Nos. 19-35668 & 19-35669

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

HOYAL & ASSOCIATES, INC., JEFFREY HOYAL, AND LORI HOYAL
Defendants-Appellants in No. 19-35668

and

REALITY KATS, LLC AND DENNIS SIMPSON
Defendants-Appellants in No. 19-35669

On Appeal from the
U.S. District Court for the District of Oregon,
No. 1:16-cv-00720

BRIEF OF THE FEDERAL TRADE COMMISSION

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JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b). The trial court entered a final order and permanent injunction on June 10, 2019 (ER 15, 16-28), and an amended permanent injunction on July 10, 2019 (ER 1-14). The appellants filed timely notices of appeal on August 7, 2019. SER 1-5 (Jeffrey Hoyal, Lori Hoyal, and Hoyal & Associates, Inc., appellants in No. 19-35668); ER-198-201 (Dennis Simpson and Reality Kats, LLC, appellants in No. 19-35669). This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

The appellants sent consumers millions of mailers offering a product that was not theirs to sell: subscriptions to newspapers whose publishers had repeatedly attempted to stop the solicitations through cease-and-desist orders, lawsuits, and by refusing to accept orders generated by appellants. The trial court entered a permanent injunction ordering appellants to halt their illegal conduct and repay $8.9 million that they took from consumers.

The questions presented in the Hoyals' appeal are:

1. Did the trial court correctly find Jeffrey and Lori Hoyal personally liable for injunctive and monetary relief?

2. Was the action below properly brought under Section 13(b) of the FTC Act, given its "is violating, or is about to violate" language?

3. Did the trial court abuse its discretion in entering a permanent injunction against the Hoyals?

4. Does Section 13(b) of the FTC Act authorize permanent injunctions that direct the return of money to injured consumers?

The principal issues separately presented in Simpson's appeal are:

5. Did the defendants' settlement with Oregon in 2004 preclude application of the FTC Act here?

6. Was the case below a "proper case" under Section 13(b) of the FTC Act?

7. Was the trial court's injunction impermissibly vague?

STATUTES AND REGULATIONS

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides:

> Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

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

STATEMENT OF THE CASE

For more than twenty years, appellants Jeffrey Hoyal and Dennis Simpson operated a business offering magazine and newspaper subscriptions through direct-mail solicitations to consumers. ER 40-41, 168-169. They sent millions upon millions of mailers that appeared to be bills or renewal notices from more than 375 national, regional, and local newspapers such as the *Washington Post*, the *New York Times*, and the *Wall Street Journal*. The mailers said that the consumer's current subscription would be automatically renewed with their payment and claimed to be offering the lowest subscription price available. ER 40-41.

None of it was true. In fact, the subscriptions that Hoyal and Simpson purported to offer were not theirs to sell. In the legitimate mail-order subscription business, publishers enter into agreements (either directly or through clearing houses) which authorize sales agents to solicit subscriptions in the name of the

publication for specified terms at particular prices. ER 44, 47-48, 160. Hoyal and Simpson, however, offered subscriptions *without* the publishers' authorization and in defiance of their wishes. Publishers sent them countless cease-and-desist letters. ER 51, 86. They told the Hoyal-Simpson operation that they would not process its subscription orders. *Id.* They returned Hoyal and Simpson's checks, sent subscribers fraud alerts warning about their mailers, and sued to stop them from soliciting subscriptions in the publishers' names. ER 52, 86, 102. Hoyal and Simpson ignored the publishers' efforts and continued to send unauthorized subscription notices to consumers. ER 45.

Consumers expect newspapers and magazines to send them mail-order reminders when their subscription is about to expire. Thus, many consumers who received Hoyal and Simpson's mailers believed that they were from the publication itself and simply wrote a check intending to "renew" their subscription, unaware that they were responding to an unauthorized third party rather than the publisher. ER 41. They often made their checks payable to the publication itself. ER 104.

Because publishers did not authorize the mailers and would not accept Hoyal and Simpson's subscription orders, the operation often had trouble fulfilling (or "clearing") those orders and resorted to deceptive clearing tactics. ER 41, 104. For example, they recruited people (once from a local retirement home) to hand-write consumers' information on subscription cards pulled from newspapers and

magazines to make it appear as if orders had come from the consumer rather than from Hoyal and Simpson. ER 43. They tried to hide this tactic by filling out the cards with different pens and handwriting, and mailing them from different locations around the country. *Id.* When publishers rejected their orders, Hoyal and Simpson would send the consumer a negative-option “switch notice,” informing the consumer that she would receive a different publication than the one ordered unless she requested a refund by a specified date. ER 54. Many consumers thus never received the publication they ordered or received it only after lengthy delays. ER 41.

Consumers complained in droves. Publishers sued. Banks stopped doing business with Hoyal and Simpson’s businesses. And state attorneys general brought enforcement actions under their consumer protection statutes. In response, Hoyal and Simpson repeatedly moved their operations to new business entities and aliases while the mailers kept arriving in consumers’ mail. They kept coming during enforcement lawsuits brought by Oregon and other states in 2015, and they kept coming after Hoyal and Simpson settled the Oregon case by agreeing to leave the mail-order subscription business. In 2016, the Commission brought this enforcement action to finally end Hoyal and Simpson’s deceptive operations.

A. Hoyal And Simpson's Deceptive Subscription Notices

At the heart of Hoyal and Simpson's operation were deceptive mailers that gave the impression of being bills or renewal notices from specific newspapers. The mailers were formatted like notices that publishers send to subscribers, listing a particular newspaper's name along with a specific subscription term and price. ER 160, 168-169. They suggested a connection to the consumer's current subscription by referring, for example, to "your subscription to the WASHINGTON POST" and "your regular subscription," which they claimed would be "automatic with receipt of your payment when you choose to renew." ER 160, 168. Hoyal and Simpson obscured the true origin of the mailer by using generic-sounding company names like "Readers Payment Service" or "Publisher's Payment." *Id.* The mailers promised that consumers could "lock in at one of our lower rates!" and that they were receiving "one of the lowest available rates we can offer." *Id.*

READERS PAYMENT SERVICE

1-707-266-6673

Control Number	Installment
0814M-556107	$299.98
Please Return By	**Total Amount**
October 27, 2014	$599.95

Your subscription to THE WASHINGTON POST is automatic with receipt of your payment when you choose to renew or order a new subscription. Fortunately by acting now, you can lock in at one of our lower rates! You're receiving one of the lowest available rates we can offer for your regular subscription.

THE WASHINGTON POST
365 ISSUES 1 YR(S)

Email: customerservice@publisherspayment.com
MAKE CHECK OR MONEY ORDER PAYABLE TO:
RPS
PO Box 2489 • White City, OR 97503

Exhibit A Page 1

LPS NORO 03/12 RENEWAL OFFER - NOT A BILL

DETACH HERE
PLEASE RETURN THIS PORTION WITH YOUR PAYMENT

NOTICE OF RENEWAL/
NEW ORDER

Control Number	Installment
0814M-556107	$299.98
Please Return By	**Total Amount**
October 27, 2014	$599.95

THE WASHINGTON POST
365 ISSUES 1 YR(S)
Installment Payment - 1/2 now and 1/2 next month
❑ Check Here If Renewal
❑ Bill Me Later ❑ NO THANK YOU

For Credit Card Payment Go To:
www.publisherspayment.com
Make check or money orders payable to:
RPS

PHONE ____________________
(for processing purposes)
Please make any name or address corrections below:

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In fact, the mailers were not from the publications they prominently featured, the prices they offered were not low, and the consumer's subscription was not "automatic" with their payment to Hoyal and Simpson's companies. To the contrary, Hoyal and Simpson were not authorized to offer subscriptions to the publications and did so against the publishers' wishes. ER 40-41, 52, 161-162. Thus, far from being "automatic," Hoyal and Simpson could not be sure the consumer would receive the offered subscription at all, and often they did not. ER 161. As for the prices, they were higher than otherwise offered by the publications themselves.

B. Hoyal And Simpson's Subscription Enterprise.

Hoyal and Simpson operated their subscription business scheme in essentially the same way for over twenty years. ER 50-53. Simpson began offering subscriptions using deceptive mailers like those described above in the 1990s. ER 50. Hoyal joined him in 1997 and the two became partners in 2005, splitting the operation's profits equally between them. ER 50, 57, 76. Throughout their association, Simpson was primarily responsible for the design of the deceptive mailer and Hoyal provided the operational support to make the business work. ER 54, 57.

Hoyal and Simpson operated the business through a maze of interrelated companies, all under their ultimate control. ER 50-51, 54-55, 69. At the top of the scheme, Simpson was primarily responsible for designing the mailer and viewed

himself as the "quarterback" of the operation, while Hoyal was responsible for day-to-day operations. ER 50-51, 54, 69. They recruited personnel to create and run numerous business entities responsible for different parts of the enterprise while reporting to Hoyal and Simpson. ER 58, 76, 125-126, 127. One set of companies focused on producing and sending mailers. ER 53. A second set received consumer responses and payments. *Id.* A third set attempted to fulfill the orders with publishers and sent "switch" notices to consumers when they failed. ER 53-54. Yet another set of companies provided support to and moved money among the others. ER 41.

Despite operating through dozens of corporations using scores of aliases, the enterprise was a single integrated business. ER 125-132. The mailing companies all used the same mailers; orders went to the same receiving companies; and they were fulfilled (or switched to other publications) by the same clearing companies. ER 114, 130-131. The companies shared operating and business addresses and the same employees did the same work from the same desks for the purportedly different companies. ER 129, 130-131, 195. The companies also intermingled funds, depositing checks to one another's accounts and transferring funds between companies without any particular relationship or services rendered between them. ER 94, 132.

Hoyal and Simpson made a practice of changing business names when one alias became compromised. *See* ER 50, 52, 76, 152. For example, when a bank closed the account of one entity, Hoyal and Simpson deposited checks to that business into the accounts of other entities. ER 132. Hoyal and Simpson shifted among different businesses entities at a dizzying pace. For example, in 2010, they began sending mailings from a company called Orbital, which used various aliases. ER 59. The next year, they moved that part of the operation to a second entity, Liberty Publishers Service, which likewise did business under dozens of aliases, many inherited from Orbital. ER 58-59. In 2012, they began sending mailers from yet another entity called United Publishers Exchange. ER 60. Two years after that, a fourth company, Express Publishers Service, took over Liberty's mailing operations, doing business under its own lengthy set of aliases. ER 59-60. And in 2013-2014, a fifth company, Associated Publishers Network, took over United's mailing operations. ER 61. The rapid-fire corporate changes did not correspond to any changes in the business, however: all of the mailing companies used the same employees, who did the same work from the same offices, and they were all owned by a single entity. ER 61.

That practice of surfing from company to company continued nearly up to the time this case was filed. In 2015, Hoyal and Simpson transferred assets of their operation sufficient "to effectively run and maintain a subscription agency busi-

ness" to Hoyal's nephew. ER 56, 152. But the very next month, one of their associates formed a corporation in Oregon with the same name ("Publishers Payment Processing") that corresponded to one of Hoyal and Simpson's websites ("publisherspayment.com"), and which they had previously used for a New York company that received mailers and performed customer service for the enterprise. ER 63, 65. Later that year, Hoyal and Simpson discussed restarting the mailing operation and circulated proposed subscription mailers for the operation with their team. ER 56.

C. Hoyal And Simpson Ignored Publications' Cease-And-Desist Letters, Fraud Alerts, And Lawsuits, Consumer Complaints, And Government Enforcement Actions.

As long as Hoyal and Simpson have been sending phony renewal notices for newspapers, publishers have tried to stop them. ER 50-52. Time after time, they sent cease-and-desist letters and issued fraud alerts warning subscribers not to respond. *Id.*; ER 102-103, 119; 2708-2717. As the publishers of *The Wall Street Journal* told them, the operation was "selling a product—and taking consumer funds for a product—that you are not authorized to sell and simply cannot deliver." ER 2712. Publishers rejected orders from Hoyal and Simpson's businesses and did not cash the operation's checks. ER 104, 112-113, 119, 2712, 2716-2717. When Hoyal and Simpson ignored those notices, the publications sued, some obtaining permanent injunctions against the businesses. *Id.* at 52 (listing lawsuits from 1999

to 2006). None those efforts led Hoyal and Simpson to stop. *See* ER 75, 96. Instead, Hoyal and Simpson shifted their operations to new companies and attempted to conceal the origin of their subscription orders. *See* ER 118-119, 124-125. To accomplish the latter, they placed anonymous calls to the papers seeking to confirm that they would accept orders via subscription insert cards. ER 118, 122. They then printed copies of the cards and hand-wrote the consumers' information on them, making sure to use different pens and ink colors. *Id.* To further conceal the origin of the orders, they had the cards mailed from different states to appear legitimate. ER 118-119, 122-123. When publishers caught on and refused to fulfill the subscriptions, Hoyal and Simpson switched consumers to publications they did not order, giving the subscriber only a limited time to request a refund. ER 54, 122-123.

Thousands of consumers complained. Many complained that the mailer looked like it was a bill issued by the publisher. ER 63-64, 113, 114, 116, 121. Other consumers wondered why they were receiving a renewal notice when they had recently renewed. ER 64, 121. Many complained that they did not receive the subscription they requested or experienced delays. ER 113, 121. Consumers also complained that Hoyal and Simpson's rates were inflated, ER 121, and some wound up paying twice for the same subscription. Many consumers tried unsuccessfully to obtain refunds. ER 102, 121.

Government officials tried to stop the scheme. In 1996, the United States Postal Service sent a cease & desist letter prohibiting Hoyal and Simpson from mailing unsolicited subscription offers that looked like bills. ER 51. In 2004, they entered into a consent judgment with Oregon to resolve complaints under its Unlawful Trade Practices Act and its Simulated Invoices statute. ER 52, SER 189-198. Oregon sued again in 2015, along with six other states that brought simultaneous enforcement actions against the enterprise. ER 55. The Oregon action was resolved by an "Assurance of Voluntary Compliance" signed on June 23, 2015. ER 55, 4007-4014. In that agreement, Hoyal (on behalf of himself and Hoyal & Associates) and Simpson (on behalf of himself and Reality Kats) were permanently prohibited from engaging in the magazine and newspaper subscription business. ER 4007, 4011. They also agreed to pay up to $500,000 in restitution and $3 million to Oregon's consumer protection fund. ER 4011-4012, 4014.

Despite all of the above, the mailers kept coming. Even after the Commission filed suit, Simpson provided the same kind of services to other direct mail companies that he provided to his operation with Hoyal. ER 75-76. And even after transferring the operation's assets to Hoyal's nephew, ER 56, 152, Hoyal and Simpson discussed restarting the mailing operation and circulated proposed subscription mailers to their team. ER 56. The mailers, meanwhile, have never stopped coming.

D. Consumers Fell For The Scheme.

Hoyal and Simpson sent consumers between 20 and 50 million mailers each year from 2010-2015. ER 55. During the five years covered by the Commission's enforcement action, Hoyal and Simpson's operation received over $12 million in newspaper subscriptions, after deducting consumers' stop payments and refunds. ER 47, 132-133. During the same period, Hoyal and Simpson each received about $15 million from the business overall (including from magazine subscriptions). ER 56-57, 132.

E. Procedural History

In April 2016, the Commission sued to finally halt Hoyal and Simpson's deceptive practices. SER 217-241. The Commission named as defendants Simpson, Hoyal, his wife Lori Hoyal, the companies that made up their mailing operation, and the individuals that Hoyal and Simpson recruited to run those companies. *Id.* The complaint alleged an ongoing scheme to solicit newspaper subscriptions through deceptive direct-mail solicitations that gave the impression they were from or authorized by particular publications and sought injunctive relief to halt the operation and the harm it was causing to consumers. SER 238-239, 240.

The parties consented to have the case heard by a magistrate judge, D.Ct. Docket No. 68, who granted summary judgment to the Commission and held that Hoyal and Simpson's mailers were deceptive as a matter of law. ER 158-169. The

court found that the mailers convey the net impression that they are "either from or authorized by the newspaper publication in question, that any current subscription would be 'renewed' automatically, and that the consumer was being offered the lowest price available," and that those impressions were false. ER 160-161. The court rejected Hoyal and Simpson's arguments that other language on the mailers undid the deception, concluding that the disclaimers were "not adequate to cure the mailer's deceptiveness." ER 161. The court noted that while the Commission is not required to provide extrinsic evidence of actual deception, consumer complaints showed that consumers were actually deceived by the mailers. ER 162-163. The court determined that the mailer's misrepresentations were material and rejected Hoyal and Simpson's argument that the consent judgment with Oregon in 2004 required them to use the deceptive language in the mailer. ER 164-166.

The case proceeded to trial on the remaining issues of common enterprise, individual liability, and remedy. After nineteen days of proceedings, the court entered extensive findings of fact and conclusions of law. ER 29-153. The court found that for twenty years, Hoyal and Simpson had solicited newspaper subscriptions using essentially the same deceptive mailers. ER 40-41, 147. The court found that they conducted the business through a maze of interrelated companies, all of which were under their joint control, and which they ran as a single company. ER 41-42, 125-126. In light of the companies' overlapping ownership, joint control,

sharing of employees and office space, and financial interdependence, the court concluded that the business was operated as a common enterprise and that each of the component companies was liable for the acts of the enterprise as a whole. ER 125-132, 135-136.

The court found Simpson, Hoyal, Lori Hoyal, and the other individual defendants liable for injunctive relief based on their participation in the illegal conduct, control of the companies that made up the enterprise, or both. ER 137-148. Simpson had overall control of the enterprise and directly participated in the deceptive conduct by, among other things, designing the deceptive mailers, directing the mailings to consumers, controlling the database used to target consumers, and creating the insert-card clearing scheme. ER 139, 144. Hoyal had control of the enterprise though his management of the operation's day-to-day activities and directly participated in the deceptive conduct by, among other things, creating the structure of the enterprise and managing the mailing and clearing operations. ER 139-140, 145.

The court found Lori Hoyal liable due to her participation in and control of Hoyal & Associates. ER 87-88, 140, 145. In particular, the court noted, Lori Hoyal was both a 50% owner of Hoyal & Associates and a corporate officer. ER 87, 140, 145. The court determined that she managed money taken from consumers through the deceptive mailing operation, opened bank accounts, kept the books, paid bills

on behalf of the company, and prepared invoices to transfer money from the various entities. ER 87. She also trained another defendant (Parducci) to track the operation's finances and distribute funds—tasks she had performed for earlier iterations of the enterprise. ER 88-89. The court found that through her 50% ownership of Hoyal & Associates, Lori Hoyal was a "primary financial beneficiary" of the operation. ER 89.

The court held Simpson, Hoyal, and Lori Hoyal liable for monetary relief based on their knowledge of the deceptive conduct.[1] ER 145-148. The court found that Simpson's knowledge was established by his constant control of the deceptive mailer itself; his knowledge of consumer complaints, cease-and-desist letters and fraud alerts, and complaints from state attorney generals; and his knowledge and design of the insert-card scheme and the practice of switching consumers to publications they did not order. ER 75-76, 146-147.

The court found that Hoyal's knowledge of the deceptive conduct was established by his own testimony. ER 84-87, 147. "Hoyal knew that consumers did not understand that the mailers were from third parties, thought they were from the publishers, and made their checks payable to the publications." ER 84. Hoyal also

[1] The court concluded that despite having become officers of the component companies, the other individual defendants were "working as employees under the control of Simpson and Hoyal," and that while they knew or should have known about the deceptive nature of the mailers, "justice would not be served by holding them individually liable for the monetary award in this case." ER 46.

knew about publishers' cease-and-desist letters and consumer complaints, that publishers rejected orders and returned the operation's checks, and that the operation switched consumers to publications they never ordered. ER 147-148. And he knew that the operation continued sending deceptive mailers despite publishers' and law enforcement's efforts to get them to stop. *Id.*

The court found that Lori Hoyal knew about the nature of the deceptive mailing operation based on her participation in the operation during the period prior to the Commission's lawsuit, which included purchasing consumer lists, tracking financial operations, and distributing profits. ER 148. In addition, the court found that Lori Hoyal knew the funds that Hoyal & Associates received were profits from the deceptive mailing operation and that they were split equally with Simpson through Reality Kats. *Id.*

The judge determined that a permanent injunction was necessary to prevent Hoyal and Simpson from continuing their widespread fraud. ER 149-152. The court noted that the operation "spanned decades" and continued despite complaints from consumers, cease-and-desist letters and lawsuits by publishers, and government enforcement actions. ER 152. The court noted that the operation had "evolv[ed]" over time and operated through "multiple iterations," that Simpson had continued to be involved in the subscription mailer business—violating the 2015 agreement with Oregon—during the lawsuit, and that he and Hoyal had met about

resuming the operation. *Id.* The court found that Hoyal and Simpson had transferred the assets, business names, and underlying records of the operation to Hoyal's nephew, and that those materials would allow him "to effectively run and maintain a subscription agency business." ER 152. Given the likelihood of recurrence, the court found that fencing in was appropriate. *Id.* Its final order therefore bans the defendants not only from making the type of misrepresentations in their mailers but also from soliciting any goods or services by direct mail. ER 3-4. The court also found that monetary relief was appropriate. ER 152-153. It ordered monetary relief equal to "the full amount of consumers' loss—*i.e.*, what consumers paid, less refunds and chargebacks already returned to them." ER 152. The court found that the defendants had received payments totaling $12.2 million for newspaper subscriptions from April 2011 to March 2015, after deducting refunds and cancelled payments. ER 132-133. The court further deducted $3.25 million that the defendants paid to Oregon in connection with the 2015 Assurance of Voluntary Compliance. ER 152-153. Accordingly, the court found the proper measure of monetary relief was $8.94 million, for which it held the corporate defendants, Simpson, and the Hoyals jointly and severally responsible. ER 5-6, 153. The court directed that the funds be deposited into a fund for consumer redress. ER 6.

Separate appeals were filed by Jeffrey Hoyal, Lori Hoyal, and Hoyal & Associates and by Simpson and his company Reality Kats. This Court consolidated the appeals.

SUMMARY OF THE ARGUMENT

Neither appeal shows that the trial court committed any error in its findings of fact, its conclusions of law, or its injunction. The decision below should be affirmed.

1.a. The Hoyals do not show that the trial court committed any error in holding them personally liable for injunctive and monetary relief. Individuals are liable for injunctive relief based on the deceptive practices of corporate entities when they participate in the violations or have the authority to control the company. They may be held responsible for monetary relief if they know or should have known of the deceptive practices. When the company is a component of a common enterprise, the individual's liability extends to the acts of the enterprise as a whole.

The trial court correctly found that Jeffrey Hoyal controlled the deceptive subscription business and participated in its illegal conduct. He set up the structure of enterprise, ran its day-to-day operations, and oversaw its deceptive practices, including by reviewing and approving the mailers themselves. Given his extensive participation in the business Hoyal plainly knew about the deceptive practices, as his testimony confirms.

Hoyal claims that the business overall was not "manifestly fraudulent" and that he could not have known that the Commission would find the mailers deceptive, but he knew that the operation had no authority to sell the subscriptions it offered, he knew that consumers thought the mailers came from publishers, and he knew that the operation often could not deliver what it offered and sent consumers something else instead. The deceptiveness of the operation was obvious; it was not cured by ambiguous disclaimers on the mailers or excused by the 2004 Oregon settlement, and Hoyal did not need the Commission to spell that out for him.

The trial court likewise made no error by holding Lori Hoyal personally liable based on her control Hoyal & Associates, the company at the heart of the enterprise. She helped oversee the operation's finances and divvy up the proceeds of the scheme, and she knew or should have known that the practices were deceptive based on her involvement in an earlier iteration, when she was personally named as a defendant in a lawsuit brought to stop the deception. Because Hoyal & Associates was part of the common enterprise, Lori Hoyal's liability for the company's practices extends to the enterprise as well.

b. The Hoyals fail to show that the 2015 enforcement action brought by Oregon ended the operation's deceptive practices and that as a result the Commission could not allege that they were violating the FTC Act or were about to do so when the complaint was filed.

Their argument is wrong on both the law and the facts. The complaint alleged ongoing conduct and that is all Section 13(b) requires. Even if the evidence at trial showed that the defendants had ceased their illegal conduct (which it did not) the Commission had "reason to believe" the defendants were or were about to violate the law at the time of the lawsuit, and that determination is committed to the agency's discretion and not subject to judicial review.

In addition, defendants cannot escape a suit for an injunction merely by stopping their illegal conduct in response to enforcement efforts. When there is a realistic danger that the conduct will recur, an injunction is lawful. The Hoyals and their codefendants had a history of ignoring every attempt, in and out of court, to stop their deceptive practices. Even if their conduct had truly stopped when the Commission sued, the danger of recurrence was palpable. This case does not remotely resemble the situation before the Third Circuit in *Shire ViroPharma*, where the conduct had ceased nearly five years before the Commission sued and there was no allegation it would soon recur.

c. The law of this Circuit is clear that Section 13(b) of the FTC Act authorizes the court to enter an injunction that requires the return of unlawfully-obtained funds. The Hoyals offer no reason to depart from that precedent.

2. Simpson's multifarious arguments are baseless and provide no reason to disturb the trial court's decision.

a. Simpson is flatly wrong that the injunction was unlawful because the Commission admitted that the business had been shut down. The Commission made no such admission, the complaint alleges otherwise, and in any event an injunction is warranted when illegal conduct can easily be resumed.

b. Simpson's argument that this action was not a "proper case" under Section 13(b) of the FTC Act is foreclosed by *FTC v. Evans Products Co.*, 775 F.2d 1084 (9th Cir. 1985).

c. Simpson's argument that the 2004 settlement with Oregon required him to use the deceptive language in the mailer fails because the settlement expressly states that it may not be used to justify Simpson's practices and a state-law settlement cannot preempt federal law in any case.

d. The injunction is neither vague nor overbroad. The defendants' extensive history of deceptive mailings amply justified the trial court's decision to enter an injunction that went beyond newspaper subscriptions and extended to all direct-mail solicitations. The terms in the injunction that Simpson complains of are not vague or overbroad under this Court's precedent.

e. Simpson is wrong that the trial court should have applied the statute of limitations from Section 19 of the FTC Act because this case was not brought under Section 19. This Court's precedent defeats his claim that the court is not authorized to enter monetary relief. And his argument that the monetary portion of

the injunction is an excessive fine under the Eighth Amendment fails because the award is neither a fine nor excessive.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Dolman v. Agee*, 157 F.3d 708, 711 (9th Cir. 1998). Its findings of fact following a bench trial are reviewed for clear error, and its conclusions of law are reviewed de novo. *Id.* "Clear error review is significantly deferential and requires [the court] to accept the district court's findings absent a definite and firm conviction that a mistake has been committed." *United States v. Walter-Eze*, 869 F.3d 891, 912 (9th Cir. 2017) (cleaned up).

The district court's entry of a permanent injunction is reviewed for abuse of discretion. *EEOC v. BNSF Railway Co.*, 902 F.3d 916, 921-922 (9th Cir. 2018). The Court likewise "review[s] the district court's grant of equitable monetary relief for an abuse of discretion." *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009).

ARGUMENT

Although there is some overlap of the issues between the Hoyals' appeal and Simpson's, their arguments are largely distinct. We therefore address the appeals separately.

I. THE HOYALS' APPEAL

The Hoyals argue that they should not be held personally liable, that the Commission improperly sought to enforce the FTC Act against them solely for

violations that occurred in the past, that the trial court improperly entered an injunction against them because the conduct was not reasonably likely to recur, and that the trial court lacked the authority to enter monetary relief.[2] As explained below, all of those arguments are wrong.

A. The Hoyals Were Properly Held Personally Liable.

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce," and directs the Commission to prevent both individuals and businesses from using such practices. 15 U.S.C. § 45(a). Individuals are, of course, liable for their own violations of the FTC Act. They may also be liable for corporate conduct. *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170-1171 (9th Cir. 1997); *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1101 (9th Cir. 2014). Moreover, "[w]here corporate entities operate together as a common enterprise, each may be held liable for the deceptive acts and practices of the others." *Grant Connect,* 763 F.3d at 1105. Accordingly, an individual may be personally liable for both injunctive and monetary relief for the violations of a common enterprise through its component companies. *Id.*

For individuals to be liable for injunctive relief, the Commission must show that "(1) the corporation committed misrepresentations of a kind usually relied on by a reasonably prudent person and resulted in consumer injury, and (2) individu-

[2] This brief generally refers to Jeffrey Hoyal as "Hoyal," to Lori Hoyal by her full name, and to the Hoyal defendants collectively as "the Hoyals."

als participated directly in the violations or had authority to control the entities." *Id.* at 1101. For an individual to be liable for monetary relief, the Commission must also show that he or she "had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that consumer injury resulted." *Id.* at 1101 (cleaned up). The knowledge requirement is satisfied if the individual "had actual knowledge of material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.* at 1101-1102 (cleaned up). "The extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability." *FTC v. Affordable Media*, 179 F.3d 1228, 1235 (9th Cir. 1999); *Grant Connect*, 763 F.3d at 1102.

Both Hoyals were correctly found liable for the violations of the enterprise. Jeffrey Hoyal participated in and controlled the deceptive mailing scheme and knew of the deceptive practices. Lori Hoyal controlled the operation that divvied up the enterprise's profits and knew of the deceptive practices.

1. Jeffrey Hoyal is individually liable for injunctive and monetary relief.

The Hoyals admit that Jeffrey Hoyal "participated in and had the authority to control the subscription business," which they do not deny was run as a common

enterprise. Hoyal Br. 11. As the trial court found, Hoyal set up the structure of the enterprise, recruited individuals to head the many companies that made up the enterprise, and ran its day-to-day operations. ER 76-77, 139-140. He also participated in the deceptive practices. He not only reviewed and approved the deceptive mailers, he oversaw the operation that mailed them to consumers, the call center that received consumer complaints, and the enterprise's efforts to fulfill customer orders, including by switching consumers to publications they never ordered. ER 82-83. By admitting Hoyal's participation in and control of the business, the Hoyals concede that he is liable for injunctive relief based on the acts of the enterprise. *See Grant Connect*, 764 F.3d at 1101.

Hoyal is also liable for monetary relief because he had actual knowledge of the operation's deceptive practices. *See id.* at 1101-1102; ER 84-87. Hoyal knew that the subscription renewal offers were lies because he and Simpson were not authorized to sell the relevant subscriptions. ER 85-86. He knew that publishers told the operation that they would not process its orders, that they rejected its orders, and that they returned its checks. *Id.* He knew that publications issued fraud alerts warning their subscribers about the operation's mailers. *Id.* He also knew that customers were actually deceived—that they believed the mailers were from publishers, thought they looked like bills, and made their checks payable to the publications. ER 84. He knew that the operation sent consumers subscriptions that they

did not order, which they justified by sending the consumer a negative-option switch notice. ER 84. And he knew that the operation continued its practices despite many cease-and-desist letters from publishers, lawsuits, and state enforcement actions. ER 86-87.

None of Hoyal's contrary arguments undermine the trial court's basis for finding that he had sufficient knowledge of the operation's deceptive practices to support monetary relief. *See* Hoyal Br. 16-34.

a. The mailers were deceptive.

Hoyal first attacks the trial court's finding of deceptiveness, claiming that the business was not "manifestly fraudulent" because consumers "received what [they] paid for," and because the business did not "trick consumers through a 'negative option.'" Hoyal Br. 16-17. He claims further that the mailer was not deceptive because it contained disclaimers suggesting that it might not be from publishers. *Id.* at 22-24.

An act or practice is deceptive under Section 5 of the FTC Act if there is (1) a representation, that (2) is likely to mislead consumers acting reasonably, and (3) the representation is material. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). "Deception may be found based on the 'net impression' created by a representation." *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009). The net impression may be misleading even if the representation also contains truthful disclosures. *FTC v. Cy-*

berspace.com, LLC, 453 F.3d 1196, 1200 (9th Cir. 2006). Here, the trial court correctly found that the mailers gave the misleading impression that they were from or authorized by the publishers of the targeted newspapers, that the consumers' current subscription would be renewed "automatically" with payment, and that consumers were being offered the lowest price available. ER 160. Those impressions were likely to (and did) mislead consumers acting reasonably and they were material to consumers' decisions to order. ER 162-164.

The trial court's judgment is sound whether or not the business was "manifestly fraudulent" and even if some consumers ultimately received the subscriptions they ordered. "[T]he salient issue in fraudulent-misrepresentation cases 'is whether the seller's misrepresentations tainted the customer's purchasing decisions,' not the value (if any) of the items sold." *FTC v. IAB Mktg. Assocs. LP*, 746 F.3d 1228, 1235 (11th Cir. 2014) (citing *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993)). That is because if consumers knew the truth, they may not have purchased at all. *See Figgie*, 994 F.2d at 606. Moreover, the consumers here did *not* always receive the publications they paid for. The Hoyals admit that when they could not provide the subscription ordered, they sent a different, unordered publication instead. Hoyal Br. 17. Indeed, despite the Hoyals' denials, the operation relied on negative-option switch notices to justify sending consumers subscriptions that they did not order.

Disclaimers were insufficient to cure the deceptiveness. The Hoyals rely on language from the back of the mailer stating that it is from an independent subscription agent and that they "do not necessarily have a direct relationship with the publishers or publications that we offer." Hoyal Br. 22-23; *see also* ER 169. They argue that the disclaimers are "not inconsistent" with the offer on the front of the mailer, Hoyal Br. 23-24, but it takes more than that to overcome the deception. To be effective, disclaimers must be "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989). "Anything less"—like the disclaimers here—"is only likely to cause confusion by creating contradictory double meanings." *Id.*

b. The Commission has applied the same deceptiveness standard for more than 35 years.

The Hoyals next claim that Hoyal could not have known the mailers were deceptive because the Commission did not provide guidance to tell him so. Hoyal Br. 24-26. But deception is largely self-explanatory, and it took no federal guidance for the Hoyals to understand that it was deceptive to falsely promise the lowest prices, to mislead consumers into thinking they were dealing with an authorized representative, and to switch subscriptions from one publication to another while keeping the money.

In any event, the argument is wrong on the facts. The Commission provided written guidance to the public on its enforcement policy against deceptive acts or practices more than 35 years ago. *See* FTC, *Policy Statement on Deception*, *appended to In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174-184 (1984). It outlined the same three-part test for deceptiveness that the trial court applied here, requiring (1) a representation; that is (2) likely to mislead consumers acting reasonably under the circumstances; and (3) material to a consumer's decision to purchase a product or service. *Id.* at 175-176. Ten years later, this Court noted that the Commission had "consistently adhered" to that standard. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994). The same standard was applied here. *See* ER 158-159.

c. Hoyal's other arguments do not negate his knowledge of the deceptive mailing operation.

Hoyal also argues that he could not have known that the mailer would be found deceptive because it was supposedly approved by the 2004 settlement with Oregon, because certain investigations and lawsuits against the operation did not result in final findings that the mailer was deceptive, or because he believed that consumer complaints were orchestrated by the publishers. Hoyal Br. 26-34. None of those arguments undermines the deceptiveness of Hoyal's and Simpson's practices or the basis for Hoyal's knowledge of them.

To begin with, the Oregon settlement did not bless Hoyal and Simpson's practices. It expressly says the opposite: that "settlement of this case does not constitute approval for past, present or future business practices." SER 192. It also forbids Hoyal from claiming otherwise: "Defendants shall not imply that [Oregon] approves of defendants' past business practices, current efforts to reform their practices, or any future practices defendants adopt."[3] *Id.* Moreover, the Hoyals admit that Hoyal and Simpson did not even comply with the directives of the Oregon settlement, and that there was "no good explanation" for their failure. Hoyal Br. 28-29.

Hoyal's remaining arguments have even less substance. Even if earlier private lawsuits or government enforcement proceedings did not result in findings that the mailers were deceptive (Hoyal Br. 29-30, 34), that does not change Hoyal's knowledge that consumers actually believed the mailers were from publishers, that the operation switched consumers to publications they never ordered, and that the operation was not authorized to solicit the subscriptions in the first place. *See* ER 84-86. Nor can he dismiss consumer complaints as being driven by publishers

[3] Hoyal's claim that the FTC "agreed to abide by the Oregon state court's determination as to the lawfulness of Simpson and Jeffrey's subscription business." (Hoyal Br. 27) is a falsity on top of a falsity. The Oregon court did not determine that the business was lawful and the FTC did not agree to anything in the order. *See* ER 45, 164-166.

(Hoyal Br. 30-32) when he admits knowing that consumers actually believed that the mailers looked like a bill from the publisher. *See* ER 77, 84.[4]

In sum, Hoyal is liable for injunctive and monetary relief based on his uncontested participation in and control of the operation and his direct knowledge of its deceptive practices.

2. Lori Hoyal was properly found individually liable.

The Hoyals miscomprehend the basis of Lori Hoyal's liability in their argument that she should not have been held individually liable because she did not participate in the deceptive acts or control the business overall. Hoyal Br. 11-16. And they fail to show that the trial court committed clear error in its finding that she had sufficient knowledge of the deceptive practices to support monetary relief.

An individual may be held liable for corporate practices if she either participated in the practices or had the authority to control the company. The authority to control may be established by taking on the role of corporate officer. *Stefanchik*, 559 F.3d at 931; *Publishing Clearing House*, 104 F.3d at 1170; *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008). Further, a person who controls a component of a common enterprise is liable for the enterprise as a whole. *Grant Connect*, 763 F.3d at 1105.

[4] Hoyal cites portions of his own testimony (Hoyal Br. 32-33) to challenge the trial court's factual findings that the business ignored publishers' cease-and-desist letters. *See* ER 84-85. He does not explain why the trial court's findings—which were based on his own admissions—were clear error.

Lori Hoyal controlled Hoyal & Associates, which was integral to the entire deceptive mailing operation as the vehicle through which Jeffrey Hoyal managed and oversaw its activities. ER 57, 87, 140, 145. She had both formal and practical control of the company. As a formal matter, she was a 50% owner, she held corporate officer roles of Secretary and Treasurer, and she prepared and signed corporate documents for the company. ER 87, 145. As a practical matter, Lori Hoyal's control over Hoyal & Associates' financial operations gave her control of the company itself. ER 87, 143. Her role in the scheme was equivalent to divvying up the loot after a bank heist. She sent invoices to components of the mailing operation, received funds from them, and split the profits with Simpson through his company Reality Kats. ER 87-88, 89. Among other things, that included creating or requesting shady invoices to move money between companies that did not have any formal agreements with each other. *Id.* She also trained another defendant to track the deceptive mailing operation's finances as a whole and distribute funds to the participants—a role she performed herself in earlier iterations of the scheme. *Id.* The flow of funds is the lifeblood of any business, and by controlling that flow, Lori Hoyal had the authority to stop the Hoyal-Simpson mailing business in its tracks.

The trial court also correctly found that Lori Hoyal had sufficient knowledge of the deceptive practices to be liable for monetary relief. As this Court has held, a person's knowledge may be demonstrated by her prior involvement with similar

schemes. In *Publishing Clearing House*, for example, the Court held "an individual liable where she filed a business license at the direction of someone facing criminal charges due to deceptive telemarketing, and had worked at a predecessor company that had been shut down due to a fraud investigation." *Grant Connect*, 763 F.3d at 1102 (describing the holding in *Publishing Clearing House*). In a prior iteration of this scheme, Lori Hoyal owned a company that assisted Simpson in purchasing lists of consumers to be targeted by deceptive mailers and a second company that performed financial reporting and bookkeeping for companies that sent out the mailers. ER 87-89. Both her company and Lori Hoyal personally were named as defendants in a publisher lawsuit alleging that the Hoyal-Simpson operation sent out mailers misrepresenting that they were from or authorized by the publisher. ER 90.

On that record, the trial court reasonably concluded that Lori Hoyal knew the operation was engaged in deceptive practices, was recklessly indifferent to the truth or falsity of the representations, or at a minimum was aware of a high probability of fraud and intentionally avoided the truth. That determination soundly rested on her participation in earlier iterations of the scheme, the machinations involved in divvying up consumers' money among the components of the enterprise, and her knowledge of publisher lawsuits alleging that the mailers were deceptive. ER 57, 87-90, 140, 145; *see Stefanchik*, 559 F.3d at 931.

B. Oregon's 2015 Enforcement Action Did Not Preempt Or Moot This Case.

The Hoyals make two arguments based on the Oregon Attorney General's 2015 enforcement action. They say they were "put out of business" by an ex parte temporary restraining order in the case, that they agreed not to continue the business in the settlement, and that they have since exited the business completely. Hoyal Br. 4-5. As a result, they argue, the Commission lacked authority to bring the complaint in this case because it was filed after the Oregon settlement and therefore alleged only "past conduct." Hoyal Br. 35-45. They also argue that the trial court abused its discretion by entering an injunction because they had already agreed to leave the subscription business and were therefore not likely to violate the FTC Act in the future. Hoyal Br. 47-51.

The former argument misconstrues the FTC Act and the facts of this case. The Commission's determination that there is "reason to believe" that defendants are engaged in illegal practices is not reviewable, and even if it were, the Commission had ample reason to believe Hoyal and Simpson would continue their deceptive mailing business and alleged as much in the complaint. The latter argument misstates the law. Defendants are not immunized from an injunction simply because they have been forced to stop illegal activity by a different court, and that is especially so where they have shown a past willingness to flout court orders.

1. The Commission had reason to believe the defendants were violating the FTC Act.

The Hoyals' first argument proceeds from the proposition that the Commission lacks statutory authority to pursue an enforcement action "for past violations." Hoyal Br. 35-46.

The Commission brought this case under Section 13(b) of the FTC Act, which in operative part provides: "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). The Hoyals' argument is based on language earlier in the statute, authorizing the Commission to obtain preliminary relief while it pursues an administrative enforcement action "[w]henever the Commission has reason to believe . . . that any person, partnership, or corporation *is violating, or is about to violate*, any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b) (emphasis added). In *FTC v. Evans Products Co.*, this Court incorporated that language into the permanent-injunction proviso through the term "proper case," under which "[t]he FTC may only seek a temporary restraining order or a preliminary injunction when it believes a person 'is violating, or is about to violate' any law enforced by the FTC." 775 F.2d at 1087. The Hoyals rely on the Third Circuit's decision in *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 152-153, 156 (3d Cir. 2019), upholding the dismissal of a complaint that the FTC brought nearly five years after the challenged conduct had ceased. The Third Circuit held that when seeking a

permanent injunction, "Section 13(b) requires that the FTC have reason to believe a wrongdoer 'is violating' or 'is about to violate' the law." *Id.* at 156.

The Hoyals argue that under *Shire ViroPharma*, the Commission "has no authority to pursue a federal court action in connection with conduct that occurred solely in the past." Hoyal Br. 42. They claim the Commission "exclusively pleaded past violations" and that "the evidence only indicates past violations with respect to the Hoyal defendants," and argue that the action must therefore "be dismissed as to them." *Id.* That argument fails for multiple reasons.

First, the text of the statute does not create a condition to suit based on whether the defendants are in fact violating or about to violate the law—it applies when "the Commission has *reason to believe*" that they are. 15 U.S.C. § 53(b) (emphasis added). Under this Court's precedent, "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion" and not subject to judicial review. *Standard Oil Co. v. FTC*, 596 F.2d 1381, 1385 (9th Cir. 1979) (analyzing the "reason to believe" language supporting the initiation of an administrative action under 15 U.S.C. 45(b)), *reversed on other grounds sub nom FTC v. Standard Oil Co.*, 449 U.S. 232 (1980). The Commis-

sion's decision to initiate a case is not subject to review in this Court under *Standard Oil*.[5]

Second, the Supreme Court ruled long ago that even where illegal conduct has ceased, a suit for an injunction may continue so long as "there exists some cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Thus, in *Evans Products*, this Court held that when the "alleged violations have completely ceased, we must review whether those violations are likely to recur."[6] 775 F.2d at 1088. As explained below, there was plenty of reason to believe the violations would recur here.

Third, the Hoyals' claim that the Commission "exclusively pleaded past violations" in its complaint is false. In fact, the complaint alleges, in detail, a course of illegal conduct that began as early as 2010, was occurring at the time of the complaint, and was likely to continue absent an injunction. *See* SER 217-240. Beginning with its second paragraph (and continuing throughout), the complaint describes the defendants' conduct almost entirely in the *present* tense: "Defendants *engage* in a nationwide campaign that relies on misrepresentations to solicit news-

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[5] The Third Circuit did not decide this issue in *Shire ViroPharma.* 917 F.3d at 159 n.17.

[6] In numerous cases, courts have construed similar "is . . . or is about to" language in the securities laws to require only a past violation and a reasonable likelihood of recurrence absent an injunction. *E.g.*, *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 99-100 (2d Cir. 1978) (Friendly, J.); *SEC v. Mize*, 615 F.2d 1046, 1051 (5th Cir. 1980).

paper renewals and new subscriptions from consumers." SER 222 (emphasis added). It alleges that the defendants "*have* no affiliation" with the newspapers they solicit and "*have* no preexisting authorization" to solicit subscriptions. SER 233 (emphasis added). It describes what the mailers "*represent*" to consumers, what the defendants "*state*" in their mailers, and what the mailers "*disclose*" in the fine print. SER 234-235. It likewise describes the corporate defendants' roles in present tense: It alleges that certain defendants "*send* . . . subscription notices to consumers and *receive* consumer funds." SER 237 (emphasis added). Other defendants "*receive*" consumer orders, "*perform* administrative services," "*forward* order information," "*receive* order information," and "*perform* processing, clearing, and administrative services." SER 237 (emphasis added). Still others "*receive* customer service calls and complaints." SER 238 (emphasis added). The complaint alleges that Hoyal & Associates (and Reality Kats) "*provide* financial, management, and consulting services" to the other defendants. *Id.* (emphasis added).

Nothing in the complaint suggests that the conduct it describes has ceased. To the contrary, it alleges that "Defendants are likely to continue to injure consumers" absent an injunction. SER 239. It specifically asks a permanent injunction "to prevent future violations." SER 240. The Hoyals' argument that the complaint "does not allege any ongoing or imminent violations against the Hoyal defendants" (Hoyal Br. 45) is simply false.

Further, even if the Hoyals' illegal conduct had temporarily stopped before the Commission filed suit, the facts of this case do not remotely resemble those of *Shire ViroPharma*. There, the Commission alleged that the defendant had illegally extended its drug monopoly by filing a series of sham citizen petitions with the FDA, ending five years before the lawsuit. 917 F.3d at 149. By the time of suit, the defendant had divested itself of the drug in question and the Commission did not allege that it would be able to repeat the conduct with a similarly-situated drug. *See id.* Here, the defendants have followed the same deceptive business model continuously through multiple iterations over more than twenty years, and at best their conduct continued until the eve of filing. Moreover, they had for years flouted every attempt, by both private and government parties, to get them to stop. That pattern of conduct gave the Commission reason to believe that Hoyal and Simpson were "about to" violate the FTC Act, if in fact they had stopped doing so at the exact time of suit.

The Hoyals argue in the alternative that even if the complaint did allege ongoing violations, "the evidence at trial demonstrated that such an allegation would be unsupported." Hoyal Br. 45-46. They argue that the evidence showed "that none of the Hoyal defendants engaged in the subscription business after March 2015." Hoyal Br. 46. But even under the Third Circuit's standard, the evidence adduced at trial is not relevant to whether the Commission has reason to believe "*at the time it*

files suit, that a violation 'is' occurring or 'is about to' occur." *Shire ViroPharma*, 917 F.3d at 158 (emphasis added). Accordingly, even if the Hoyals had truly ceased their participation in the business before the Commission filed suit, it would not mean that the complaint against them should have been dismissed. Moreover, "[i]t is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants 'would be free to return to (their) old ways.'" *Allee v. Medrano*, 416 U.S. 802, 810-811 (1974); *accord W.T. Grant Co.*, 345 U.S. at 633; *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (affirming injunction and asset freeze issued after defendants ceased operations).

There is also good reason to doubt that the Hoyals ceased their activities before the Commission filed suit. The Hoyals rely on Jeffrey Hoyal and Hoyal & Associates' having signed the Oregon Assurance of Voluntary Compliance in June 2015, "agreeing not to engage in the subscription business." Hoyal Br. 46. But the business had ignored or eluded similar agreements in the past simply by creating new corporate entities and continuing just as before. And as the Third Circuit acknowledged, a company that "ha[s] the capacity and motivation to engage in similar conduct in the future" could be "violating, or is about to violate" the FTC Act even if it ceased the specific conduct at issue. *Shire ViroPharma*, 917 F.3d at 157 (citing *FTC v. Accusearch*, 570 F.3d 1187, 1202 (10th Cir. 2009)). This is es-

pecially true where, as here, defendants only purported to cease their misconduct as a result of government intervention.

2. The trial court properly entered an injunction to prevent future violations of the FTC Act.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes a court to issue a permanent injunction whenever a defendant violates any of the laws enforced by the FTC and the conduct is likely to continue. *H.N. Singer*, 668 F.2d at 1112-1113. A permanent injunction is justified when there is some cognizable danger of recurring violation or some reasonable likelihood of future violations. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). To determine whether defendants are likely to engage in similar violations in the future, courts look to two general factors: (1) the deliberateness and seriousness of the present violation, and (2) the defendants' past record with respect to deceptive and unfair marketing practices. *See Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982).

As the Hoyals concede, the trial court found that Hoyal and Simpson's operation spanned decades; that it evolved over multiple iterations; that it persisted despite customer complaints, publishers' cease-and-desist letters and lawsuits, and government enforcement actions; that Simpson flouted the 2015 Oregon settlement; that Hoyal and Simpson considered resuming the business even after the settlement; and that they sold the company's assets to Hoyal's nephew. Hoyal Br. 48-49. They nevertheless argue that the trial court abused its discretion by entering a

permanent injunction without making individualized findings that Hoyal and Lori Hoyal in particular were likely to violate the FTC Act in the future. Hoyal Br. 48.

Once again, the Hoyals ignore the basis of their liability. Jeffrey and Lori Hoyal were held individually liable (and properly so, *see* pages 24-35 above) for the violations of the common enterprise. Hoyal ran the deceptive enterprise's day-to-day operations for decades and Lori Hoyal controlled the flow of consumer funds from the various entities to Hoyal and Simpson's pockets. Accordingly, they are personally subject to an injunction that permanently enjoins the enterprise's illegal practices if there is a reasonable likelihood that those practices will recur. Here, the trial court correctly concluded that, absent an injunction, the operation was likely to violate the FTC Act in the future based on its long history of violations, its multiple iterations, and its continual intransigence in the face of opposition from consumers, publishers, and enforcement authorities. ER 152. The Hoyals are properly subject to that injunction.

C. The Court Need Not Revisit Whether Section 13(b) Of The FTC Act Authorizes An Injunction That Orders The Return Of Illegally-Obtained Funds.

In *FTC v. AMG Capital Management, LLC*, this Court rejected the argument that Section 13(b) of the FTC Act does not authorize district courts to enter permanent injunctions that include monetary relief: "We have repeatedly held that § 13 'empowers district courts to grant any ancillary relief necessary to accomplish

complete justice, including restitution.'" 910 F.3d 417, 426 (9th Cir. 2018) (quoting *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016)). The Court declined to revisit that precedent in light of the Supreme Court's decision in *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), holding that "*Kokesh* and *Commerce Planet* are not clearly irreconcilable," and that the Court "remain[s] bound" by its prior decisions interpreting Section 13(b). *AMG*, 910 F.3d at 427. Although Judge O'Scannlain (in a special concurrence) urged the Court to reconsider that precedent en banc, the Court declined to do so without any judge calling for a vote.

Following that decision, the Seventh Circuit overruled its own longstanding precedent and created a split with this Court and six other circuits by holding that Section 13(b) does not authorize an injunction that orders the return of ill-gotten gains to consumers. *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). The Commission has filed a petition for certiorari asking the Supreme Court to review that decision. *See FTC v. Credit Bureau Ctr., LLC*, No. 19-825 (Sup. Ct.). The appellants in *AMG* have also filed a petition raising the same issue, asking the Supreme Court to review this Court's decision in that case. *See AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (Sup. Ct.). A third petition which raises the same question has been filed in *Publishers Business Services, Inc. v. FTC*, No. 19-507 (Sup. Ct.). Those petitions are all pending before the Court.

The Hoyals now assert that Section 13 of the FTC Act does not authorize the court to award monetary relief as part of an injunction. Hoyal Br. 51-56. They acknowledge that this Court held to the contrary in *AMG* and that it declined to reconsider that case en banc. Hoyal Br. 52-53. And they do not argue that the Court should stray from those precedents here. Instead, they apparently raise the issue to preserve it for "additional guidance" from the Supreme Court in *Credit Bureau Center* or *AMG*. Hoyal Br. 54. The Court should reject the Hoyals' argument for the same reasons it rejected the same argument in *AMG*. *See* 910 F.3d at 426-427.

II. SIMPSON'S APPEAL

Simpson raises a scattershot series of claims that partly overlap with the Hoyals' contentions. To the degree that the foregoing discussion does not resolve them, they are addressed below.

A. Simpson's *ViroPharma* Arguments Lack Merit.

Like the Hoyals, Simpson contends that the Commission's case fails under *Shire Viropharma*, though for slightly different reasons. Simpson Br. 18-25. None of his theories withstands scrutiny.

1. The Commission did not proceed on a theory that the defendants "could" violate the law.

As explained above (pages 36-43), the Complaint alleges that Simpson "is violating or is about to violate" the FTC Act. Simpson nevertheless claims that the Commission "conceded that the relevant business had 'shut down'" before the

complaint was filed. Simpson Br. 18. According to Simpson, the Commission therefore proceeded on the theory that the defendants "could" violate the law, and—contrary to the requirements of Section 13(b)—the trial court adopted that theory. Simpson Br. 18-19.

That argument seriously misstates the record. Simpson relies entirely on a few snippets of a transcript from an early telephonic hearing in the case. Simpson Br. 18-19; ER 4988-4994. The hearing involved Simpson's motion to dismiss and the Commission's motion to strike the affirmative defenses of other defendants. *See* D.Ct. Docket No. 69, ER 5018. Simpson's motion argued that the court lacked subject-matter jurisdiction over the case and that it failed to sufficiently allege a common enterprise. *See* D.Ct. Docket No. 36 at 4-7. He did not argue that the Commission failed to allege conduct that "is violating" or "about to violate" the law. *Shire ViroPharma* had not yet been decided.

In response to a question from the bench,[7] counsel for the Commission stated that "according to defense counsel," the 2015 action by Oregon had the effect of "essentially shutting down the existing operation." ER 4993. Counsel explained

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[7] Simpson did not include the question in the excerpts of the record and did not respond to our request to provide the full transcript. We believe the question related to the Hoyals' contention that "none of the corporate or individual defendants have been engaged in the magazine and newspaper subscription business since at least mid-2015, with the exception, upon information and belief, of Defendants Dennis Simpson ("Simpson") and Reality Kats, Inc." D.Ct. Docket No. 33 at 2.

that the Commission was not a part of that case, and did not "know the details" of it. *Id.* Counsel further explained that even if the operation were shut down in Oregon, "the defendants have been mailing these deceptive mailers all over the country," affecting a massive number of consumers outside Oregon. ER 4994. Counsel pointed out that there was good reason to believe that the Oregon agreement would not stop the defendants for long, if it stopped them at all. *Id.* In the past, the defendants had simply "remorphed the game under new names and moved—moved on with them." *Id.* Counsel explained that this case was brought "to stop these deceptive practices for the long term." *Id.* Thus, rather than conceding that the business had been shut down, the colloquy demonstrates that the Commission had reason to believe that the defendants were still violating or were about to violate the FTC Act.[8]

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[8] Although it is not clear to what end, Simpson sometimes frames his *Shire ViroPharma* argument as a jurisdictional question, Simpson Br. 17, 24-25. As the Third Circuit held, "statutory limitations are nonjurisdictional unless Congress provides otherwise." 917 F.3d at 153, citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006). Therefore, the court explained, "Section 13(b)'s 'is' or 'is about to violate' requirement is nonjurisdictional." *Shire ViroPharma*, 917 F.3d at 154. *See also FTC v. AT&T Mobility LLC*, 883 F.3d 848, 853 (9th Cir. 2018) (en banc) (a challenge to the Commission's regulatory jurisdiction does not affect the district court's federal question jurisdiction).

2. Simpson's arguments about the mailer do not show that the Commission lacked reason to believe that the defendants were violating or were about to violate the FTC Act when the complaint was filed.

Simpson next makes a confusing and self-contradictory argument that the Commission did not allege that defendants were using "the offending mail piece," (Simpson Br. 20-21), that he had changed the mailer to comply with the trial court's summary judgment decision, (*id.* at 21), that the mailer was not "currently" in use, but the mailer that was "currently" in use had been so for 10 years, (*id.*), and that the mailer wasn't used for newspapers, (*id.* at 21-22). Whatever the sum of those claims, they do not change the fact that the Commission alleged an ongoing scheme involving deceptive mailers. *See* SER 217-242. The Commission attached a sample mailer to the Complaint that specifically solicited subscriptions for the *Washington Post*, which is a newspaper. SER 242-243.

3. The Oregon action did not relieve Reality Kats from liability.

Simpson next argues that Commission could not show that Reality Kats was violating or about to violate the law because as a result of the Oregon action, the common enterprise of which it was a part had ceased to exist by the time the Commission filed suit. Simpson Br. 22-23. As explained above, the Commission alleged in the complaint and had reason to believe that the defendants, including Reality Kats, were violating or about to violate the FTC Act. The conduct alleged in the complaint includes running the operation as a common enterprise through a

maze of interrelated companies. *See* SER 237-238. Simpson's claim that the common enterprise "ceased to exist" boils down to a claim that part of "the conduct complained of was terminated," but under settled law discussed at page 38 above, even complete termination does not moot an action for an injunction where there is a possibility of recurrence. *Allee v. Medrano*, 416 U.S. at 810. Here, the complaint states ample reason to believe that even if the operation had ceased, Simpson and Reality Kats were likely to return to their old ways.

4. The complaint stated a claim against Simpson and Reality Kats.

Simpson next makes a cursory argument that the allegations of the complaint regarding Reality Kats are "too bare" and that the Commission should have been required to allege more facts against Simpson personally. Simpson Br. 23-24.

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Here, the complaint alleged that Simpson was the owner of Reality Kats, that he directed and controlled the company, and that Reality Kats was part of a common enterprise with the other corporate defendants. SER 232. The complaint alleges that Simpson, Reality Kats, and the other de-

fendants collectively engaged in a deceptive mail-order subscription business, which it describes in detail. SER 233-238. Simpson's spartan argument that the allegations are "too bare" is refuted by the complaint itself.

B. This Is A "Proper Case" Under Section 13(b) Of The FTC Act.

Section 13(b) provides: "That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). In *FTC v. H.N. Singer, Inc.*, this Court held that Section 13(b) authorizes "permanent injunctions in proper cases even though the Commission does not contemplate any administrative proceedings." 668 F.2d at 1111. Three years later, the Court held that a "proper case" under Section 13(b) is one involving "violations of any provisions of law enforced by the Commission." *Evans Products*, 775 F.2d at 1086.

Those decisions defeat Simpson's claim (Simpson Br. 27) that the Commission may seek a permanent injunction under Section 13(b) of the FTC Act only if it also pursues an administrative complaint. Simpson further asserts that if "proper case" means any case involving the violation of any law under the FTC's enforcement authority, it is "unconstitutionally overbroad, void for vagueness, and contrary to law." Simpson Br. 25. That one passing sentence is insufficient to raise three separate claims, and Simpson fails to explain how Congress's grant of authority to

a federal law enforcement agency to seek relief could be overbroad, vague, or somehow illegal.

C. The Trial Court Correctly Found That The Mailers Were Deceptive.

Simpson argues that the trial court abused its discretion by holding that the operation's mailers were deceptive because the mailers purportedly complied with the 2004 Oregon settlement, which, he says, "mandated" the language and format that the operation used to solicit newspapers. Simpson Br. 28-36.

The defendants in the 2004 Oregon case agreed that when soliciting consumers "by mail to purchase a magazine subscription or subscriptions," in the future, they would provide "in as clear and conspicuous form or clearer," "substantially the same information and explanations" as provided in an exemplar mailer attached to the settlement. SER 194. They further agreed to include, in specified type size and colors, the words "NOTICE OF RENEWAL/NEW ORDER" and "INDEPENDENT AGENT NOT A BILL. KEEP THIS PORTION FOR RECEIPT OF OFFER." *Id.*

Simpson admits (Simpson Br. 35-36) that the Hoyal/Simpson operation did not use the required "INDEPENDENT AGENT" language in its mailers. He contends, however, that the Oregon settlement both approved of and mandated "a particular form of mail piece," and that the trial court was therefore prohibited from

finding that the operation's mailers were deceptive because they resembled what Simpson calls the "Approved Mail Piece." *Id.* at 30-36.

That argument is wrong on several levels. For one thing, the Oregon settlement agreement states expressly that the settlement "does not constitute approval for past, present or future business practices." SER 192. It also forbids Simpson from claiming, as he does here, that the settlement immunizes his conduct. It states: "Defendants shall not imply that [Oregon] approves of defendants' past business practices, current efforts to reform their practices, or any future practices defendants adopt." *Id.* Indeed, Oregon demonstrated that it did *not* approve of Hoyal and Simpson's practices by bringing another enforcement action against them in 2015.

Moreover, the agreement does not even apply to the relevant mailers in this case. Its requirements expressly apply only to mail-order offers for *magazine* subscriptions, whereas this case is limited to offers for *newspaper* subscriptions. SER 194.

And even if the Oregon settlement did purport to immunize Simpson's future mailers, an agreement between a private party and a state attorney general cannot preempt the application of the FTC Act. Federal law is the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI. Just as a state cannot declare by legislation

that certain practices are immune from regulation under the FTC Act, its attorney general may not determine that particular representations are not deceptive under the FTC Act by entering into a settlement agreement with the defendant.

D. Simpson's Remaining Liability Arguments Lack Merit.

Simpson next offers a parade of arguments unsupported by fact or law, several of which are frivolous and directly contrary to the Court's precedents. Simpson Br. 36-44. Specifically:

He argues that laches bars the FTC's case, *id.* at 37-38, but the United States "is not bound by . . . laches in enforcing its rights." *Chevron, U.S.A., Inc. v. United States*, 705 F.2d 1487, 1491 (9th Cir. 1983); *see also Costello v. United States*, 365 U.S. 265, 281 (1961) ("[L]aches is not a defense against the sovereign").[9]

Simpson argues that the trial court should have allowed more evidence on the extent to which Hoyal and attorney David Lennon controlled the enterprise, that there was "no evidence" for several factual propositions, and that his role was limited to "database analysis and consulting" Simpson Br. 39-41. The trial court found otherwise on all those matters and Simpson does not attempt to show how any of the court's findings on his liability amounted to plain error.

[9] Simpson also mentions "estoppel" but does not explain how that concept should apply. Simpson Br. 36-37. He also asks the Court to develop a qualified-immunity doctrine for defendants in Section 13(b) cases, *id.* at 38, an argument that requires no response.

He also argues that he relied on Hoyal and Lennon to handle "regulatory compliance" (Simpson Br. 41-42), but "reliance on advice of counsel is not a valid defense on the question of knowledge required for individual liability" under the FTC Act. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) (cleaned up).

He asserts that the trial court should have based its monetary award only on the consumers who complained of actual deception, and should have measured their injury by the amount they paid beyond the publishers' normal subscription rates. Simpson Br. 42-43. But the Commission is not required to show that every consumer was actually deceived by a defendant's misrepresentations, and a trial court does not abuse its discretion by ordering monetary relief equal to "the full amount lost by consumers." *Stefanchik*, 559 F.3d at 931; *Figgie*, 994 F.2d at 605.

E. The Injunction Is Not Vague Or Overbroad.

When the Commission secures injunctive relief to remedy a violation of law, it "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). Rather, those "caught violating" the FTC Act "must expect some fencing in." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957). Injunctive relief under the FTC Act may be framed "broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements." *FTC v. Colgate-Palmolive Co.*, 380

U.S. 374, 395 (1965). The injunction will be upheld so long as it bears a "reasonable relation to the unlawful practices found to exist." *Id.* at 394-395. "Injunctions are not set aside" for vagueness "unless they are so vague that they have no reasonably specific meaning." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992).

The trial court considered the defendants' long history of deceptive mail-order practices and prohibited them from engaging in the direct-mail marketing of any product or service, from making misrepresentations like those in Hoyal and Simpson's mailers, and from using information about consumers obtained through their mail-order subscription business. ER 3-5. The injunction also requires them to regularly report information about their business activities to the Commission. ER 7-9.

Simpson argues that the trial court's injunction is too broad because it extends to direct mail solicitations for "any good or service," whereas the complaint involved only solicitations for newspaper subscriptions. Simpson Br. 44-46. He argues that newspaper sales "can be the only subject of any permanent injunction." *Id.* But given his recidivism and long history of using deceptive mailers in the face of complaints by both private and government entities, a broader restriction on direct-mail marketing is appropriate fencing-in relief.

He also argues that certain terms in the injunction ("customer information," "business," and "controls directly or indirectly") are unconstitutionally vague and overbroad. Br. 46-47; *see* ER 4-5. In fact, the injunction is very specific about the kind of customer information at issue, which includes "the name, address, telephone number, email address, social security number, other identifying information, [and] any data that enables access to a customer's account." ER 20. Simpson's vagueness argument fails because he does not show that "customer information" or any of the other terms he complains of has "no reasonably specific meaning." *E. & J. Gallo*, 967 F.2d at 1297.

F. Simpson's Monetary Relief Arguments Are Meritless.

Simpson argues that the trial court erred by entering an order of monetary relief for four reasons. None of them has merit.

First, Simpson argues that the court should have applied the three-year statute of limitations from Section 19 of the FTC Act, 15 U.S.C. § 57b(d), and limited the amount of monetary relief accordingly. Simpson Br. 49. But this case was not brought under Section 19 of the FTC Act. It was brought under Section 13(b), which does not contain a statute of limitations. *See* 15 U.S.C. § 53(b). As this Court has held, "In the absence of a federal statute expressly imposing or adopting one, the United States is not bound by any limitations period." *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993). Indeed, a panel of this Court

described as “meritless” the claim that Section 19’s statute of limitations applies to a case brought under Section 13(b). *FTC v. Publishers Business Services, Inc.*, 748 F. App’x 735, 739 (9th Cir. 2018).

Simpson next argues that the trial court erred “by assessing an unlawful civil penalty as ‘restitution.’” Simpson Br. 50. As explained above and in this Court’s decision in *AMG*, that argument is contrary to the Court’s precedent in *Commerce Planet*. *See AMG*, 910 F.3d at 426, 427; *Commerce Planet*, 815 F.3d at 598. Like the Hoyals, Simpson acknowledges that the Court’s precedent is contrary to his argument and he offers no reason to deviate from it. Simpson Br. 50-52.

Simpson next argues that the monetary award violates the Eighth Amendment prohibition on excessive fines. Simpson Br. 52-53. Simpson asserts that the trial court’s restitution order “constitutes a fine for purposes of constitutional analysis” and is excessive because it was “based on the concept of a ‘markup’, and not related to the rate of actual deception.” Simpson Br. 53.

Under established law, the trial court’s monetary award was not a fine and is not excessive. As the Supreme Court has explained, “at the time the Constitution was adopted, the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense.” *United States v. Bajakajian*, 524 U.S. 321, 327-328 (1998) (cleaned up). The monetary portion of the injunction in this case is not a fine because it was ordered not to punish the defendants but as “restitution” to

redress injuries to the consumers who were duped by Simpson and his associates. *See* ER 152-153. The "primary goal of restitution is remedial or compensatory," not punitive. *Paroline v. United States*, 572 U.S. 434, 456 (2014). The non-punitive restitution award thus does not amount to a fine for Eighth Amendment purposes.

Nor is it excessive. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id.* at 337. The restitution order in this case does not meet that test. The amount of the order was directly proportional—indeed it was equal to—the amount that consumers lost to Hoyal and Simpson's deception. ER 152. The trial court began with the amount that consumers paid, subtracted amounts already returned to them, and further subtracted $3.25 million that the defendants paid as a result of their settlement with Oregon. ER 152-153. That calculation is appropriate under this Court's cases. *See Stefanchik*, 559 F.3d at 931 ("because the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits").

Lastly, Simpson argues that the restitution award violates Due Process because it "penalizes protected commercial speech" and because the defendants' conduct "had never been deemed 'deceptive'" under Section 5 of the FTC Act. Simpson Br. 53. But "[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). "[M]isleading advertising does not serve, and, in fact, disserves, [the] interest" of "consumers and society . . . in the free flow of commercial information." *FTC v. Brown & Williamson*, 778 F.2d 35, 43 (D.C. Cir. 1985). The deceptive mailers in this case enjoy no First Amendment protection.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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June 8, 2020

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FOR THE NINTH CIRCUIT

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