so expressly. Section 5(*l*) of the FTC Act, for example, provides that where a person violates a final cease-and-desist order from the Commission, the "district courts are empowered to grant mandatory injunctions *and such other and further equitable relief* as they deem appropriate" to redress the violation. 15 U.S.C. § 45(*l*) (emphasis added). But § 13(b) contains no mention of such equitable relief.

That "absence of similar language in section 13(b) is conspicuous." *Credit Bureau*, 937 F.3d at 773. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Nken* v. *Holder*, 556 U.S. 418, 430 (2009). That presump-

tion is particularly apt here. Congress expanded § 5(*l*) to encompass "injunctions and * * * other and further equitable relief" in 1973, in the very same legislation that gave the Commission authority to seek only "injunction[s]" in § 13(b). See Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 87 Stat. 584, 591 (1973). If Congress meant the Commission to be able to seek more than injunctions, and demand all equitable relief, under § 13(b), it would have said so there as well.

2. Congress's decision to amend the FTC Act to specifically authorize certain types of backward-looking monetary relief confirms § 13(b)'s limited reach. Added just two years after §13(b), § 19 provides that district courts "shall have jurisdiction" in certain circumstances "to grant such relief as the court finds necessary to redress injury to consumers." 15 U.S.C. § 57b(b). "Such relief may include," among other things, "rescission or reformation of contracts," and "the refund of money or return of property." *Ibid.*

Under the majority's interpretation of § 13(b), much of § 19 is "entirely redundant." App., *infra*, 29a. There would have been no need for Congress to expressly authorize "the refund of money or return of property" to consumers in limited situations through § 19, 15 U.S.C. § 57b(b), if § 13(b) already "empower[ed] district courts to grant 'any ancillary relief necessary to accomplish complete justice,'" including monetary "restitution," for violations of the FTC Act, *Commerce Planet*, 815 F.3d at 598. Limiting § 13(b) to its text—authorizing only injunctions—avoids "an interpretation [that] would render superfluous another part of the same statutory scheme." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). "[T]he canon against surplusage" thus also weighs strongly against the majority interpretation. *Ibid.*

Allowing the Commission to seek monetary relief under § 13(b), moreover, vitiates critical "procedural protections" Congress provided in § 19. App., *infra*, 27a. For example, to obtain monetary relief under § 19, the Commission must make one of two showings—both of which ensure that a defendant had reason to believe the FTC Act proscribed the challenged conduct. The Commission can show the conduct violated an existing "rule," promulgated under the Commission's rulemaking authority, "respecting unfair or deceptive acts or practices." 15 U.S.C. § 57b(a)(1). Or the Commission must already have issued a "cease and desist order which is applicable" to the defendant, and then must prove in district court that a "reasonable man would have known under the circumstances" that the conduct "was dishonest or fraudulent." *Id.* § 57b(a)(2).

Section 13(b) contains no comparable safeguards. Instead, the Commission may seek relief under § 13(b) "[w]henever [it] has reason to believe" there is a violation of "any provision of law enforced by the [Commission]." 15 U.S.C. § 53(b)(1). That includes § 5's general prohibition against "unfair or deceptive acts or practices in or affecting commerce." *Id.* § 45(a)(2). The conduct potentially covered by § 5 is broad, and the bar for proving a violation after the fact is low: "An act or practice is deceptive if * * * there is a representation, omission, or practice that * * * is likely to mislead consumers acting reasonably under the circumstances, and * * * the representation, omission, or practice is material." *FTC* v. *Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (quotation marks omitted).[3] Reading § 13(b) broadly to encompass

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[3] Under that "consumer-friendly standard," the Commission is not required "to provide proof of actual deception." App., *infra*, 7a (quo-

monetary relief licenses the Commission to bypass the express protections Congress built into § 19 by seeking otherwise identical relief under § 13(b) instead.

Section 19, moreover, includes a statute of limitations. "No action may be brought by the Commission under" § 19, it declares, "more than 3 years after" the "rule violation" or "unfair or deceptive act or practice" at issue. 15 U.S.C. § 57b(d). Section 13(b), by contrast, "contains no statute of limitations," and courts have declined to impose one. *FTC* v. *Dantuma*, 748 F. App'x 735, 739 (9th Cir. 2018); see *Credit Bureau*, 937 F.3d at 783. Allowing the Commission to seek monetary relief under § 13(b) renders that time limit—and the values it preserves—virtually meaningless.[4]

Surely Congress did not craft the limits on monetary and other relief that it imposed in § 19 with the intention that the Commission could evade those limits at will by seeking the same relief under § 13(b). Cf. *Middlesex Cty. Sewage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) (holding that where Congress has provided "elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens"); *City of*

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tation marks and alterations omitted). That, too, is difficult to reconcile with basic restitution principles, which generally require that the defendant actually have "wrong[ed]" the "claimant," and that the defendant's "illicit profit [was] manifestly realized at the expense of the claimant." *Restatement (Third) of Restitution and Unjust Enrichment* § 44 cmt. a (2011).

[4] The three-year limitations period, 15 U.S.C. § 57b(d), helps ensure the "prompt resolution of disputes," *Hardin* v. *Straub*, 490 U.S. 536, 542 n.10 (1989), and protects "'vital'" public interests in repose, *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1641 (2017).

Rancho Palos Verdes v. *Abrams*, 544 U.S. 113, 121 (2005) (holding that "more expansive remedy under § 1983" is unavailable to redress violations of federal statutory rights where Congress provided "more restrictive remedies" in the statute itself).

C. *Porter* Cannot Sustain the Majority's Interpretation of § 13(b)

The circuits uniformly agree "that the statute's text does not expressly authorize the award of [monetary] consumer redress." *Ross*, 743 F.3d at 890. But the majority have nevertheless justified expanding it to include such relief as "grounded" in this Court's decision in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946). See, *e.g.*, *Commerce Planet*, 815 F.3d at 598. They construe *Porter* as "articulat[ing] an interpretive principle that inserts a presumption"—that, where Congress authorizes a court to issue an "injunction," courts should construe "the legislative branch's *real* intent" as authorizing the court "to exercise the full measure of its equitable jurisdiction." *Ross*, 743 F.3d at 890-891 (emphasis added). But *Porter* cannot sustain that expansive interpretation of § 13(b).

1. *Porter* concerned § 205(a) of the Emergency Price Control Act of 1942. 328 U.S. at 396. That provision expressly authorized the Administrator of the Office of Price Administration to seek a " 'permanent or temporary injunction, restraining order, or other order' " against landlords who violated the Act's ceilings on rents. *Id.* at 397. The question presented was whether the Administrator could seek "restitution of rents collected by a landlord in excess of the permissible maximums" under § 205(a). *Id.* at 396.

This Court held that the Administrator could pursue restitution under § 205(a). The Court stated that, by authorizing an injunction, the statute invoked the district

court's "equitable" "jurisdiction," making "all the inherent and equitable powers of the District Court * * * available for the proper and complete exercise of that jurisdiction," including restitution. 328 U.S. at 398. "Only in that way," the Court stated, "can equity do complete rather than truncated justice." *Ibid.* Looking to the statute's text, the Court stated that "the language of § 205(a) admits of no other conclusion." 328 U.S. at 399. "[T]he term '*other order*,'" the Court explained, "contemplates a remedy other than that of an injunction." *Ibid.* (emphasis added). "An order for the recovery [of] restitution * * * may be considered a proper 'other order' * * *." *Ibid.*

The Court stated that a statute's invocation of a particular equitable remedy will not always carry with it all the powers of "equitable jurisdiction" if the statute, "in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." 328 U.S. at 398. For that reason, the Court found that another provision of the Emergency Price Control Act that authorized a tenant to sue for damages "provides an exclusive remedy relative to damages," and "supersedes th[e] possibility" that courts of equity might award damages "under 205(a)." *Id.* at 401. But the Court found that no "other provision" of the Act "expressly or impliedly preclude[d] a court from ordering restitution." *Id.* at 403.

2. Unlike the statute at issue in *Porter*, § 13(b) mentions only "injunction[s]"; it does not include the "other order" language the Court found to "contemplate[] a remedy other than * * * an injunction." 328 U.S. at 399. No other provision of the statute in *Porter* expressly referenced restitution, so as to "supersede[] th[e] possibility" of awarding restitution as a matter of implicit equitable "jurisdiction under" the statute. *Id.* at 401. But § 19

of the FTC Act expressly authorizes the Commission to obtain the very monetary relief that the majority of circuits have construed § 13(b) to impliedly authorize. See pp. 19-21, *supra*. And construing § 13(b) to authorize such relief circumvents the important procedural and substantive safeguards that § 19 provides. *Ibid.* For those reasons alone, *Porter*'s construction of "injunction" in § 205(a) of the Emergency Price Control Act should not control the construction of "injunction" in § 13(b) of the FTC Act.

3. In all events, the supposed "interpretive principle" some courts have drawn from *Porter*—that by using the term "injunction," Congress "real[ly]" means "the full measure of [a court's] equitable jurisdiction," *Ross*, 743 F.3d at 891—is not consistent with this Court's approach to statutory construction or implied remedies. At the time *Porter* was decided, "the Court followed a different approach to recognizing implied causes of action than it follows now." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855 (2017). Under that "'*ancien regime*,' the Court assumed it to be a proper judicial function to 'provide such remedies as [were] necessary to make effective' a statute's purpose." *Ibid.* (citation omitted). The majority's interpretation of § 13(b) is "a relic of that *ancien regime*." App., *infra*, 37a.

Since *Porter*, this Court has "adopted a far more cautious course" before implying remedies "not explicit in the statutory text itself." *Ziglar*, 137 S. Ct. at 1855. Now, "separation-of-powers principles are or should be central to the analysis." *Id.* at 1857. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create" a particular remedy. *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001).

Thus, in *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), this Court declined to "imply" additional remedies (remedies remarkably similar to those implied below) into otherwise clear statutory text. The question there was whether "'equitable restitution'" was available under the Resource Conservation and Recovery Act of 1976 ("RCRA"), which authorizes district courts "'to restrain any person who has contributed or who is contributing to the past or present handling * * * of any solid or hazardous waste.'" *Id.* at 482 & n.* (quoting 42 U.S.C. § 6972(a)). The government, citing *Porter*, urged that district courts had "inherent authority to award any equitable remedy" that was not "expressly" foreclosed by the statute. *Id.* at 487. The Court refused to find an implied restitution remedy in that provision. "Under a plain reading of th[e] remedial scheme," the Court explained, courts could impose either "a mandatory injunction" or "a prohibitory injunction." *Id.* at 484. Neither of those forward-facing remedies, however, "contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'" *Ibid.*

The Court then contrasted the RCRA with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), which addresses similar toxic-waste issues. 516 U.S. at 485. Unlike the RCRA, CERCLA expressly authorizes monetary relief. See 42 U.S.C. § 9607(a)(4). "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs[ ] and that the language used to define the remedies under [the] RCRA does not provide that remedy." 516 U.S. at 485. Because Congress had "provided 'elaborate enforcement provisions' for remedying the violation" of those statutes, it could not "'be assumed that Congress intended to authorize by implication addi-

tional judicial remedies.'" *Id.* at 487-488. The Court therefore refused to follow the *Porter* "line of cases." *Id.* at 487.

Meghrig should make this an *a fortiori* case. "Every one of *Meghrig*'s reasons for refusing to find restitutionary authority in the RCRA applies with equal force to section 13(b)." *Credit Bureau*, 937 F.3d at 783. Like the RCRA, § 13(b)'s plain text does not authorize restitution or other monetary relief. See pp. 15-18, *supra*. It addresses only injunctions. 15 U.S.C. § 53(b). Moreover, § 5(*l*) and § 19 of the FTC Act both authorize additional equitable remedies. See pp. 18-19, *supra*. And § 19 expressly authorizes monetary relief, but limits its availability. See pp. 19-21, *supra*. Because "Congress has provided 'elaborate enforcement provisions' for remedying the violation" of the FTC Act, "'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies'" in § 13(b). *Meghrig*, 516 U.S. at 487-488.

D. The Erroneous Departure from § 13(b)'s Text Has Spawned Additional Circuit Conflicts

While most circuits have held that § 13(b) implicitly authorizes the Commission to seek monetary relief, they have divided over *what forms* of monetary relief are available under that provision. For example, the Second Circuit has held that, while the Commission may seek restitution, it is limited to the form of restitution traditionally available in equity. The Ninth Circuit, by contrast, has held that the Commission may seek a broader form of restitution that is legal in nature. That conflict is predictable: Section § 13(b) says nothing about monetary remedies in the first place, leaving the courts without guidance about which forms of monetary relief are permitted and when. The fact that the circuits cannot agree

on the type of restitution available under § 13(b) shows precisely why it is error to read such relief into § 13(b) in the first place.

1. In *FTC* v. *Verity International, Ltd.*, 443 F.3d 48 (2d Cir. 2006), the Second Circuit considered whether restitution under § 13(b) "must be limited to so-called equitable restitution." *Id.* at 66. The court explained that there are "two types of restitution"—equitable and legal. *Ibid.* "Equitable restitution allowed the plaintiff to recover money or property in the defendant's possession that could 'clearly be traced' to money or property 'identified as belonging in good conscience to the plaintiff.'" *Id.* at 66-67 (quoting *Great-West*, 534 U.S. at 212). "Legal restitution, on the other hand, was awarded when the plaintiff could not assert title to or the right to possession of particular property but nevertheless had some basis for recovering * * * some benefit that the defendant wrongly received from the plaintiff." *Id.* at 67.

The Second Circuit reasoned that, because "the availability of restitution under § 13(b) of the FTC Act, to the extent it exists, derives from the district court's equitable jurisdiction, it follows that the district court may award only equitable restitution." 443 F.3d at 67. And to "ensure" that an award can properly "be characterized as equitable," the Second Circuit has required that a restitutionary award "be limited to funds that actually were paid to the defendants." *Bronson*, 654 F.3d at 374.[5]

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[5] Courts have reached the same conclusion about restitution awarded under other federal statutes, including ERISA, see, *e.g.*, *Callery* v. *United States Life Ins. Co. in N.Y.C.*, 392 F.3d 401, 406 (10th Cir. 2004) ("[R]estitution recoveries are based upon a defendant's gain, not on a plaintiff['s] loss."), and the Commodities Exchange Act, see, *e.g.*, *CFTC* v. *Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1345 (11th

2. The Ninth Circuit "take[s] a different view." *Commerce Planet*, 815 F.3d at 601. It has "expressly rejected the argument that § 13(b) limits district courts to traditional forms of equitable relief." App., *infra*, 17a. Like the Second Circuit, the Ninth Circuit reasons that restitution is authorized under § 13(b) because its reference to "injunctive relief" thereby "invokes a court's equity jurisdiction." *Commerce Planet*, 815 F.3d at 602. But the Ninth Circuit has held that the implied power to grant all equitable relief "includes the power 'to award complete relief even though the decree includes that which might be conferred by a court of law,' such as monetary relief that would traditionally be viewed as 'legal.'" *Ibid.* (citation omitted).

As a result, while "the Second Circuit limits § 13(b) relief to equitable restitution, the Ninth Circuit permits restitution measured by the loss to consumers." *FTC* v. *Inc21.com Corp.*, 475 F. App'x 106, 110 (9th Cir. 2012) (citing *Stefanchik*, 559 F.3d at 931-932).[6] The Ninth Circuit has "refused to limit restitution under § 13(b) to the recovery of 'identifiable assets in the defendant's possession.'" App., *infra*, 32a (quoting *Commerce Planet*, 815 F.3d at 601). Consequently, the "relief" the Commission obtains in the form of restitution today "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.'" *Id.* at 33a (quoting *Great-West*, 534 U.S. at 213).

Cir. 2008) (reversing district court because "awarding restitution in the amount of customer loss was a legal remedy, and thus outside the equitable powers of the district court").

[6] See also *FTC* v. *Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (affirming restitution award measured by "the full amount lost by consumers").

3. It is perhaps not surprising that, having adopted a "starkly atextual" view of § 13(b) as authorizing restitution, *Credit Bureau*, 937 F.3d at 767, the courts cannot agree on the parameters of that implied remedy. Error begets error. But if this Court were to find that § 13(b) authorizes monetary remedies, that circuit conflict would warrant review in its own right. The conflict is clear and acknowledged. And it has profound consequences. For example, under the Ninth Circuit's approach, the Commission in this case was able to obtain a $1.27 billion award for "restitution," supposedly calculated in terms of "the full amount lost by consumers." App., *infra*, 103a-104a. That is more than triple the $419 million the Commission asserted that petitioners directly "received," C.A. App. 1491, which would be a ceiling under the Second Circuit's approach. As Judge O'Scannlain explained below, while the Ninth Circuit purports to authorize "equitable monetary relief," App., *infra*, at 4a, its approach does not "have much resemblance to equitable forms of restitution," *id.* at 32a. Instead, the Ninth Circuit's imposition of restitution under § 13(b) " 'bears all the hallmarks of a penalty' " that this Court identified in *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017). App., *infra*, 31a.

III. THE ISSUE IS IMPORTANT AND RECURRING

The parties agree that the circuit conflict warrants this Court's review. The Commission has acknowledged that "the question whether monetary relief is available under Section 13(b) is a recurring one of great public importance." FTC *Credit Bureau* Mot. 5. Indeed, it has represented to the Seventh Circuit that "[t]here is a reasonable probability" this Court would "grant certiorari" to review the issue. *Id.* at 4.

A. As a result of the courts' prevailing interpretation of the statute, § 13(b) has been transformed from a provi-

sion with a limited role in the overall scheme of the FTC Act into the "cornerstone of the FTC's enforcement program." FTC *Credit Bureau* Mot. 5. When § 13(b) was enacted in the 1970s, "no one" within the Commission "imagined" that it "would become an important part of the Commission's consumer protection program." D. Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* 1, https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf. Indeed, "in the eight years" after it was enacted, § 13(b) was scarcely employed by the Commission for any purpose beyond seeking preliminary injunctions. D. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, 18 Antitrust 43, 43 (Summer 2004). The agency's reluctance to use § 13(b) in that fashion in its early years, of course, belies the Commission's current position. Cf. *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933) (agency "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion").

When the Commission deemed § 19's procedures for obtaining monetary relief too "time consuming," it developed a legal strategy to press § 13(b) as an "alternative[ ]." *Injunctions, Divestiture and Disgorgement* 12-13, http://www.ftc.gov/sites/default/files/documents/public_events/ftc-90th-anniversary/symposium/040923transcript007.pdf. "When the early [§ 13(b)] cases were proposed, many people within the Commission predicted they would be unsuccessful, because Section 13(b) authorized only injunctive relief." Fitzgerald, *supra*, at 22.

But the Commission prevailed in circuit after circuit regardless, repeatedly obtaining monetary relief under § 13(b). See pp. 12-13, *supra*. As result, the Commission has chosen to funnel the bulk of its enforcement efforts into its "[Section] 13(b) Fraud Program," rather than utilizing § 19 or purely administrative channels. See Spiegel, *supra*, at 43. "Suits for injunctions and equitable monetary relief" under § 13(b) thus have been commonplace "for more than 30 years." FTC *Credit Bureau* Mot. 5. Indeed, "the agency files dozens of cases each year under Section 13(b)." *Ibid.*

B. Whether the Commission has statutory authority to seek monetary relief under § 13(b) is thus "of great public importance"—both to the Commission and to the many defendants who are sued under that provision. FTC *Credit Bureau* Mot. 5. According to the Commission, it "has utilized Section 13(b)" to recover "billions of dollars" from defendants. *Ibid.* It has used that provision to obtain a judgment of more than $1 billion in this case alone. App., *infra*, 104a.

The issue, of course, is not whether the Commission has the power to seek monetary remedies at all. It is the *circumstances* under which the Commission may do so. The Commission may seek "the refund of money or return of property," among other monetary remedies, under § 19. 15 U.S.C. § 57b(b). The question here is whether the Commission may instead seek the same relief under § 13(b)—a provision that mentions only injunctions—and thereby bypass substantive and procedural protections Congress built into § 19 (including the requirements of "notice" that the conduct is unlawful and agency action within the limitations period). *Credit Bureau*, 937 F.3d at 784; see 15 U.S.C. § 57b(a)(2); pp. 20-21, *supra*. Review is warranted.

C. The importance of the question presented, moreover, extends beyond the Commission and the FTC Act. Other federal agencies rely on their statutory authority to obtain injunctive relief to pursue billions of dollars in restitution, disgorgement, and other forms of monetary relief. As the Commission has explained, "the organic acts of the Securities and Exchange Commission and the Food and Drug Administration authorize courts to issue injunctions but do not expressly mention monetary relief." FTC *Credit Bureau* Mot. 6 (citing 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d); 21 U.S.C. § 332(a)). "Relying on the same legal theory used to interpret Section 13(b), courts have consistently held that these statutes likewise allow restitution or disgorgement." *Id.* at 6 & n.3.[7] Resolving the question presented here thus will also shed light on the propriety of a number of other federal agencies' enforcement regimes.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT

This case presents an excellent vehicle for resolving the circuit conflict. Whether § 13(b) authorizes monetary remedies was both "pressed" by petitioners and "passed upon" by the Ninth Circuit. *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (quotation marks omitted); see App., *infra*, 15a. And there are no "logically antecedent questions that could prevent [the Court] from reach-

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[7] See, *e.g.*, *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC* v. *Manor Nursing Ctrs.*, 458 F.2d 1082, 1103-1106 (2d Cir. 1972); *SEC* v. *Tex. Gulf Sulfur Co.*, 446 F.2d 1301, 1307-1308 (2d Cir. 1971); *United States* v. *Rx Depot, Inc.*, 438 F.3d 1052, 1054-1063 (10th Cir. 2006); *United States* v. *Lane Labs-USA, Inc.*, 427 F.3d 219, 223-236 (3d Cir. 2005); *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760-762 (6th Cir. 1999).

ing the question of the correct interpretation" of § 13(b). *Unite Here Local 355* v. *Mulhall*, 571 U.S. 83, 85 (2013).

This case, moreover, casts the real-world consequences of the issue into stark relief. This case involves "the largest litigated judgment ever obtained" by the Commission. Press Release, *U.S. Court Finds in FTC's Favor and Imposes Record $1.3 Billion Judgment Against Defendants Behind AMG Payday Lending Scheme* (Oct. 4, 2016), https://www.ftc.gov/news-events/press-releases/2016/10/us-court-finds-ftcs-favor-imposes-record-13-billion-judgment. The Commission was awarded *$1.27 billion* in "equitable monetary relief" from petitioners, App., *infra*, 4a—under a statutory provision that mentions only "injunction[s]," 15 U.S.C. § 53(b).

The case also demonstrates the consequences of allowing the Commission to proceed under § 13(b), rather than § 19—evasion of § 19's safeguards. In this case, there was no existing Commission rule that identified petitioners' conduct as an "unfair or deceptive act[ ] or practice[ ]," as would support liability under § 19. 15 U.S.C. § 57b(a)(1); pp. 6-7, *supra*. Nor was the Commission required to issue a "cease and desist order" first and then prove in court that a "reasonable man would have known under the circumstances" that the conduct "was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2). Those requirements have special salience where, as here, the supposedly unfair and deceptive practices petitioners engaged in were widespread in the industry. See p. 7, *supra*. By proceeding under § 13(b), the Commission was able to recover more than $1 billion by showing only that the "'net impression' of the representation[s]" at issue "would be likely to mislead" a reasonable consumer. App., *infra*, 7a. Indeed, the Commission initiated an investigation into petitioners' lending practices in late 2002, but waited *10*

years to bring suit against them. See p. 7, *supra*. In that time, the Commission never notified petitioners of particular concerns, and thus gave them no opportunity to take corrective action. *Ibid.* And it sought restitution covering a longer span than would be allowed under § 19's three-year limitations period. See App., *infra*, 100a.

The Commission is "currently evaluating whether to file a petition for a writ of certiorari" seeking review of the § 13(b) issue in the Seventh Circuit's *Credit Bureau* decision. FTC *Credit Bureau* Mot. 3. The Court will not find a better vehicle than this case. The petition should be granted.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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OCTOBER 2019

APPENDIX

APPENDIX A
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.

Appeal from the United States District Court for the District of Nevada in No. 2:12-cv-00536-GMN-VCF, Gloria M. Navarro, Chief Judge, Presiding

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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

SUMMARY[**]

Federal Trade Commission

The panel affirmed the district court's summary judgment, and relief order, in favor of the Federal Trade Commission ("FTC") in the FTC's action alleging that Scott Tucker's business practices violated § 5 of the FTC Act's prohibition against "unfair or deceptive acts or practices in or affecting commerce."

Tucker's businesses offered high-interest, short-term payday loans through various websites that directed approved borrowers to hyperlinked documents that included the "Loan Note" and the essential terms of the loan as mandated by the Truth in Lending Act ("TILA"). The FTC alleged that Tucker violated § 5 of the FTC Act because the Loan Note was likely to mislead borrowers about the terms of the loan.

The panel held that the Loan Note was deceptive because it did not accurately disclose the loan's terms. Specifically, the panel held that the TILA box's "total of payments" value was deceptive, and the fine print's oblique

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[*] The Honorable Richard G. Stearns, United States District Judge for the District of Massachusetts, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

description of the loan's terms did not cure the misleading "net impression" created by the TILA box. The panel concluded that the Loan Note was likely to deceive a consumer acting reasonably under the circumstances.

The panel held that the district court had the power to order equitable monetary relief under § 13(b) of the FTC Act. The panel held that the Supreme Court's recent decision in *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017), and this court's decision in *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) (holding that § 13 empowers district court's to grant any ancillary relief necessary), were not clearly irreconcilable; and *Commerce Planet* remained good law.

The panel held that the district court did not abuse its discretion in calculating the $1.27 billion award. The panel applied the burden-shifting framework of *Commerce Planet*, and concluded that the district court did not abuse its discretion when calculating the amount it ordered Tucker to pay.

The panel held that the district court did not err in permanently enjoining Tucker from engaging in consumer lending.

Judge O'Scannlain, specially concurring, joined by Judge Bea, wrote separately to suggest that the court rehear the case en banc to reconsider *Commerce Planet* and its predecessors, and the court's interpretation of § 13(b) of the FTC Act to empower district courts to compel defendants to hold that this interpretation wrongly authorized a power that the statute did not permit.

Judge Bea concurred in the opinion because precedent compelled him to do so, but he wrote separately because he believed that this court's precedent was wrong in that it allowed the panel to decide that the Loan Note was de-

ceptive as a matter of law. See *FTC* v. *Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006). Judge Bea would hold that courts should reserve questions such as whether the Loan Note was "likely to deceive" for the trier of fact.

COUNSEL

Paul C. Ray (argued), Paul C. Ray Chtd., North Las Vegas, Nevada, for Defendants-Appellants.

Imad Dean Abyad (argued) and Theodore P. Metzler, Attorneys; Joel Marcus, Deputy General Counsel; David C. Shonka, Acting General Counsel; Federal Trade Commission, Washington, D.C.; for Plaintiff-Appellee.

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!"

B

In April 2012, the Federal Trade Commission ("Commission") filed suit against Tucker and his businesses in the District of Nevada.[2] The Commission's

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

[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."

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 "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

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[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).

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, *Cyber-*

space 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 borrow-

ers 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.

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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.

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 "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]

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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

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 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**.

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that the district court did not err when it ordered Kim Tucker and Park 269 to disgorge ill-gotten gains.

APPENDIX

The following is an example of the Loan Note:

LOAN NOTE AND DISCLOSURE

Date: 08/03/2011 ID#: OneClickCash-

Borrower's Name: [redacted] **1953793314**

Parties: In this Loan Note and Disclosure ("Note") you are the person named as Borrower above. "We" One-ClickCash 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 [redacted] ("Account"), at [redacted] ("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	**FINANCE CHARGE**	**Amount Financed**	**Total of Payments**
The cost of your credit as a yearly rate (e) **782.14%**	The dollar amount the credit will cost you. **$150.00**	The amount of credit provided to you or on your behalf. **$500.00**	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 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. **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 show 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 this 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. In-

deed, 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 "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.

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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).

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. 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,

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[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.

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

[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,

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, 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

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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.

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 B
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 2:12-cv-00536-GMN-VCF

Federal Trade Commission,
Plaintiff,

v.

AMG Services, Inc., *et al.*,
Defendants.

ORDER

May 28, 2014

Pending before the Court for consideration is the Report and Recommendation (ECF No. 539) of the Honorable Cam Ferenbach, United States Magistrate Judge, entered on January 28, 2014. On February 14, 2014, the Muir Law Firm, LLC and Timothy J. Muir (collectively the "Muir Defendants") filed their Limited Objection (ECF No. 541) and AMG Services Inc., SFS, Inc., Red Cedar Services, Inc., and MNE Services, Inc. (collectively the "Lending Defendants") filed their Objection. (ECF No. 542.) The Lending Defendants' Objection was joined by Defendants AMG Capital Management, Level 5 Motorsports, LeadFlash Consulting, Black Creek Capital Corporation, Broadmoor Capital Partners, Scott A.

Tucker, Blaine A. Tucker, Don E. Brady, Troy LittleAxe, and Robert D. Campbell. (ECF Nos. 545, 548, 549, 552.) The Federal Trade Commission (the "FTC") filed its Response to the Muir Defendants' Objection (ECF No. 554) and Response to the Lending Defendants' Objection (ECF No. 556) on March 2, 2014.

For the reasons discussed below, the Court will accept and adopt Magistrate Judge Ferenbach's Report and Recommendation (ECF No. 539) to the extent that it is not inconsistent with this opinion.

I. BACKGROUND

The FTC's Complaint (ECF No. 1) alleges that Defendants violated portions of the Federal Trade Commission Act (the "FTC Act"),[1] the Truth in Lending Act ("TILA"),[2] and the Electronic Fund Transfer Act ("EFTA"),[3] in connection with the Defendants' activities in offering and extending "high-fee, short-term 'payday' loans and the collection of those loans." (Complaint 2:23-25, ECF No. 1.) The relevant facts underlying these claims primarily involve the loan application and loan repayment processes created by Defendants.[4]

A. The Loan Application Process

In order to obtain a short-term, payday loan from the Lending Defendants, borrowers must complete online applications available through the Lending Defendants'

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[1] 15 U.S.C. §§ 41-58.

[2] 15 U.S.C. §§ 1601-1667f.

[3] 15 U.S.C. §§ 693-1693r.

[4] A more detailed recitation of the underlying facts of the case is set forth in Judge Ferenbach's Report and Recommendation (ECF No. 539.)

websites[5] that request personal, employment, and financial information. (Defendants' Opposition 6:8-7:20, ECF No. 493.) With the information provided in the loan applications, the Lending Defendants determine a maximum amount that can be borrowed, which ranges between $150.00 and $800.00. (*Id.* 7:20-8:3.) This information also allows the Lending Defendants to make automatic withdrawals from the borrowers' bank accounts. (*Id.*)

In order to receive the loan proceeds, the borrower is required to select the desired loan amount, click four separate boxes accepting the Lending Defendants' terms and conditions, type his or her name in an electronic signature box, and click a button that reads: "I AGREE Send Me My Cash!" (*Id.* 8:4-9:22.) The borrowers, however, are not actually required to read the terms and conditions of their loans in order to receive the loan proceeds. See generally (*Id.*) On the contrary, the webpage format discourages the reading of the terms and conditions because it breaks the terms and conditions up into nine separate hyperlinks in eight or nine point font. See (*Id.* 8:4-9:22.) Furthermore, the most important link that takes the borrowers to the document at issue for the present motions—the Loan Note and Disclosure link—is the least conspicuous[6] of the nine links. (*Id.*) The boxes and disclosure links appear on the websites as follows:

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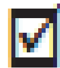
[5] Though the various websites of the Lending Defendants differ in appearance, all of them provide the same information to borrowers in the same language, so all of the Lending Defendants' loan notes and other documents are essentially "identical." (Defendants' Opposition 6:12-16, ECF No. 493.)

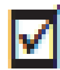
[6] As noted by Judge Ferenbach, the <u>Loan Note and Disclosure</u> link is buried in the fourth paragraph and overshadowed by two all caps redundant links to the <u>LIMITED WAIVER OF SOVERIEGN</u>

I have read and accept the terms of the Application, including the terms and provisions of the LIMITED WAIVER OF SOVEREIGN IMMUNITY and the ARBITRATION PROVISION contained therein.



I have read and accept the terms of the Privacy Policy & Electronic Disclosure and Consent Agreement.

I have read and accept the terms of the Authorization Agreement.



I have read and accept the terms of the Loan Note and Disclosure, including the terms and provisions of the LIMITED WAIVER OF SOVERIEGN IMMUNITY and the ARBITRATION PROVISION contained therein.[7]

(*Id.* 9:1-22.) If a borrow does click on the Loan Note and Disclosure link, the following document appears, which consists of a Truth in Lending Box ("TILA Box") and 764 words in densely packed, fine print with some of the fine print curiously contained in a second box:

IMMUNITY and the ARBITRATION PROVISION. (Report & Recommendation 3:10-21, ECF No. 539.)

[7] As depicted in Defendants' filings, hyperlinks are signified by underlining. See (Defendants' Opposition 8:4-9:22, ECF No. 493.)

LOAN NOTE AND DISCLOSURE

Borrower's Name: ____________

<u>**Parties:**</u> In this Loan Note and Disclosure ("Note") you are the person named as Borrower above. "We" Ameriloan 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 Ameriloan at the fax number and address specified in this Note and in your other loan documents.

<u>**The Account**</u>: You have deposit account, No **********5844 ("Account"), at First Arkansas Bank and Trust ("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.

<u>**DISCLOSURE OF CREDIT TERMS:**</u> The information in the following box is part of this Note.

ANNUAL PERCENTAGE RATE	**FINANCE CHARGE**	**Amount Financed**	**Total of Payments**
The cost of your credit as a yearly rate (e) **684.38%**	The dollar amount the credit will cost you **$90.00**	The amount of credit provided to you or on your behalf **$300.00**	The amount you will have paid after you have made the scheduled payment **$390.00**
Your **Payment Schedule** will be: 1 payment of **$390.00** due on **2010-09-24**, 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 $90.00 only, on 2010-09-24. 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 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. **Security**: The loan is unsecured.
Prepayment: <u>You may prepay your loan only in increments of $50.00</u>. 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 9-8-2010.
<u>Itemization Of Amount Financed of $300.00;</u> Given to you directly: <u>$300.00</u>; Paid on your account <u>$0</u>
See below and your other contract documents for any additional information about prepayment, nonpayment and default.

<u>Promise to Pay</u>: 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 show 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 re-

newal 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 this Note, the term "Business Day" means a day other than Saturday, Sunday, or legal holiday, that Ameriloan 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.

See (FTC's Memo in Supp. of MSJ 10:4-12, ECF No. 456) (reproducing this exact Loan Note Disclosure); see also (Defendants' Opposition 11:1-26, ECF No. 493) (reproducing a loan note from OneClickCash with the same exact provisions); (Lending Defendants' Mot. Summary

Judgment 5:11-22, ECF No. 461) (reproducing a loan note from USFastCash with the same exact provisions).

B. The Repayment Process

As indicated by the emphasized terms located in the TILA Box portion of the Loan Note and Disclosure document, borrowers who obtain loans from the Lending Defendants are only obligated to repay a fixed sum equal to one finance charge plus the amount borrowed. (FTC's Memo in Supp. of MSJ 10:4-12, ECF No. 456) (showing a single repayment of $390.00 for a $300.00 loan); see (Defendants' Reply 7:1-15, ECF No. 512.) However, if borrowers fail to satisfy certain conditions precedent to establish the single payment option, then they are automatically enrolled in a ten pay-period "renewal" plan. (*Id.*) Under the renewal plan, the terms of which are scattered throughout the dense text below the TILA Box in the Loan Note and Disclosure document, a new finance charge accrues each pay-period and the borrower's principal balance only begins to decrease by $50.00 per pay-period following the fourth payday. (Defendants' Opposition 12:1-15:4, ECF No. 493.) As a result, if the borrower of a $300.00 loan from the Lending Defendants fails to successfully opt out of the renewal plan, his or her total payments would actually total $975.00 rather than the $390.00 shown in the TILA Box. (*Id.*) The following table illustrates such a payment schedule under the renewal plan:

Payday	Payment	Finance Charge (30% of Remaining Principal Balance)	Amount Applied to Principal	Remaining Principal Balance	Total Paid to Date
1	$90.00	$90.00	$0.00	$300.00	$90.00
2	$90.00	$90.00	$0.00	$300.00	$180.00
3	$90.00	$90.00	$0.00	$300.00	$270.00
4	$90.00	$90.00	$0.00	$300.00	$360.00
5	$140.00	$90.00	$50.00	$250.00	$500.00
6	$125.00	$75.00	$50.00	$200.00	$625.00
7	$110.00	$60.00	$50.00	$150.00	$735.00
8	$95.00	$45.00	$50.00	$100.00	$830.00
9	$80.00	$30.00	$50.00	$50.00	$910.00
10	$65.00	$15.00	$50.00	$0.00	$975.00
Total	**$975.00**	**$675.00**	**$300.00**	–	**$975.00**

(*Id.*); see also (FTC's Memo in Supp. of MSJ 14:1-14, ECF No. 456) (reproducing an internal document from Defendants' containing this payment schedule).

While borrowers technically have the ability to decline enrollment in the automatic renewal plan, the mechanism for declining enrollment is controlled by the Defendants through a convoluted email-and-hyperlink procedure.[8]

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[8] The fine print of Defendants' Loan Note and Disclosure document states that "[t]o decline this option of renewal, you must select your payment option using the Account Summary link sent to your email at least three business days before your loan is due." The document, however, appears to somewhat contradict the first statement when it

See (Defendants' Opposition 7:12-14; 14:15-16; 16:16-18, ECF No. 493.) For a borrower to decline enrollment in the automatic renewal plan using the email-and-hyperlink procedure, the following steps must be completed: (1) three days after the loan is funded, the Lending Defendants send an email to the borrower containing additional loan terms and a link to a webpage from where the borrower may elect to decline enrollment in the renewal plan; (2) the borrower opens the email, reads the new terms, accesses the webpage, and selects the option to opt out; and (3) the selection is executed three business days before the borrower's "loan is due." (*Id.* 7:12-14.)

The discrepancy between the repayment schedule prominently presented in the TILA Box and the renewal plan repayment schedule borrowers are automatically entered into by the Lending Defendants as well as the convoluted procedure for opting out of the renewal plan appear to have created significant confusion for many borrowers about the true cost of their loans. See (Exs. 167-168 of FTC's Dec. in Supp. of MSJ, ECF No. 455-167, 455-168) (compiling approximately 8,500 consumer complaints); (Oxenford Depo. 170:18-172:10, Ex. 113 of FTC's Dec. in Supp. of MSJ, ECF No. 455-113) (estimating that approximately eighty percent of the borrowers she spoke with complained that Defendants had with-

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also states that "[t]his 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." (Defendants' Opposition 11:1-26, ECF No. 493.) Therefore, it appears ambiguous from the face of the document whether a borrower must use the email-and-hyperlink procedure to opt out of the renewal plan or whether simply notifying the Defendants of the desire to opt out would be sufficient to opt out. (Report & Recommendation 6:3-13, ECF No. 539.)

drawn more from their accounts than the loan cost). Furthermore, Defendants' own internal records indicate that the Lending Defendants' employees were instructed to conceal how the loan repayment plans worked in order to keep potential borrowers in the dark. For example, in response to an email from one of the Lending Defendants' sales representatives suggesting they use clearer language when explaining a loan to potential borrowers, the Manager of Training and Development stated:

> I don't think that [this language] encourages a customer to GET a loan . . . . When we are trying to sell it I think we should leave out terms like renew and pay down. We don't want to complicate things if we are trying to get them to get a loan. I have heard many times customers ask to withdraw the loan after the explanation and I believe that a lot of it has to do with the way it is explained.

(Email, Ex. 72 of FTC's Dec. in Supp. of MSJ, ECF No. 455-72.)

C. Procedural History of the Case

The FTC filed its Complaint on April 2, 2012, alleging claims for deceptive acts and practices and deceptive collection practices in violation of the FTC Act (Counts I & II), for failing to properly disclose certain loan information in violation of TILA and its implementing Regulation Z[9] (Count III), for conditioning the extension of credit on the preauthorization of recurring loans in violation of EFTA (Count IV), and for disgorgement as provided under section 13(b) of the FTC Act (Count V). (Complaint 15:1-20:8, ECF No. 1.)

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[9] 12 C.F.R. § 1026.

On December 27, 2012, the Court signed an Order entering the parties' joint stipulation for preliminary injunction and bifurcation. (ECF No. 296.) The Bifurcation Order divided the litigation into two phases: a liability phase and a relief phase. (*Id.* 9:1-10:23.) During Phase I of the proceedings, the Court would adjudicate the merits of the FTC's claims for violations of the FTC Act, TILA, and EFTA. (*Id.* 9:1-24.) During Phase II of the proceedings, the Court would adjudicate the remaining issues, including whether the various Defendants constitute a common enterprise. (*Id.* 10:1-19.)

On July 18, 2013, the Lending Defendants as well as Defendants AMG Capital Management, Level 5 Motorsports, LeadFlash Consulting, Black Creek Capital Corporation, Broadmoor Capital Partners, Scott A. Tucker, Blaine A. Tucker, Don E. Brady, Troy LittleAxe, and Robert D. Campbell (collectively the "Settling Defendants") stipulated to settle Counts II & IV with the FTC. (Joint Motion for Stipulated Order, ECF No. 446.) The settlement, however, remained contingent upon Court approval. (*Id.*) Furthermore, the Muir Defendants, whose liability in this action depends largely upon the FTC's common enterprise theory, were notably absent from the settlement. (*Id.*; Complaint ¶¶16, 19, 25, ECF No. 1; Muir Objection 2:1-16, ECF No. 541.)

On September 30, 2013, before the Court had approved the settlement with the Settling Defendants, the FTC moved for summary judgment on Counts I-IV against all Defendants. (FTC's Mot. Summary Judgment p. 1, ECF No. 454.) That same day, the Lending Defendants filed their own motion seeking summary judgment on Count III, which was joined by the other Defendants. (Lending Defendants' Mot. Summary Judgment, ECF No. 461; Joinders, ECF Nos. 462-63, 465-66, 470-71.)

Then on October 8, 2013, the Court approved the stipulated settlement of Counts II & IV with the Settling Defendants. (Order pp. 1-13, ECF No. 478.) Subsequently, on November 4, 2013, the FTC withdrew its motion for summary judgment on Counts II & IV against the Settling Defendants, but not the Muir Defendants. (Withdrawal Motion p. 2, ECF No. 487.)

The FTC's Motion for Summary Judgment on Counts I & III against all Defendants, and Counts II & IV against the Muir Defendants (ECF Nos. 454, 487) and the Lending Defendants' Motion for Summary Judgment on Count III (ECF No. 461) were referred to Magistrate Judge Ferenbach pursuant to 28 U.S.C. § 636(b)(1)(B) and District of Nevada Local Rule IB 1-4. On January 28, 2014, Judge Ferenbach recommended that this Court enter an order granting the FTC's Motion for Summary Judgment on Counts I & III against all Defendants and denying without prejudice the motion on Counts II & IV against the Muir Defendants as well as denying the Lending Defendants' Motion for Summary Judgment on Count III. (Report & Recommendation, ECF No. 539.) Judge Ferenbach further recommended that the Bifurcation Order be amended to permit Counts II & IV to proceed against the Muir Defendants during Phase II. (*Id.*)

II. LEGAL STANDARD

A party may file specific written objections to the findings and recommendations of a United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B); D. Nev. R. IB 3-2. Upon the filing of such objections, the Court must make a de novo determination of those portions of the Report to which objections are made. *Id.* The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made

by the Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. IB 3-2(b).

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. See *id.* "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz* v. *Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States* v. *Shumway*, 199 F.3d 1093, 1103-04 (9th Cir. 1999)). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co.* v. *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its bur-

den in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc.* v. *Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. See *Taylor* v. *List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be

drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. See *id.* at 249-50.

III. DISCUSSION

A. Objection of the Lending Defendants

In their Objection (ECF No. 542), the Lending Defendants—joined by the other Defendants—assert that Judge Ferenbach erred in his Report and Recommendation (ECF No. 539) by applying an incorrect legal standard, by improperly treating fact questions as questions of law, and by violating the summary judgment standard in resolving disputes of material fact in the FTC's favor. (Objection 1:9-14, ECF No. 542.) Specifically, Defendants assert that Judge Ferenbach erred (1) by treating the net impression of Defendants' loan documents as a question of law instead of fact, (2) by ignoring facts as immaterial that are favorable to Defendants, (3) by "inventing new theories" as to why the loan documents are ambiguous, (4) by misconstruing material facts in favor of the FTC, (5) by evaluating the TILA disclosure in a manner contrary to Ninth Circuit case law, (6) by applying the incorrect test for contractual ambiguity, and (7) by failing to grant summary judgment to Defendants. (*Id.* 1:15-2:6.) The first four objections relate to Judge Ferenbach's granting of summary judgment to the FTC on Count I while the final three objections relate to Judge Ferenbach's granting of summary judgment to the FTC on Count III. For the following reasons, each of these objections is without merit.

1. Treatment of the Net Impression of the Loan Documents

Section 5 of the Federal Trade Commission Act of 1914 prohibits, *inter alia*, "unfair or deceptive acts or

practices in or affecting commerce." 15 § U.S.C. 45(a)(1). "An act or practice is deceptive if 'first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.'" *F.T.C.* v. *Gill*, 265 F.3d 944, 950 (9th Cir. 2001) (citing *F.T.C.* v. *Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994)). Actual deception is not required for a Section 5 violation. *Trans World Accounts, Inc.* v. *F.T.C.*, 594 F.2d 212, 214 (9th Cir. 1979). Rather, Section 5 "only requires a showing that misrepresentations 'possess a tendency to deceive.'" *F.T.C.* v. *Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1073 (C.D. Cal. 2012) (quoting *Trans World Accounts, Inc.*, 594 F.2d at 214). Furthermore, the Court considers "the overall, common sense 'net impression' of the representation or act as a whole to determine whether it is misleading," and a Section 5 violation may still be found even if the fine print and legalese were technically accurate and complete. *Commerce Planet*, 878 F. Supp. 2d at 1063 (citing *Gill*, 265 F.3d at 956)); see also *F.T.C.* v. *Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (stating that a representation "may be likely to mislead by virtue of the net impression it creates even though the [representation] also contains truthful disclosures").

Defendants' first objection is that Judge Ferenbach erred by "improperly step[ping] into the shoes of the fact-finder" and treating the net impression of the Loan Note and Disclosure document as a question of fact instead of law. (Objection 3:8-19, ECF No. 542.) Defendants assert that the Ninth Circuit and District of Nevada cases granting summary judgment to the FTC for Section 5 claims are distinguishable from this case because in those cases the Court found that no genuine issues of

material fact existed. (*Id.* 4:1-9) (citing *FTC* v. *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009); *Cyberspace.Com LLC*, 453 F.3d at 1201; *Gill*, 265 F.3d at 955- 56; *FTC* v. *Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 1205, 1226 (D. Nev. 2010); *FTC* v. *Grant Connect*, LLC, 827 F. Supp. 2d 1199, 1219 (D. Nev. 2011)).

Defendants' argument, however, is unpersuasive. First, numerous Ninth Circuit cases, including the ones cited by Defendants have found the net impression of a representation to be suitable for summary judgment determination. See *e.g. Cyberspace.Com LLC*, 453 F.3d at 1201 ("[T]he district court properly granted summary judgment to the FTC on the FTCA § 5 violation because no reasonable factfinder could conclude that the solicitation was not likely to mislead consumers acting reasonably under the circumstances in a way that is material."); *F.T.C.* v. *Gill*, 71 F. Supp. 2d 1030, 1035 (E.D. Cal. 1999), aff'd, 265 F.3d 944 (9th Cir. 2001) ("Where the operative facts are substantially undisputed, and the heart of the controversy is the legal effect of such facts, such a dispute effectively becomes a question of law that can, quite properly, be decided on summary judgment."). Second, as will be addressed in the next section of this opinion, Judge Ferenbach correctly found that there are no genuine issues of material fact regarding the terms Loan Note Disclosure and no reasonable factfinder could conclude that the document was not likely to mislead consumers. See *Infra* § III.A.2. Therefore, Judge Ferenbach did not improperly supplant the role of the jury in determining the net impression of the Loan Note Disclosure. Defendants' objection is without merit.

2. Ignoring as "Immaterial" Facts Favorable to Defendants

Defendants' second objection is that in conducting his "likely to mislead" analysis, Judge Ferenbach failed to follow the appropriate summary judgment standard by ignoring all the evidence that was favorable to Defendants and drawing all factual inferences in favor of the FTC. (Objection 7:15-24, ECF No. 542.) In support of this objection, Defendants argue that the facts ignored by Judge Ferenbach, such as Defendants' expert testimony, show the Loan Note Disclosure was not misleading. (*Id.* 8:4-13:24.) Defendants' also reorganize and explain the terms of the document in an attempt to show that the TILA Box and fine print are consistent and that the terms contained in the fine print of the document are not hidden, vague, uncertain, or contradictory. (*Id.*)

This argument, however, misunderstands the law and Judge Ferenbach's analysis and was directly addressed and refuted in the Report and Recommendation. (Report & Recommendation 22:11-26:18, ECF No. 539.) First, the terms of the Loan Note Disclosure are not disputed by Defendants. See *e.g.* (Defendants' Opposition 11:1-26, ECF No. 493.) Second, Judge Ferenbach noted that the terms of the TILA Box and the fine print of that document provide the basis for his finding that Defendants violated Section 5 of the FTC Act. (Report & Recommendation 23:4-6, ECF No. 539.) Therefore, any facts other than the terms of the Loan Note Disclosure and their presentation in the document are immaterial to a summary judgment determination. *Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."); see also (Report & Recommendation 24:17-26:18, ECF No. 539) (ad-

dressing in detail why each of Defendants' factual disputes are immaterial).

Furthermore, Defendants' presentation and explanation of the fine print terms fail to show that Judge Ferenbach erred in finding that the Loan Note Disclosure was likely to mislead as a matter of law. The Loan Note and Disclosure document's net impression is likely to mislead because of the way the terms are presented to borrowers by the document, not because Defendants' counsel can pull out the important terms and rearrange them in large bullet point lists that allow for a clearer understanding of their effects. See *Feil* v. *F.T.C.*, 285 F.2d 879, 887 n.18 (9th Cir. 1960) ("The law is not made for experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impression.") (quoting *Aronberg* v. *F.T.C.*, 132 F.2d 165, 170 (7th Cir. 1943)); *Cyberspace.Com LLC*, 453 F.3d at 1200 ("A [representation] may be likely to mislead by virtue of the net impression it creates even though the [representation] also contains truthful disclosures."); (Report & Recommendation 10:14-18, ECF No. 539) ("[A]rguments about the technicalities of the loan note's provisions, qualifications, and disclaimers are misplaced. Even if an argument regarding the loan note is technically true in the mind of an attorney, the argument is immaterial under Rule 56 if it is not also true in the eyes of a 'reasonable' borrower."). The test for a FTC Act violation is whether the representation "is likely to mislead consumers acting reasonably under the circumstances." *Pantron I Corp.*, 33 F.3d at 1095.

As Judge Ferenbach correctly found, the net impression of the Loan Note Disclosure is likely to mislead bor-

rowers acting reasonably under the circumstances because the large prominent print in the TILA Box implies that borrowers will incur one finance charge while the fine print creates a process under which multiple finance charges will be automatically incurred unless borrowers take affirmative action. (Report & Recommendation 16:17-19, ECF No. 539) ("It requires no citation of authority to demonstrate that the 'net impression' of a boldfaced representation, which states that the borrower is responsible to repay a fixed sum, is misleading when the fine print indicates that the boldfaced fixed sum is not fixed."); see *Commerce Planet, Inc.*, 878 F. Supp. 2d at 1065 ("the information about the continuity plan . . . is buried with other densely packed information and legalese, which makes it unlikely that the average consumer will wade through the material and understand that she is signing up for a negative option plan.") This structure gives the impression that a $300.00 loan from the Lending Defendants will only cost borrowers $90.00, when in fact, unless borrowers read the fine print and take the necessary steps to opt out of the renewal plan, such a loan will incur $675.00 in fees.

Furthermore, the material terms in the fine print are arranged in the document in such a way that the existence of the automatic renewal and the process for declining renewal are hidden from borrowers. See *Supra* 4:1-18 (reproducing the Loan Note Disclosure). These terms, which significantly alter the parties' legal obligations from what is implied by the terms in the TILA Box, are concealed from borrowers because they are scattered throughout the fine print in the document and because the terms never expressly state that the renewal plan is

automatic.[10] (*Id.*) Instead, the Loan Note Disclosure merely uses phrases implying automatic enrollment, such as that "1 payment [will be due] if you decline the option of renewing your loan."[11] (*Id.*)

Therefore, Defendants' factual disputes are immaterial and no reasonable jury could find that the Loan Note Disclosure was not likely to mislead borrowers acting reasonably under the circumstances. This objection is without merit.

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[10] Perhaps the most telling evidence that the important terms in the Loan Note Disclosure are hidden by their scattered presentation in the fine print is provided by Defendants' own counsel. In the portion of their Opposition arguing that the process for declining renewal is not hidden, Defendants' counsel listed nine bulleted terms that allegedly advise borrowers about the automatic nature of the renewal process. (Defendants' Opposition 9:4-10-5, ECF No. 493.) As pointed out by the FTC, however, only five of the listed terms are actually contained in the Loan Note Disclosure document and, if numbered as they are listed by Defendants' counsel, those five terms appear in the Loan Note Disclosure in the order 2, 3, 5, 1, 6. (Resp. to Opposition 17:5-18:9, ECF No. 556.) Furthermore, all of these terms except 1 and 6 are separated from the next relevant term by unrelated fine print. (*Id.*)

[11] Buried in the seventeenth sentence of the Loan Note Disclosure's block of fine print is the statement: "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." See *Supra* 4:1-18 (reproducing the Loan Note Disclosure). This statement is the closest the Loan Note Disclosure comes to clearly expressing the automatic nature of the renewal plan, and notably, it is the first bullet point in Defendants' counsel's list of terms that are "not hid[den]." (Defendants' Opposition 9:3-13, ECF No. 493.)

3. Provision of Additional Reasons why the Loan Documents are Ambiguous

Defendants' third objection is that Judge Ferenbach violated Federal Rule of Civil Procedure 56(f) by granting summary judgment to the FTC after "invent[ing] a new theory" never advanced by the FTC that the Loan Note Disclosure's net impression is misleading because it is unclear under its terms how a borrower may opt out of the renewal plan.[12] (Objection 10:19-23, ECF No. 542.)

It is true that a district court may grant a summary judgment motion "on grounds not raised by a party" only "[a]fter giving [the nonmovant] notice and a reasonable time to respond." Fed. R. Civ. P. 56(f). However, while the FTC may not have specifically argued that this particular ambiguity pointed out by Judge Ferenbach contributed to the misleading net impression of the Loan Note Disclosure, the FTC repeatedly argued in its motion that summary judgment was appropriate because of the "inconspicuous, contradictory, confusing, and vague language" in the document. (FTC's Memo in Supp. of MSJ 1:20-21, ECF No. 456); see *e.g.* (*id.* 19:6-7) ("the loan documents were confusing, particularly on the issue of the repayment terms"). Judge Ferenbach's citing of a particular example of the confusing and contradictory terms argued by the FTC as a basis for their motion does not constitute a ruling on grounds not raised by the moving party under Federal Rule of Civil Procedure 56(f). See *Ervco, Inc.* v. *Texaco Ref. & Mktg., Inc.*, 422 F. Supp. 2d 1084, 1086 (D. Ariz. 2006) ("Notice is not required if the

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[12] This ambiguity arises from two statements in the Loan Note Disclosure, which alternatively provide that a borrower may opt out by the email-hyperlink procedure or by "tell[ing]" the Lending Defendants that he or she wishes to opt out. See *supra* note 8.

issue on which the summary judgment was granted is a subset of the larger issue raised by the party.") (citing *Intel Corp.* v. *Hartford Accident and Indemnity Co.*, 952 F.2d 1551, 1556 (9th Cir. 1991)). Therefore, this objection is without merit.

4. Interpretation of the Facts

Defendants' fourth objection is that "the Report misconstrues or misunderstands numerous material facts, always in ways favoring the FTC." (Objection 1:23-24, ECF No. 542.) The three examples of "material facts" cited by Defendants that Judge Ferenbach is alleged to have misconstrued are that: (1) The Loan Note Disclosure link is not buried or inconspicuous because it is also displayed at the top of the webpage, (2) the words under the TILA Box are not "fine" because they are the same size as the rest of the disclosures, and (3) borrowers did not need to click the nine separate hyperlinks to read all the loan documents because all the documents were contained on the same webpage and only required scrolling up and down. (*Id.* 17:4-17.)

Defendants' assertions that Judge Ferenbach erred in interpreting these three facts are misleading and irrelevant. Regarding the first example, Judge Ferenbach noted that the Loan Note Disclosure link appearing next to the mandatory check boxes, which would naturally draw a borrower's attention, was inconspicuous because it was buried in the fourth paragraph and overshadowed by two all caps hyperlinks. (Report & Recommendation 3:10-23, ECF No. 539.) This observation is true and unrefuted by Defendants. The fact that another link to the Loan Note Disclosure may have been placed at another location on the webpage far away from the check boxes is irrelevant and does not invalidate Judge Ferenbach's observation. Likewise, Judge Ferenbach's use of the

phrase "fine print" to describe the 628 words appearing below the TILA Box is accurate, notwithstanding Defendants' argument that they are the same size as the text in the rest of the document, because the 628 words are grouped in one large block of small print while the TILA Box disclosures are bolded and surrounded by eye-catching white space. See BLACK'S LAW DICTIONARY 709 9th ed. 2009) ("fine print. (1951) The part of an agreement or document—usu. in small, light print that is not easily noticeable—referring to disclaimers, restrictions, or limitations."). Finally, the fact that the nine separate hyperlinks lead to the location of each loan document on one webpage rather than separate webpages with one document on each is irrelevant to Judge Ferenbach's point that the large number of links presented to borrowers as containing the loan documents discourages them from reading the documents. See (Report & Recommendation 3:10-23, ECF No. 539) ("Defendants' webpage facilitates borrowers not reading Defendants' terms and conditions."). Therefore, this objection is without merit.

5. Evaluation of the TILA Disclosures

"[TILA] requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). These mandated terms must be disclosed "clearly and conspicuously" to borrowers before the credit is extended. 12 C.F.R. § 1026.17(a)-(c). Furthermore, TILA requires "absolute compliance by creditors." *Rubio* v. *Capital One Bank*, 613 F.3d 1195, 1199 (9th Cir. 2010) (citations omitted). "[B]ecause TILA is liberally construed in favor of the consumer and strictly enforced against the creditor . . . any misleading ambiguity . . . should be resolved in favor

of the consumer." *Id.* at 1202 (internal quotations omitted).

Defendants' fifth objection is that Judge Ferenbach ignored binding Ninth Circuit precedent in determining that the Loan Note Disclosure was ambiguous in the abstract rather than determining the technical question of whether the Loan Note Disclosure complied with TILA. (Objection 19:14-22:7, ECF No. 542.) Defendants rely entirely on the Ninth Circuit's ruling in *Hauk* v. *JP Morgan Chase Bank USA*, 552 F.3d 1114 (9th Cir. 2009) for the proposition that courts may not "engage . . . in an abstract inquiry into whether any part of the Loan Note [Disclosure] is 'ambiguous.'" (*Id.* 19:25-28.)

Defendants, however, are the ones who appear to be ignoring binding Ninth Circuit precedent as their argument based on *Hauk* has been explicitly rejected by the Ninth Circuit. In *Hauk*, the Ninth Circuit denied a plaintiff's claims under TILA based upon ambiguous or misleading language in a provision that was not a disclosure governed by TILA or Regulation Z. *Hauk*, 552 F.3d at 1121-22. In *Rubio* v. *Capital One Bank*, the Ninth Circuit clarified that "*Hauk* did not condone misleading disclosures. It simply rejected the argument that TILA liability could be based on disclosures that were misleading about anything at all—what it called misleading in the abstract." *Rubio*, 613 F.3d at 1200 (internal quotations omitted). By contrast, the Ninth Circuit found in *Rubio* that disclosures which are required under TILA must be clear and conspicuous, and such a "disclosure that is not 'clear and conspicuous' is *ipso facto* misleading." *Id.*

The misleading disclosures at issue here—the finance charge, APR, total of payments, and payment schedule—are the very ones mandated by TILA. 12 C.F.R. § 1026.18(d)-(e), (g)-(h). Therefore, Judge Ferenbach did

not ignore binding Ninth Circuit precedent in finding that the Loan Note Disclosure was ambiguous and in violation of TILA. (Report & Recommendation 30:4-6, ECF No. 539) ("Because Defendants' loan note is ambiguous as a matter of law, 'the terms of the legal obligation between the parties' were not 'clearly and conspicuously' disclosed, as TILA requires."). Defendants' objection is without merit.

6. Ambiguity in TILA Mandated Terms

Defendants' sixth objection is that Judge Ferenbach failed to use the correct test for contractual ambiguity in finding that the ambiguities in the Loan Note Disclosure violated TILA. (Objection 2:1-2, ECF No. 542.) In support of this objection, Defendants assert that the proper "hornbook test" for ambiguity in this case is "whether the Loan Note [Disclosure] may reasonably be read as creating an obligation to renew as opposed to the single-payment obligation reflected in the TILA disclosures."[13] (*Id.* 19:6-8.) Defendants then assert that under this standard the TILA mandated terms in the Loan Note Disclosure were not ambiguous because the "single-payment option" was "clearly disclosed" and borrowers were not legally required to follow the renewal plan. (*Id.* 19:8-14, 22:9-25:22.)

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[13] Defendants provide no legal citation for this "test," though they do later cite *Williston on Contracts*, for the proposition that, "as a matter of contract law, performance (like renewal) that either party may decline is not a legal obligation." 1 WILLISTON ON CONTRACTS § 1:2 (4th ed. 2010) (The actual quote is: "[A]n understanding that leaves an essential element of a promise open for future negotiation and agreement, constitutes no promise, and creates no legal obligation until the future agreement is actually made.").

Defendants' argument here is unpersuasive. A contract is ambiguous if it is "reasonably susceptible" to more than one interpretation. *Skilstaf, Inc.* v. *CVS Caremark Corp.*, 669 F.3d 1005, 1015 (9th Cir. 2012); see also 11 WILLISTON ON CONTRACTS § 30:5 (stating the same). In its analysis of FTC Act violations, this Court has already determined that the terms in the Loan Note Disclosure regarding the automatic renewal plan were likely to mislead because they implied in the prominent TILA Box that only one finance charge would be incurred while the fine print created a process under which multiple finance charges would be automatically incurred unless borrowers take affirmative action. See *supra* § III.A.2. Those terms are therefore also ambiguous because a reasonable borrower could think the information prominently displayed in the TILA Box accurately reflected his or her legal obligations without needing to undertake any additional action, even if such a reading is not technically accurate. *Rubio*, 613 F.3d at 1202 (citing *Rossman* v. *Fleet Bank (R.I.) Nat. Ass'n*, 280 F.3d 384, 394 (3d Cir. 2002)) ("any misleading ambiguity—any disclosure that a reasonable person could read to mean something that is not accurate—'should be resolved in favor of the consumer.'"). Furthermore, an ambiguous disclosure is necessarily not clearly and conspicuously disclosed.[14] See *id.* ("it is precisely because reasonable con-

[14] The Court also notes that even if the terms were not ambiguous, the disclosures relating to the automatic entry of a loan into the renewal plan were not clear and conspicuous as they were buried in fine print. See *supra* § III.A.2; see also *Barrer* v. *Chase Bank USA, N.A.*, 566 F.3d 883, 892 (9th Cir. 2009) ("Clear and conspicuous disclosures, therefore, are disclosures that a reasonable cardholder would notice and understand . . . . [T]he change-in-terms provision

sumers can interpret an ambiguous disclosure in more than one way that such a disclosure cannot be clear and conspicuous."); see also *Watts* v. *Key Dodge Sales, Inc.*, 707 F.2d 847, 852 (5th Cir. 1983) ("the provision is ambiguous, thus violating the TILA or Regulation Z."); *In re Whitley*, 772 F.2d 815, 817 (11th Cir. 1985) ("these divergent readings of the provision render the language ambiguous and therefore violative of TILA and Regulation Z."). This objection is without merit.

7. Failing to Grant Defendants' Motion for Summary Judgment

Defendants' seventh objection is that Judge Ferenbach erred by failing to grant Defendants' summary judgment on Count III. (Objection 2:3-6, ECF No. 542.) As the Court has already found that Judge Ferenbach did not err in granting summary judgment for the FTC on Count III, this objection is without merit.

B. Limited Objection of the Muir Defendants

In their Limited Objection (ECF No. 541), the Muir Defendants assert that Judge Ferenbach erred in his Report and Recommendation by only denying summary judgment against the Muir Defendants on Counts II & VI while granting the FTC summary judgment against the Muir Defendants on Counts I & III. (Limited Objection 3:23-4:10, ECF No. 541.)

Under the Bifurcation Order, no discovery regarding the Muir Defendants' liability for any of the counts alleged in the Complaint would occur until Phase II of the litigation. (Bifurcation Order p. 10, ECF No. 296); (Report & Recommendation 34:3-6, ECF No. 539.) As a re-

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. . . is buried too deeply in the fine print for a reasonable cardholder to [notice].")

sult, discovery during Phase I regarding the alleged violations underlying the claims was effectively left to the Lending Defendants. See (Stip. to Withdraw Discovery Requests, ECF No. 278) (where the Muir Defendants and the FTC agree to withdraw pending discovery requests and postpone future discovery against each other until Phase II of the litigation). However, all discovery regarding Counts II & IV ceased when the FTC and the Settling Defendants reached a settlement agreement on those two counts, even though the settlement did not include the Muir Defendants and explicitly did not resolve the FTC's claims against the Muir Defendants on Counts II & IV. (Order Granting Stipulated Motion ¶4, ECF No. 478) ("This settlement does not settle and resolve any conduct not alleged in Counts II and IV of the Complaint ***or as to any other party***.") (emphasis added). Therefore, while the Muir Defendants remained potentially liable for Counts II & IV, discovery had not been effectively completed on those counts at the time of the FTC's Motion for Summary Judgment.

In the Report and Recommendation, Judge Ferenbach granted the FTC summary judgment against all Defendants, including the Muir Defendants, on Counts I & III. (Report & Recommendation 35:16-18, ECF No. 539.) However, because the Bifurcation Order and settlement agreement had effectively prevented the Muir Defendants from conducting discovery at the time the motion for summary judgment was filed, Judge Ferenbach recommended denying summary judgment on Counts II & IV and amending the Bifurcation Order to permit those claims to proceed during Phase II. (*Id.* 35:1-36:5) (citing Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot pre-

sent facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it.").

The Muir Defendants assert that granting summary judgment on Counts I & III effectively "nullified" the protections afforded under the Federal Rules of Civil Procedure that necessitated denying summary judgment on Counts II & IV. (Limited Objection 3:23-4:10, ECF No. 541.) The Muir Defendants further assert that the Bifurcation Order and Judge Ferenbach's "inconsistent ruling" denied them of their fundamental right to engage in discovery about the claims against them. (*Id.* 4:23-5:8.)

The Muir Defendants assertions, however, are unpersuasive. In contending that they were denied the right to engage in discovery and that Judge Ferenbach's Report and Recommendation is inconsistent in granting summary judgment on Counts I & III while denying it on Counts II & IV, the Muir Defendants appear to ignore two important facts. First, the Muir Defendants voluntarily chose to postpone discovery until after Phase I by stipulation (ECF No. 278) and no doubt benefited from being relieved from the costs involved in conducting that discovery. Second, the situation regarding Counts I & III is fundamentally different from the situation regarding Counts II & IV. Unlike Counts II & IV, which were not fully litigated by the Lending Defendants, full discovery and litigation was conducted by the Lending Defendants on Counts I & III, as was originally contemplated by all parties—including the Muir Defendants—in the Bifurcation Order. See (Bifurcation Order, ECF No. 296); (Stip. to Withdraw Discovery Requests, ECF No. 278). With respect to Counts I & III, the Muir Defendants are in the same position as all the other Defendants who allowed the Lending Defendants to take the lead in Phase I. Therefore, the Muir Defendants' rights to discovery

and litigation of the claims in Count I & III were voluntarily given to and adequately protected by the Lending Defendants, while those rights with respect to Counts II & IV were not protected by the Lending Defendants due to their separate settlement.

It was for precisely this reason that Judge Ferenbach denied summary judgment on Counts II & IV while granting it on Counts I & III. (Report & Recommendation 35:1-4, ECF No. 539) ("In light of the Settling Defendants' not opposing summary judgment on counts two and four, the court must deny the FTC's motion for summary judgment on counts two and four in order to . . . afford the Muir Defendants an opportunity to conduct discovery and litigate the relevant claims and defenses."). Judge Ferenbach's recommendation to grant summary judgment against the Muir Defendants on Counts I & III while denying it on Count II & IV, would prevent the Muir Defendants from improperly relitigating issues while ensuring their right to engage in discovery and litigation on those claims which were not adequately protected by the Lending Defendants. Therefore, the Muir Defendants' objection is without merit, and the recommendation of Judge Ferenbach regarding summary judgment against the Muir Defendants and amendment of the Bifurcation Order is adopted by the Court.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 539) is **ACCEPTED and ADOPTED** in full, to the extent it is not inconsistent with this opinion.

IT IS FURTHER ORDERED that the FTC's Motion for Summary Judgment (ECF No. 454) is **GRANTED in part and DENIED in part**. The FTC's Motion for Summary Judgment is **GRANTED** on Count I and Count III.

The FTC's Motion for Summary Judgment is **DENIED without prejudice** on Count II and Count IV.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (ECF No. 461) is **DENIED**.

IT IS FURTHER ORDERED that the Bifurcation Order is amended to permit Count II and Count IV to proceed against the Muir Defendants during Phase II of the litigation.

DATED this 28th day of May, 2014.

/s/ Gloria M. Navarro
Gloria M. Navarro, Chief Judge
United States District Judge

APPENDIX C
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NO. 12-cv-00536-GMN-VCF

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

AMG SERVICES, INC., *et al.*,
Defendants.

AMENDED ORDER[1]

April 30, 2017

Pending before the Court is a Motion for Summary Judgment, (ECF No. 900), filed by Defendants AMG Capital Management, LLC ("AMG Capital"); Level 5 Motorsports, LLC ("Level 5"); Black Creek Capital Corporation ("Black Creek"); Broadmoor Capital Partners ("Broadmoor"); and Scott A. Tucker ("Scott Tucker")

[1] The Court merely intends this Amended Order to clarify that its original Order, (ECF No. 1057), of September 30, 2016, in no way implicates Defendants Nereyda Tucker, as Executor of the Estate of Blaine Tucker, or LeadFlash Consulting, LLC. The Amended Order does not alter any deadlines set by its original Order, nor does the Amended Order constitute a re-entry of judgment against any defendant.

(collectively "Tucker Defendants").[2] Plaintiff Federal Trade Commission ("FTC") filed a Response, (ECF No. 938), and the Tucker Defendants filed a Reply, (ECF No. 949).

Also pending before the Court is a Motion for Summary Judgment, (ECF No. 907), filed by the FTC. Defendants Park 269, LLC ("Park 269") and Kim C. Tucker ("Kim Tucker") (collectively "Relief Defendants") filed a Response, (ECF No. 935), as did the Tucker Defendants, (ECF No. 941). The FTC filed a Reply, (ECF No. 952).

Also pending before the Court is a Motion for Summary Judgment, (ECF No. 913), filed by the Tucker Defendants. The FTC filed a Response, (ECF No. 940), and the Tucker Defendants filed a Reply, (ECF No. 950).

Because the Court **GRANTS** FTC's Motion, the Court **DENIES as moot** the motions filed by the Tucker Defendants and the Relief Defendants (collectively "Defendants").[3]

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[2] As per the Court's Order of September 20, 2016, the instant Order does not implicate Defendants Nereyda Tucker, as Executor of the Estate of Blaine Tucker, or LeadFlash Consulting, LLC. (See Order, ECF No. 1054).

[3] Also pending before the Court are three Motions to Reconsider filed by the Tucker Defendants. (See ECF Nos. 850, 963, 975). Two of these motions relate to orders entered by Magistrate Judge Cam Ferenbach. "A district judge may reconsider any pretrial matter referred to a magistrate judge in a civil . . . case . . . where it has been shown that the magistrate judge's ruling is clearly erroneous or contrary to law." LR IB 3-1. A magistrate judge's pretrial order issued under 28 U.S.C. § 636(b)(1)(A) is not subject to *de novo* review, and the reviewing court "may not simply substitute its judgment for that of the deciding court." *Grimes* v. *City and County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). The Court may overturn the magistrate judge's decision if, upon review, the Court is left with a definite and firm conviction that a mistake has been made. See *Da-*

I. BACKGROUND

This action was brought by the FTC, asserting that the "high-fee, short-term payday loans" offered by former Defendants AMG Services, Inc. ("AMG"), SFS, Inc. ("SFS"), Red Cedar Services, Inc. ("Red Cedar"), and MNE Services, Inc. ("MNE") (collectively "Lending Defendants") violated section 5 of the Federal Trade Commission Act of 1914, 15 § U.S.C. 45(a)(1), the Truth in Lending Act of 1968, 15 U.S.C. § 1601(a), and Regulation Z, 12 C.F.R. § 1026(a). (Am. Compl. 15:1-20:6, ECF No. 386).

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vid H. Tedder & Assocs. v. *United States*, 77 F.3d 1166, 1169-70 (9th Cir. 1996).

The most recently filed Motion, (ECF No. 975), asks the Court to reconsider its Asset Freeze Order, (ECF No. 960). Because the Court grants the FTC's request for equitable monetary relief, *infra*, the Court DENIES this Motion as moot. Similarly, Defendants' first Motion to Reconsider, (ECF No. 850), is DENIED as moot in light of the instant Order. In this Motion, Defendants raise a multitude of objections to Magistrate Judge Ferenbach's Order, (ECF No. 849), regarding discovery issues. Even if the Court were to grant this Motion, the result of the instant Order would remain unchanged given the wealth of evidence establishing Defendants' liability.

Finally, Regarding Defendants' remaining Motion to Reconsider, (ECF No. 963), the Court does not agree with Defendants that Judge Ferenbach exceeded his authority. First, Judge Ferenbach's Order, (ECF No. 956), denying Defendants' request for discovery sanctions did not constitute a dispositive order. See 28 U.S.C. § 636(b)(1)(A) (listing dispositive motions). Second, the Court does not endorse Defendants' interpretation of Judge Ferenbach's Order as indicative of double standard. The well-reasoned decision does not reflect Defendants' absolutist reading. In light of the acrimonious discovery process in this case, Judge Ferenbach's Order is a clear attempt to move the discovery process forward. Accordingly, the Court DENIES this Motion.

The FTC has filed its Motion for Summary Judgment against the only remaining parties that did not settle the claims against them. The remaining defendants are AMG Capital, Level 5, Black Creek, and Broadmoor (collectively "Corporate Lending Defendants") as well as Scott Tucker. The FTC seeks injunctive relief against Scott Tucker and equitable monetary relief from the Corporate Lending Defendants and Scott Tucker. The FTC also seeks disgorgement from the Relief Defendants.

A. Factual History[4]

Scott Tucker controlled, founded, or was president of a host of short-term payday loan marketing and servicing companies, including, *inter alia*, National Money Service, Inc. ("NMS"), CLK Management LLC ("CLK"), and Universal Management Services, Inc. ("UMS") (collectively "Scott Tucker Loan Servicing Companies"). (Exs. 1-2, 4-5, 14 to Singhvi Decl., ECF Nos. 908-1-2, 4-5, 14). Between 2003 and 2008, the Scott Tucker Loan Servicing Companies entered into agreements with the Santee Sioux Tribe of Nebraska, the Miami Tribe of Oklahoma, and the Modoc Tribe of Oklahoma to allow the tribes to become "authorized lenders" for CLK. (See Exs. 14-15, 18 to Singhvi Decl., ECF Nos. 908-14-15, 18). The tribes subsequently formed SFS, Red Cedar, and MNE. (Exs. 17, 19-20 to Singhvi Decl., ECF Nos. 908-17, 19-20). In 2006, CLK transferred its trademarks for 500 FastCash, OneClickCash, Ameriloan, USFastCash, and United-CashLoans ("Loan Portfolios") to the new tribal entities. (Ex. 6 to Singhvi Decl., ECF No. 908-6). Following these transfers, SFS, Red Cedar, and MNE became the lenders for the Loan Portfolios. (Dempsey Dep. at 15-19,

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[4] Given the lengthy history of this case, the Court provides a brief factual overview and discusses the remaining facts in further detail, *infra*, as they pertain to specific issues.

ECF No. 908-7). In 2008, CLK was acquired by AMG Services, Inc., a tribal corporation created by the Miami Tribe. (Ex. 46 to Singvhi Decl., ECF No. 908-46).

B. Procedural History

On December 27, 2012, the Court signed an Order, (ECF No. 296), entering the parties' joint stipulation for preliminary injunction and bifurcation. The Bifurcation Order divided the litigation into two phases: Phase I, a liability phase, and Phase II, a relief phase. (*Id.* 9:1-10:23). During Phase I of the proceedings, the Court would adjudicate the merits of the FTC's claims for violations of the FTC Act, TILA, and EFTA. (*Id.* 9:1-24). During Phase II of the proceedings, the Court would adjudicate the remaining issues, including the individual liability of the various Defendants. (*Id.* 10:119). On January 28, 2014, Magistrate Judge Cam Ferenbach entered a Report and Recommendation ("R&R"), (ECF No. 539), granting summary judgment in favor of the FTC on two of its four causes of action. In his R&R, Magistrate Judge Ferenbach reviewed the websites through which the Lending Defendants sold their loans as well as the Loan Note Disclosures contained therein. (See, *e.g.*, R&R 2:12-16).

On May 28, 2014, this Court entered an Order, (ECF No. 584), adopting the R&R. Specifically, the Court agreed that "the net impression of the Loan Note Disclosure is likely to mislead borrowers acting reasonably under the circumstances because the large prominent print in the TILA Box implies that borrowers will incur one finance charge while the fine print creates a process under which multiple finance charges will be automatically incurred unless borrowers take affirmative action." (Order 15:8-12, ECF No. 584). Subsequently, the Lending Defendants stipulated to settle all of the FTC's claims against them resulting in monetary judgments in the ag-

gregate amount of $25,496,677. (See generally Orders, ECF Nos. 727, 760-762, 888-889).

In the instant Motion, the FTC seeks summary judgment on the Defendants' remaining affirmative defenses as well as the issues of individual liability, common enterprise liability, liability of the Relief Defendants, and remedies. (Pl.s' MSJ 14:22-23, ECF No. 907). The Court addresses each of these issues in turn, after first addressing several of Defendants' evidentiary objections.

II. <u>LEGAL STANDARD</u>

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. See *id.* "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz* v. *Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States* v. *Shumway*, 199 F.3d 1093, 1103-04 (9th Cir. 1999)). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would enti-

tle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co.* v. *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc.* v. *Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. See *Taylor* v. *List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth

specific facts by producing competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. See *id.* at 249-50.

III. DISCUSSION

A. Evidentiary Objections

The Tucker Defendants object to nearly all of the evidence relied upon by the FTC in its Motion for Summary Judgment. (See Obj., ECF No. 943). While the Court addresses some of those objections that pertain to the Court's Order below, the Tucker Defendants' remaining objections do not merit further discussion.

1. The Squar Milner Report

The Squar Milner Report was prepared at AMG's request "to assist management in calculating any outstanding balances to, from, and among AMG, CLK Management, the various portfolios . . . on the one hand, and Scott Tucker and related entities, on the other hand." (Squar Milner Report at 8, ECF No. 908-260). It reflects statements and interviews with unknown individuals, (see *id.* at 11), and the FTC seeks to offer evidence from the Squar Milner Report to prove the truth of the matter asserted: "the presence of *thousands* of transactions solely for Scott Tucker's benefit, that AMG's books and records were not maintained in an orderly fashion, and that the Defendants' complete lack of accounting controls were

susceptible to manipulation," (FTC's MSJ 47:24-27, ECF No. 907).

The FTC argues this Report falls within the exception under Federal Rule of Evidence 803(6) for a business record. (See Resp. to Obj. 13:3-14:9, ECF No. 953). However, the Court finds that this Report does not meet the requirements in order to constitute a business record pursuant to this Rule. The case relied upon by Defendants, *Paddack* v. *Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984), is instructive. In *Paddack*, the subject documents were special audit reports prepared in anticipation of litigation, not restated quarterly and annual reports or corresponding auditor's work product prepared in the ordinary course of business. *Paddack*, 745 F.2d at 1257-58. Similarly, the Squar Milner Report is not simply a regular audit report. Instead, it was "a special investigation" in which "a financial audit report under GAAP" was not issued and, moreover, was likely made in anticipation of and preparation for this litigation. (Obj., 4:9-15, ECF No. 943). Therefore, the Court finds that the Squar Milner Report was not made in the normal, regular course of business, as required by Federal Rule of Evidence 803(6), and is therefore inadmissible.

2. Emails

The Tucker Defendants argue that the emails relied upon by the FTC "must be excluded as unauthenticated and inadmissible hearsay." (Obj. 11:25-26). However, all but one of the emails are presumptively authentic because they were produced by a party opponent. *Haack* v. *City of Carson City*, No. 3:11-CV-00353-RAM, 2012 WL 3638767, at *7 (D. Nev. Aug. 22, 2012) (noting that exhibits produced by a party opponent are "deemed authentic"). In addition, all of the emails are authentic per Federal Rule of Evidence 901(b)(4) because of their distinc-

tive characteristics. See, *e.g.*, *Brown* v. *Wireless Networks, Inc.*, No. C 07-4301 EDL, 2008 WL 4937827, at *4 (N.D. Cal. Nov. 17, 2008).

Regarding the hearsay issue, many of the emails are admissible non-hearsay as they were sent by Scott Tucker or an employee of the Corporate Lending Defendants. See Fed. R. Evid. 801(d)(2)(D). Further, other emails are admissible pursuant to Federal Rule of Evidence 801(c)(2) because they are not offered for the truth of the matter asserted. See Fed. R. Evid. 801(c)(2). The FTC relies on one such email, for example, to show Scott Tucker was "*aware* that the loan repayment model was problematic and confusing to consumers," (Resp. to Obj. 18:13-15) (emphasis added), not that "90% of the issues [the Tucker Defendants] have with customers stems from them not understanding [the Tucker Defendants'] process of renewal and paydowns," (Ex. 75 to Singhvi Decl., ECF No. 908-75). The Court therefore overrules the Tucker Defendants' objections regarding emails.

3. Checks and Other Bank Records

The Tucker Defendants seek to exclude certain checks and bank records as unauthenticated and inadmissible hearsay. (See Tucker Defs.' Resp. to FTC's MSJ 16:26-18:11, ECF No. 941). With regard to the authentication objection, "[a]s a negotiable instrument, a check is a species of commercial paper, and therefore self-authenticating." *United States* v. *Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004); see also Fed. R. Evid. 902(9). As to the bank records, the Tucker Defendants have not set forth any reasons for questioning the authenticity of the bank records submitted by the FTC. Federal Rule of Evidence 901(a) provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims." Fed. R. Evid. 901(a). The appearance of the bank records and content persuade the Court that the documents are what they purport to be. See Fed. R. Evid. 902(9) ("Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law" are self-authenticating); Fed. R. Evid. 901(b)(4) (documents can be authenticated by their "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances").

Next, neither the checks nor the bank records constitute hearsay. The bank records fall under the business records exception to the hearsay rule. See Fed. R. Evid. 803(6); (see, *e.g.*, Custodian of Bus. R. Aff., Ex. 257 to Singhvi Decl., ECF No. 908-257) (laying foundation testimony establishing that bank statements are bank's business records). Further, to the extent the bank statements and checks are signed by Scott Tucker, they are non-hearsay pursuant to Federal Rule of Evidence 801(d)(2)(A). Accordingly, the Court overrules the Tucker Defendants' objections regarding the checks and bank records relied upon by the FTC.

B. Defenses

The remaining affirmative defenses argued by Defendants' are without merit. See *F.T.C.* v. *Am. Microtel, Inc.*, No. CV-S-92-178-LDG(RJJ), 1992 WL 184252, at *1 (D. Nev. June 10, 1992) ("[T]he law is well established that principles of laches and equitable estoppel are not available as defenses in a suit brought by the government to enforce a public right or a public interest.") (citing *United States* v. *Ruby Co.*, 588 F.2d 697, 705 n.10 (9th Cir.)); *F.T.C.* v. *Ivy Capital, Inc.*, No. 2:11-CV-283 JCM GWF, 2011 WL 2470584, at *2 (D. Nev. June 20, 2011)

("Section 13(b) of the Federal Trade Commission Act specifies no statute of limitations period."); *F.T.C.* v. *Commerce Planet, Inc.*, 815 F.3d 593, 601 (9th Cir. 2016) (holding that "joint and several liability is permissible" in actions brought under § 13(b) and affirming monetary award); *F.T.C.* v. *Evans Prod. Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985) (rejecting defendant's attempt to "limit § 13(b) to cases involving 'routine fraud'" and agreeing that "a 'proper case' for which § 13(b) injunctive relief may be sought includes . . . any case involving a law enforced by the FTC").

Likewise, the Court rejects the Tucker Defendants' argument that the FTC abused its discretion under the FTC Act by proceeding through adjudication rather than rulemaking. (See Tucker Defs.' Resp. to FTC's MSJ 96:15-16). "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). The Ninth Circuit has clarified that where "adjudication change[d] existing law, and ha[d] widespread application," the FTC "exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking." *Ford Motor Co.* v. *F.T.C.*, 673 F.2d 1008, 1010 (9th Cir. 1981). Subsequent cases have clarified that an agency may announce new principals during adjudication so long as "its action [does not] 1) constitute an abuse of discretion or 2) circumvent the [Administrative Procedure Act's] requirements." *Union Flights, Inc.* v. *FAA*, 957 F.2d 685, 688 (9th Cir. 1992).

Here, adjudication by the FTC is proper. First, this litigation will not result in any changes to existing law. It merely applies the established principles of the FTC Act to the Tucker Defendants' particular unfair business

practices. Moreover, this action is against a single set of defendants and involves one discrete fraudulent practice. The Court's instant Order does not have "widespread application." Further, the FTC has not abused its discretion nor attempted to circumvent the APA. The FTC is not using this "adjudication to amend a recently amended rule, or to bypass a pending rulemaking proceeding." *Union Flights*, 957 F.2d at 688. Similarly, the Tucker Defendants cannot claim that they relied on a former FTC policy, or any other recognized situation constituting an abuse of discretion. See *id.* Without these showings, the Tucker Defendants have not demonstrated an abuse of discretion or an attempt to circumvent the APA.

C. Individual Liability

An individual may be held liable for corporate violations of the FTC Act if the individual: "(1) participated directly in, or had the authority to control, the unlawful acts or practices at issue; and (2) had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth." *Commerce Planet*, 815 F.3d at 600; see also *F.T.C.* v. *Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)

If the FTC proves direct participation in or authority to control the wrongful act, then the individual may be permanently enjoined from engaging in acts that violate the FTC Act. *F.T.C.* v. *Garvey*, 383 F.3d 891, 900 (9th Cir. 2004). To hold an individual liable for monetary redress, the FTC must additionally establish knowledge. *FTC* v. *Affordable Media*, 179 F.3d 1228, 1234 (9th Cir. 1999); *FTC* v. *Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). Proof that the defendant intended to deceive consumers or acted in bad faith is unnecessary

to establish a § 5(a) violation. *FTC* v. *World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988) ("An advertiser's good faith does not immunize it from responsibility for its misrepresentations."); *Feil* v. *F.T.C.*, 285 F.2d 879, 896 (9th Cir. 1960) ("Whether good or bad faith exists is not material, if the Commission finds that there is likelihood to deceive.").

1. Participation and Authority to Control

Authority to control may be evidenced by "active involvement in business affairs and making of corporate policy, including assuming the duties of a corporate officer." *F.T.C.* v. *Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). An individual's position as a corporate officer or authority to sign documents on behalf of the corporate defendant is sufficient to show requisite control. See *Publ'g Clearing House*, 104 F.3d at 1170 (holding that individual's "assumption of the role of president of [the corporation] and her authority to sign documents on behalf of the corporation demonstrate that she had the requisite control over the corporation" for purposes of finding individual liability under § 5(a)).

The FTC has satisfied the first prong for individual liability. The evidence abundantly establishes that Scott Tucker participated in and had authority to control the Lending Defendants. As president of NMS and CLK, Scott Tucker directed the creation and organization of the Lending Defendants, which operated merely as a veneer for Scott Tucker's lending entities. Specifically, Scott Tucker presented the Santee Sioux Tribe of Nebraska, the Miami Tribe of Oklahoma, and the Modoc Tribe of Oklahoma with business proposals that would allow the tribes to become "authorized lenders" for NMS. (Exs. 2, 12-13 to Singhvi Decl., ECF Nos. 908-2, 12-13). These proposals required the Scott Tucker Loan Servic-

ing Companies to provide "the capital to fund all loan transactions" and "the personnel, equipment and knowledge to make the business an immediate success," while the tribes were not required to invest any capital in the business. (See, *e.g.*, Ex. 2 to Singhvi Decl. at 3, 7, ECF No. 908-2) ("The Tribe and the proposed Tribal entity will not be required to provide any investment, cash or cash equivalent and will not be responsible for any losses."). Instead, the tribes were merely required to designate one employee and to do "all things reasonably necessary to carry on the Pay Day Loan business as a lender with the full support of [a Scott Tucker Loan Servicing Company]." (*Id.*). In exchange, the tribes would receive a guaranteed monthly fee. (*Id.*). Scott Tucker arranged for the drafting of the tribal lending ordinances that the tribes ultimately enacted without any significant changes. (Exs. 18, 27-29 to Singhvi Decl., ECF Nos. 908-18, 27-29).

Scott Tucker structured the Lending Defendants to be completely dependent on the Scott Tucker Loan Servicing Companies. The service agreements signed by Scott Tucker between UMS and the tribes required UMS to "furnish . . . all support staff, equipment and business arrangements required to conduct an efficient payday loan business." (Miami Tribe Serv. Agreement ¶3, ECF No. 908-14). Further, UMS agreed to provide all capital for the payday loan operation "to be administered wholly and only by UMS." (*Id.* ¶2); (see also SFS Serv. Agreement ¶1, ECF No. 908-15). Moreover, the Lending Defendants' 30(b)(6) representative, Natalie Dempsey, testified that "all the consumer loans ever offered by [the Lending Defendants have] been serviced by AMG, CLK or NM Services." (Dempsey Dep. at 21, ECF No. 908-7).

With regard to the Lending Defendants' lending activities, SFS's Rule 30(b)(6) representative, Lee Ickes

("Ickes"), testified that AMG drafted SFS's loan applications. (Ickes Dep. at 9, ECF No. 908-13). Similarly, MNES stated during discovery that AMG performs "the drafting, modification and review of [MNES's] loan notes, disclosures and websites." (MNE Resp. to FTC Interrog. No. 9, ECF No. 908-144); (see also Red Cedar Resp. to Interrog. No. 9, ECF No. 908-146) (stating same). Moreover, Dempsey testified that only AMG staff were involved in the drafting and modification of loan disclosures and websites. (Dempsey Dep. at 90). Ickes testified that AMG set the payment schedule for consumer loans for SFS and underwrites consumers' loan applications. (Ickes Dep. at 14, 16). Moreover, Ickes testified that SFS does not have access to the criteria for loan approval, and SFS has never rejected a loan that AMG determined met the criteria for approval. (*Id.* at 15-16).

Scott Tucker's role did not materially change following the merger of CLK into AMG in 2008. Indeed, AMG Meeting Minutes describe CLK's merger with AMG as "just a name change." (Ex. 48 to Singhvi Decl., ECF No. 908-48). In addition, an email to CLK employees announcing the AMG merger clarifies that "[y]our job description, responsibilities and pay will not change at all . . . just the name of the company you work for." (Ex. 49 to Singhvi Decl., ECF No. 908-49). Even after the merger, Scott Tucker retained the authority to implement policies as AMG's President. (See Grote Dep. at 44, Ex. 908-67); (Ex. 54 to Singhvi Decl. at 7, ECF No. 908-54) (referencing Scott Tucker as AMG President). Although Scott Tucker attempted to obfuscate his official title with AMG over time, Defendants admit that, at the very least, Scott Tucker was an executive with operational control of AMG. (AMG Am. Resp. to Expedited Interrog. No. 3, ECF No. 908-58).

Consistent with this authority, Scott Tucker continued to participate in control of the Lending Defendants. Scott Tucker had authority to control the Lending Defendants' accounts used to fund consumer loans. (See Ickes Dep. at 21) ("AMG Services oversees or manages [the day-to-day operational funds] for the Santee Sioux Nation, SFS, Inc."). Specifically, the Miami Tribe passed a corporate resolution granting Scott Tucker power of attorney over its accounts. (Ex. 80 to Singhvi Decl., ECF No. 908-80). Scott Tucker is also an authorized signatory on the SFS portfolio account and seven other accounts belonging to the Lending Defendants. (Ickes Dep. at 29); (AMG Am. Resp. to Interrog. No. 1, ECF No. 908-81). The FTC has produced a voluminous record of checks signed by Scott Tucker from the Lending Defendants' accounts to the Corporate Lending Defendants wholly owned by Scott Tucker. (See, *e.g.*, Ex. 83 to Singhvi Decl., ECF No. 908-83).

Further, Scott Tucker reviewed and approved loan disclosures and websites for the Lending Defendants. (See, *e.g.*, AMG Am. Resp. to Expedited Interrog. No. 9, ECF No. 908-62); (Dempsey Dep. at 90). Indeed, the FTC has produced numerous examples of Scott Tucker involved in such activities. (See, *e.g.*, Ex. 63 to Singhvi Decl., ECF No. 908-63) (email in which Scott Tucker opines on whether or not certain language should be included in lending application). Scott Tucker also had the power to hire and fire and exercised that authority with respect to the expansion of loan processing employees in the Miami office. (Williams Decl. at 7, ECF No. 908-155).

2. Knowledge

The knowledge requirement is satisfied by establishing that "the individual had actual knowledge of the material misrepresentation, was recklessly indifferent to the

truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of truth." *Garvey*, 383 F.3d at 900 (citing *Publ'g Clearing House*, 104 F.3d at 1171). "The degree of participation in business affairs is probative of knowledge." *FTC* v. *Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1089 (C.D. Cal. 1994); see also *Affordable Media*, 179 F.3d at 1235 ("The extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability.").

The evidence demonstrates that, at the very least, Scott Tucker was recklessly indifferent to the misleading representations of the Lending Defendants. As discussed above, Scott Tucker reviewed the loan disclosures and websites. Dempsey testified that Tucker "conducted reviews" of loan documents and websites. (Dempsey Dep. at 90). In many instances, Scott Tucker proposed specific language for loan disclosures. (See, *e.g.*, Ex. 65 to Singhvi Decl., ECF No. 908-65). Further, Scott Tucker stated in discovery exchanges that he "comments on and recommends proposed changes to webpages." (Scott Tucker Resp. to Interrog. No. 2, ECF No. 908-68).

With regard to consumer complaints, Scott Tucker had ample notice of internal AMG complaint tracking reports as well as complaints received by the tribes and third party services. Dempsey testified that Scott Tucker had "seen [AMG] reports on customer complaints." (Dempsey Dep. at 90). Red Cedar Services' president, Troy LittleAxe, stated that he "would forward the written [consumer] complaints to AMG Services, Inc., specifically Scott Tucker." (LittleAxe Resp. to Pl.'s Interrog. No. 4, ECF No. 908-69). Moreover, "[e]verytime [LittleAxe] had contact with an individual consumer or a state

agency, [he] would notify . . . AMG Services, Inc., specifically Scott Tucker." (*Id.*). In emails between Scott Tucker and Blaine Tucker discussing the escalating consumer complaints, Scott Tucker suggested development of a compliance department. (See Ex. 72 to Singhvi Decl., ECF No. 908-72).

Finally, Scott Tucker was specifically aware that customers often did not understand Defendants' process of renewals and paydowns. Scott Tucker received an email from Tim Buckley, an AMG manager, proposing a new repayment model that would address the fact that "90% of the issues we have with customers stem from them not understanding our process of renewals and paydowns." (Ex. 75 to Singhvi Decl.). When asked about the e-mail during his deposition, Scott Tucker invoked his Fifth Amendment privilege against self-incrimination.[5] (Scott Tucker Dep. 41:25-44:9, , ECF No. 908-76). Scott Tucker's pervasive role and authority at AMG, which extended to almost every facet of the company's business and operations, also creates a strong inference that Scott Tucker had the requisite knowledge that the Lending Defendants' webpages were misleading. *Am. Standard Credit Sys.*, 874 F. Supp. at 1089; *Amy Travel*, 875 F.2d at 574; *Affordable Media*, 179 F.3d at 1235. Accordingly, the evidence, coupled with Scott Tucker's assertions of the Fifth Amendment, demonstrate that Scott Tucker had the requisite knowledge to be held individually liable for the deceptive website marketing of the Lending Defendants.

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[5] In this instance, the Court draws an adverse inference against Scott Tucker for his repeated invocation of his Fifth Amendment privilege during his deposition. See *SEC* v. *Jasper*, 678 F.3d 1116, 1126-27 (9th Cir. 2012) (affirming district court's adverse inference in similar circumstances).

D. Common Enterprise Liability

Under the theory of common enterprise, each entity in a group of interrelated companies can be held jointly and severally liable for the actions of other entities in that group. *FTC* v. *Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010). "Entities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues." *Id.* "To determine whether a common enterprise exists, the Court considers factors such as: common control; the sharing of office space and officers; whether business is transacted through a maze of interrelated companies; the commingling of corporate funds and failure to maintain separation of companies; unified advertising; and evidence that reveals that no real distinction exists between the corporate defendants." *FTC* v. *Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1216 (D. Nev. 2011) aff'd in part, vacated in part, 763 F.3d 1094 (9th Cir. 2014).

The evidence demonstrates that no real distinction exists between the Corporate Lending Defendants. The Tucker Defendants admit that AMG Capital, Level 5, and Broadmore all used the same Nevada address for incorporation. (Tucker Defs.' Am. Ans. ¶¶10-12, 15, ECF No. 397). Further, bank statements, checks, and invoices all demonstrate that the Corporate Lending Defendants all operated from the same Kansas address, which the Tucker Defendants do not dispute. (See Ex. 168 to Singhvi Dep., ECF No. 908-168). Nor do the Tucker Defendants dispute that the Corporate Lending Defendants are wholly-owned by Scott Tucker. (See Corp. Disclosure Statement, ECF No. 58). Finally, as discussed *supra*, Scott Tucker dominated the Lending Defendants' bank

accounts and funneled thousands of payments to the Corporate Lending Defendants. Indeed, beyond their unfounded evidentiary objections, the Tucker Defendants do not dispute the commingling of funds between AMG Capital, Level 5, Broadmore, Black Creek, and other entities owned by Scott Tucker. (See Tucker Defs.' Resp. to FTC's MSJ 67:15-27, 68:18-24).

The Tucker Defendants argue that a common enterprise did not exist because "the FTC has not shown that the Tucker entities participated in the lending." (Resp. 66:5-7). The Tucker Defendants oversimplify the standard to show common enterprise liability. The Ninth Circuit panel in *Network Services* did not find the existence of a common venture dispositive. *Network Servs.*, 617 F.3d at 1143. Instead, the panel also considered the existence of pooled resources, staff, and funds as well as common ownership in its determination that a common enterprise existed under the facts in that case. *Id.* Likewise, other courts analyze these factors collectively without emphasis on any one factor. See, *e.g.*, *Fed. Trade Comm'n* v. *Mortg. Relief Advocates LLC*, No. CV-14-5434-MWF (AGRx), 2015 WL 11257575, at *6 (C.D. Cal. July 1, 2015) ("It is not necessary that the FTC prove any particular number of entity connections in order to establish a common enterprise, and, similarly, no one connection is dispositive."). Accordingly, in light of the overwhelming evidence that the Tucker Defendants operated as a common enterprise, each is jointly and severally liable for one another's wrongful conduct.

E. Relief Defendants

District courts are given broad authority under the FTC Act to fashion equitable remedies to the extent necessary to ensure effective relief. *Network Servs.*, 617 F.3d at 1141-42. "[T]he broad equitable powers of the

federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong." *S.E.C.* v. *Colello*, 139 F.3d 674, 676 (9th Cir. 1998). "The creditor plaintiff must show that the [relief] defendant has received ill gotten funds *and* that he does not have a legitimate claim to those funds." *Id.* at 677. Upon such a showing, the remedy is an equitable monetary judgment in the amount of the funds that the relief defendant received. See *id.*; see also *S.E.C.* v. *Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) ("[D]isgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset.").

The evidence establishes that Scott Tucker diverted millions of dollars from himself and the Corporate Lending Defendants to the Relief Defendants. Beginning with Scott Tucker's wife, Kim Tucker, numerous bank statements show payments amounting to $19,072,774 in favor of Kim Tucker from the Tucker Defendants. (See Ex. 227 to Singhvi Decl., ECF No. 908-227). These payments include a check for over $4.1 million from Black Creek. (Ex. 228 to Singhvi Decl., ECF No. 908-228). In addition, on several occasions Scott Tucker directed loan portfolios to make payments to a Corporate Lending Defendant, then simultaneously caused the Corporate Lending Defendant to pay the aggregate amount to Kim Tucker. (See, *e.g.*, Ex. 231 to Singhvi Decl., ECF No. 908-231). Moreover, Kim Tucker admits that she "intermittently received monies from or on behalf of her spouse, Scott Tucker, through AMG Services, Inc. and Black Creek Capital Corporation . . . for the purposes of personal and household uses." (Kim Tucker Supp. Ans. to Interrog. 6(c), ECF No. 908-226).

Turning to Park 269, Kim Tucker's wholly owned entity and nominal owner of an $8 million home located at 269 Park Avenue, Aspen, Colorado, the evidence demonstrates that AMG financed the purchase, mortgage, furnishing, maintenance, housekeeping, landscaping, and property taxes for the property. (See Ex. 87 to Singhvi Decl., ECF No. 908-87); (Ex. 238 to Singhvi Decl., ECF No. 908-238). Park 269 does not dispute these payments. (See generally House Dep., ECF No. 908-237). Further, a summary created by Blaine Tucker of Scott Tucker's investments shows that AMG is the holding company and funding company for Park 269. (Ex. 202 to Singhvi Decl. at 4, ECF No. 908-202).

Neither Kim Tucker nor Park 269 have a legitimate claim to these funds. See *Colello*, 139 F.3d at 676. Kim Tucker admits she had no role or ownership interest in any Corporate Lending Defendant. (Kim Tucker Supp. Resp. to Interrog. No. 1, ECF No. 908-226). Nor did Kim Tucker provide any consideration for the money transfers to her. (See Kim Tucker Supp. Ans. to Interrog. 6(c)). Further, Park 269 disclaims having offered any services or other value to the Tucker Defendants. (Park 269 Resp. to Interrog. No. 6, ECF No. 908-235). The Court therefore finds disgorgement of $19,072,774 from Kim Tucker's accounts and $8 million from Park 269 is appropriate.

F. Remedies

The FTC requests both a permanent injunction against the Tucker Defendants and monetary equitable relief, in the form of restitution or, in the alternative, disgorgement. (First Am. Compl. 20:7-19, ECF No. 386). Under § 13(b) of the FTC Act, the FTC "may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b); see also *Evans Prods.*, 775

F.2d at 1086. "This provision gives the federal courts broad authority to fashion appropriate remedies for violations of the Act," *F.T.C.* v. *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), including "any ancillary relief necessary to accomplish complete justice," *F.T.C.* v. *H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

1. Permanent Injunction

A permanent injunction is justified if there exists "some cognizable danger of recurrent violation," *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953), or "some reasonable likelihood of future violations," *CFTC* v. *Co Petro Mktg. Grp., Inc.*, 502 F. Supp. 806, 818 (C.D. Cal. 1980), aff'd, 680 F.2d 573 (9th Cir. 1982). The Court examines the totality of the circumstances involved and a variety of factors in determining the likelihood of future misconduct. *Co Petro Mktg. Grp.*, 502 F. Supp. at 818; *SEC* v. *Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). Non-exhaustive factors include the degree of scienter involved, whether the violative act was isolated or recurrent, whether the defendant's current occupation positions him to commit future violations, the degree of harm consumers suffered from the unlawful conduct, and the defendant's recognition of his own culpability and sincerity of his assurances, if any, against future violations. *Murphy*, 626 F.2d at 655; *FTC* v. *Magui Publishers, Inc.*, No. 89-3818, 1991 WL 90895, at *15-16 (C.D. Cal. Mar. 28, 1991). "[I]t must be 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *TRW, Inc.* v. *F.T.C.*, 647 F.2d 942, 953 (9th Cir. 1981) (quoting *United States* v. *Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

The Court finds that a permanent injunction against Scott Tucker is appropriate under the circumstances to enjoin him from engaging in similar misleading and de-

ceptive lending activities. Here, Scott Tucker did not participate in an isolated, discrete incident of deceptive lending, but engaged in sustained and continuous conduct that perpetuated the deceptive lending since at least 2008. Scott Tucker initiated the Corporate Lending Defendants' relationship with the tribes and oversaw the organization of the Lending Defendants. Scott Tucker served as a key leader and executive of the Corporate Lending Defendants. Scott Tucker reviewed the various iterations of the loan documents and webpages and, at the very least, was recklessly indifferent to the fact that they were misleading, given the ample notice of consumer confusion. In addition, Scott Tucker was previously convicted on federal charges related to another fraudulent lending scheme. See *United States* v. *Tucker*, Case No. CR-90-00163-01 (W.D. Mo. Aug. 13, 1990); *United States* v. *Tucker*, Case No. 4:81-CR-00001 (W.D. Mo. Jan. 4, 1991). Further, as with every question asked during his deposition, Scott Tucker invoked the Fifth Amendment as to his current business ventures and whether or not he is currently engaged in consumer lending. (See Scott Tucker Dep. 111:21-114:12); *Colello*, 139 F.3d at 677 (affirming district court's adverse inference against defendant who "consistently invoked his Fifth Amendment privilege not to testify"). All of these factors weigh in favor of imposing a permanent injunction against Scott Tucker.

2. Monetary Equitable Relief

Section 13(b) permits a panoply of equitable remedies, including monetary equitable relief in the form of restitution and disgorgement, as well as miscellaneous reliefs such as asset freezing, accounting, and discovery to aid in providing redress to injured consumers. *Pantron I Corp.*, 33 F.3d at 1103 n.34 (9th Cir. 1994); *F.T.C.* v. *Fig-*

gie Int'l, Inc., 994 F.2d 595, 606-08 (9th Cir. 1993); *H.N. Singer*, 668 F.2d at 1113.

i. Restitution and Disgorgement

The FTC Act is designed to protect consumers from economic injuries. *Stefanchik*, 559 F.3d at 931. To effect that purpose, courts may award restitution to redress consumer injury. *F.T.C.* v. *Gill*, 265 F.3d 944, 958 (9th Cir. 2001) ("We have held that restitution is a form of ancillary relief available to the court in these circumstances to effect complete justice."). Restitution may be measured by the "the full amount lost by consumers rather than limiting damages to a defendant's profits." *Stefanchik*, 559 F.3d at 931 (affirming restitution of over $17 million for the full amount of consumer loss); see also *FTC* v. *Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (affirming restitution for more than $16 million against company and officer as consumer loss under section 13(b)). Consumer loss is calculated by "the amount of money paid by the consumers, less any refunds made." *FTC* v. *Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 213-14 (D. Mass. 2009), aff'd, 624 F.3d 1 (1st Cir. 2010); see also *Stefanchik*, 559 F.3d at 931; *Figgie*, 994 F.2d at 606; *Gill*, 265 F.3d at 958.

As an alternative to restitution, "[s]ection 13(b) permits a district court to order a defendant to disgorge illegally obtained funds." *Febre*, 128 F.3d at 537. Disgorgement is measured by the amount of profits causally connected to the violation. *SEC* v. *Happ*, 392 F.3d 12, 31 (1st Cir. 2004). The purpose of disgorgement is not to redress consumer injuries but to deprive wrongdoers of ill-gotten gains. *Febre*, 128 F.3d at 537.

Irrespective of the measure used to calculate monetary equitable relief, courts apply a burden-shifting framework to determine the specific amount to award.

Direct Mktg. Concepts, 624 F.3d at 15. First, the FTC bears the initial burden of providing the Court with a reasonable approximation of the monetary relief to award. *Commerce Planet*, 815 F.3d at 603. A reasonable estimate, rather than an exact amount, is proper because that may be the only information available, as when defendants do not maintain data necessary to calculate the precise amount. *FTC* v. *QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008) ("A court is entitled to proceed with the best available information[.]"); *FTC* v. *Verity Int'l, Ltd.*, 443 F.3d 48, 69 (2d Cir.2006) ("Of course, the reasonableness of an approximation varies with the degree of precision possible."), cert. denied, 549 U.S. 1278, 127 S. Ct. 1868, 167 L. Ed. 2d 317 (2007).

Second, once the FTC satisfies this burden, "the burden then shifts to the defendant to show that the FTC's figures overstate the amount of the defendant's unjust gains." *Commerce Planet*, 815 F.3d at 604. "Any fuzzy figures due to a defendant's uncertain bookkeeping cannot carry a defendant's burden to show inaccuracy." *Direct Mktg. Concepts*, 624 F.3d at 15; see also *Commerce Planet*, 815 F.3d at 604 ("Any risk of uncertainty at this second step 'fall[s] on the wrongdoer whose illegal conduct created the uncertainty.'") (quoting *F.T.C.* v. *Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011)).

ii. Calculation of Consumer Loss

The FTC requests an amount of $1,317,753,577 in consumer loss between 2008 and 2012. (FTC's MSJ 73:20-21). The FTC relies on calculations performed by Elizabeth Miles, a data analyst employed by the FTC. (See Miles Decl. ¶1, ECF No. 908-244). Miles used loan data from eCash, the Tucker Defendants' loan management software, produced by AMG and MNES. (See *Id.* ¶2); (Resp. to Obj. 22:13-15). To implement the calculations,

Miles used Stata, software designed to sort and aggregate large databases. (Miles Decl. ¶4). Miles created "scripts," or commands, to identify where a consumer paid more than the disclosed total of payments, the principal and one finance charge. (*Id.* ¶¶4-11). Miles excluded loan records without matching consumer information as well as loans to individual consumers who borrowed from any specific portfolio more than once. (*Id.* ¶¶8-9). For that subset of loans, the FTC instructed Miles multiply the amount borrowed by the disclosed total of payments, or 1.3, reflecting the standard 30% finance charge imposed by the Lending Defendants. (*Id.* ¶11); (see Resp. to Obj. 25:2-4). Then, Miles directed the software to subtract that amount from the total amount consumers paid. (*Id.* ¶12). The resulting amount of consumer harm is the total amount paid in excess of the amount borrowed accounting for disclosed finance charges, or $1,317,753,577. (*Id.* ¶13).

The Tucker Defendants' objections to the FTC's consumer harm calculation largely center on the admissibility of the Miles Declaration. (See Obj. 21:13-22:20); (Tucker Defs.' Resp. to FTC's MSJ 72:20-80:2). On this point, the Tucker Defendants argue, *inter alia*, that the FTC's calculations do not include "over 3.3 million consumer records and over 3,000 loan records" that failed to merge into a single new data set. (Tucker Defs.' Resp. to FTC's MSJ 79:13). However, the absence of these records likely benefits the Tucker Defendants; if these records had successfully merged, the amount of consumer harm would conceivably be greater than the instant calculation. Further, the Court has already found the Miles Declaration admissible. (Order 9:20 n.5, ECF No. 960).

Next, the Tucker Defendants object that the FTC's calculation "erroneously assumes that every single bor-

rower forever relied upon the loan disclosures and that every dollar paid in excess of the principal plus one finance charge was directly attributable to a Section 5 violation." (Tucker Defs.' Resp. to FTC's MSJ 80:9-11). The Court agrees with the FTC that, as a matter of law, the FTC need not show that all consumers were deceived or that all consumers relied upon the misrepresentations. Under § 13(b) of the FTC Act, proof of injury by every individual consumer is not required to justify a restitution award. *Stefanchik*, 559 F.3d at 929 n.12; *Figgie*, 994 F.2d at 605 ("It is well established with regard to Section 13 of the FTC Act . . . that proof of individual reliance by each purchasing customer is not needed."). This is because, unlike a private suit for fraud, "[s]ection 13 serves a public purpose by authorizing the Commission to seek redress on behalf of injured consumers," and "[r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section." *Figgie Int'l*, 994 F.2d at 605. 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.*; see also *FTC* v. *Inc21.com Corp.*, 745 F. Supp. 2d 975, 1011 (N.D. Cal. 2010) ("[I]t is sufficient for the FTC to prove that misrepresentations were widely disseminated (or impacted an overwhelming number of consumers) and caused actual consumer injury."), aff'd, 475 Fed. Appx. 106 (9th Cir. 2012).

In addition, the Tucker Defendants argue that repeat borrowers within the same loan portfolio as well as repeat borrowers across the different loan portfolios should be excluded from the calculation. (Tucker Defs.' Resp. to

FTC's MSJ 81:21-84:19). The Tucker Defendants assert that the repeat nature of these loans indicates that these borrowers were "satisfied" and "unconfused." (*Id.* 82:27, 83:2). In support, the Tucker Defendants rely on a report prepared by their economics expert, Dr. David Scheffman ("Dr. Scheffman"). (*Id.* 81:22-25). Dr. Scheffman states in his report that "[repeat borrowers] . . . plainly understood the loan terms," without further explanation and merely as a premise to his ultimate conclusions. (Scheffman Report ¶ 20, ECF No. 942-16). This single conclusory statement alone is insufficient to create a genuine dispute of material fact that repeat customers were not misled. Further, the Tucker Defendants provide no evidence that repeat borrowers across loan portfolios knew they were dealing with the same enterprise.

Finally, the Tucker Defendants also argue that they should only be liable for one finance charge per borrower because "the only amount with a causal nexus to the Court's finding of a Section 5 violation is one finance charge for each first-time borrower." (Tucker Defs.' Resp. to FTC's MSJ 86:5-6). This argument is legally and factually incorrect. The instant § 13 damages calculation asks whether consumers who purchased loans "did so in reliance on the misrepresentations." *Commerce Planet*, 815 F.3d at 604. On this point, the Court determined, *supra*, that the FTC was entitled to a presumption in the affirmative. Consumers began paying back their loans only after the "fraud in the selling" was complete and could not thereafter escape the loan repayment scheme. *Figgie*, 994 F.2d at 606. Accordingly, the calculation appropriately includes subsequent finance charges.

Where, as here, consumers suffer economic injury resulting from a defendant's violations of the FTC Act, equity requires monetary relief in the full amount lost by

consumers. See *Stefanchik*, 559 F.3d at 931. Accordingly, the Court finds that the Tucker Defendants are jointly and severally liable for restitution in the amount of $1,266,084,156, plus prejudgment interest. This amount reflects the $1,317,753,577 in total harm minus the $24,596,677 collected from former defendants and the $27,072,744 owing from the Relief Defendants, discussed *supra*. (See FTC's MSJ 100:3-6).

IV. CONCLUSION

IT IS HEREBY ORDERED that the Relief Defendants' Motion for Summary Judgment, (ECF No. 900), is **DENIED**.

IT IS FURTHER ORDERED that the Tucker Defendants' Motion for Summary Judgment, (ECF No. 913), is **DENIED**.

IT IS FURTHER ORDERED that the Tucker Defendants' Motions to Reconsider, (ECF Nos. 850, 963, 975), are **DENIED**.

IT IS FURTHER ORDERED that the FTC's Motion for Summary Judgment, (ECF No. 907), is **GRANTED** pursuant to the following terms:

I. DEFINITIONS

For the purpose of this Order, the following definitions apply:

1. "Collection of Debts" means any activity the principal purpose of which is to collect or attempt to collect, directly or indirectly, Debts owed or due or asserted to be owed or due.

2. "Consumer credit" means credit offered or extended to a natural person primarily for personal, family, or household purposes.

3. "Corporate Defendants" means AMG Capital Management, LLC; Black Creek Capital Corporation; Level 5 Motorsports, LLC; and Broadmoor Capital Partners, LLC, and their successors and assigns, individually, collectively, or in any combination.

4. "Debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, or services that are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

5. "Defendants" means the Corporate Defendants and Scott Tucker.

6. "Material" means likely to affect a person's choice of, or conduct regarding, goods or services.

7. "Person" means a natural person, organization, or other legal entity, including a corporation, partnership, proprietorship, association, cooperative, or any other group or combination acting as an entity.

8. "Relief Defendants" means Kim Tucker and Park 269, LLC.

II. BAN ON CONSUMER LENDING

IT IS ORDERED that Scott Tucker and the Corporate Defendants, whether directly or through an intermediary, are permanently restrained and enjoined from, or assisting others engaged in:

A. Providing, arranging for, or assisting any consumer in receiving or applying for any loan or other extension of Consumer Credit; and

B. Advertising, marketing, promoting, or offering any loan or other extension of Consumer Credit.

III. PROHIBITION AGAINST MISREPRESENTATIONS

IT IS FURTHER ORDERED that Scott Tucker and the Corporate Defendants, and the Corporate Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, Whether acting directly or indirectly, in connection with promoting or offering for sale any good or service, are permanently restrained and enjoined from misrepresenting or assisting others in misrepresenting, expressly or by implication, any fact Material to consumers concerning any good or service, such as: the total costs; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics.

IV. PROHIBITION AGAINST DECEPTIVE COLLECTION PRACTICES

IT IS FURTHER ORDERED that Scott Tucker and the Corporate Defendants, and their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the Collection of Debts, are hereby permanently restrained and enjoined from misrepresenting, or assisting others in misrepresenting, expressly or by implication:

A. That consumers can be arrested, prosecuted, or imprisoned for failing to pay the Defendant;

B. That the Defendant will or can take formal legal action against consumers who do not pay the Defendant, including but not limited to, filing suit; and

C. Any other Material fact.

V. INJUNCTION CONCERNING ELECTRONIC FUND TRANSFER PRACTICES

IT IS FURTHER ORDERED that Scott Tucker and the Corporate Defendants, and their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are hereby permanently restrained and enjoined from conditioning the extension of credit on preauthorized electronic fund transfers.

VI. MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment in the amount of $1,301,897,652 is entered in favor of the Commission against the Defendants as equitable monetary relief. In addition, judgment in the amount of $19,072,774 is entered in favor of the Commission against Relief Defendant Kim Tucker, and judgment in the amount of $8,000,000 is entered in favor of the Commission against Relief Defendant Park 269, LLC.

B. The Defendants are ordered to pay to the Commission $$1,266,084,156, plus prejudgment interest. Such payment must be made within 14 days of entry of this Order by electronic fund transfer in accordance with instructions previously provided by a representative of the Commission.

C. Kim Tucker is ordered to pay to the Commission $19,072,774. Such payment must be made within 14 days of entry of this Order by electronic fund transfer in accordance with instructions previously provided by a representative of the Commission.

D. Park 269, LLC is ordered to pay to the Commission $8,000,000. Such payment must be made within 14

days of entry of this Order by electronic fund transfer in accordance with instructions previously provided by a representative of the Commission.

E. The Defendants and Relief Defendants relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

F. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

G. The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

H. The Defendants and Relief Defendants must submit their Taxpayer Identification Numbers to the Commission, and acknowledge that their Taxpayer Identification Numbers may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

I. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equi-

table relief (including consumer information remedies) as it determines to be reasonably related to the Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. The Defendants and Relief Defendants have no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection.

VII. CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Scott Tucker and the Corporate Defendants, the Corporate Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, are hereby permanently restrained and enjoined from directly or indirectly:

A. Failing to provide sufficient customer information, to the extent it is in the Defendants' possession, custody or control, to enable the Commission to efficiently administer consumer redress. If a representative of the Commission requests in writing any information related to redress, the Defendants must provide it, in the form prescribed by the Commission, within 14 days.

B. Disclosing or transferring to any other person customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that the Defendants obtained prior to entry of this Order in connection with the offering and collection of high-fee, short-term payday loans.

C. Failing to destroy such customer information in all forms in its possession, custody, or control within 30 days

after receipt of written direction to do so from a representative of the Commission. *Provided, however*, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

VIII. ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that the Defendants and Relief Defendants obtain acknowledgments of receipt of this Order:

A. The Defendants and Relief Defendants, within 7 days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 20 years after entry of this Order, Scott Tucker, for any business that Scott Tucker, individually or collectively with any other defendant in this action, is the majority owner or controls directly or indirectly, and each Corporate Defendant must deliver a copy of this Order to (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in the Collection of Debts; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 7 days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Scott Tucker and the Corporate Defendants delivered a copy of this Order, these Defendants must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

IX. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Scott Tucker and the Corporate Defendants make timely submissions to the Commission:

A. One year after entry of this Order, Scott Tucker and the Corporate Defendants must submit compliance reports, sworn under penalty of perjury:

1. Scott Tucker and each Corporate Defendant must:
    a. Identify the primary physical, postal, and e-mail address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Scott Tucker and the Corporate Defendants;
    b. Identify all of Scott Tucker's or the Corporate Defendant's businesses by all of their names, telephone numbers, and physical, postal, e-mail, and Internet addresses;
    c. Describe the activities of each business and the involvement of any other defendant in this proceeding;
    d. Describe in detail whether and how Scott Tucker and the Corporate Defendants are in compliance with each Section of this Order; and
    e. Provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Scott Tucker must:

   a. Identify all telephone numbers and all physical, postal, email and Internet addresses, including all residences;

   b. Identify all business activities, including any business for which Scott Tucker performs services whether as an employee or otherwise and any entity in which Scott Tucker has any ownership interest; and

   c. Describe in detail Scott Tucker's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 20 years after entry of this Order, Scott Tucker and the Corporate Defendants must submit compliance notices, sworn under penalty of perjury, within 14 days of any change in the following:

1. Scott Tucker and each Corporate Defendant must report any change in:

   a. Any designated point of contact; or

   b. The structure of any Corporate Defendant or any entity that Scott Tucker or any Corporate Defendant has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Scott Tucker must report any change in:

a. Name, including aliases or fictitious names, or residence address; or

b. Title or role in any business activity, including any business for which Scott Tucker performs services whether as an employee or otherwise and any entity in which Scott Tucker has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Scott Tucker and the Corporate Defendants must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Scott Tucker or the Corporate Defendants within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. AMG Services, Inc., No. X120026.

X. RECORDKEEPING

IT IS FURTHER ORDERED that Scott Tucker and the Corporate Defendants must create certain records for 20 years after entry of the Order, and retain each such record for 5 years. Specifically, Corporate Defendants and Scott Tucker for any business that Scott Tucker, individually or collectively with any other defendants in this action, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

E. A copy of each unique advertisement or other marketing material.

XI. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Scott Tucker and the Corporate Defendants' compliance with this Order:

A. Within 14 days of receipt of a written request from a representative of the Commission, Scott Tucker and the Corporate Defendants must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for dep-

ositions; and produce documents for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69, provided that Scott Tucker or the Corporate Defendants, after attempting to resolve a dispute without court action and for good cause shown, may file a motion with this Court seeking an order for one or more of the protections set forth in Rule 26(c).

B. For matters concerning this Order, the Commission is authorized to communicate directly with the Defendants. The Defendants must permit representatives of the Commission to interview any employee or other person affiliated with the Defendants who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives, as consumers, suppliers, or other individuals or entities, to the Defendants or any individual or entity affiliated with the Defendants, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

XII. PRESERVATION OF RECORDS AND TANGIBLE THINGS

IT IS FURTHER ORDERED that the Defendants and officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order are hereby enjoined from: destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any documents or

records that relate to the business practices, or business or personal finances, of the defendants in this proceeding or any other entity directly or indirectly under the control of any defendant in this proceeding. In the event of the dissolution of any Corporate Defendant, that Defendant shall ensure continued preservation of all such documents and records through the conclusion of the proceeding (and any appeals therefrom). *Provided that*, nothing in this Article shall prohibit destruction of consumer information as may be directed by the Commission pursuant to Article VI.C.

XIII. DISSOLUTION OF STIPULATED ORDERS FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND JUDGMENT

IT IS FURTHER ORDERED that, upon entry of this Order, the Court's Order Entering Stipulated Preliminary Injunction and Bifurcation dated December 27, 2012 (ECF No. 296) is **VACATED**; and

IT IS FURTHER ORDERED that, upon entry of this Order, the Court's Stipulated Order for Permanent Injunction and Judgment dated October 8, 2013 (ECF No. 478) is **VACATED**.

XIV. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

The Clerk of the Court shall enter judgment accordingly and close the case.

Dated this 30 day of April, 2017.

/s/ Gloria M. Navarro
Gloria M. Navarro, Chief Judge
United States District Judge

APPENDIX D
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NO. 2:12-cv-00536-GMN-VCF

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

AMG SERVICES INC., *et al*.,
Defendants.

JUDGMENT IN A CIVIL CASE

September 30, 2016

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered pursuant to Order #1057 entered September 30, 2016.

Date: September 30, 2016

/s/ Lance S. Wilson
Clerk

/s/ M. Morrison
(By) Deputy Clerk

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.

Appeal from the United States District Court
for the District of Nevada, Las Vegas in
No. 2:12-cv-00536-GMN-VCF,
Gloria M. Navarro, Chief Judge, Presiding

Filed: June 20, 2019

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

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* The Honorable Richard G. Stearns, United States District Judge for the District of Massachusetts, sitting by designation.

ORDER

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

RELEVANT STATUTORY PROVISIONS

1. Section 5 of the Federal Trade Commission Act, Pub. L. No. 203, 38 Stat. 717 (1914), codified as amended at 15 U.S.C. §45, provides:

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

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

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

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

(3) This subsection shall not apply to unfair methods of competition involving commerce with

foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(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, partner-

ship, or corporation under paragraph[1] (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

[1] So in original. Probably should be "clause".

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 At-

torney 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.

2. Section 13 of the Federal Trade Commission Act, Pub. L. No. 203, 38 Stat. 717 (1914), codified as amended at 15 U.S.C. § 53, provides:

§ 53. False advertisements; injunctions and restraining orders

(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 ef-

fect: *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.

(c) Service of process; proof of service

Any process of the Commission under this section may be served by any person duly authorized by the Commission—

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Exception of periodical publications

Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

3. Section 19 of the Federal Trade Commission Act, Pub. L. No. 203, 38 Stat. 717 (1914), codified as amended at 15 U.S.C. § 57b, provides:

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

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

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

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

was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available

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

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

(1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final

by reason of section 45(g)(1) of this title, in which case such finding shall be conclusive if supported by evidence.

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

(d) Time for bringing of actions

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

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

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