No. 13-

IN THE

Supreme Court of the United States

KRISTY ROSS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), this Court held that where Congress had imposed "elaborate enforcement provisions" in one statute allowing for monetary awards, Congressional authorization for mere injunctions in a different statute did not include monetary relief. Years later, this Court denied the Government's petition for a writ of *certiorari* after the District of Columbia Circuit applied *Meghrig* by holding that an injunction section of the RICO Act did not permit a disgorgement remedy since RICO provided elaborate enforcement provisions elsewhere for such relief. *See United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir.), cert. denied, 546 U.S. 960 (2005).

The question presented here is whether, following *Meghrig*, the presence of elaborate enforcement provisions authorizing monetary relief under Section 19 of the FTC Act, 15 U.S.C. § 57b, precludes interpreting monetary remedies into the purely injunctive language of Section 13(b), 15 U.S.C. § 53(b).

PARTIES TO THE PROCEEDING

Kristy Ross, an individual, is the Petitioner. The United States Federal Trade Commission is the Respondent.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Not applicable.

Parties and individuals who are no longer participating in this matter (having defaulted or settled) are:

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kristy Ross respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit, insofar as it allowed the award of monetary remedies under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. at 1a-16a) is reported at 743 F.3d 886. The findings and conclusions of the United States District Court for the District of Maryland (App. at 17a-53a) are reported at 897 F. Supp. 2d 369.

JURISDICTION

The Fourth Circuit issued its opinion and judgment on February 25, 2014. This Petition is thus timely. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 13(b) of the FTC Act states in pertinent part: "a temporary restraining order or a preliminary injunction may be granted without bond," and "[in] proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

Section 19(b) of the FTC Act states in pertinent part:

> The court in an action under subsection (a) of this section 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 . . . .

15 U.S.C. § 57b(b).

STATEMENT OF THE CASE

This case presents a rare chance to review a nonstatutory Federal Trade Commission ("FTC") strategy that, by the FTC's own admission, resulted in over 300 FTC complaint-filings and over $2 billion in consent- and litigated-judgments in the past six years alone. (App. at 54a). Just last year, a former Chair of the FTC published a scholarly analysis of this strategy and criticized its lack of an appropriate legal basis.[1] Commentators have widely criticized the strategy as one that exceeds the FTC's statutory authority and coerces settlements by individuals and businesses alike.[2] The strategy, therefore, dissuades those with the greatest interest in this Court's review from seeking its elimination. Though several circuit courts have given their imprimatur to it over the past 30 years, this case is apparently the first after *Meghrig v. KFC Western*, 516 U.S. 479 (1996), to bring the FTC's overreaching before this Court for review.

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[1] J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 26 (2013) (hereafter, "Beales & Muris") ("[Section 19's] enactment suggests that no such [consumer redress] authority was ever granted [in Section 13(b)].").

[2] Peter C. Ward, *Restitution for Consumers under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 Am. U.L. Rev. 1139, 1191-92 (1992) ("[T]he finding that section 13(b) permits an unrestricted means of restitution creates such a conflict with section 19 that an 'inescapable

The issue is now as fully percolated as it is likely to be. The Fourth Circuit in this case found Petitioner's arguments seeking to end the FTC's overreaching "not entirely unpersuasive," yet gave them no effect out of a stated reluctance to create a circuit split. (App. at 7a-8a). With such circuit court reasoning, it becomes increasingly unlikely that any future circuit court will be willing to rein in FTC illegality and overreaching.

In short, courts have allowed the FTC to read Section 13(b) of the FTC Act to seek monetary remedies in consumer protection cases, when that Section only contains express authorization for

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inference' arises that the power to grant permanent injunctions under section 13(b) does not include the power to grant redress to consumers injured by the conduct giving rise to the injunction when the requirements of section 19 have not been satisfied."); *see also* George P. Roach, *Counter-Restitution for Monetary Remedies in Equity*, 68 Wash & Lee L. Rev. 1271, 1309 (2011) ("[A] defendant might readily settle for an injunction and a moderate monetary award rather than face the prospect of defending a claim for a large claim for gross disgorgement in a district court that has previously agreed to follow the FTC's aggressive theory of monetary damages in equity."); Michael Thurman & Michael L. Mallow, "*Hid[ing] Elephants in Mouseholes": the FTC's Unwarranted Attempt to Regulate the Debt-Relief-Services Industry Using Rulemaking Authority Purportedly Granted by the Telemarketing and Consumer Fraud and Abuse Prevention Act*," 14 Tex. Rev. L. & Pol. 301, 305-15 (2010).

injunctions. Injunctions already protect the public from unfair or deceptive practices. Congress put thoughtful restraints on FTC efforts to seek monetary relief. Section 19 recites those restraints, which the FTC evades each time it seeks monetary remedies under Section 13(b) alone.[3]

This Court's precedents, discussed below, require first discerning the statutory purpose of the enactments in question.

I. Congress Inserted Injunctions into One FTC Act Section, and Monetary Remedies into Another

Congress added Section 13(b) to the FTC Act as part of the Trans-Alaska Oil Pipeline Authorization Act of 1973. P.L. No. 93-153, 87 Stat. 592 (1973). This section was added primarily as a bandage, allowing the FTC to enjoin defendants' deceptive practices pending an administrative proceeding. *See* Beales & Muris, *supra* n.1, at 6-21 (containing an extensive discussion of statutory purpose and history of the FTC Act and its amendments). Prior to this, a defendant could

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[3] Reporting on the Fourth Circuit decision here, the National Law Journal described this dispute as "high-stakes," since the lower court's adoption of the FTC's arguments meant that "a key part in [its] 'arsenal' . . . [escaped a] potentially devastating challenge." *See* Jenna Greene, *Court Lets FTC Keep Its Big Gun*, Nat'l L.J. (March 3, 2014). No one can debate the national importance of this issue.

continue to injure consumers before an FTC internal "cease and desist order" proceeding concluded.

Both the legislative history and the larger statutory scheme confirm the limited purpose of this amendment. A Senate Report addressing what was to become Section 13(b) stated:

> The purpose of [Section 13(b)] is to permit the Commission to bring an *immediate halt to unfair or deceptive acts or practices when to do so would be in the public interest*. At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded. [Section 13(b)] authorizes the granting of a temporary restraining order or a preliminary injunction without bond pending the issuance of a complaint by the Commission under Section 5 . . . .

S. Rep. No. 93-151, at 30-31 (1973) (emphasis added).[4] In the House discussion on Section 13(b), Representative Smith noted that "[i]t is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator

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[4] Although Section 13(b) was passed as part of the Trans-Alaska Pipeline Authorization Act in 1973, it was originally introduced as part of and was discussed in the legislative history of the Federal Trade Commission Improvement Act. P.L. No. 93-637, 88 Stat. 2201 (1975).

ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision." 119 Cong. Rec. 36608-9 (Nov. 12, 1973). Furthermore, a 1974 House Report, written just after passage of Section 13(b), set out the purpose of the amendment:

> Both the Nader and ABA reports recommended that the FTC be empowered to obtain preliminary injunctions against unfair or deceptive acts or practices which are unfair or deceptive to consumers. This authority was granted by Section 408 of the Alaska Pipeline Act [Section 13(b)] . . . .

H.R. Rep. No. 93-1107, at 7716 (1974).

Former FTC Chair Timothy J. Muris, in his scholarly writing, recently criticized courts for ignoring the "rich and nuanced debate that produced the 1970's amendments to the FTC Act," concluding that "[n]either the FTC nor Congress thought that the changes to Section 13 solved the FTC's need for greater remedial authority, which led to the passage of Sections 19 and 5(m)(1)(B) in 1975." Beales & Muris, *supra* n.1, at 6. He notes that "[w]hat little debate there was evinces no indication that *anyone* understood the [Section 13(b)] provision to do anything other than confer on the agency the authority to seek injunctive relief to end practices while administrative proceedings were on-going." *Id.* at 14-15. The FTC on its own accord decided to read this interpretation into the statute years later. *Id.* at 22-28.

Chair Muris notes that "if Section 13(b) allowed the FTC to go into court to seek consumer redress routinely, the FTC could have used Section 13(b) with or without the issuance of a cease-and-desist order." *Id.* at 17. "Tellingly, the debate over redress did not stop." *Id.* at 16.

In 1975, only two years after the passage of Section 13(b), Congress amended the FTC Act to include Section 19.[5] This Section permits the FTC to bring civil actions against parties only *after* it has gone through the administrative process and issued a final cease-and-desist letter. 15 U.S.C. § 57b(b). While the relief granted in Section 13(b) cases is limited to injunctions, Section 19(b) (repeated here) explicitly *includes* monetary relief:

> The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons,

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[5] Both Sections 13(b) and 19(b) were originally introduced during the same session of Congress. *See* S. Rep. No. 93-151, at 27-31 (Origins of Section 19(b) introduced as "Consumer Redress (section 203)," and origins of Section 13(b) introduced as "Injunctions (section 210)"). Section 19(b) was passed in 1975 as part of the Federal Trade Commission Improvement Act. P.L. No. 93-637, 88 Stat. 2183 (1975). However, the fact that both Sections were originally contemplated together provides additional evidence that Sections 13(b) and 19(b) were meant to address separate issues.

> 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 . . . .

15 U.S.C. § 57b(b) (emphasis added). The difference in wording between Sections 13(b) and 19(b) is clear. Section 13(b) lays out an exhaustive list limiting relief to temporary restraining orders, preliminary injunctions, and permanent injunctions. 15 U.S.C. § 53(b). Section 19(b), in contrast, provides a *non-exhaustive* list ("such relief *may include, but shall not be limited to*") that *explicitly* permits the FTC to seek monetary relief. 15 U.S.C. § 57b(b).

"During debates in both the Senate and the House, the members of Congress who spoke on the floor again seemed to be of the view that Section 19 was giving the FTC significant, new authority." Beales & Muris, *supra* n.1, at 19-20. Their conduct in enacting Section 19 suggests that members of Congress were ignorant of the possibility that Section 13 (which the same Congress had just recently passed) already gave the FTC broad redress authority. *Id.* at 20. This and the rest of the "legislative history, viewed in its entirety, provides the 'inescapable inference' that Congress did not intend the injunctive relief provision to swallow the monetary relief provision." *Id.* at 21.

II. The Multi-Decade Evolution of the FTC's Strategy to Use Section 13(b) to Seek Monetary Remedies

At first, the FTC did not seek monetary remedies under Section 13(b). But in the early 1980's, the FTC developed what it termed the "Section 13(b) Fraud Program." *Id.* at 22-23. The Fraud Program started by convincing the Seventh and Ninth Circuits that the "preliminary injunction" language of Section 13(b) permitted an asset freeze at the outset of litigation. *Id.* However, even acquiring Section 13(b) asset freeze powers was not enough from the FTC's perspective. The FTC perceived that it would be a "clunky, multi-step process" to use three different actions against defendants: first, a Section 13(b) asset freeze in court; second, a Section 19 proceeding in the FTC to obtain a cease-and-desist order; and third, years later, a Section 19 court action to seek consumer redress. *Id.* The FTC thus began to rely on this Court's precedent, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), to argue for monetary remedies as part of the inherent equitable powers "presumed" to reside within the enactment of Section 13(b). *Id.* at 24-25. This use of Section 13(b) avoided the inconvenience to the FTC of respecting Congressional limitations on FTC power inserted into Section 19: a statute of limitations, a causation requirement, and a prior cease-and-desist order requirement.

But as discussed in more detail below, "*Porter* made clear that Congress need not grant the courts full equitable jurisdiction if doing so would be inconsistent with Congress's intended statutory scheme." *Id.* at 25. *Meghrig v. KFC Western*, also discussed below, solidifies this conclusion. Thus, the analysis required by *Porter* and its progeny ought to have required the FTC and its chosen courts to discern Congressional intent. *Id.* Yet, courts allowing the FTC its desired Section 13(b) scope "have not considered the legislative history of Section 13(b) and the 1975 amendments to the FTC Act." *Id.* at 26. Nor have they properly considered the manifestation of Congressional intent embodied in the respective 1973 and 1975 enactments themselves.

III. The District Court Proceedings

The FTC brought this case on December 2, 2008, alleging a scheme to "exploit[] consumers' legitimate concerns about Internet-based threats like spyware and viruses by issuing false security or privacy warnings to consumers for the sole purpose of selling software to fix the imagined problem." (Complaint ¶15). The Complaint alleged a "common enterprise" among several corporate entities, including Innovative Marketing, Inc. (Complaint ¶7). The FTC also named Petitioner Kristy Ross, the company's one-time Vice President of Business Development.

The Complaint alleged violations of Section 5(a) (15 U.S.C. § 45(a)), and asserted the FTC's power as a federal agency to bring a court action solely under Section 13(b) of the FTC Act (15 U.S.C.

§ 53(b)). (Complaint ¶1; App. at 17a). The FTC had not commenced an administrative complaint within the FTC that might have led to a cease-and-desist order under Section 5(b) (15 U.S.C. § 45(b)). Thus, the FTC had done nothing that might trigger a possibility of consumer redress under Section 19.

After several persons and entities defaulted, the district court entered default judgments on February 24, 2009. Judgment was not entered against Petitioner Ross, who by then had appeared to defend and clear her name. Eventually, all co-defendants who had not defaulted settled with the FTC, except for Petitioner Ross.

The district court denied an FTC summary judgment motion and set the matter for trial. A two-day bench trial commenced on September 11, 2012. As a consequence of prior court rulings, Ms. Ross was precluded from presenting evidence of non-deceptiveness. Only a single witness testified in person, a witness who had never met or spoken to Ms. Ross. Testimony took up only eighteen of the 242 pages of trial transcript, mostly to authenticate a document for the FTC. Most of the trial consisted of opening statements and closing arguments (the other 224 pages).

On September 24, 2012, the district court issued its judgment, along with its memorandum opinion containing findings and conclusions. The district court found Ms. Ross liable under Section 13(b) for the same $163 million in monetary remedies as in the default judgments, and issued a permanent injunction against her involvement in computer security software. (App. at 50a-53a). The FTC immediately issued a press release boasting of the $163 million judgment. *See* Press Release, Federal Trade Commission, FTC Case Results in $163 Million Judgment against "Scareware" Marketer (Oct. 2, 2012) (Published by the FTC at http://www.ftc.gov/opa/2012/10/winfixer.shtm, last visited May 16, 2014). An appeal followed.

IV. The Fourth Circuit's Decision

Ms. Ross presented five grounds for reversal, only one of which is addressed in this Petition.[6]

The Fourth Circuit agreed with Petitioner Ross that Section 13(b)'s statutory "text does not expressly authorize the award of consumer redress." (App. at 5a). It went on, however, to analyze the scope of the court's equitable jurisdiction in light of *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). (App. at 5a).

Unfortunately, the Fourth Circuit failed to acknowledge that *Porter* compels that unstated equity remedies do not exist when there is a "necessary and inescapable inference" that Congress did not grant the full scope of equity jurisdiction. *Porter*, 328 U.S. at 397-98. Nor did the Fourth Circuit acknowledge that *Mitchell* restated this

[6] Petitioner Ross does not directly petition for review of the Fourth Circuit's decision on the standard for individual monetary liability, though it, too, is entirely absent from the plain words of the FTC Act.

principle.[7] *Mitchell*, 361 U.S. at 291. Instead, the Fourth Circuit quoted out of context *Porter's* statement that the "comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." (App. at 5a). Under this seemingly higher standard, the Fourth Circuit searched for a such a "command," and claimed that it found none. (App. at 5a-7a). However, *Porter* defined how such a "command" may be embodied – as a "necessary and inescapable inference" (328 U.S. at 398) revealed through statutory purpose (328 U.S. at 400).

The Fourth Circuit also claimed that Petitioner Ross failed to present "some countervailing indication sufficient to rebut the presumption" that monetary consumer redress is allowed under Section 13(b). (App. at 5a). Instead, the Fourth Circuit created a straw man to represent Petitioner Ross's argument. The Fourth Circuit labored under the misimpression that Petitioner Ross was arguing that the absence of *Porter's* "other order" language sealed the outcome here. The Fourth Circuit thus held that the absence of "magic words" that had permitted full equitable remedies in *Porter* (namely, the text "other order" after text about injunctions) did not suffice. (App. at 6a). The problem is, that was not Petitioner Ross's argument (as shown below).

[7] Though Petitioner Ross cited and applied *Meghrig v. KFC Western* prominently in her briefing, the Fourth Circuit ignored that decision as well.

The Fourth Circuit proceeded to declare that this Court in *Mitchell* "significantly expanded *Porter's* holding." (App. at 6a). As perceived by the Fourth Circuit, even though the "other order" language from *Porter* was absent in *Mitchell*, "the Court held that ordering reimbursement was nevertheless permissible under *Porter*." (App. at 7a). In so doing, the Fourth Circuit failed to recognize how *Mitchell* actually clarified *Porter*. The Fourth Circuit decision appears to overlook that *Mitchell* turned on analysis of "statutory purpose." Only a "statutory purpose" analysis may properly answer the question whether Congress implies nontextual equity remedies *sub silentio* when expressly mentioning only injunctive powers. *Mitchell*, 361 U.S. at 291-92.

The Fourth Circuit gave short shrift to Petitioner's actual arguments. Without providing their details, the Fourth Circuit labeled them "a series of arguments about how the structure, history, and purpose of the Federal Trade Commission Act weigh against the conclusion that district courts have the authority to award consumer redress." (App. at 7a). The Fourth Circuit offered no rationale for rejecting these arguments. It indeed praised them as "not entirely unpersuasive." (App. at 7a).

The Fourth Circuit then exhibited a rare case of jurisprudential vertigo. It recognized that respecting Petitioner Ross's arguments would "obliterate a significant part of the Commission's remedial arsenal . . . [and] would foresake almost thirty years of federal appellate decisions and create a circuit conflict." (App. at 8a). By ruling against her, the Fourth Circuit actually deepened a circuit conflict far more encompassing than a single-issue conflict, by departing from the District of Columbia Circuit's *United States v. Philip Morris* decision.

This Petition does not seek to overturn the Fourth Circuit's affirmance of liability under the FTC Act, or the entry of an injunction against Petitioner Ross. The Petition instead requests review of the statutory authority of the district court to award any monetary remedy under Section 13(b).

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Blindly Followed Prior Circuit Decisions that Incorrectly Ignored the Impact of *Meghrig* and Evidence of Statutory Purpose, Each of Which Independently Forecloses Monetary Remedies under Section 13(b)

This Court has noted that "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)). Congress passed Section 19(b) to grant the FTC powers which it did not previously have. To assume otherwise would be to accuse Congress of passing a largely superfluous amendment after two years of legislative deliberation. *See, e.g., Bilski v. Kappos*, 130 S. Ct. 3218, 3228-29 (2010) (explaining the statutory canon that courts should not "interpret[] any statutory provision in a manner that would render another provision superfluous," even when "Congress enacted the provisions at different times") (internal citations omitted).

It is also an elementary principle of administrative law that agencies have only the power that Congress grants them. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power . . . is limited to the authority delegated by Congress.").[8] Agencies should not read authority into statutes where none exists. "[I]f we were to '*presume* a delegation of power' from the absence of 'an express *withholding* of such power, agencies would enjoy virtually limitless hegemony . . . .'" *American Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) (*quoting Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 571 (D.C. Cir. 1994)) (*en banc*) (emphasis in original).

Despite these foundational principles, in the 40 years since its Congressional enactment, the FTC has transformed Section 13(b) from an injunctive tool into a powerful weapon for monetary remedies and business-settlement extractions, contrary to the

[8] In the Federalist No. 14, James Madison wrote of the limited government and enumerated powers implied under our Constitution: "In the first place it is to be remembered that the general [federal] government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects. . . ." The Federalist No. 14, at 61 (James Madison) (Cambridge Univ. Press, 2003).

specific intent of Congress and the manifest statutory purpose.

The plain text of Section 13(b) is clear, and provides only for the granting of injunctive relief. The heading of Section 13(b) is "Temporary restraining orders; preliminary injunctions." 15 U.S.C. § 53(b). Section 13(b) uses precise wording: "a *temporary restraining order* or a *preliminary injunction* may be granted without bond," and in the final proviso, "[in] proper cases the Commission may seek, and after proper proof, the court may issue, a *permanent injunction*." 15 U.S.C. § 53(b) (emphasis added). The fact that Congress expressly enumerated the types of relief available precludes the reading in of monetary remedies. *See, e.g.*, *Reyes-Gaona v. North Carolina Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001) ("[T]he doctrine of *expressio unius est exclusio alterius* instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded"); *see also Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) ("courts should not add an 'absent word' to a statute;" "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

Here, if Congress intended the FTC to wield all equitable remedies within its 1973 enactment of Section 13(b), it knew how to do so. Instead, it used plain, limiting language. Courts have long recognized that within such plain language, injunctions, restitution, and disgorgement are each subspecies of the larger category of equitable remedies.[9]

Even if the intent of Section 13(b) were not clear from its plain text, the legislative history provides ample evidence of its purpose as a stopgap measure. As discussed extensively above (STATEMENT OF THE CASE, Section I), and confirmed by a former Chair of the FTC and other

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[9] Countless court decisions treat the word "injunction" as separate from "restitution" or "disgorgement," and treat them all as subspecies of "equitable remedies." *E.g., SEC v. Jasper*, 678 F.3d 1116, 1130 (9th Cir. 2012) ("Defendant notes that '[f]orfeiture and penalties are legal remedies, as compared to equitable remedies like restitution, disgorgement, and injunctions.'"); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455-56 (3d Cir. 2003) (plaintiff established a case or controversy as to her request for injunctive relief but failed to do so with respect to requests for restitution and disgorgement); *Tourgeman v. Collins Fin. Servs.*, 2012 U.S. Dist. LEXIS 54036, at *15 (S.D. Cal. 2012) ("Plaintiff's Reply also concedes for the first time that he is not entitled to restitution, and thus seeks only injunctive relief on behalf of the UCL class."); *Jackson v. Truck Drivers' Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1136 (D. Mass. 1996) (Section 502(a)(3) provides only for "equitable relief" and a suit to recover plan losses was not "a remedy traditionally viewed as 'equitable,' such as injunction or restitution").

scholars,[10] Congress did not enact Section 13(b) in 1973 to empower the FTC to seek monetary remedies. It granted the power to seek monetary remedies, with significant limitations and after years of legislative debate, through the 1975 enactment of Section 19.

The FTC has enjoyed success for 30 years in arguing in the lower courts that the "injunction" remedies recited in Section 13(b) invoke any and all of the court's inherent equity powers. The first appellate decision to infer ancillary relief (wrongly) into the clear wording of Section 13(b) was *FTC v. Singer*, 668 F.2d 1107 (9th Cir. 1982). That court found that "unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." 668 F.2d at 1112 (*quoting Porter*, 328 U.S. at 398). It further found that "unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* (*quoting Porter*, 328 U.S. at 398). It reasoned that because Section 19 contained a "savings clause" stating that its remedies were in addition to and not in lieu of any other remedy provided under the FTC Act, and that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law," it could not be inferred that Congress had explicitly acted to restrict

[10] Beales & Muris, *supra* n.1, at 6-21; Ward, *supra* n.2, at 1174-94; Thurman & Mallow, *supra* n.2, at 305-15.

the full scope of equitable remedies in Section 13(b). *Id.* at 1113.

Section 13(b) may not be construed so broadly, and may not be expanded by judicial *fiat* to play the role that Section 19 plays in the overall statutory program.

First, the savings clause should be viewed as legally irrelevant. To say that a 1975 enactment should not be interpreted to "limit" a 1973 enactment merely begs the question of what the 1973 enactment meant at the time of its passage. Section 19 should not be understood to limit the FTC's authority to seek consumer redress under Section 13(b), but rather its existence suggests that no such authority was ever granted. Beales & Muris, *supra* n.1, at 26. A savings clause such as this one merely preserves causes of action and remedies that already existed and do not conflict. *Id.*; *see also, Pennsylvania R.R. Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 123 (1916).

Second, Congress made an express grant of power to seek monetary remedies in Section 19(b) – Section 13(b)'s sister provision. The *Singer* court's interpretation renders Section 19(b) superfluous. *See Bilski*, 130 S. Ct. at 3228-29. By comparison, this Court in *Meghrig v. KFC Western* stated that where "Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . . ."[11] 516 U.S. at 487-88.

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[11] The Court went so far as to state that "it is an elementary canon of statutory construction that

In accord with this Court's pronouncements in *Meghrig*, Sections 13(b) and 19(b) work in concert to provide such elaborate enforcement provisions. They designate the specific types of relief granted under each, and the specific set of facts that must exist in order to grant such relief. Congress did not pass each provision ignorant of the other.

The Court of Appeals for the District of Columbia Circuit has split from the FTC-friendly circuits by recognizing the limits of inferring judicial equitable power. In *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1192 (D.C. Cir.), cert. denied, 546 U.S. 960 (2005), the court found that the equitable remedy of disgorgement went above and beyond the equitable relief provided by the Racketeer Influenced and Corrupt Organizations Act. The court acknowledged the command of *Porter* granting courts a wide equitable berth, but was careful to read the wording of the federal statute so as not to run astray of Congressional intent. *Id.* at 1197. Stating that courts may only "assume broad equitable powers when the statutory or Constitutional grant of power is equally broad," the court noted that the relief-granting statutory language in *Porter* was broad (the court was permitted to grant "a permanent injunction, restraining order, *or other order*" when deciding what relief to grant under the Emergency Price Control Act). *Id.* at 1198 (emphasis added).

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where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Meghrig*, 516 U.S. at 488 (*quoting TransAmerica Mortgage Advisors, Inc., v. Lewis*, 444 U.S. 11, 19 (1979)).

Because "other order[s]" were permitted, the court found in that case it was "not a stretch" to read broad equitable relief into what the statute permitted. *Id.*; *accord Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 19 (1974) (explaining that *Porter* upheld broad equitable power "*not only because of the presence of the 'other order' language*, but because of the 'traditional equity powers of a court.'") (emphasis added) (citing *Porter*).[12]

The language in *Porter* differs materially from the language in *Philip Morris*, and here. Nowhere in Section 13(b) does the statutory wording permit "other order," or "other relief." In fact, the equitable relief granted is specifically enumerated, and only includes "temporary restraining orders," "preliminary injunctions," and "permanent

[12] Before the Fourth Circuit did in this case, other courts have misinterpreted *Mitchell* as rendering irrelevant the "other order" language in *Porter*, contrary to this Court's explanation of *Porter* in *Bannercraft*, 415 U.S. at 19. *E.g.*, *FTC v. Bronson Partners LLC*, 654 F.3d 359, 365-67 (2d Cir. 2011). Even a superficial review shows that the rationale in *Porter* for permitting wide monetary relief was based on the existence of "other order" in the list of statutory authorizations. *Porter*, 328 U.S. at 399 ("An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories: . . . ."). Often what the lower courts cite within *Porter* when granting the FTC broad powers under Section 13(b) comes from the following paragraphs containing the two theories why "other order" language implies broad equitable powers.

injunctions." 15 U.S.C. § 53(b). In contrast, Section 19(b) resembles the language of the statute in *Porter*, in that it expressly provides that the enumerated remedies "shall include, *but shall not be limited to*," specific types of monetary relief. 15 U.S.C. § 57b(b). In addition, the court in *Philip Morris* engaged the canons of *noscitur a sociis* and *eijusdem generis* to find that a list of explicit remedies in a statute should only be expanded, if at all, "with remedies similar in nature to those enumerated." 396 F.3d at 1200. Stating that the remedies explicitly provided in the statute were all directed at future conduct, the court found that disgorgement, which is meant to remedy *past harm*, could not properly be inferred as an additional equitable remedy. *Id.*

The parallels to Section 13(b) are striking. As has been stated both in the legislative history and by courts alike (including the *Singer* court, which nonetheless expanded the scope of Section 13(b)'s equitable relief to include monetary relief), the purpose of Section 13(b) is to maintain the status quo, a *forward-looking* remedy. In contrast, consumer redress is backward-looking relief intended to remedy *past* consumer harm.

Finally, like other courts before it, the Fourth Circuit's silence on *Meghrig v. KFC Western* reveals the inadequacy of past legal analyses. The Fourth Circuit did not cite or discuss *Meghrig*, where this Court unanimously held that courts lack "equitable restitution" powers under the Resource Conservation and Recovery Act (RCRA). *Id.*, 516 U.S. at 481-88 (denying past cost recovery for waste cleanup). *Meghrig* distinguished the United States' attempt (as *amicus curiae*) to apply *Porter* to evidence restitutionary power within remedies that *Megrig* labeled (*id.* at 484) a "prohibitive injunction" and a "mandatory injunction." *Id.* at 487-88. *Meghrig* compared RCRA to the Comprehensive Environmental Recovery and Cleanup Act (CERCLA), and concluded, "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 RCRA does not provide that remedy." *Id.* at 485.

Meghrig's distinction from *Porter* applies with equal force here. The Court observed, "the limited remedies described in [RCRA], along with the stark differences between the language of [the RCRA injunction] section and the cost recovery provisions of CERCLA, amply demonstrate that Congress did not intend [equitable restitution] under RCRA." *Id.* at 487. This analysis applies fully to Sections 13(b) and 19(b). Section 13(b) remedies compare with RCRA's injunction provisions, while Section 19(b) remedies compare with CERCLA's explicit cost recovery provisions. To reword the key part of *Meghrig* accordingly, "Congress thus demonstrated in [Section 19(b)] that it knew how to provide for [consumer redress], and that the language used to define the remedies under [Section 13(b)] does not provide that remedy." *Id.* at 485.

II. The Issue is Fully Percolated, With No Circuit Court Having Performed a Proper Analysis of Statutory Purpose, and With No Circuit Court Having Cited or Distinguished *Meghrig*

The monetary relief issue is fully percolated, and the decision below is already being used to stretch FTC powers even more. Just this month, the Government filed a brief in this Court citing the decision below. Brief for the Respondant in Opposition, *Publishers Business Services, Inc. v. FTC* (Case No. 13-1045) (May 2014) ("Government's PBS Brief"). The Government's PBS Brief boasts that "the courts of appeals have uniformly held that, upon a showing by the FTC that a defendant has engaged in 'unfair or deceptive acts or practices' in violation of 15 U.S.C. 45, the district courts may order not only prospective injunctive relief, but also ancillary remedies, including equitable monetary relief, to achieve complete justice." *Id.* at 9.[13]

After spending two pages fighting this issue, the Government's PBS Brief strangely acknowledges

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[13] Contrary to the Government's suggestion, a longstanding statutory misapplication does not immunize such an error from this Court's review. *See Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177, 191 (1994), *superseded on other grounds by* 15 U.S.C. § 78t(e) (1995) (overruling sixty years of allowance of a statutory cause of action because Congress had not expressly provided for that cause of action).

that "Petitioners do not dispute that equitable monetary relief can be awarded under Section 13(b)." *Id.* at 11. As Lady MacBeth "doth protest too much," so too does the Government.

The Government's PBS Brief at note 1 purports to catalog the decisions of the circuit courts supporting its position. None of the Government's authorities (nor the one additional authority cited by the Fourth Circuit below) performed the proper analysis required by *Porter* and its progeny, especially *Meghrig*. This section addresses each such circuit court decision in turn:

***FTC v. Ross*, 743 F.3d 886, 891 (4th Cir. 2014)**: As already discussed, the *Ross* decision (this case) conducted no analysis of statutory purpose of Section 13(b), and did not cite or analyze *Meghrig*, nothwithstanding that decision's centrality to Petitioner's arguments below.

***FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366 (2d Cir. 2011)**: The *Bronson Partners* decision does not cite or acknowledge *Meghrig*. It also erroneously states that *Mitchell* "made clear" that the *Porter* Court's significance given to the "other order" language was not, in fact, tied to the "other order" language. 654 F.3d at 366. That is wrong, since *Porter* itself states that the monetary remedy under review "may be considered a proper 'other order' on either of two theories," and goes on to state what they were. *Porter*, 328 U.S. at 399; *see also supra*, n.12; *Bannercraft*, 415 U.S. at 19 (explaining "the presence of the 'other order' language" as one reason why *Porter* "upheld broad equitable power.").

The *Bronson Partners* decision nonetheless contends there to be a rationale for liberating the *Porter ratio decendi* from the "other order" language, supposedly finding that rationale in *Mitchell*. 654 F.3d at 366. But *Mitchell* did no such thing. *Mitchell* instead simply found statutory purpose evidence equivalent to *Porter's* "other order" language in the facts at bar. *Mitchell*, 361 U.S. at 291-92 (finding that "complete relief in light of the statutory purposes" that will "give effect to the policy of the legislature" must include compensation for wrongful retaliatory discharge because "fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."). *Mitchell* observed that the monetary relief in question bolstered the statutory purposes because "[w]e cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice." *Id.* at 293. In its conclusion, *Mitchell* underscored that its discernment of the power to award a particular kind of limited monetary relief (reimbursement for lost wages due to wrongful retaliatory discharge) was based on "what we have found to be the statutory purposes." *Id.* at 296.

The *Bronson Partners* decision materially miscites *Mitchell* in this regard. It contended that *Mitchell* reads *Porter* to allow wide ancillary remedies "as necessary to afford complete relief." 654 F.2d at 366. However, *Bronson Partners* ended the quotation too soon. *Mitchell's* actual words are "complete relief *in light of the staututory purposes*." *Mitchell*, 361 U.S. at 292 (emphasis added). As discussed above, the manifest statutory purpose of

Section 13(b) was *solely limited* to injunctive relief, *without* further monetary remedies.

***FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010)**: *Direct Marketing Concepts* is inapposite. Appellant did not challenge the availability of monetary remedies *vel non*. Thus, the First Circuit performed no analysis of whether monetary remedies are available under Section 13(b), but rather resolved disputes as to *what kind*. *Id.*

***FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005)**: As with *Direct Marketing*, the Tenth Circuit's decision in *Freecom Communications* did not include any challenge to the availability of monetary relief under Section 13(b). If anything, it is even less apposite since there was not any dispute as to the kinds of monetary remedies available.

***FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996)**: As with *Direct Marketing* and *Freecom Communications*, the Appellant in *Gem Merchandising* did not challenge the availability of monetary relief under Section 13(b). *Gem Merchandising* is more akin to *Direct Marketing*, since the dispute centered solely on the *type* of monetary remedies permitted. The appellant agreed that consumer redress was allowed, but argued (unsuccessfully) that disgorgement was a penalty and not redress, and that payment into the United States Treasury was disallowed. 87 F.3d at 468-69. While the Eleventh Circuit cited *Porter* in addressing the questions presented, the court did not consider or analyze the statutory purpose of Section 13(b).

***FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994)**: As with *Direct Marketing*, *Freecom Communications* and *Gem Merchandising*, the Ninth Circuit's *Pantron I* decision contains no indication that the appellant challenged the availability of monetary relief under Section 13(b) *vel non*. Instead, with all parties apparently assuming that such relief was permissible, the *Pantron I* court addressed whether the lower court erred in finding that the FTC had not proven consumer injury caused by adjudged misrepresentations. 33 F.3d at 1102.

***FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991) (cited by decision below, but not cited in Government's PBS Brief)**: The Eighth Circuit in *Security Rare Coin* also found the availability of monetary remedies under Section 13(b), but did not consider that Section's statutory purpose. In a decision that predated *Meghrig*, the court concluded without much analysis that "[n]othing in the wording of the statute expressly precludes ancillary equitable relief." 931 F.2d at 1314. While *Security Rare Coin* did address the existence of Section 19, it wrongly concluded that the savings clause in Section 19(e) nullified any significance for interpreting Section 13(b): "There can be no inference from this language that Congress intended section 19 to restrict the broad equitable jurisdiction granted to the district court by section 13(b)." *Id.* at 1315. As discussed above in Argument Section I, the savings clause cannot be read this way to brush aside parts of a comprehensive regulatory program, particularly in light of the extensive legislative history leading up to the enactment of Section 19. Like every other court, the Eighth Circuit ignored that history, as well as the statutory purpose manifested in the respective enactments themselves.

***FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir.), cert. denied, 493 U.S. 954 (1989)**: Finally, the *Amy Travel* decision also lacks any analysis of statutory purpose, and also predates this Court's *Meghrig* decision. The Seventh Circuit relied on one of its prior decisions concerning preliminary injunctions under Section 13(b) to expand dicta concerning monetary remedies to permanent injunctions under Section 13(b). 875 F.2d at 571. In its prior decision (*FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988)), the appellant did not contest the availability of ancillary equitable remedies, including an asset freeze, under Section 13(b). Rather, the appellant contested whether a preliminary injunction proceeding was allowed at all in a case filed by the FTC under the last proviso of Section 13(b), which solely mentions permanent injunctions. *World Travel*, 861 F.2d at 1025-26 (holding that the final proviso is not limited to permanent injunctions despite its text). Thus, when the Seventh Circuit based its *Amy Travel* decision on *World Travel*, it eschewed any analysis whatsoever of statutory purpose, and gave *stare decisis* effect to previously-nondisputed dictum.

III. This Case Provides an Ideal Vehicle to Stop the FTC's Abuse of Power

For the first time since before *Meghrig*,[14] this case squarely presents the question of the FTC's authority to seek monetary remedies under Section 13(b). The question has fully percolated through most of the circuit courts. It is a question of exceptional importance, rarely arising before this Court because of the immense settlement pressures imposed by the very tactics that this Petition addresses. This case also provides an opportunity for this Court to resolve an inconsistency in the circuits' application of this Court's *Porter* decision.

A. The Exceptional Importance of Confining FTC Activities to Their Proper Statutory Scope

The FTC must believe it has a green light to misuse its authority since it filed over 300 complaints under Section 13(b) seeking monetary relief between 2007 and 2013. (App. at 54a). The FTC boasts over $2 billion in actual or potential proceeds in this period from such efforts. (App. at 54a). While the frequency and monetary consequences alone of this government overreach signal the extraordinary need for review, there is more.

Ironically, it was the Fourth Circuit that warned about agency creep, observing that "government agencies have a tendency to swell, not

[14] This Court denied *certiorari* on this issue in *Amy Travel*, 493 U.S. 954 (1989).

shrink, and are likely to have an expansive view of their mission." *Brown & Williamson Tobacco v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998), *aff'd* 529 U.S. 120 (2000) (citation omitted). The federal court system has been unusually tolerant of the FTC's expanding mandate, based in part on "weak research" by federal courts and "sympathy" for its mission. Roach, *supra* n.2, at 1309. That tolerance has now raised alarm bells from unexpected quarters.

Having received no resistance to its nonstatutory assertion of monetary remedy powers under Section 13(b), the FTC has now expanded its activities beyond the "Fraud Program" mentioned earlier. The FTC is now using its enforcement authority under Section 13(b) against well known companies who are themselves victims of fraud. This new tack appears most prominently within the FTC's use of Section 13(b) against retailers and hotel chains victimized by data breaches, having allegedly failed to maintain reasonable and appropriate data security for consumers' personal information.

The District of New Jersey granted the latest green light to the FTC, over the objections of twelve substantial district court *amici*, including the Chamber of Commerce of the United States of America, the American Hotel & Lodging Association, Public Citizen, the National Federation of Independent Business and TechFreedom. *See FTC v. Wyndham Worldwide Corp.*, __ F. Supp. 2d __, 2014 U.S. Dist. LEXIS 47622, at *10 n.3 (D.N.J. 2014) (denying motion to dismiss; listing *amici*). In *Wyndham*, the hotel chain and its *amici* were unable to obtain dismissal, even though the FTC lacked express statutory authority to regulate in the data security context, and had issued neither formal regulations on the subject nor guidance adequate to provide fair notice. *Id.* It is no stretch to realize that the FTC's self-granted authority puts legitimate, victimized companies at risk of massive monetary liabilities without any protections that Section 19 should provide. Such monetary liabilities might be sought in, at best, the outer edge of the FTC's proper area of activity.[15]

Circuit court decisions allowing the FTC to extract monetary remedies under Section 13(b) have now been used to justify expanding equitable relief under other injunction-only statutes. For example, the Tenth Circuit cited FTC Act cases to justify injecting monetary remedies into injunction-only provisions of the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq. United States v. RX Depot, Inc.*, 438 F.3d 1052, 1054-63 (10th Cir. 2006) (rejecting argument that *Meghrig* limits *Porter/Mitchell*). The Sixth Circuit did the same in *United States v. Universal Management Services, Inc.*, 191 F.3d 750, 760-62 (6th Cir. 1999). This distinct area of federal regulatory law, outside of FTC jurisdiction, would benefit from this Court's clarification of the scope of *Porter* and *Mitchell* in view of *Meghrig*.

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[15] Sometimes the FTC's misuse of Section 13(b) sets in motion a sequence of events leading to the target's loss of liberty, such as has happened when a former FTC target allegedly violated a cooercive consent decree, triggering contempt proceedings.

B. The Rarity of Opportunities to Review This Fully Percolated Issue

The FTC structured the Fraud Program in a way that dissuades defendants from vindicating their rights through litigation. These tactics rely on the overreaching interpretation of Section 13(b) exposed in this Petition, tactics calculated to circumvent the Congressionally-devised defendant protections of Section 19. Very few FTC litigants have ever had the capacity or courage to bring this issue before this Court.

The FTC typically begins a Section 13(b) monetary remedy action by filing it under seal, obtaining a secret asset freeze in a temporary restraining order. The FTC then allows unsealing of the complaint to begin preliminary injunction proceedings. By this point, all affected persons – usually including corporate leadership who are personally named and whose personal assets are frozen – must plead for permission from the court to partially unfreeze assets, simply to have living expenses and to retain and keep counsel.[16] The FTC's high settlement rate depends on placing defendants in this coerced state. As one commentator explained:

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[16] Richard Newman, *FTC Enforcement Actions, Asset Freezes and Personal Liability*, Performance Mktg. Insider (Apr. 27, 2014), http://performinsider.com/2014/04/ftc-enforcement-actions-asset-freezes-and-personal-liability/ (last visited May 16, 2014).

> Settled or stipulated verdicts are very common and the rate of injunctive relief appears high. From anecdotal notes in FTC reports it appears that defendants to FTC settlements and awards are often financially unable to fund the monetary award and must seek reductions from the FTC or bankruptcy protection. Personal liability for the principals is frequently in dispute. The mass action aspects of FTC litigation discourage rescission or counter-restitution in kind. It would be reasonable to surmise that a defendant might readily settle for an injunction and a moderate monetary award rather than face the prospect of defending a claim for a large claim for gross disgorgement in a district court that has previously agreed to follow the FTC's aggressive theory of monetary damages in equity.

Roach, *supra* n.2, at 1315.

In short, litigants face immense pressure not to bring the FTC's overreach before this Court. Litigants perceive the profound reluctance of the remaining circuit courts – those that might later hear the issue as one of first impression – to create a circuit conflict (as happened here). On top of that, litigants most often proceed under extreme duress just to have defenses heard that they believe to be meritorious. This Court should sieze this rare opportunity for review, as it may not come again for many decades, during which time the FTC will continue to conduct its nonstatutory activities and expand them into unexpected business areas.

C. The District of Columbia Circuit Conflicts with the Fourth Circuit Approach, In that It Excludes Monetary Relief from Injunctive-Only Statutes Where the Comprehensive Statutory Framework Includes Other Statutes that Permit It

Finally, while no direct circuit conflict exists on the issue presented, the Fourth Circuit's decision conflicts with the District of Columbia Circuit on the proper application of *Porter* and its progeny. Since the conflict is more generalized than a single-issue split, it potentially reaches many different statutory regimes, not just the FTC Act. Viewed this way, the situation at hand is jurisprudentially worse than the single-issue circuit conflicts that often motivate this Court's review.

The Fourth Circuit's decision here cited *United States v. Philip Morris*, 396 F.3d 1190 (D.C. Cir.), cert. denied, 546 U.S. 960 (2005), as contrary authority to its holding. (App. at 6a). Namely, the District of Columbia Circuit in *Philip Morris* held that an injunction section of the RICO Act did not permit a disgorgement remedy since RICO provided elaborate enforcement provisions elsewhere for such relief. *Id.* at 1198. The District of Columbia Circuit's understanding and application of *Porter* and *Mitchell* is hopelessly conflicted with the same understanding and application by the Fourth Circuit below. As just one example, the *Philip Morris* decision gives full weight (correctly) to this Court's identification of "other order" language as critical to the *ratio decendi* in *Porter*. *Id.* Yet the Fourth Circuit held the opposite, finding (contrary to the District of

Columbia Circuit's analysis) that *Mitchell* greatly broadened *Porter's* holding and negated the significance of the "other order" language.

In its 2005 petition for a writ of *certiorari* in *Philip Morris* (Case No. 05-92) (Government's PM Petition), the Government agreed that a circuit conflict exists that transcends subject area. There, the Government urged review because *Philip Morris* was "inconsistent with numerous decisions of other courts of appeals applying the principles of *Porter* and *Mitchell* to other statutory schemes." Government's PM Petition at 19 n.6. Not surprisingly, the Government included a citation applying Section 13(b) of the FTC Act. *Id.* (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996)).[17]

Only confusion can result from these opposing approaches. The conflict renders unstable the extent of nontextual, ancillary equitable remedies within federal injunction statutes. This case presents the opportunity to clarify the law and eliminate the confusion.

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[17] The Governement also named opinions interpreting Section 332(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 332(a)); the Securities Exchange Act, 15 U.S.C. 78u(d)-(e); the Motor Carrier Act of 1980; and the Commodity Exchange Act. Government's PM Petition at 19 n.6.

IV. Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED FEBRUARY 25, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2340

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

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

Defendant-Appellant,

and

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

Defendants.

JUDGES: Before DAVIS and FLOYD, Circuit Judges, and HAMILTON, Senior Circuit Judge. Judge Davis wrote the opinion, in which Judge Floyd and Senior Judge Hamilton joined.

OPINION BY: DAVIS

OPINION

DAVIS, Circuit Judge:

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

I

The Commission sued Innovative Marketing, Inc. ("IMI"), and several of its high-level executives and founders, including Ross, for running a deceptive internet "scareware" scheme in violation of the prohibition on deceptive advertising in Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a). The core of the Commission's case was that the defendants operated "a massive, Internet-based scheme that trick[ed] consumers into purchasing computer security software," referred to as "scareware." J.A. 29. The advertisements would advise consumers that a scan of their computers had been performed that had detected a variety of dangerous files, like viruses, spyware, and "illegal" pornography; in reality, no scans were ever conducted. J.A. 29.

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

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

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

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

Ross, 897 F. Supp. 2d at 384. The district court further concluded that Ross had actual knowledge of the deceptive marketing scheme, or was "at the very least recklessly indifferent or intentionally avoided the truth" about the scheme. *Id.* at 386. It entered judgment against Ross in the amount of $163,167,539.95, and it enjoined her from engaging in similar deceptive marketing practices. *Id.* at 389. Ross timely appealed.

II

The Federal Trade Commission Act authorizes the Commission to sue in federal district court so that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). Ross contends that the district court did not have the authority to award consumer redress - a money judgment - under this provision of the statute.

Ross first takes the position, correctly, that the statute's text does not expressly authorize the award of consumer redress, but precedent dictates otherwise: the Supreme Court has long held that Congress' invocation of the federal district court's equitable jurisdiction brings with it the full "power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." *Porter v. Warner Holding Co.*, 328 U.S. 395, 399, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946). Once invoked by Congress in one of its duly enacted statutes, the district court's inherent equitable powers cannot be "denied or limited in the absence of a clear and valid legislative command." Id. Porter and its progeny thus articulate an interpretive principle that inserts a presumption into what would otherwise be the standard exercise of statutory construction: we presume that Congress, in statutorily authorizing the exercise of the district court's injunctive power, "acted cognizant of the historic power of equity to provide complete relief in light of statutory purposes." *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 291-92, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960).

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

Ross insists that the text of the Federal Trade Commission Act is unlike that of the statutes at issue in Porter and Mitchell, and therefore argues that the interpretive principle of those cases is inapplicable in her case. In Porter, a case involving the Emergency Price Control Act of 1942, the statute authorized district courts to grant "a permanent or temporary injunction, restraining order, or other order." 328 U.S. at 397 (internal quotations and citation omitted). Ross contends that the "other order" language, absent from the instant provision of the Federal Trade Commission Act, cabins Porter's applicability. See also *United States v. Phillip Morris USA, Inc.,* 396 F.3d 1190, 1198, 364 U.S. App. D.C. 454 (D.C. Cir. 2005). In other words, her argument is that Porter was a "magic words" case - if Congress uses the magic words "other order," then Congress has invoked the full injunctive powers of the district court.

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

The point is that *Mitchell* broadened *Porter's* applicability, rendering the textual statutory differences irrelevant to the ultimate conclusion: because there is no affirmative and clear legislative restriction on the equitable powers of the district court, ordering monetary consumer redress is an appropriate "equitable adjunct" to the district court's injunctive power. *Porter,* 328 U.S. at 399.

Ross makes a series of arguments about how the structure, history, and purpose of the Federal Trade Commission Act weigh against the conclusion that district courts have the authority to award consumer redress; her arguments are not entirely unpersuasive, but they have ultimately been rejected by every other federal appellate court that has considered this issue. *F.T.C. v. Bronson Partners LLC,* 654 F.3d 359, 365-67 (2d Cir. 2011); *F.T.C. v. Amy Travel Service, Inc.,* 875 F.2d 564, 571 (7th Cir. 1989); *F.T.C. v. Security Rare Coin & Bullion Corp.,* 931 F.2d 1312, 1314-15 (8th Cir. 1991); *F.T.C. v. Pantron I Corp.,* 33 F.3d 1088, 1101-02 (9th Cir. 1994); *F.T.C. v. Gem*

Merchandising Corp., 87 F.3d 466, 468-70 (11th Cir. 1996). We adopt the reasoning of those courts and reject Ross' attempt to obliterate a significant part of the Commission's remedial arsenal. A ruling in favor of Ross would forsake almost thirty years of federal appellate decisions and create a circuit split, a result that we will not countenance in the face of powerful Supreme Court authority pointing in the other direction.

III

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

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

Ross contends that the district court's standard was wrong and asks us to reject it. She proposes that we import a standard from our securities fraud jurisprudence that requires proof of an individual's (1) "authority to control the specific practices alleged to be deceptive," coupled with a (2) "failure to act within such control authority while aware of apparent fraud." App. Br. 35 (citing *Dellastatious v. Williams,* 242 F.3d 191, 194 (4th Cir. 2001)). Any other standard, argues Ross, would permit a finding of individual liability based on "indicia having more to do with enthusiasm for and skill at one's job [rather] than authority over specific ad campaigns, and allow fault to be shown without any actual awareness of" a co-worker's misdeeds. App. Br. 36. Ross maintains that she would not have been held individually liable under her proposed standard.

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

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

Our ruling maintains uniformity across the country and avoids a split in the federal appellate courts. Every other federal appellate court to resolve the issue has adopted the test we embrace today. *F.T.C. v. Direct Marketing Concepts, Inc.,* 624 F.3d 1, 12 (1st Cir. 2010); *Amy Travel Service,* 875 F.2d at 573-74; *F.T.C. v. Publishing Clearing House, Inc*., 104 F.3d 1168, 1170 (9th Cir. 1997); *F.T.C. v. Freecom Communications, Inc.,* 401 F.3d 1192, 1207 (10th Cir. 2005); *Gem Merchandising Corp.,* 87 F.3d at 470. Ross' proposed standard, by contrast, invites us to ignore the law of every other sister court that has considered the issue, an invitation that we decline.

IV

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

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

Although the district court admitted the profit and loss statement under Federal Rule of Evidence 807, the residual exception to the rule against hearsay, *F.T.C. v. Ross,* 2012 U.S. Dist. LEXIS 129353, 2012 WL 4018037, at *1-3 (D. Md. Sept. 11, 2012), we may affirm the district court "on the basis of any ground supported by the record even if it is not the basis relied upon by the district court," *Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir. 1999), and we conclude that the profit and loss summary plainly was admissible as an adoptive admission by Ross. Fed. R. Evid. 801(d)(2)(B). Ross expressly adopted Jain's affidavit: she swore in her own affidavit produced during the Canadian litigation that she had read Jain's affidavit and was "in agreement with [its] contents." J.A. 1590. She did take some exceptions, but she did not object to the profit and loss statement attached to Jain's affidavit, nor did she object to the authenticity or reliability of the statements.

The third of Ross' evidentiary assignments of error also rests on the improper admission of hearsay evidence: an e-mail from Sundin to Jettis, a payment processor, listing Skype numbers and titles for a group of high-level company executives. Ross' telephone number is listed on the e-mail, as is her title, "Vice President." The district court admitted the e-mail pursuant to the hearsay exception for statements made by a co-conspirator in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). Ross argues that there was insufficient evidence establishing as a predicate for the e-mail's admission the existence of the conspiracy, and that admission of the e-mail itself was improper "bootstrapping" of the existence of the conspiracy to the document's admissibility. *See Bourjaily v. United States*, 483 U.S. 171, 176-81, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

We disagree. It is true, of course, that the proponent for admission of a co-conspirator's out-of-court statement "must demonstrate the existence of the conspiracy by evidence extrinsic to the hearsay statements." *United*

States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976). But that requirement was satisfied in this case. There was independent evidence that established the existence of the conspiracy: Ross produced an affidavit during the corporate litigation in Canada in which she stated that she was a Vice President and one of the founders of IMI, and she adopted the affidavits of her co-defendants attesting to the same facts. The affidavits provided a sufficient basis upon which the district court could conclude, prima facie, see *United States v. Vaught,* 485 F.2d 320, 323 (4th Cir. 1973), the existence of a conspiracy. Moreover, the e-mail from Sundin to Jettis was a quintessential example of a statement made "in furtherance" of the conspiracy because its role was to maintain the logistics of the conspiracy and "identify names and roles" of members of the deceptive advertising endeavor. Michael H. Graham, Handbook of Federal Evidence 421 (7th ed. 2013).

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

V

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

The district court did not clearly err in finding that Ross had "authority to control the deceptive acts within the meaning" of the Federal Trade Commission Act. *Ross,* 897 F. Supp. 2d at 383. In an affidavit in the Canadian litigation, she swore that she was a high-level business official with duties involving, among other things, "product optimization," which the district court could reasonably have inferred afforded her authority and control over the nature and quality of the advertisements. J.A. 1589. Moreover, there was evidence that other employees requested Ross' authority to approve certain advertisements, and that she would check the design of the advertisements before approving them.

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

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

All of this evidence paints a picture that the district court was wholly capable of accepting as a matter of fact: Ross made "countless decisions" that demonstrated her authority to control IMI. *F.T.C. v. Bay Area Business Council, Inc.*, 423 F.3d 627, 637 (7th Cir. 2005). Although a different fact-finder may have come to a contrary conclusion from that reached by the experienced district judge in this case, the "rigorous" clear error standard requires more than a party's simple disagreement with the court's findings. *PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161, 174-75 (4th Cir. 2013).

VI

The judgment of the district court is

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER & JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, DATED SEPTEMBER 24, 2012

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO.: RDB-08-3233

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

KRISTY ROSS, INDIVIDUALLY AND AS AN OFFICER OF INNOVATIVE MARKETING, INC.,

Defendant.

September 24, 2012, Decided

MEMORANDUM OPINION

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

"Enterprise") to conduct a massive "scareware"[1] scheme that marketed a variety of computer security software via deceptive advertising. The FTC alleged that several of the companies' officers and directors, namely, Sam Jain ("Jain"), Daniel Sundin ("Sundin"), Marc D'Souza ("D'Souza"), Kristy Ross ("Ross"), and James Reno ("Reno"), directed or participated in the IMI Enterprise. The FTC also named Maurice D'Souza, the father of Marc D'Souza, as a defendant in this suit. Of the original eight defendants, four have settled with the FTC, and three are in default and have had judgments entered against them for failure to appear and participate in this litigation. Defendant Kristy Ross is the only remaining defendant at issue.[2]

Jurisdiction over this case is based on the United States' status as a plaintiff under 28 U.S.C. § 1345 and federal question jurisdiction under 28 U.S.C. § 1331. After a two-day bench trial from September 11 to September 12, 2012, this Court has carefully considered the exhibits introduced into evidence, the testimony of the witness who testified in person, the testimony of the witnesses presented by deposition, the Proposed Final Pretrial

1. As noted in the FTC's Complaint, "scareware" is a common term that refers to a software-driven, Internet-based scheme that "exploits consumers' legitimate concerns about Internet-based threats like spyware and viruses by issuing false security or privacy warnings to consumers for the sole purpose of selling software to fix the imagined problem." Compl. ¶ 15, ECF No. 1.

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

Order, the written submissions of the parties, and the oral arguments of counsel. The following constitutes this Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. The accompanying Order enters Judgment in favor of Plaintiff Federal Trade Commission against Defendant Kristy Ross individually, and as an officer of Innovative Marketing, Inc.

I. Background

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

3. A criminal action was brought against Defendants Sundin, Jain and Reno in the U.S. District Court for the Northern District of Illinois in connection with their activities with IMI. *See USA*

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

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v. Bjorn Daniel Sundin, Shaileshkumar P. Jain, a.k.a Sam Jain, and James Reno, Criminal Action No. 1:10-cr-00452. This case was assigned to the Fugitive Calendar on June 7, 2012 with respect to Defendants Sundin and Jain. Additionally, two other actions are presently pending against Defendant Jain. First, he is charged with Failure to Appear After Pre-Trial Release in the U.S. District Court for the Northern District of California in a case where he was charged with Criminal Copyright Infringement, Trafficking in Counterfeit Goods, as well as Mail and Wire Fraud. *See USA v. Shaleshkumar Jain, a/k/a/ Sam Jain,* Criminal Action No. EXE-09-00137. Second, he was indicted on May 20, 2010 in the U.S. District Court for the Southern District of New York for International and Domestic Money Laundering with respect to a number of internet-based companies, including IMI, owned and operated by him. *See USA v. Shaileshkumar Jain, a/k/a Sam Jain,* Criminal Action No. NRB-10-00442.

accepting Defendants' advertisements. At that point, in 2007, Defendants began creating a number of sham Internet advertising agencies that duped advertising networks and commercial websites into accepting their misleading advertisements. Toward this end, Defendants falsely represented that they were authorized to place advertisements, and they used sophisticated program coding that concealed the exploitative nature of the ads in order to gain approval for distribution from the advertising networks. Once distributed and placed on popular Internet sites, the exploitative content of the ads was revealed to many of the consumers, who were thereupon redirected to the Defendants' websites that operated the bogus scans.

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

Internet-based ads and software-generated reports that induced consumers to purchase their computer security products. (Mem. Op. & Order, ECF Nos. 227 & 228; Ltr. Order, ECF No. 229).

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

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

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

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

This Court, having considered the evidence presented at trial and having reviewed the parties' pre-trial submissions, finds that Defendant Kristy Ross had authority to control the deceptive practices or acts of Innovating Marketing and that she participated directly in these deceptive practices. Additionally, the FTC has shown by a preponderance of the evidence that Defendant Ross had knowledge of the deceptive practices of Innovative Marketing, Inc. ("IMI") or that alternatively she clearly acted with reckless indifference and intentionally avoided the truth. As a result, Kristy Ross is individually liable for IMI's unlawful practices and judgment shall be entered in favor of the Federal Trade Commission ("FTC") against her. The FTC shall be awarded injunctive relief and monetary relief in the form of consumer redress and disgorgement. Specifically, Defendant Ross shall be permanently restrained and enjoined from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing. Defendant Ross shall also be jointly and severally liable with the co-Defendants Innovative Marketing, Inc., Sam Jain and Daniel Sundin for the consumer redress amount of $163,167,539.95.

II. Findings of Fact

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

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

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

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

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

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

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

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

2. The IMI Deceptive Marketing Scheme

This Court has previously held that the conduct in this case violated Section 5 of the Federal Trade Commission Act as a result of representations being made to consumers through Internet-based ads and software-generated reports that induced consumers to purchase their computer security products. (Mem. Op. & Order, ECF Nos. 227 & 228; Ltr. Order, ECF No. 229). Specifically, the Defendants -both corporate and individual- developed a series of software advertisements, in the form of popups and warnings, purporting to discover malicious software ("malware") on consumers' computers and provide a "cure" at a cost ranging from $30 to $100, depending on the software involved. Essentially, these deceptive advertisements, some of which included sham "system scans," had the effect of convincing internet users that their computers contained malicious software, "illegal" pornography, or critical system errors, and that to fix these problems they needed the Defendants' repair software. The repair software sold by IMI included WinFixer, WinAntiVirus, WinAntiVvirusPro, WinAntiSpyware, Popupguard, WinFirewall, InternetAntispy, WinPopupguard, ComputerShield, WinAntispy, PCsupercharger, ErrorSafe, SysProtect, DriveCleaner, SystemDoctor and ErrorProtector. However, both the advertisements and the repair software were deceptive. In fact, the number of errors found on any given computer was pre-determined by the Defendants. Moreover, the Defendants sold scareware as these repair products did not in fact repair or clean consumers' computers. As a result, more than one million consumers purchased Defendants' products, and approximately three thousand customers filed complaints with the Federal Trade Commission ("FTC").[6] Consumer Compls., Pl.'s Ex. 40. Moreover, every major computer security vendor considered these products to be system threats.

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

3. Defendant Kristy Ross's Role at IMI

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

Defendant Ross worked at Innovative Marketing, Inc. from 2002 to 2008. She was in charge of business expansion, sales and marketing, as well as product optimization. Although IMI did not use formal titles until late 2005, from 2006 to 2008 she essentially performed the same functions but held the position of Vice President of Business Development. She also intermittently replaced Defendant Sundin as Chief Operating Officer and Chief Technology Officer from 2004 to 2007. She assumed these roles because Mr. Sundin was suffering from bacterial overgrowth syndrome and because he considered her "to be a savvy manager and technically knowledgeable in [his] areas of computer software and design as well as marketing skills." Sundin Aff., Pl.'s Ex. 21 ¶ 15. Moreover, at times she had access to his email account and was carbon copied on all emails sent to him. *See, e.g.,* Chat Log, Def.'s Ex. 9A; *see also* Email, Def.'s Ex. 3.

As part of her duties, Ms. Ross often approved and requested payment for expenses incurred by IMI, and on several occasions, used her personal credit card to pay for certain advertising and operating expenses. Specifically, she was one of seven people to approve expenses at IMI. Additionally, she was in charge of reorganizing IMI's operational structure and dealt with accounting, hiring and IMI product issues. Notably, a chat log[7] reveals that she and Defendants Jain and Sundin were to finalize the "todos [sic]" for the company reorganization prior to their distribution to the managers. Chat Log, Def.'s Ex. 3A at 365. In the same chat log, she instructs "James"[8] to provide her with a problem-solving matrix which would contribute to the reorganization of certain departments. *Id.* Another chat log indicates that on several occasions she attended meetings with a major venture capital firm interested in doing business with IMI. Chat Log, Def.'s Ex. No. 11A at 3. Furthermore, the bulk of the IMI chat logs reveal that Ms. Ross routinely made executive-type decisions, demanding that employees fix problems and follow company procedures, and delegating IMI business projects. *See generally* Chat Logs, Def.'s Exs. 1A - 16A. Ms. Ross even threatened to fine an entire department if it did not complete a project on schedule. Chat Log,

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

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

Def.'s Ex. 1A at 323; *see also* Chat Log, Def.'s Ex. 7A. Additionally, she often demanded and obtained reports on web traffic, sales numbers, and click-through response rates for IMI's products and advertising campaigns. She also participated in strategic discussions regarding IMI's future, was actively involved in the daily operations of the company and had the authority to set prices for IMI's products. *See, e.g.,* Chat Log, Def.'s Ex. 14A.

With respect to the deceptive ads, Ms. Ross used her expertise in marketing and personally approved, developed, wrote, altered, reviewed, and contributed to a large number of them. In fact, she dictated the appearance and style of certain ads, suggested which words should or should not be included and how certain sentences should be translated, as well as decided the level of aggression to consumers that these ads should present. *See, e.g.,* Chat Log, Pl.'s Ex. 1 at 326; Chat Log, Pl.'s Ex. 2 at 351; Chat Log, Def.'s Ex. 1A at 322, 326, 331; Chat Log, Def.'s Ex 2A at 348, 351-52. On two occasions, Ms. Ross instructed ad developers to remove advertising disclaimers which would have indicated to consumers that these popups or warnings were mere advertisements as opposed to real scanners. *See, e.g.,* Chat Log, Def.'s Ex. 2A at 352. In the company's chat logs, Ross is observed directing employees to make ads more aggressive because "aggression zero doesn't [sic] give sales." Chat Log, Def.'s Ex. 2A at 350. In another instance, she specifically instructs the developers to "add aggression" to certain creatives. Chat Log, Def.'s Ex. 2A at 347.

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

As the direct contact at IMI for MyGeek, Ms. Ross interacted daily with the MyGeek account manager, Geoff Gieron. Specifically, Mr. Gieron would get in touch with her when publishers and other ad networks complained about the Defendants' advertisements. In attempts to resolve the problems, publishers would contact MyGeek, who would in turn contact Ms. Ross, by forwarding screenshots of

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

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

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

III. Conclusions of Law

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

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

It has been Defendant Ross's position that she should not be held individually liable because the FTC has not satisfied its burden to prove by a preponderance of the evidence that she either had authority to control or directly participated in the deceptive acts. Moreover, Defendant contends that the FTC failed to demonstrate that she knew of the IMI deceptive marketing scheme. At trial, Defendant's counsel made much of the fact that at the time of the formation of IMI, Ms. Ross was a twenty-two-year-old woman romantically involved with one of the main partners of IMI. Her counsel further explained that she was not a corporate officer but that she held a position of favor due to her status as Mr. Jain's girlfriend. She contended that instead she held a type of administrative assistant's role, facilitated employee relations because she was kinder and easier to work with than Defendant Jain, and stepped up when necessary to help out when Mr. Sundin became too ill to fulfill his responsibilities. Ms. Ross's counsel repeatedly argued that she was a troubleshooter and introduced the idea, for the first time at trial, that her position was not that of a Vice President but more that of a media buyer which is considered to be a lower level employee. During the brief bench trial, Ms. Ross's counsel sought to paint the picture of a betrayed young woman who had made poor choices in both work and life partners.[10] Once again, the argument of counsel is not evidence in this case in which Ms. Ross not only failed to respond to any discovery request but declined to appear for trial.[11]

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

To secure individual liability under the FTC Act, there must be a showing of participation or control in an enterprise's unlawful activity, which in turn may be indicated by an individual's assumption of duties as a corporate officer, involvement in business affairs, or

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

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

role in the development of corporate policies. *See Publ'g Clearing House,* 104 F.3d at 1171; *Amy Travel,* 875 F.2d at 573; *FTC v. Neovi, Inc.,* 598 F. Supp. 2d 1104, 1117 (S.D. Cal. 2008); *FTC v. Nat'l Urological Group, Inc.,* 645 F. Supp. 2d 1167, 1207-08 (N.D. Ga. 2008); *FTC v. Wilcox,* 926 F. Supp. 1091, 1104 (S.D. Fla. 1995). On the one hand, authority to control is also evidenced by an individual's ability to review and approve advertisements as well as his or her ability to issue checks, make hiring decisions and personally finance or pay for corporate expenses. *See Kitco of Nevada, Inc.,* 612 F. Supp. at 1293; *FTC v. USA Financial,* 415 Fed. Appx. 970, 2011 WL 679430, at * 3 (11th Cir. 2011); *FTC v. Stefanchik,* No. C04-1852RSM, 2007 U.S. Dist. LEXIS 25173, 2007 WL 1058579, at * 6-7 (W. D. Wash. Apr. 3, 2007). The FTC need not show that the Defendant was the Chief Executive Officer ("CEO") of a company to demonstrate authority to control, active involvement in the affairs of the business and the deceptive scheme is sufficient. *See Kitco of Nevada, Inc.,* 612 F. Supp. at 1293; *FTC v. J.K. Publ'ns, Inc.,* 99 F. Supp. 2d 1176 (C.D. Cal. 2000).[12]

On the other hand, direct participation can be demonstrated through evidence that the defendant

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

developed or created, reviewed, altered and disseminated the deceptive marketing materials. *See FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 310-11 (D. Mass. 2008); *Nat'l Urological Group, Inc.,* 645 F. Supp. 2d at 1207-08; *Kitco of Nevada, Inc.,* 612 F. Supp. at 1293; *J.K. Publ'ns,* 99 F. Supp. 2d at 1203; *FTC v. Am. Standard Credit Sys.,* 874 F. Supp. 1080, 1088 (C.D. Cal. 1994). Active supervision of employees as well as the review of sales and marketing reports related to the deceptive scheme is also demonstrative of direct participation. *See Wilcox,* 926 F. Supp. at 1104; *FTC v. Consumer Alliance,* No. 02-C-2429, 2003 U.S. Dist. LEXIS 17423, 2003 WL 22287364, at *6 (N.D. Ill. Sept. 30, 2003).

Although the FTC is only required to prove (a) that Ms. Ross had authority to control or (b) that she directly participated in the deceptive acts, the evidence in this case demonstrates that Defendant Ross had both the authority to control the deceptive acts within the meaning of the Section 5 of the FTC Act and that she directly participated in said acts. Although not explicitly labeled as a controlling shareholder or partner of IMI, the evidence reveals that Ms. Ross was an original founder of the company and was known by all three of the other main officers of the company as someone who would receive and who received shares of the profits. As far as IMI is concerned, none of the partnership agreements were reduced to a writing but Mr. D'Souza sent letters in late 2006 terminating the Joint Venture between himself, as a representative of Web Integrated Net Solutions, Inc., Mr. Jain, Mr. Sundin and notably Ms. Ross. Moreover, Ms. Ross herself identified herself as the IMI Vice President of

Business Development and stated that she was responsible for business expansion, sales and marketing, as well as product optimization. Nowhere did she state that she was a media buyer. While she argued that her corporate title was meaningless because IMI did not operate under traditional corporate formalities, her role with the company, her adoption of Defendants Jain and Sundin's affidavits in the Canadian Litigation and the plethora of evidence in emails and chat logs indicate that she was a control person at IMI.

Out of the six hundred employees, Ms. Ross has been shown to be one of the founders, one of seven people to approve expenses, one of the four to receive percentages of the profits of IMI, and one of the main individuals to appear in a managerial role in chat logs, emails and advertising contracts. Furthermore, in her affidavit, Ms. Drexler, now known as Ms. Novick, explicitly identified Ms. Ross as one of the individuals responsible for the deceptive marketing scheme at IMI. As such, the FTC demonstrated by a preponderance of the evidence that Ms. Ross had authority to control the deceptive marketing scheme at IMI.

Arguendo, even if Ms. Ross had not had authority to control the deceptive acts at IMI, compelling evidence establishes that she directly participated in the deceptive marketing scheme. First, her interactions with the staff and the developers indicate that she not only controlled the contents and appearance of the ads, but that she also reprimanded and disciplined departments when the work did not coincide with her standards. Her co-defendants even acknowledged that they partnered with her because of her marketing expertise. Secondly, the chat logs also establish that she was involved in key company decisions such as partnership arrangements (*e.g.*, Sundin and a major U.S. venture capital firm), how to reorganize the company and whom to hire. Furthermore, she also had access to company accounts and approved corporate expenses. On several occasions she even opened advertising accounts using her own personal credit card. While her counsel argued at trial that she only personally spent approximately $23,000 on accounts with MyGeek of the $3.3 million spent, Ross did not submit any evidence that other IMI employees funded those accounts. Moreover, the Drexler affidavit specifically states that "[t]o place these advertisements with MyGeek, she used credit cards in the name of "M D" (which [Ms. Drexler] believe[d] to be Marc D'Souza . . .), "Daniel Sundin," and wire transfers from IMI's account." Drexler Aff., Def.'s Ex. 1 at ¶ 106. The FTC's evidence demonstrates that Ms. Ross was not just a staff member but that she supervised the ad developers, made changes and gave orders concerning the ads, and funded the dissemination of these ads, whether through her own personal account or other accounts such as those of IMI, Daniel Sundin and Marc D'Souza. As such, Ms. Ross directly participated in the deceptive marketing scheme.

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

2. Knowledge

As mentioned previously, Defendant Ross contends that even if she is found to have had authority to control or directly participated in the deceptive acts, she did not know of the deceptive marketing scheme. To establish individual liability under section 5(a) the FTC must also establish that an individual defendant had some knowledge of the unlawful conduct. As previously mentioned, the knowledge requirement may be "fulfilled by showing that the individual had 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Amy Travel,* 875 F.2d at 574 (quoting *FTC v. Kitco of Nevada, Inc.,* 612 F. Supp. 1282, 1292 (D. Minn. 1985)); *see also FTC v. Direct Mktg. Concepts, Inc.,* 569 F. Supp. 2d 285, 311 (D. Mass. 2008) (noting that the FTC must prove "that the individual defendants either knew or should have known about the deceptive practices, but it is not required to prove subjective intent to defraud."). "[T]he degree of participation in business affairs is probative of knowledge." *Amy Travel,* 875 F.2d at 574.

Courts have held that defendants have knowledge of the deceptive marketing scheme where they "wrote or reviewed many of the scripts that were found to be deceptive and [where] they were undoubtedly aware of the avalanche of consumer complaints." *Id.* at 575; *see also FTC v. Cyberspace.com, LLC,* No. C00-1806L, 2002 U.S. Dist. LEXIS 25565, 2002 WL 32060289, at * 5 (W.D. Wash. 2002) ("There is ample evidence in the record that defendant Eisenberg was directly involved in the development of the deceptive marketing scheme . . . that he reviewed at least some of the solicitation forms before they were mailed, that he knew very few subscribers used the internet services for which they were being billed, and that he was aware that some of the consumers . . . did not realize they had contracted for internet services."). In *FTC v. Direct Marketing Inc.,* two defendants were held to be "at least willfully blind or recklessly indifferent to the deceptive" scheme because one was a co-owner of the company, and attended managerial meetings where he heard concerns about the product; and the other had a controlling position at the corporation and "procured placement" for the deceptive advertisements. 569 F. Supp. 2d 285, 311 (D. Mass. 2008). In *FTC v. J.K. Publications, Inc.,* involving credit card fraud scheme, the defendant's wife was held to be individually liable because her actions demonstrated intentional avoidance of the truth and reckless indifference. 99 F. Supp. 2d 1176, 1207 (C.D. Cal. 2000). She was a corporate officer of the company, had five years of experience as a bank teller and loan officer, was aware of her husband's criminal past, and personally signed for purchases and opened bank accounts used to perpetrate the deceptive acts. *Id.* at 1206-07. Moreover, the court made note of the fact that she accepted the large sums of money her husband brought into the household despite knowing that his previous business ventures were unsuccessful. *Id.* Conversely, the wife of the defendant in

FTC v. QT, Inc., a case which involved the marketing of a bracelet which falsely purported to cure arthritis, was not determined to have had knowledge of the deceptive scheme because she was only listed as a corporate secretary and her responsibilities "did not include the marketing of the Q-Ray bracelet or anything pertaining to the marketing of the Q-Ray bracelet." 448 F. Supp. 2d 908, 973 (N.D. Ill. 2006). Accordingly, when an individual (1) had some level of participation in the development, review, creation or editing of the deceptive marketing scheme, (2) disseminated the deceptive advertisements, and (3) was aware of complaints or problems surrounding the marketed product or the advertisements, while he or she may not necessarily have actual knowledge of the unlawful acts, this individual is at best recklessly indifferent to the truth or intentionally avoids it.

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

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

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

Second, the evidence demonstrates that she received shares of the business's profits and made large sums of money from it. Third, she received and was aware of the numerous consumer and ad network complaints. Notably, she knew that complaints concerned the fact that the advertisements purported to scan but that the ads themselves were not supposed to scan. She also knew that the ads were "unpleasant" and that customer retention was low. She purported to fix the problem, but the problem continued to occur and she continued to receive complaints. Additionally, MyGeek terminated the relationship with IMI by informing her that her advertisements were threatening MyGeek's reputation. Moreover, she actively participated in making the advertisements unpleasant and instructed her developers to increase their aggression level. Finally, she requested that the term "advertisement" be removed from certain ads thereby further contributing to the deception of customers. Consequently, the FTC has demonstrated by a preponderance of the evidence that Ms. Ross had actual knowledge of the deceptive marketing scheme. Alternatively, her involvement with IMI and her participation in the deceptive marketing scheme as well as her awareness of consumer complaints demonstrate that she acted with reckless indifference and intentionally avoided the truth. As such, she is individually liable for the deceptive acts of IMI, and judgment shall be entered in favor of the Federal Trade Commission ("FTC").

3. Injunctive and Monetary Relief

Under Section 13(b) of the FTC Act, "in proper cases the Commission may seek, and after proper proof, the court may issue a permanent injunction." 15 U.S.C. § 53(b). This Court has previously held that "[t]he authority to grant such relief includes the power to grant any ancillary relief necessary to accomplish complete justice, including ordering equitable relief for consumer redress through the repayment of money, restitution, rescission, or disgorgement of unjust enrichment." *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005) (citing *FTC* *v. Febre,* 128 F.3d 530, 534 (7th Cir. 1997)). "To insure that any final relief is complete and meaningful, the court may also order any necessary temporary or preliminary relief, such as an asset freeze." *Ameridebt,* 373 F. Supp. 2d at 562 (citing *FTC v. Gem Merch. Corp.,* 87 F.3d 466, 469 (11th Cir. 1996)). The court therefore possesses broad equitable authority which it must particularly exercise to protect the public interest. *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) (citing *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754 (1944)). "Permanent injunctive relief is appropriate when there is 'some cognizable danger of recurring violation.'" *FTC v. Medical Billers Network, Inc.,* 543 F. Supp. 2d 283, 323 (S.D.N.Y. 2008). To make this determination a court can consider the following factors: "the defendants' scienter, whether the conduct was isolated or recurrent, whether defendants are positioned to commit future violations, the degree of consumer harm caused by defendants, defendants' recognition of their culpability, and the sincerity of defendants' assurances (if any) against future violations." *Id.* (citing *FTC v. Minuteman Press,* 53 F. Supp. 2d 248, 260-61 (E.D.N.Y. 1998)). "Moreover, the egregious nature of past violations is a factor supporting the need for permanent injunctive relief of a broad nature." *Kitco of Nevada,* 612 F. Supp. at 1296. Finally, the injunction must not "unduly harm the defendants . . . [by] put[ing] them out of business, but [must] simply ensure that they will conduct their business in a manner which does not violate Section 5 of the FTC Act, 15 U.S.C. § 45." *Id.*

In this case, the FTC seeks to permanently restrain and enjoin Ms. Ross from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing. Ms. Ross is found to be responsible for the deceptive marketing scheme at IMI which affected a large number of online consumers and led to the filing of three thousand consumer complaints with the FTC. The scheme generated large sums of money, a portion of which went to Ms. Ross. Her expertise in marketing was touted by her partners and used to deceive and defraud a large number of consumers. As such, a permanent injunction prohibiting Ms. Ross from marketing computer security software and software that interferes with consumers' computer use is appropriate. Finally, this permanent injunction does not in any way harm her or deprive her of other employment opportunities. She may still utilize her marketing talents as long as they are used for legitimate products and ventures and do not contribute to deceiving the public.

As far as consumer redress is concerned, "[t]he power to grant ancillary relief includes the power to order repayment of money for consumer redress as restitution or recession." *Febre,* 128 F.3d at 534; *see also Ameridebt,* 373 F. Supp. 2d at 563. As a permanent injunction can be imposed on Ms. Ross she may also be liable for monetary damages. *Medical Billers Network, Inc.,* 543 F. Supp. 2d at 324. In order to obtain restitution under Section 13(b), however, the FTC must establish that "(1) the business entity made material misrepresentations likely to deceive consumers, (2) those misrepresentations were widely disseminated, and (3) consumers purchased the entity's products." *FTC v. Free Commc'n, Inc.,* 401 F.3d 1192, 1206 (10th Cir. 2005). "The proper measure of consumer restitution is the amount that will restore the victims to the *status quo ante,* not what defendants received as profit." *FTC v. Cyberspace.com, LLC, et al.,* No. C00-1906L, 2002 U.S. Dist. LEXIS 25565, 2002 WL 32060289, at *5 (W.D. Wash. 2002). Specifically, "allowing a damages determination based on gross receipts in a case arising directly under the FTC Act furthers the FTC's ability to carry out its statutory purpose." *FTC v. Kuykendall,* 371 F.3d 745, 765-66 (10th Cir. 2004); *see also Febre,* 128 F.3d 535-36. As such the amount of consumer redress is the amount paid by consumers for the Defendants' products minus any refunds. Additionally, under section 13(b) a court may order disgorgement of a defendant's "unjust enrichment" when it is not possible to reimburse all of the consumers who have been injured by the defendant's misrepresentations. *FTC v. Gem Merch. Corp.,* 87 F.3d 466, 470 (11th Cir. 1996) (citing *FTC v. Pantron I Corp.,* 33 F.3d 1088, 1103 n. 34 (1994), *cert. denied,* 514 U.S. 1083, 115 S. Ct. 1794, 131 L. Ed. 2d 722 (1995). Once the FTC has satisfied its burden, it is up to the defendant to show that the calculations are not accurate. *FTC v. QT, Inc.,* 448 F. Supp. 2d 908, 974 (N.D. Ill. 2006).

In this case, the FTC has satisfied its burden to show that the Defendants made material misrepresentations which were likely to deceive, that those misrepresentations affected a large number of consumers and that more than one million consumers bought Defendants' products. The FTC correctly notes that if Defendant Ross is found to be individually liable for the deceptive scheme, she is jointly and severally liable for the consumer redress amount of $163,167,539.95 calculated by the FTC.[13] Defendant Ross argued, however, that this sum was grossly overinflated and that she should only be held liable for the ads and products she herself marketed at MyGeek. Specifically, counsel for Defendant Ross noted that "the FTC cannot disgorge from an individual defendant net revenue received by the Enterprise before or after the defendant directly participated in, or had authority to control, the deception." *FTC v. Wash. Data Res.,* 856 F. Supp. 2d 1247, 2012 U.S. Dist. LEXIS 56233, at *86 (M.D. Fla. Apr. 23, 2012). In response, the FTC has correctly noted that Ms. Ross had the opportunity to present financial information and to respond to discovery but has failed to do so.

It is well established that once a defendant is found to be individually liable for a corporate defendant's deceptive acts, he or she is jointly and severally liable for the total amount of consumer redress. *See, e.g., FTC v. J.K. Publ'ns,* 99 F. Supp. 2d 1176 (C.D. Cal. 2000); *FTC v. Kitco of Nevada, Inc.,* 612 F. Supp. 1282 (D. Minn. 1985). Ms. Ross participated and had authority to control the advertising scheme from its inception until it was

13. According to the FTC, this amount was calculated based on Defendants' profit and loss statements for 2004-2006, and Defendants' payment processor records for 2006-2007. Proposed Final Pre-Trial Order at 22, ECF No. 239. Moreover, the FTC has repeatedly stated that this amount represents a ceiling for monetary recovery and this Court has previously held that this amount was a reasonable approximation of the damages in this case.

interrupted by the FTC. Moreover, Ms. Ross was at least recklessly indifferent to or intentionally avoided the truth when it came to the deceptive marketing scheme, and the FTC satisfied its burden with respect to the imposition of consumer redress. Defendant Ross had sufficient time to challenge the amount of recovery proposed by the FTC by proposing her own calculation and amount but failed to do so. Having previously determined that the amount calculated by the FTC was a reasonable approximation of consumer redress, this Court finds that Defendant Ross is jointly and severally liable for $163,167,539.95 in this case. Accordingly, Defendant Ross shall be permanently restrained and enjoined from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing. Defendant Ross shall also be jointly and severally liable with co-Defendants Innovative Marketing, Inc., Sam Jain and Daniel Sundin for the consumer redress amount of $163,167,539.95.

IV. Conclusion

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

A separate Order and Judgment follows.

Dated: September 24, 2012

/s/ ______________________
Richard D. Bennett
United States District Judge

<u>ORDER & JUDGMENT</u>

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

> 1. That Judgment is entered in favor of Plaintiff Federal Trade Commission ("FTC") against Defendant Kristy Ross, individually and as an officer of Innovative Marketing, Inc. on all Counts contained in the FTC Complaint;
>
> 2. That Defendant Kristy Ross shall be permanently restrained and enjoined from the marketing and sale of computer security software and software that interferes with consumers' computer use as well as from engaging in any form of deceptive marketing;
>
> 3. That Defendant Ross shall be jointly and severally liable with the co-Defendants Innovative Marketing, Inc., Sam Jain and Daniel Sundin for the consumer redress amount of $163,167,539.95;
>
> 4. That any and all prior rulings made by the Court disposing of any claims against any parties are incorporated by reference therein, and this Order shall be deemed to be a final Judgment within the meaning of Fed. R. Civ. P. 58;

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

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

/s/
Richard D. Bennett
United States District Judge

APPENDIX C — STATISTICAL ANALYSIS

Year	Consumer Protection Federal Actions Filed	Reported Total Amount of Redress and Disgorgement Ordered in Judgments (in millions of dollars)
2013	43	$297
2012	62	741.5
2011[1]	43	223.7
2010	38	368
2009	83	393
2008	64	371.2
Totals	**333**	**$2,393.7**

Source: http://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports

1. 2008 to 2011 reports include the data range of March of the named year to February of the next year. Starting with 2012, the FTC reports calendar year statistics. The 2012 row likely includes results that were already included in the 2011 row: any data within the date range January 1 to February 29, 2012.