No. 19-

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,
PETITIONER

v.

CREDIT BUREAU CENTER, LLC AND MICHAEL BROWN

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

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

Under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), the Commission may sue those who violate the laws under its purview in federal district court. The statute authorizes district courts in such cases to issue "a permanent injunction." Seven courts of appeals have held that district courts exercising that authority may enter an injunction that requires defendants to return to the victims of their wrongdoing funds obtained through their illegal activity. One has held the opposite.

The question presented is:

Whether Section 13(b) authorizes district courts to enter an injunction that orders the return of unlawfully obtained funds.

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PETITION FOR A WRIT OF CERTIORARI

The Federal Trade Commission, pursuant to the authority of 15 U.S.C. 56(a)(3)(A), respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit.[1]

[1] The Commission rarely exercises its authority to represent itself before this Court, having done so only four times previously since Congress granted that authority 44 years ago. The Commission takes this step now not only because the decision of the court of appeals is at odds with the holdings of seven other circuits and this Court's precedents, but also because of the extraordinary importance of the issue presented. The decision of the court of appeals threatens the FTC's ability to carry out its mission by eliminating one of its most important and effective enforcement tools.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-63a) is reported at 937 F.3d 764. The opinion of the district court (App., *infra*, 65a-99a) is reported at 325 F. Supp. 3d 852.

JURISDICTION

The judgment of the court of appeals, accompanied by a denial of rehearing, was entered on August 21, 2019. On November 8, 2019, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including December 19, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, are reproduced in the appendix to the petition (App., *infra*, 135a-143a).

STATEMENT

This case presents a square conflict among the circuits, explicitly acknowledged by the court below, on a recurring issue of law essential to effective enforcement of the Federal Trade Commission Act.

1. Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce, and "empower[s] and direct[s]" the Federal Trade Commission to "prevent" such conduct. 15 U.S.C. 45(a). Before 1973, the Commission generally could enforce these prohibitions only through administrative proceedings, in which the Commission's sole remedy was an order to cease and desist from the unlawful practices. 15 U.S.C. 45(b).

In 1973, Congress added Section 13(b) to the FTC Act, giving the Commission new authority to enforce Section 5 directly in federal district courts. Section 13(b) authorizes

two distinct types of lawsuits. The bulk of the statute is devoted to actions for "a temporary restraining order or a preliminary injunction" in aid of an administrative proceeding. 15 U.S.C. 53(b). For example, when the Commission reviews the legality of a merger, Section 13(b) authorizes it to seek a preliminary injunction blocking the merger pending the completion of administrative proceedings. See, *e.g.*, *FTC* v. *Penn State Hershey Med. Ctr.*, 838 F.3d 327, 353-354 (3d Cir. 2016).

Section 13(b) also provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction" directly in federal district court. 15 U.S.C. 53(b). This proviso authorizes the Commission to file standalone enforcement actions without also undertaking an administrative proceeding. Congress added Section 13(b) to give the Commission the ability "to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order," and it expected that by allowing such actions "Commission resources will be better utilized, and cases can be disposed of more efficiently." S. Rep. No. 93-151, at 31 (1973).

2. Until the decision in this case, the courts of appeals (including the Seventh Circuit) had uniformly held for more than 35 years that a district court's authority to grant a permanent injunction under Section 13(b) includes the authority to require wrongdoers to return money that they illegally obtained.[2] Those decisions follow from this Court's

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[2] See *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982); *FTC* v. *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432, 1434 (11th Cir. 1984); *FTC* v. *Amy Travel Serv., Inc.*, 875 F.2d 564, 571-572 (7th Cir. 1989); *FTC* v. *Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir.

decisions in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), holding that a district court exercising authority to enjoin violations of a regulatory statute may order violators to return their unlawful gains absent a clear congressional directive to the contrary.

Porter addressed a federal rent control statute that authorized the government to sue for a "permanent or temporary injunction, restraining order, or other order" to enforce the statute. 328 U.S. at 397. The Court held that the district court's remedial authority under the statute was not limited to prohibiting future violations; it also included the authority to order the refund of unlawfully collected rents. *Ibid.*

The Court explained that by authorizing an injunction, the statute invoked the district court's equitable jurisdiction, which made "all the inherent equitable powers of the District Court . . . available for the proper and complete exercise of that jurisdiction." *Id.* at 398. Those powers "assume an even broader and more flexible character" where the statute protects the public interest, and may be limited only by "a clear and valid legislative command," expressed "in so many words, or by a necessary and inescapable inference." *Ibid.*

Applying those principles, the Court found it "readily apparent" that the district court could enter an injunction that required the return of illegally collected rents. *Ibid.* "Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has

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1991); *FTC* v. *Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC* v. *Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC* v. *Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014).

been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* at 399.

In *Mitchell*, the Court applied the same principles to uphold a monetary judgment entered under a provision of the Fair Labor Standards Act that empowered district courts to "restrain" violations. See 29 U.S.C. 217. The Court explained that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell*, 361 U.S. at 291-292. The Court found it insignificant that the labor statute did not include the additional phrase "other order," as the rent-control statute in *Porter* did. That clause was not necessary to the monetary judgment, but simply provided "confirmation" of the district court's authority to order the payment of wages lost as a result of the violation. *Id.* at 296.

3. The Commission depends heavily on Section 13(b) in carrying out its mandate to protect consumers and competition. It brings dozens of cases every year seeking a permanent injunction and the return of illegally obtained funds. As a result of Section 13(b) cases, the Commission has returned billions of dollars to consumers who have fallen victim to a wide variety of illegal scams. In some cases, courts order defendants to return money directly to consumers. Other times, the court orders money to be paid to the Commission itself, which then attempts to distribute recovered funds to injured consumers. Agency records show that from 2016 to 2019, the Commission returned approximately $977 million directly to consumers in Sec-

tion 13(b) cases. Billions more were returned to consumers directly from defendants.[3]

4. This case arises out of a scam perpetrated by respondents Michael Brown and his company, Credit Bureau Center, LLC. Respondents offered consumers a "free" credit report, but those who accepted were unwittingly enrolled in a credit-monitoring service for $30 per month. Respondents drove consumers to their websites through an affiliate that posted bogus ads for rental apartments on Craigslist. The ads and subsequent emails falsely offered desirable properties at attractive prices and instructed applicants to obtain a credit report from respondents. Duped consumers submitted more than 500 complaints to the FTC, other law enforcement agencies, and the Better Business Bureau, and suffered over $6 million in losses.

The Commission sued under Section 13(b), seeking to halt continuing violations and return the unlawful gains to consumers. The district court awarded summary judgment to the Commission. It entered a permanent injunction barring future violations of the FTC Act and requiring respondents to repay $5.2 million, the net amount they took from consumers after deducting amounts recovered from settling codefendants. App., *infra*, 103a-134a.

The district court directed that those sums be used to compensate injured consumers as "restitution." App., *infra*, 88a-89a. The judgment specifies that the money "may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for

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[3] When it is not possible to identify victims, or distribution costs would exceed the available funds, the FTC remits money to the Treasury. In the 2016-2019 period, that happened with about $15 million, a small fraction of the funds recovered under Section 13(b).

the administration of any redress fund." *Id.* at 127a. If "direct redress to consumers is wholly or partially impracticable or money remains after redress is completed," the Commission may seek court approval to apply any remaining money to "other equitable relief" reasonably related to Brown's unlawful practices. *Ibid.* Only if funds remain after that may they "be deposited to the U.S. Treasury." *Ibid.*

5.a. On appeal, the Seventh Circuit affirmed the finding of liability but reversed the monetary judgment. The court overruled its longstanding precedent to hold that Section 13(b) does not authorize monetary relief. The court acted pursuant to a circuit rule permitting a panel to overrule circuit precedent or create a circuit split so long as a majority of the active judges does not vote for rehearing en banc. See 7th Cir. R. 40(e). The court acknowledged that its decision created a split with the seven other courts of appeals that have held that Section 13(b) authorizes monetary relief. App., *infra*, 3a n.1, 39a.

Examining Section 13(b)'s authorization to enter "a permanent injunction," the court thought it "obvious" that "[r]estitution isn't an injunction." App., *infra*, 12a. The court described an injunction as a "forward-facing" remedy and restitution as "a remedy for past actions." *Id.* at 14a. It contrasted the language of Section 13(b) with two other provisions of the FTC Act, Sections 5(*l*) and 19, which it characterized as "backward-facing methods to obtain monetary relief for past injury." *Id.* at 17a.

Section 5(*l*) authorizes the Commission to seek civil penalties against parties that violate an administrative cease-and-desist order and permits courts in such cases to award "mandatory injunctions and such other and further equitable relief as they deem appropriate." 15 U.S.C. 45(*l*).

Section 19 authorizes courts to order relief "necessary to redress injury" against persons who (1) violate a Commission rule; or (2) have been ordered to cease and desist from illegal practices in an administrative proceeding. 15 U.S.C. 57b. Although Section 19 specifies that its remedies are "in addition to, and not in lieu of, any other remedy or right of action" available to the Commission, 15 U.S.C. 57b(e), the court did not believe that the savings clause prevented it from relying on Section 19's remedies to find that monetary relief is unavailable under Section 13(b). In the court's view, such relief would "effectively nullif[y]" Section 19, and it thus declined to read the savings clause to authorize what it described as "that self-defeating effect." App., *infra*, 19a.

The court next considered the holdings in *Porter* and *Mitchell* that Congress authorizes monetary remedies when it empowers district courts in enforcement lawsuits to issue an "injunction" or to "restrain" violations. App., *infra*, 20a-23a, 29a-33a. It concluded that those decisions were no longer binding because they had been undermined by this Court's later decision in *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996). *Meghrig* held that the citizen-suit provisions of the Resource Conservation and Recovery Act (RCRA) did not allow a private party to recover costs incurred to clean up previously contaminated land. The court read *Meghrig* as having adopted a "more limited understanding of judicially implied remedies" than the one espoused in *Porter* and *Mitchell*. App., *infra*, 31a. In particular, whereas *Mitchell* instructed courts to "provide complete relief in light of the statutory purposes," 361 U.S. at 292, after *Meghrig*, the court of appeals believed that "an exploration of statutory purpose is no longer the Supreme Court's polestar in cases raising interpretive questions

about the scope of statutory remedies." App., *infra*, 32a. The court viewed this case as "materially indistinguishable" from *Meghrig*. *Id.* at 38a.

b. Chief Judge Wood, joined by Judges Rovner and Hamilton, dissented from the denial of rehearing en banc. App., *infra*, 41a-63a. They disagreed with the panel's conclusion that Congress's use of the term "injunction" necessarily excludes an order of restitution. Rather, they opined, injunctions "come in all shapes and sizes" and may require a party to undertake affirmative acts, including "an order requiring the enjoined party to return ill-gotten gains, or to pay money into a court escrow account, or otherwise to turn over property." *Id.* at 42a, 43a.

The dissent argued that the multiple enforcement mechanisms provided in the FTC Act do not preclude reading Section 13(b) to authorize monetary relief. Rather, agencies have "broad discretion in their choice of which of several authorized procedural tools they wish to use as they carry out their mission." App., *infra*, 45a. The dissent found that Section 19's savings clause (15 U.S.C. 57b(e)) "says it all: the non-exhaustive examples of relief Congress chose to mention in one section do not limit what a court may or may not include pursuant to another section—for instance, a 13(b) injunction." App., *infra,* 62a. Similarly, the "other and further equitable relief" clause in Section 5(*l*) simply "clarifies that courts have a wide range of equitable relief available to them" to enforce a cease-and-desist order in addition to the limited mandatory injunction. *Ibid.*

The dissent disagreed with the panel's analysis of *Meghrig*. App., *infra*, 52a-55a. It noted that *Meghrig* involved private plaintiffs suing under a very different statutory scheme, and that even in that context *Meghrig* "did not purport categorically to exclude from injunctive relief an

order to make payments." *Id.* at 54a. The dissent concluded that "[t]he majority's interpretation upends what the agency and Congress have understood to be the status quo for thirty years, and in so doing grants a needless measure of impunity to brazen scammers like the defendant in this case." *Id.* at 62-63a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision creates a square circuit split on an important and recurring question: whether, in a suit brought under Section 13(b), a district court may order a defendant to both cease its illegal practices and return the money it gained as a result of those practices. The resolution of that question is critically important to the Commission's ability to carry out its consumer protection and antitrust enforcement missions. The court of appeals' decision neuters Section 13(b) within the Seventh Circuit and makes the remedies available to the Commission depend on the happenstance of geography.

The court of appeals' analysis of Section 13(b) is incorrect. The court's cramped view that injunctions are strictly limited to prohibitions on future misconduct contradicts historical understanding of that remedy. Courts and commentators have understood since the founding era that injunctions may serve reparative purposes and may include an order requiring the defendant to yield up wrongfully acquired property. That principle informs the controlling decisions in *Porter* and *Mitchell* that a statute permitting an injunction invokes "all the inherent equitable powers of the District Court," including the power to award monetary relief. *Porter*, 328 U.S. at 398. *Porter* and *Mitchell* were the law of the land when Congress added Section 13(b) to the FTC Act, and they remain good law after *Me-*

ghrig, which involved private litigation under a statute very different from Section 13(b).

The Court should grant this petition notwithstanding the grant of certiorari in *Liu* v. *SEC*, No. 18-1501, which involves whether disgorgement under the securities laws is an equitable remedy in light of this Court's decision in *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017), that such orders are penal in nature. The answer to that question will not resolve whether Section 13(b) authorizes district courts entering a permanent injunction against illegal conduct to order that money taken by that conduct be returned to consumers. The question here is distinct from the question in *Liu*, will not be resolved in that case, and warrants independent review.

I. This Case Presents A Square Circuit Split On An Important And Recurring Issue.

The decision of the court of appeals has unsettled the longstanding and uniform judicial interpretation that Section 13(b) authorizes district courts to enter injunctions requiring the return of illegally obtained funds. The court of appeals acknowledged that it was creating a circuit split when it held "that section 13(b)'s permanent-injunction provision does not authorize monetary relief." App., *infra*, 40a. Every other court of appeals that has decided that issue has held the opposite.

Specifically, the First, Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that Section 13(b) authorizes district courts to enter injunctions that include monetary relief. See *FTC* v. *Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 367 (2d Cir. 2011) ("In sum, Section 13(b) of the FTC Act permits courts to award not only injunctive relief but also ancillary relief, including mone-

tary relief."); *FTC* v. *Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014) ("[B]ecause 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."); *FTC* v. *Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982); *FTC* v. *Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005) ("[Section] 13(b)'s grant of authority to provide injunctive relief carries with it the full range of equitable remedies, including the power to grant consumer redress."); *FTC* v. *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432, 1434 (11th Cir. 1984). Unlike the decision below, those courts have continually applied this Court's decisions in *Porter* and *Mitchell* to uphold that authority.

The issue is critically important: the ability to seek an injunction that requires the defendant to return illegally obtained funds to consumers is essential to the effective enforcement of the FTC Act and other laws enforced by the Commission. Stripping district courts of that authority would reduce Section 13(b) to a stop sign and would effectively reward fraudsters for their illegal conduct.

Contrary to the court of appeals' view, neither Section 5(*l*) nor Section 19 of the FTC Act is an adequate alternative to requiring the return of unlawful gains under Section 13(b). Section 5(*l*) allows civil penalties, but only against parties who have already been ordered by the Commission to cease and desist in an administrative enforcement proceeding and who then violate that order. See 15 U.S.C. 45(*l*). It does not allow courts to order the return of gains from the original misconduct that led to the cease-and-desist order. Section 19 is also of limited utility. Although it

authorizes district courts to redress harm to consumers from violations of FTC rules, 15 U.S.C. 57b(a)(1), many cases do not involve rule violations. Section 19 also allows district courts to redress consumer harm in certain cases against defendants who have gone through the administrative process and been ordered to cease and desist from unfair or deceptive acts or practices. 15 U.S.C. 57b(a)(2). That remedy would be illusory in most of the cases that the Commission brings under Section 13(b) because defendants would dissipate their ill-gotten gains long before the Commission ever got to court. In suits under Section 13(b), the district court may freeze assets at the outset of litigation, but Section 19 does not provide similar protection.

The issue is also recurring. The FTC brings dozens of cases each year seeking injunctions that return funds to consumers under Section 13(b). As of mid-2019, 55 such cases were pending in district courts.[4] The question presented here is integral to all of them. Three pending appellate cases raise the same issue, as do two currently pending petitions seeking certiorari in this Court. See *FTC* v. *Hoyal & Assocs.*, No. 19-35668 (9th Cir.); *FTC* v. *Abbvie, Inc.*, No. 18-2621 (3d Cir.); *FTC* v. *Dorfman*, No. 19-11932 (11th Cir.); cert. petitions in *Publishers Bus. Serv., Inc.* v. *FTC*, No. 19-507 & *AMG Capital Mgmt., LLC* v. *FTC*, No. 19-508.

II. THE COURT OF APPEALS' DECISION IS INCORRECT.

1. The court of appeals' decision rests on the proposition that "injunction" plainly refers only to forward-looking relief and necessarily excludes an order to return money

[4] See generally FTC, Semiannual Federal Court Litigation Status Report, June 30, 2019, https://www.ftc.gov/system/files/attachments/quarterly-litigation-status-report/semiannual_litigation_report_6-30-19.pdf.

improperly obtained in the past. It is "obvious," the court held, that "[r]estitution isn't an injunction." App., *infra*, 12a. That narrow reading of "injunction" was error.

Contrary to the court of appeals' reading, it has long been understood that an injunction can provide for restitution or other forms of monetary relief to undo harm caused by the defendant's conduct. The leading legal dictionary defines "injunction" as "[a] court order commanding or preventing an action" and notes that the term encompasses a "reparative injunction" which "requir[es] the defendant to restore the plaintiff to the position that the plaintiff occupied before the defendant committed a wrong." *Black's Law Dictionary* 904-905 (10th ed. 2014). Indeed, the understanding that injunctions may both prohibit future misconduct and remedy past harm by requiring the restoration of wrongfully obtained property dates at least to the earliest days of the Republic. Justice Story, for example, explained that although injunctions are "generally preventative and protective, rather than restorative," they are "by no means confined to the former," and "may contain a direction to the party defendant to yield up . . . lands or other property, constituting the subject-matter of the decree, in favor of the other party." 2 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* §§ 861-862, at 154-155 (1836). Applying that principle in *Osborn* v. *Bank of the United States*, 22 U.S. 738 (1824), the Court affirmed an injunction that forbade enforcement of a state tax law against the Bank and directed the state to return money improperly seized from the Bank under that law. *Id.* at 870-871.

An early-20th-century commentator similarly explained that injunctions may "in some cases be used to reinstate the rights of persons to property of which they have been

deprived," and that "a preventative and a mandatory injunction" can be "made to co-operate so that by a single exercise of equitable power an injury is both restrained and repaired." 1 Howard C. Joyce, *A Treatise on the Law Relating to Injunctions* §§ 2, at 5; 2a, at 7 (1909). In the modern era, the leading scholar on remedies, Professor Dobbs, agrees that an injunction "may attempt to prevent harm, or to compel some form of reparation for harm already done," and that "some injunctive orders both repair and prevent harm." 1 Dan B. Dobbs, *Law of Remedies* §§ 1.1, at 7; 2.9, at 225 (2d ed. 1993). Professor Dobbs specifically notes that an injunction may compel restitution. *Id.* § 1.1, at 7.

Porter and *Mitchell* rest on the same principles. As the Court explained, "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter*, 395 U.S. at 399. It therefore requires an affirmative expression of Congress "in so many words, or by a necessary and inescapable inference," to exclude that authority when Congress has authorized an injunction. *Id.* at 398; *Mitchell*, 361 U.S. at 291. As further discussed below, those principles were well established when Congress granted district courts the authority to enter "a permanent injunction" in Section 13(b), but Congress did not place any limit on the grant of authority. The court of appeals, on the other hand, disregarded the established understanding by reading "injunction" to exclude monetary remedies.

This Court has continued to recognize the broad nature of injunctions in cases decided after *Porter* and *Mitchell*. In *California* v. *American Stores Co.*, 495 U.S. 271 (1990), for example, the Court held that an order requiring divestiture

of unlawfully acquired assets is a form of "injunctive relief" under the Clayton Act. The Court explained that "[o]n its face," a statute authorizing "injunctive relief" was broad enough to encompass an order requiring a company to divest itself of illegally acquired assets. *Id.* at 281. The statute stated "no restrictions or exceptions to the forms of injunctive relief" that could be awarded, but instead expressed "Congress' intention that traditional principles of equity govern the grant of injunctive relief." *Ibid.* The "plain text" of the statute therefore authorized divestiture. *Id.* at 282. As the dissent in this case correctly observed, "[a]n order of divestiture is almost identical to an order requiring equitable restitution: both require the wrongdoer to turn over property that was unlawfully obtained." App., *infra*, 44a. The court of appeals' decision, by contrast, cannot be squared with *American Stores*.

2. When Congress passes a law, it is presumed to understand how courts have interpreted existing laws using the same or similar language. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). By the time Congress adopted Section 13(b) in 1973, this Court's decisions in *Porter* and *Mitchell* were settled law. In addition, the Second Circuit had recently held that the authority to enter a "permanent or temporary injunction" in the securities laws authorized district courts to order the return of ill-gotten gains. See *SEC* v. *Texas Gulf Sulphur*, 446 F.2d 1301, 1307-1308 (1971); *SEC* v. *Manor Nursing*, 458 F.2d 1082, 1103-1105 (1972). Congress would have understood that a statute empowering district courts to enter "a permanent injunction" in Section 13(b) would be interpreted the same way.

Further, when Congress amends a statute but chooses not to alter an existing statutory interpretation "then presumably the legislative intent has been correctly dis-

cerned." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982). In 1994, Congress undertook a thorough review of the FTC Act in connection with a reauthorization of the Commission. By then, multiple courts of appeals had recognized that Section 13(b) authorizes orders to return ill-gotten gains to consumers.[5] Congress amended Section 13(b) to expand its venue provisions and authorize nationwide service of process, but did not alter the permanent injunction clause. See Pub. L. No. 103-312, § 10 (1994). That is "convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals." *Texas Dept. of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). Indeed, the relevant Senate Report notes that Section 13(b) "authorizes the FTC to file suit to enjoin any violation of the FTC [Act]" and "obtain consumer redress," and explained that the expansion of venue and service of process provisions were intended to "assist the FTC in its overall efforts." S. Rep. No. 103-130, at 15-16 (1993).

By 2006, when still more courts of appeals had recognized that Section 13(b)'s authority encompasses monetary relief, Congress amended Section 5 to give the FTC authority over aspects of foreign commerce and stated in the statute that the new authority would include "[a]ll remedies available to the Commission . . . including restitution to domestic or foreign victims." Pub. L. 109-455, § 3 (2006) (codified at 15 U.S.C. 45(a)(4)). By then, courts had ordered such relief under Section 13(b) hundreds of times, as Congress would have been well aware.

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[5] See *H.N. Singer*, 668 F.2d at 1112-1113; *U.S. Oil & Gas*, 748 F.2d at 1432, 1434; *Amy Travel Serv.*, 875 F.2d at 571-72; *Sec. Rare Coin*, 931 F.2d at 1314-15.

In the decision below, however, the court of appeals summarily rejected those strong indications of legislative intent, thereby overriding the principles of statutory interpretation the Court has repeatedly set out. App., *infra*, 19a-20a. That was error.

3. The court of appeals further erred in its conclusion that this Court's decision in *Meghrig* undermined *Porter* and *Mitchell* and that an order returning ill-gotten gains to consumers under Section 13(b) is "materially indistinguishable" from the relief sought in *Meghrig.* App., *infra*, 32a-33a, 38a.

Meghrig involved a lawsuit filed by a private landowner against a prior owner to recover the costs of environmental cleanup under a provision of RCRA that permits such a suit where contamination presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). In such cases, the statute authorizes courts to "restrain" persons who contributed to pollution or order them to "take such other action as may be necessary." *Meghrig*, 516 U.S. at 484 (quoting 42 U.S.C. 6972(a)). When the case was filed, the landowner had already cleaned up the land, and the environmental contamination therefore presented no danger. The Court held that on those facts the statute "does not contemplate the award of past cleanup costs," and that once the land had been remediated, the statute "quite clearly excludes waste that no longer presents such a danger." *Id.* at 485-486, 488.

Meghrig does not undermine *Porter* and *Mitchell* or control this case for several reasons. First, unlike statutes that authorize permanent injunctions without qualification (like Section 13(b) and those at issue in *Porter* and *Mitchell*), RCRA limits a court's remedial authority to cases of imminent and substantial danger. The lawsuit in *Meghrig*

failed that statutory condition for suit because the land had already been decontaminated; the plaintiff sought "a remedy that compensates for past cleanup efforts." *Id.* at 486. No similar situation existed in *Porter* and *Mitchell* or in this case, where the illegal scheme was ongoing at the time of suit. Indeed, *Meghrig* expressly declined to address whether "a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced." *Id.* at 488. As the dissent in this case correctly noted, *Meghrig* "did not purport categorically to exclude from injunctive relief an order to make payments." App., *infra*, 54a.

Second, *Meghrig* involved a private plaintiff, not (as in *Porter* and *Mitchell*, and here) a government enforcement action. As the Third Circuit noted in rejecting the claim that *Meghrig* limits remedies in government enforcement cases, the money sought by the plaintiff "resembles traditional damages far more than . . . restitution." *United States* v. *Lane Labs-USA, Inc.*, 427 F.3d 219, 231 (3d Cir. 2005).

Third, RCRA's citizen-suit injunctive provision is integrally tied into "the extensive remedial scheme" that might have been disrupted by allowing monetary relief for already-remediated land. *Id.* at 231-232. That was not the case in *Porter* or *Mitchell*.

Finally, nothing in *Meghrig* purports to undermine the principles established in *Porter*. Although the Court did not accept a government argument that relied partly on *Porter*, see *Meghrig*, 516 U.S. at 487, it did not suggest that it was overruling or limiting the earlier decision. And since *Meghrig* was decided, the Court has relied upon *Porter* without qualification multiple times. In particular, in *Kansas* v. *Nebraska*, 135 S. Ct. 1042 (2015), the Court relied on *Porter*

in support of its authority to impose a monetary remedy under its equitable authority to apportion interstate water rights. *Id.* at 1052-1053, 1057. The Court noted that "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *Id.* at 1053 (quoting *Porter*, 328 U.S. at 398); see also *United States* v. *Oakland Cannabis Buyers' Co-Op.*, 532 U.S. 483, 496-497 (2001); *Miller* v. *French*, 530 U.S. 327, 340 (2000).

In light of these factors, other courts of appeals have correctly held that "*Meghrig* did not overrule or limit *Porter* and *Mitchell*." *United States* v. *Rx Depot, Inc.*, 438 F.3d 1052, 1057 n.3 (10th Cir. 2006); *accord Lane Labs*, 427 F.3d at 232 (finding no "indication, either in *Meghrig* or since, that the Court has abandoned the holdings of *Porter* and *Mitchell*"). In this case, the court of appeals erred by relying on *Meghrig* rather than the directly controlling authorities of *Porter* and *Mitchell*.

4. The court of appeals further erred in its conclusion that the remedies created by two other enforcement provisions of the FTC Act mean that injunctions under Section 13(b) cannot order defendants to return money they took from consumers. App., *infra*, 15a-16a.

The FTC Act gives the Commission multiple ways to enforce the laws under its authority: by rulemaking, through the administrative cease-and-desist process, and through direct enforcement actions in federal court. See 15 U.S.C. 57a (rulemaking); 45(b) (administrative enforcement); 53(b) (direct action). The choice between those enforcement mechanisms lies "in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); see also *NLRB* v. *Bell Aerospace Co.*, 416

U.S. 267, 294 (1974). The court of appeals misapplied that principle by effectively ruling that when Congress allows a type of relief under one statutory enforcement mechanism, it necessarily withholds such relief from other mechanisms.

Section 5(*l*) of the Act, 15 U.S.C. 45(*l*), serves the sole purpose of supplementing the Commission's administrative enforcement authority. It allows the Commission to sue for relief only against violators of a cease-and-desist order entered through the administrative process and provides remedies tailored for such violations, including civil penalties, "mandatory injunctions," and "other and further equitable relief." *Ibid.* The court of appeals erred in holding that without similar clauses Section 13(b) cannot support an order returning money to consumers. App., *infra*, 15a-16a. That is the very approach this Court rejected in *Mitchell* when it held that a statute authorizing an injunction need not also provide for "other order[s]" to justify monetary relief. 361 U.S. at 296.

The court of appeals was likewise wrong to hold that the monetary relief authorized by Section 19 limits the scope of Section 13(b). Congress stated expressly that the "[r]emedies provided" in Section 19 "are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in [Section 19] shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. 57b(e). Given that savings clause, Section 19 cannot properly be read to limit the remedies available under Section 13(b).

Nor does reading Section 13(b) to authorize monetary remedies render the procedural requirements to obtain monetary relief under Section 19 (as described by the court of appeals, App., *infra*, 16a-17a) "largely pointless." App., *infra*, 17a. To the contrary, the two sections support the

Commission's prerogative to choose among the enforcement tools Congress has provided by balancing power between the courts and the Commission depending on which route the agency takes. When the Commission opts for direct action under Section 13(b) to end illegal practices and return money to consumers, it cedes to the court the determination whether there has been a violation. By contrast, if the Commission chooses to proceed under Section 19, it retains plenary authority to determine that a particular practice should be prohibited (through rulemaking) or that particular conduct is illegal (through the administrative process), but in exchange for having to satisfy the procedural requirements of Section 19 before seeking judicial redress. The court of appeals' decision upends that balanced remedial scheme by crippling Section 13(b) and requiring the Commission to obtain consumer redress only via Section 19. That was error.

III. The Question Presented Merits Plenary Review and This Case Is The Ideal Vehicle To Resolve It.

The question presented here is also presented by the petitions in No. 19-508, *AMG Capital Management* v. *FTC*, and No. 19-507, *Publishers Business Services* v. *FTC*. In his response to the *AMG* petition, the Solicitor General acknowledges that the circuit split would "ordinarily warrant this Court's review," but recommends that the Court hold that petition based on a perceived "overlap" between the issue here and the question presented in No. 18-1501, *Liu* v. *SEC* (petition granted Nov. 1, 2019).[6] The Court should not hold this petition but grant it and hold *AMG*

[6] The Solicitor General's brief in opposition in No. 19-507, *Publishers Business Services, Inc.* v. *FTC*, recommends that the petition be denied or in the alternative held for *Liu*.

pending resolution of this case. The question presented here is ripe for review, distinct from *Liu*, and unlikely to be answered by the Court's disposition of that case. At the same time, the circuit split has a continuing adverse effect on the Commission's ability to protect consumers, and this case presents an ideal vehicle to resolve it.

1. The question presented in *Liu* is: "Whether the Securities and Exchange Commission may seek and obtain disgorgement from a court as 'equitable relief' for a securities law violation even though this Court has determined that such disgorgement is a penalty." That question follows from the Court's recent decision that "SEC disgorgement constitutes a penalty" within the meaning of the 5-year statute of limitations for civil penalties, 28 U.S.C. 2462. *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1638 (2017). Whether SEC disgorgement is properly considered an "equitable" remedy in light *Kokesh* will not resolve the question here, namely, whether the authority in Section 13(b) of the FTC Act to enter a "permanent injunction" authorizes an order to return to consumers money illegally taken from them.

Indeed, the petitioners' merits brief in *Liu* demonstrates that the issues presented there will not determine the outcome here. The brief's argument focuses on (1) the SEC's statutory authority to obtain "disgorgement"; (2) the Court's decision in *Kokesh* that SEC disgorgement is penal; (3) whether penal remedies are within the traditional scope of equity; and (4) the effect of holding in Liu's favor. *Liu* Pet. Br. 15-19 & 35-40, 19-26, 26-33, 40-43. To make the case that SEC disgorgement orders are penal and not "equitable," the brief takes pains to distinguish disgorgement orders that *do not* return money to victims from orders that provide restitution to injured parties. *Id.* at 6, 25, 30-31, 34 & n.16.

Unlike the SEC disgorgement orders at issue in *Liu*, neither this Court nor any other has held that orders including monetary relief under the FTC Act are punitive. Indeed, the judgments in *Liu* and this case starkly illustrate the differences between SEC disgorgement and the relief awarded under Section 13(b). The court in *Liu* ordered $26.7 million in disgorgement and did not require that the SEC use the money to compensate injured investors.[7] *Liu* Pet. App. 62a. Here, by contrast, the judgment directs that the monetary relief be used for "consumer redress and any attendant expenses for the administration of any redress fund."[8] Such compensatory orders are typical in Section 13(b) cases; as discussed above, virtually all of the money the FTC recovers is repaid to injured consumers.

Thus, no matter how the Court resolves its holding in *Kokesh* that SEC disgorgement is a penalty with the contention that relief under the securities laws must be "equitable," the decision in *Liu* will not answer whether Section 13(b) authorizes district courts to order monetary relief for compensatory purposes.

2. That question has been definitively answered in eight circuits, with only the decision below diverging from the others.[9] It is ripe for review now. The issue has been thor-

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[7] That approach appears typical of SEC disgorgement cases. In *Kokesh*, this Court observed that "in many cases, SEC disgorgement is not compensatory" and that courts have required disgorgement "regardless of whether the disgorged funds will be paid to such investors as restitution." 137 S. Ct. at 1644 (quoting *SEC* v. *Fischbach Corp.*, 133 F.3d 170, 176 (2d Cir. 1997)).

[8] The order provides for disgorgement to the Treasury only as a last resort. App., *infra*, 127a.

[9] The question is pending in one court with no binding precedent on the issue, see *FTC* v. *Abbvie Inc.*, No. 18-2621 (3d Cir.).

oughly examined in multiple decisions in the courts of appeals for more than 30 years and is unlikely to benefit from further percolation. Because it will not be answered in *Liu*, holding this petition would serve no purpose other than delay while a serious impediment to Commission enforcement persists.

Until the split is resolved, the FTC Act will mean one thing in the Seventh Circuit and something different in seven other circuits. In the Seventh Circuit, unlike the others, Section 13(b) will be useless to return money taken from consumers by scam artists like respondents. The circuit split will also cause unnecessary and time-consuming litigation over forum: defendants have already sought to force enforcement cases against them into courts in the Seventh Circuit. The upshot is Commission resources spent on procedural fencing rather than enforcement action. Given the consequences to Commission enforcement and to the consumers it seeks to protect, the Court should not delay resolution of the issue, but should grant the petition in this case.

If—following *Liu*—the Court were simply to remand this case (and *AMG*), the split and its consequences to consumers would likely persist for years with little prospect of righting itself.

3. This case is an ideal vehicle to resolve the circuit split. The issue was squarely presented and dispositive in the court of appeals and there are no procedural or other impediments to its resolution in this Court. The same is not true in the other pending petitions. In *Publishers Business Services*, the petitioners waived the issue by failing to raise it properly below. See Brief in Opp'n, No. 19-507, at 4. Although the petition in *AMG* would otherwise present an appropriate vehicle, the Solicitor General's view that the

case be held pending *Liu* makes this case the most suitable candidate for review. The best course would be to grant the Commission's petition and hold *AMG* pending its resolution.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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DECEMBER 2019

APPENDIX

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-2847 & 18-3310

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

CREDIT BUREAU CENTER, LLC,
AND MICHAEL BROWN,
Defendants-Appellants.

Decided August 21, 2019

Before MANION, SYKES, and BRENNAN, *Circuit Judges*.

SYKES, *Circuit Judge*. Michael Brown is the sole owner and operator of Credit Bureau Center, a credit-monitoring service. (We refer to both collectively as "Brown.") Brown's websites used what's known as a "negative option feature" to attract customers. The websites offered a "free credit report and score" while obscuring a key detail in much smaller text: that applying for this "free" information automatically enrolled customers in an unspecified $29.94 monthly "membership" subscription. The subscription was for Brown's credit-monitoring service, but customers learned this information only when he sent them a letter *after* they were automatically enrolled. Brown's most successful contractor capitalized on the confusion by posting Craigslist advertisements for fake rental properties and telling applicants to get a "free" credit score from Brown's websites.

The Federal Trade Commission eventually took notice. It sued Brown under section 13(b) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 53(b), alleging that the websites and referral system violated several consumer-protection statutes. The Commission sought a permanent injunction and restitution. Relevant here, the district judge found that Brown was a principal for his contractor's fraudulent scheme and that the websites failed to meet certain disclosure requirements in the Restore Online Shopper Confidence Act ("ROSCA"). *Id.* § 8403. The judge entered a permanent injunction and ordered Brown to pay more than $5 million in restitution to the Commission.

Brown now concedes liability as a principal for his contractor's Craigslist scam. And he doesn't dispute that his own websites failed to meet some of ROSCA's disclosure requirements. So we have no trouble affirming the judge's decision to hold him liable for both. We also affirm the issuance of a permanent injunction. Brown's argument there rests on an erroneous understanding of the Eighth Amendment's Excessive Fines Clause.

But the restitution award is a different matter. By its terms, section 13(b) authorizes only restraining orders and injunctions. But the Commission has long viewed it as also authorizing awards of restitution. We endorsed that starkly atextual interpretation three decades ago in *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571 (7th Cir. 1989). Since *Amy Travel*, the Supreme Court has clarified that courts must consider whether an implied equitable remedy is compatible with a statute's express remedial scheme. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487–88 (1996). And it has specifically instructed us not to assume that a statute with "elaborate enforcement provisions" implicitly authorizes other remedies. *Id.* at 487.

Applying *Meghrig*'s instructions, we conclude that section 13(b)'s grant of authority to order injunctive relief does not implicitly authorize an award of restitution. Every reason *Meghrig* gave for not finding an implied monetary remedy applies here. Most notably, the FTCA has two detailed remedial provisions that expressly authorize restitution if the Commission follows certain procedures. Our current reading of section 13(b) allows the Commission to circumvent these elaborate enforcement provisions and seek restitution directly through an implied remedy.

Stare decisis cannot justify adherence to an approach that Supreme Court precedent forecloses. Accordingly, we overrule *Amy Travel* and hold that section 13(b) does not authorize restitutionary relief.[1] Because the Commission brought this case under section 13(b), we vacate the restitution award.

I. Background

In January 2014 Brown contracted with Danny Pierce to direct customers to his credit-monitoring service. Brown gave Pierce several functionally identical websites with names like "eFreeScore.com" and "FreeCreditNation.com" to use for referrals. As their names suggest, these websites invited people to sign up for a "free credit report and score." But signing up for the free score also automatically enrolled applicants in Brown's credit-monitoring service, which charged a monthly subscription fee.

Brown didn't tell prospective customers about the credit-monitoring service. His websites almost entirely focused on the free credit score and report. Three disclaimers, buried in much smaller font, told consumers that applying

[1] Because this opinion overrules circuit precedent and creates a circuit split, we circulated it under Circuit Rule 40(e) to all judges in active service. A majority did not favor rehearing en banc.

for the free offer also enrolled them in an unspecified "membership" subscription that cost $29.94 each month. Customers later learned that this subscription was for credit monitoring when Brown sent them a letter after the automatic enrollment.

Pierce did nothing to clear up this confusion. Indeed, it's undisputed that his method for drumming up referrals was fraudulent. He subcontracted with Andrew Lloyd, who posted Craigslist advertisements for nonexistent rental properties at bargain prices. Lloyd invited prospective tenants to email the landlord. Posing as the "landlord," he then responded and instructed them to obtain a credit report and score through one of Brown's websites. But once applicants got this "free" information—and were automatically enrolled in the credit-monitoring service—Lloyd stopped replying to emails.

The plan was effective. Pierce quickly became Brown's most successful recruiter. Over the course of their relationship, Pierce referred more than 2.7 million customers to Brown, generating just over $6.8 million in revenue. Unsuspecting customers were understandably upset. They flooded Brown's customer-service operators, questioning the monthly subscription charge. They complained that the Craigslist advertisements were scams. And many were blindsided by the fact that requesting a free credit score automatically enrolled them in a costly credit-monitoring service. Brown told his customer-service team to deny any involvement with Pierce's operation. And although Brown typically agreed to cancel future charges, he often refused to issue refunds. He also instructed his representatives to offer reduced prices to retain customers. Some customers accepted the offer, but others told their credit-card compa-

nies to cancel Brown's charges. Credit-card companies cancelled more than 10,000 of Brown's charges.

Consumers complained to the Commission, which opened an investigation. In January 2017 it sued Brown under section 13(b) of the FTCA seeking an injunction and restitution. The Commission alleged that the Craigslist advertisements violated the FTCA's prohibition on "unfair or deceptive acts or practices." 15 U.S.C. § 45(a). The suit also alleged that Brown's websites violated the same provision of the FTCA, as well as ROSCA, *id.* § 8403; the Fair Credit Reporting Act ("FCRA"), *id.* § 1681j(g); and the Free Credit Reports Rule, 12 C.F.R. §§ 1022.130–.138.

On the Commission's motion, the judge issued a temporary injunction, froze Brown's assets, and appointed a receiver to manage his company. Brown and the Commission later filed cross-motions for summary judgment. In addition to contesting liability, Brown argued that section 13(b) doesn't authorize an award of restitution and, alternatively, that it doesn't authorize penalties or *legal* restitution (as opposed to *equitable* restitution, which requires tracing a plaintiff's entitlement to a particular account or fund).

The judge ruled for the Commission across the board, holding that Brown violated the FTCA as a principal for the Craigslist scheme and that the websites violated the FTCA, ROSCA, the FCRA, and the Free Credit Reports Rule. The judge issued a permanent injunction that imposed extensive conditions on Brown's continued involvement in the credit-monitoring industry and ordered Brown to pay $5,260,671.36 in restitution. He also denied Brown's motion to unfreeze funds to pay his attorneys.

II. Discussion

Brown contests his liability, the permanent injunction, and the restitution award. Different standards of review apply. For liability, we review the summary judgment de novo, viewing the evidence in the light most favorable to Brown and drawing reasonable inferences in his favor. *Holloway v. Soo Line R.R. Co.*, 916 F.3d 641, 643 (7th Cir. 2019). We review the judge's decision to enter a permanent injunction for abuse of discretion. *SEC v. Yang*, 795 F.3d 674, 681 (7th Cir. 2015). Finally, Brown's challenge to the restitution award raises legal questions, which we review de novo. *Breneisen v. Motorola*, Inc., 656 F.3d 701, 704 (7th Cir. 2011).

A. Liability Issues

The Commission sued under section 13(b) of the FTCA, which by its terms authorizes temporary restraining orders and permanent injunctions to enjoin violations of federal trade law. § 53(b)(1). To impose individual liability on the basis of a corporate practice, the Commission must prove (1) that the practice violated the FTCA; (2) that the individual "either participated directly in the deceptive acts or practices or had authority to control them"; and (3) that the individual "knew or should have known about the deceptive practices." *FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005).

Based on the summary-judgment record, the judge held that Brown violated the FTCA as a principal for the Craigslist marketing scheme contrived by Pierce and Lloyd. He also held that Brown's websites violated the FTCA, ROSCA, the FCRA, and the Free Credit Reports Rule. Finally, the judge concluded that Brown was individ-

ually liable for the violations because he owned and operated all aspects of his company.

While Brown concedes liability for the Craigslist scheme, he challenges his liability for the website violations. He asserts that his websites contained no misrepresentations in violation of the FTCA and satisfied ROSCA's disclosure requirements. He also argues that the Commission must enforce the FCRA and the Free Credit Reports Rule through an internal adjudication. *See* 15 U.S.C. § 1681s(a)(1) (stating that FCRA violations "shall be subject to enforcement by the Federal Trade Commission under section 5(b) of the Federal Trade Commission Act").

It's unnecessary to consider every theory of liability. Brown's challenges to the injunction and restitution award do not turn on which statute his websites violated. And section 13(b) permits the Commission to seek relief against Brown for violating "any provision of law" it enforces. § 53(b).

So we start and end with ROSCA, which restricts the use of a "negative option feature" to sell goods or services on the Internet. § 8403. A negative-option feature is "a provision [in an offer] under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w); *see also* § 8403 (incorporating this definition by reference). ROSCA prohibits this feature unless the seller "(1) provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information; (2) obtains a consumer's express informed consent before charging the consumer . . . ; and (3) provides simple mechanisms for a consumer to stop recurring charges." § 8403. ROSCA violations are "unfair

or deceptive acts or practices" under the FTCA, so the Commission can use the FTCA's enforcement regime against violators. *Id.* § 8404.

There's no dispute that Brown used a negative-option feature to enroll customers in his credit-monitoring service. The only question is whether he complied with ROSCA's disclosure requirements. In the apt words of the district judge, Brown's websites were "virtually devoid of *any* mention of the [credit-monitoring] service aside from the statement that the customer is to be billed for it." Moreover, Brown concealed this incomplete disclosure behind more prominent language offering a free credit score and report. The judge determined that these partial and obscure disclosures did not "clearly and conspicuously disclose[ ] all material terms of the transaction" or ensure that customers gave "express informed consent." § 8403(1)–(2).

Brown focuses on the conclusion that the disclosures weren't conspicuous. He parses font sizes, details his websites' color schemes, and takes a microscope to the Commission's affidavits in an effort to highlight evidence that consumers read and understood the disclosures. But he gives only passing attention to the decisive point: His websites didn't provide certain information that ROSCA requires—namely, that the subscription was for a credit-monitoring service.

This oversight is fatal to Brown's defense. Setting aside whether his disclosures satisfied the "clear and conspicuous" standard (and on that point we see nothing unsound in the judge's ruling that they did not), Brown violated ROSCA if the disclosures failed to provide "all material terms of the transaction." § 8403(1). The service Brown provided in exchange for the subscription is clearly a material term. *See Material Term*, BLACK'S LAW DICTIONARY

(10th ed. 2014) ("A contractual provision dealing with a significant issue such as subject matter . . . or the work to be done."). And the websites did not tell consumers that they were enrolling in a credit-monitoring service. Brown seeks refuge in the form letter that he delivered to new subscribers, which did provide this information. But ROSCA required Brown to disclose the material terms "before obtaining the consumer's billing information." § 8403. Brown protests that he sent the letter "almost instantaneously" upon subscription. But almost instantaneously is still too late under ROSCA.

Brown next contends that even if corporate liability is established, he should not be held personally liable. But it's undisputed that he controlled the websites and was aware of their content. That's enough to establish personal liability for the ROSCA violations.

B. The Permanent Injunction

The judge held that Brown's conduct warranted a permanent injunction, applying our standard under the Securities and Exchange Act. *See Yang*, 795 F.3d at 681 (asking whether "there is a reasonable likelihood of future violations in order to obtain [injunctive] relief") (quotation marks omitted). The ensuing injunction imposes extensive requirements on Brown if he ever operates a credit-monitoring business again.

We don't need to decide whether our standard for an injunction under the Securities and Exchange Act also applies to section 13(b) because Brown's challenge doesn't turn on that question. His attack on the injunction rests largely on the Excessive Fines Clause. U.S. CONST. amend. VIII. He contends that the injunction is unconstitutionally harsh and disproportionate. But he skips a necessary step in the analysis—whether the injunction is a "fine" at all.

It's not. The Supreme Court has limited "fines" to "cash [or] in-kind payment[s] imposed by and payable to the government." *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 n.6 (2002) (quotation marks omitted); *see also Zamora-Mallari v. Mukasey*, 514 F.3d 679, 695 (7th Cir. 2008) ("The Board's removal order . . . is not a 'fine,' and thus the Excessive Fine Clause of the Eighth Amendment does not apply."). Because an injunction isn't a fine, the permanent injunction doesn't implicate the Excessive Fines Clause.

Brown also offers an assortment of drive-by arguments, all of which are too undeveloped to establish an abuse of discretion. *See Roger Whitmore's Auto. Serv., Inc. v. Lake County*, 424 F.3d 659, 664 n.2 (7th Cir. 2005) ("It is the parties' duty to package, present, and support their arguments . . . ."). We affirm the permanent injunction.

C. The Restitution Award

The bulk of Brown's appeal challenges the restitution order. His primary argument is that section 13(b) does not authorize an award of restitution. This is fundamentally a question of statutory interpretation, but it's obscured by layers of caselaw, so bear with us while we untangle the knot. A brief overview of the FTCA's remedial structure is helpful to a proper understanding of section 13(b), so we begin there.

The FTCA gives the Commission several tools to enforce the Act's prohibition on unfair or deceptive trade practices. Under its "cease and desist" power, the Commission adjudicates a case before an administrative law judge, who can issue an order prohibiting the respondent from engaging in the illegal conduct at issue. *See* 15 U.S.C. § 45(b). This order becomes final if it survives administrative appeal and judicial review. *Id.* § 45(g).

A final cease-and-desist order empowers the Commission to sue the violator for legal and equitable relief, but only if "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent." *Id.* § 57b(a)(2), (b). After it becomes final, the order also draws a line in the sand for both the respondent and anyone else who engages in the prohibited conduct. If the respondent later violates the order, the Commission can sue for civil penalties and any equitable relief "the court finds necessary." *Id.* § 45(*l*). If anyone else engages in the prohibited conduct after the order becomes final, the Commission can seek civil penalties if it can prove that the violator acted with "actual knowledge" that his conduct was unlawful. *Id.* § 45(m)(1)(B).

The Commission has two other enforcement mechanisms at its disposal. First, it can promulgate rules that "define with specificity acts or practices which are unfair or deceptive." *Id.* § 57a(a)(1)(B). By preemptively resolving whether certain conduct violates the FTCA, rulemaking permits the Commission to pursue "quick enforcement" actions against violators. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 225–26 (2019). Once the Commission promulgates a rule, it can seek legal and equitable remedies, including restitution, from violators. *See* 15 U.S.C. § 57b(a)(1), (b). And if it establishes that a violator had "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that his conduct violated a rule, the Commission can also pursue civil penalties. *Id.* § 45(m)(1)(A).

The Commission's remaining enforcement mechanism is different. Under section 13(b) of the FTCA, the Commission can forego any administrative adjudication or rule-

making and directly pursue a temporary restraining order and a preliminary or permanent injunction in federal court. § 53(b). As noted, the Commission sued Brown under this provision.

1. ***Section 13(b)***

The restitution order against Brown rests on section 13(b)'s permanent-injunction provision, which states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *Id.* Brown's straightforward argument is that section 13(b) doesn't authorize restitution because it doesn't mention restitution.

We start with the obvious: Restitution isn't an injunction. "Injunction" is of course a broad term. *See Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A court order commanding or preventing an action."). But statutory authorizations for injunctions don't encompass other discrete forms of equitable relief like restitution. *See*, *e.g.*, *Meghrig*, 516 U.S. at 484 ("[N]either [a mandatory or prohibitory injunction] contemplates . . . equitable restitution.") (quotation marks omitted); *Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc.*, 622 F.3d 1307, 1324 (11th Cir. 2010) ("Injunctive relief constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses restitution or disgorgement."); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 365 (2011) (holding that an equitable order for backpay isn't an injunction); *Nken v. Holder*, 556 U.S. 418, 430 (2009) ("Whether [a deportation stay] might technically be called an injunction is beside the point; that is not the label by which it is generally known.").

The Commission doesn't seriously argue otherwise. It instead contends that section 13(b) *implicitly* authorizes

restitution. We endorsed that reading in *Amy Travel*, 875 F.2d at 571, which Brown asks us to overturn. We'll discuss *Amy Travel* in a moment, but we begin with a closer look at the FTCA itself. If the Commission's reading is correct, there's no need to reconsider our precedent.

> Section 13(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 . . . 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. . . .

An implied restitution remedy doesn't sit comfortably with the text of section 13(b). Consider its requirement that the defendant must be "violating" or "about to violate" the law. Requiring ongoing or imminent harm matches the forward-facing nature of injunctions. *See* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2942, at 47 (3d ed. 2013) ("[I]njunctive relief looks to the future and is designed to deter . . . ."). Conversely, restitution is a remedy for past actions. *See* 1 DAN. B. DOBBS, LAW OF REMEDIES § 4.1(1), at 551 (2d ed. 1993) ("Restitution is a return or restoration of what the defendant has gained in a transaction."). Beyond the conceptual tension, this requirement raises an illogical implication: It would condition the Commission's ability to secure restitution for past conduct on the existence of ongoing or imminent unlawful conduct.

Section 13(b)'s second requirement—that the Commission must reasonably believe that enjoining an ongoing or imminent violation would be in the public interest—raises a similar problem. The public interest in stopping or preventing a violation is distinct from the public interest in remedying a past harm. And yet the Commission's reading ties restitution to this inapposite inquiry.

The rest of section 13(b) is likewise keyed to injunctions, not other forms of equitable relief. For example, the statute conditions the district court's authority to issue a temporary restraining order or preliminary injunction on injunction-specific requirements—such as "weighing the equities and considering the Commission's likelihood of ultimate success"—and dissolves the order or injunction within 20 days if the Commission doesn't issue an adminis-

trative complaint. § 53(b). These demands don't apply to equitable restitution, which has its own preconditions. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212–15 (2002).

True, this appeal concerns section 13(b)'s permanent-injunction provision, not the provision governing temporary restraining orders and preliminary injunctions, which is tied to the subsequent initiation of an administrative proceeding. And we have held that at least some of section 13(b)'s requirements don't apply to permanent injunctions. *See United States v. JS & A Grp.*, 716 F.2d 451, 456–57 (7th Cir. 1983) (holding that the Commission can seek a permanent injunction without initiating an internal adjudication). *But see FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 156 (3d Cir. 2019) (requiring the Commission to allege an ongoing or imminent violation to receive a permanent injunction). But that's beside the point. Even if some of section 13(b)'s requirements do not apply to permanent injunctions, they inform the meaning of "injunction." We see no contextual support for giving vastly different meanings to section 13(b)'s two uses of the word "injunction." *See Hall v. United States*, 566 U.S. 506, 519 (2012) ("At bottom, identical words and phrases within the same statute should normally be given the same meaning.") (quotation marks omitted). And in any event, we haven't drawn an interpretive distinction in the past. *See FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989) (holding that section 13(b)'s preliminary-injunction provision also authorizes implied equitable relief).

The FTCA's two other enforcement provisions amplify the poor fit between section 13(b) and restitution. Both use more than the word "injunction" to authorize other forms of equitable relief. As discussed, when a person violates a

final cease-and-desist order, the district courts are empowered to "grant mandatory injunctions *and such other and further equitable relief as they deem appropriate*." § 45(*l*) (emphasis added). And when someone engages in conduct prohibited by a rule, the FTCA authorizes "such relief as the court finds necessary . . . , [including] *the refund of money or return of property*." § 57b(b) (emphasis added).

The absence of similar language in section 13(b) is conspicuous. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken*, 556 U.S. at 430 (quotation marks omitted). This instruction applies with particular force here, where Congress simultaneously expanded § 45(*l*) to allow for "other and further equitable relief" and enacted section 13(b) without this language. *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591 (1973). Moreover, Congress expressly approved restitution as a remedy under § 57b(b) two years after enacting section 13(b). *See* Magnuson-Moss Warranty Act, Pub. L. No. 93-637, § 206, 88 Stat. 2183, 2202 (1975). If section 13(b) permitted restitution as a general matter, Congress would have had no reason to enact § 57b, which authorizes restitution under narrower circumstances.

Remedial scope isn't the only difference between section 13(b) and the FTCA's other enforcement mechanisms. The latter procedures also impose a detailed framework that the Commission must follow before obtaining a restitution order. This framework counterbalances the FTCA's amorphous "unfair or deceptive practices" standard by requiring the Commission to give defendants fair notice, either through cease-and-desist orders or rules that "de-

fine with specificity" prohibited acts. §§ 45(b); 57a(a)(1). The Commission can bypass these notice requirements only if it obtains a cease-and-desist order against a violator, brings a suit in court, and then establishes that the prohibited practice "is one which a reasonable man would have known under the circumstances was dishonest or fraudulent." § 57b(a)(2). Finally, the FTCA imposes a three-year statute of limitations on bringing actions against most violators. § 57b(d).

Section 13(b) doesn't offer any of these protections. And yet the Commission contends that it provides an unqualified right to the very remedies that the FTCA's other enforcement provisions give with heavy qualification. Reading an implied restitution remedy into section 13(b) makes these other provisions largely pointless. Without a clear textual signal, we cannot presume that Congress implicitly made such a consequential shift in policy. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions . . . .").

The tensions we've just discussed dissipate if we read section 13(b) to mean what it says: The remedy is limited to injunctive relief. In fact, giving section 13(b) its plain meaning harmonizes the three enforcement mechanisms. The FTCA gives the Commission a pair of backward-facing methods to obtain monetary relief for past injury. Its cease-and-desist power targets individual violations. *See* § 45(b). And its rule-enforcement authority under § 57b(a)(1) allows it to more efficiently address widespread unfair or deceptive practices. *See* Parrillo, *supra*, at 225–26.

Section 13(b) serves a different, forward-facing role: enjoining ongoing and imminent future violations. This authority aligns with the predicate requirements it impos-

es—notably, a reasonable belief that a violation is ongoing or imminent and that stopping the violation is in the public interest. § 53(b). It also explains the lack of procedural protections. As Congress reported when enacting section 13(b), the Commission's existing enforcement processes couldn't quickly address ongoing or imminent violations. *See* § 408(a)(1), 87 Stat. 576, 591 (finding that the Commission had "been restricted and hampered because of inadequate legal authority . . . to seek preliminary injunctive relief to *avoid* unfair competitive practices") (emphasis added). Section 13(b) corrected this problem, providing an expedited pathway to injunctive relief. *See id.* § 408(b) (noting that the "purpose of [the] act" was to give the Commission "the requisite authority to insure *prompt* enforcement of the laws [it] administers by granting statutory authority . . . to seek preliminary injunctive relief") (emphasis added).

The Commission's argument to the contrary rests almost entirely on the saving clause in § 57b(e): "Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." According to the Commission, § 57b(e) explains away the tensions that its reading of section 13(b) otherwise creates.

We disagree for two reasons. To start, the Commission's understanding of the saving clause runs against more than a century of interpretive practice. The Supreme Court has long instructed that acts "cannot be held to destroy [themselves]" through saving clauses. *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *accord Adams Express Co. v. Croninger*, 226 U.S. 491, 507

(1913); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299 (1976); *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 228 (1998). Put differently, we cannot read a saving clause to "allow specific provisions of the statute that contains it to be nullified." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). This principle extends to claims that a particular statutory provision implicitly authorizes new remedies. *See Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15–16 (1981) ("It is doubtful that the phrase 'any statute' [in a saving clause] includes the very statute in which this statement was contained."). As we've explained, the Commission's reading of section 13(b) effectively nullifies § 57b. We cannot read § 57b(e) to authorize that self-defeating effect.

And even if the Commission's reading of the saving clause were correct, we couldn't infer a right to restitution in section 13(b). The saving clause preserves only those remedies that exist. It does not inform the question whether section 13(b) contains an implied power to award restitution.

The Commission also suggests that Congress "ratified" an implied section 13(b) restitution remedy in its 1993 and 2006 amendments to the FTCA. We disagree. The 1993 amendment reworked section 13(b)'s venue and service-of-process provisions but didn't alter its remedial scope. The 2006 amendment fares no better as a prop for the Commission's argument. It simply empowered the Commission to use "[a]ll remedies available to [it] with respect to unfair and deceptive acts or practices . . . , including restitution," when prosecuting certain violations in foreign commerce. § 45(a)(4)(B). The Commission contends that the use of "restitution" in this provision refers to an implied restitution remedy in section 13(b). But the FTCA expressly

authorizes restitution through § 45(*l*) and § 57b(b). So the 2006 amendment says nothing about the Commission's authority to seek that remedy under section 13(b).

In short, nothing in the text or structure of the FTCA supports an implied right to restitution in section 13(b), which by its terms authorizes only injunctions. Unsurprisingly, the Commission wagers nearly all of its case on stare decisis rather than the plain meaning of section 13(b). So we turn to that question.

2. *The Road to* Amy Travel

The Commission correctly observes that we addressed a materially identical challenge to the scope of section 13(b) in *Amy Travel*, 875 F.2d 564. Brown in turn invites us to revisit that decision in light of intervening Supreme Court decisions. We of course can do so. "Although we must give considerable weight to our prior decisions, we are not bound by them absolutely and may overturn circuit precedent for compelling reasons." *Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005). An intervening Supreme Court decision that displaces the rationale of our precedent is one such reason. *See Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009).

Brown's invitation implicates a line of Supreme Court precedents long predating *Amy Travel*. The prevailing interpretation of section 13(b) developed in the shadow of two decisions that took a capacious view of implied remedies: *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). To understand *Amy Travel*, we must begin with them.

Porter considered section 205(a) of the Emergency Price Control Act of 1942, which limited the rent that certain landlords could collect from their tenants. The act empowered district courts to issue a "permanent or tempo-

rary injunction, restraining order, or other order" against persons who collect rents above its limits. *Porter*, 328 U.S. at 397. The Court held that section 205(a) authorizes restitution, offering this reasoning:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its equitable] jurisdiction. . . . 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. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.

Id. at 398 (citations and quotation marks omitted).

Porter later clarified that implied remedies must be "consistent with the statutory language and policy, the legislative background and the public interest." *Id.* at 403; *see also id.* at 400 ("In framing such remedies under § 205(a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved."). In short, *Porter* adopted a presumption in favor of implying equitable remedies that accord with statutory purpose. But it also recognized that an express statement or a "necessary and inescapable inference" to the contrary could rebut this presumption. *Id.* at 398.

Returning to the Price Control Act, the Court held that restitution was a proper "other order" under section 205(a). *Id.* at 399. It offered two justifications. First, restitution could be an "equitable adjunct to an injunction." *Id.* Second, restitution advanced the purpose of the statute.

See id. at 400 ("[T]he statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums."). Still, the Court found that an "inescapable inference" foreclosed one particular remedy. The statute's separate right of action for damages "provide[d] an exclusive remedy relative to damages." *Id.* at 401. But "save [this] one aspect," the statute invoked "the broad equitable jurisdiction that inheres in courts." *Id.* at 403.

In *Mitchell* the Court applied *Porter* to section 17 of the Fair Labor Standards Act ("FLSA"), which gave district courts the jurisdiction to "restrain violations" of the statutory prohibition on firing employees for reporting workplace violations. 361 U.S. at 289. After quoting *Porter*'s broad language about equitable remedies, *Mitchell* reiterated that implied remedies must fit with the statutory purpose: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291–92.

Applying *Porter*'s presumption, the Court drew on its understanding of the FLSA's purpose, which was to achieve "minimum labor standards" by using worker complaints as a private enforcement mechanism. *Id.* at 292. The Court reasoned that restitution furthered that purpose. Without it, the "fear of economic retaliation" would stifle worker complaints. *Id.*

Mitchell then assessed whether anything in the FLSA precluded restitution as an implied remedy. The defendants pointed to the statute's ban on awarding unpaid minimum wages and overtime compensation as one such provision, but the Court disagreed. It found "no indication in the

language of the [ban], or in the legislative history, that Congress intended [it] to have a wider effect." *Id.* at 294.

Porter and *Mitchell* were typical of their era: The Court would resolve ambiguities by identifying a statute's purpose and "deducing the result most consonant with that purpose." William N. Eskridge Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 282 (1988); *see also* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 16–17 (2014) ("However clearly Congress framed its statutes, the Court could rework them to fit with the background policies that inspired them."). Using this interpretive approach, the Court assumed that the judiciary could freely craft remedies to fully enforce whatever rights Congress had recognized. *See* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 45–51 (1983). As the Court would proclaim four years after *Mitchell*, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

* * *

Lower-court interpretations of section 13(b) built on *Porter* and *Mitchell*. The trail starts with *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982). There the Ninth Circuit held that section 13(b)'s permanent-injunction provision implicitly authorizes preliminary injunctions and asset freezes.[2] *Id.* at 1113. While its analysis was cursory,

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[2] Shortly before *Singer*, the Fifth Circuit held that section 13(b)'s preliminary-injunction provision implicitly authorizes asset freezes. *See FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982). But its holding appeared to preclude the possibility of restitution in section 13(b), pointing instead to § 57b for monetary remedies. *Id.* at 719

Singer channeled *Porter* and *Mitchell*. The court held that preliminary injunctions and asset freezes advanced section 13(b)'s purpose by ensuring that assets were available at the end of the enforcement process. *Singer* also rejected the defendant's claim that the express equitable remedies in § 57b foreclosed implied remedies in section 13(b), pointing to the saving clause in § 57b(e).

Singer sparked a line of appellate cases holding that section 13(b) is a broad grant of equitable authority. The Eleventh Circuit followed Singer's lead two years later. After quoting Porter's language on implied remedies, the court concluded that it "agree[d] with Singer's interpretation of [section] 13(b)" and without further discussion held that section 13(b) authorizes asset freezes. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (per curiam).

Our decision in *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988), was next. There, the defendant passingly suggested that section 13(b)'s permanent-injunction provision does not implicitly authorize preliminary injunctions. (Recall that the statute's express authorization for temporary restraining orders and preliminary injunctions is tied to the eventual initiation of an administrative proceeding.) We held that the defendant waived the argument, but we discussed the issue anyway "in order to satisfactorily explain our disposition of . . . other issues." *Id.* at 1026. Because it was dicta, our reasoning was understandably brief. We simply quoted language from *Singer* and noted that we had "no reason to disagree

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("[T]he exhortation in [*Mitchell*] to preserve the possibility of complete relief . . . makes it appropriate to consider that the final, complete relief in this case may entail consumer redress through a [§ 57b] proceeding."). Predictably, no circuit has materially relied on *Southwest Sunsites* to support an implied restitution award.

with the conclusion of our colleagues of the Ninth and Eleventh Circuits that the authority to grant permanent injunctive relief also includes the authority to grant interlocutory relief." *Id.* Other than distinguishing a prior decision, we did not discuss the matter further.

Two months after *World Travel*, we concluded in *Elders Grain* that section 13(b)'s preliminary-injunction provision implicitly authorizes rescission. 868 F.2d at 907. Perhaps because the parties didn't dispute the issue, our analysis was again cursory. But it was highly consequential. We articulated a new standard for inferring equitable remedies: "[T]he statutory grant of the power to issue a preliminary injunction carries with it the power to issue whatever ancillary equitable relief is necessary to the effective exercise of the granted power." *Id.* Notably absent was any inquiry into whether an implied remedy was compatible with the statutory text and structure or whether Congress precluded the implied remedy. We instead would permit whatever implied remedies furthered the exercise of the express remedy.

The effect of this reasoning was evident in our justification for inferring the power to order rescission. We simply restated the facts of the case, which involved a transaction timed to avoid the Commission's review, and observed that "[t]o reward these tactics by holding that a district court has no power under section 13(b) to rescind a consummated transaction would go far toward rendering the statute a dead letter." *Id.*

We extended *Elders Grain* to the permanent-injunction provision three months later in *Amy Travel*. The district court had ordered the defendants to pay more than $6 million in restitution to the Commission. *Amy Travel*, 875 F.2d at 570. The defendants argued on appeal that nothing in sec-

tion 13(b) authorized monetary relief. We disagreed, explaining that our then-recent decisions in *World Travel* and *Elders Grain* "thwarted" the defendants' arguments. *Id.* at 571. In particular, we said that the reasoning in *Elders Grain* applied "with equal force" to the permanent-injunction provision. We adopted that expansive formulation, holding that section 13(b)'s "statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers." *Id.* at 572. But unlike *Elders Grain*, we never addressed how an award of restitution was "necessary to effectuate the exercise" of the power to issue an injunction. We simply noted that restitution was a "proper form[ ] of ancillary relief." *Id.* at 571.

Our approach in *Amy Travel* became the standard. Some circuits held, on a similarly brief analysis, that section 13(b) categorically authorizes the court's "*full* equitable powers," including restitution. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (emphasis added); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991). Others simply cited *Amy Travel* or other decisions to reach the same conclusion. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005); *FTC v. Pantron I. Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *see also FTC v. Ross*, 743 F.3d 886, 891 (4th Cir. 2014) (conceding that "arguments about how the structure, history, and purpose of the [FTCA] weigh against the conclusion that district courts have the authority to award consumer redress . . . are not entirely unpersuasive" but allowing restitution because of *Porter*, *Mitchell*, and uniform circuit practice).

To be sure, these decisions have attracted some judicial skepticism. *See Shire ViroPharma*, 917 F.3d at 156, 161 n.19 (declining to decide whether section 13(b) authorizes monetary relief but concluding that it wasn't "meant to duplicate [§ 45(b)], which already prohibits past conduct"); *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., concurring) (disagreeing with the prevailing interpretation). But the view that section 13(b) implicitly authorizes restitution has largely escaped critical examination.[3]

We have affirmed restitution awards under section 13(b) three times since *Amy Travel*. *See United States v. Tankersley*, 96 F. App'x 419, 422 (7th Cir. 2004); *FTC v. Think Achievement Corp.*, 312 F.3d 259, 262 (7th Cir. 2002); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997). But Brown is the first litigant to question our precedent.

3. *Modern Implied-Remedies Jurisprudence*

The Supreme Court's understanding of implied remedies evolved after *Porter* and *Mitchell*. Though the Court continued to presume that courts could "use any available remedy to afford full relief" when a party had a general statutory cause of action, over time it began to emphasize

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[3] Chief Judge Wood's dissent from the denial of rehearing en banc relies heavily on *FTC v. Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011), but there the Second Circuit summarily followed the lead of other circuits in reading section 13(b) to include an implied power to order restitution. *Id.* at 365. The court quickly moved on to, and thoroughly considered, a wholly different question: whether the implied restitution remedy is equitable or legal. The lengthy passages quoted in the chief judge's dissent relate to that second-order question. Moreover, *Bronson* rejected the view that the plain meaning of "injunction" encompasses restitution. *Id.* at 367 (approving restitution because "section 13(b) does not limit the district court to awarding *only injunctions*") (emphasis added).

that this presumption "yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (quoting *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983) (White, J., op.)); *see also California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."). In particular, the Court now recognizes the importance of Congress's choice to specify forms of relief. *See, e.g.*, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 69 n.6 (1992) (noting that the presumption in favor of relief doesn't apply "under a statute that expressly enumerated the remedies available to plaintiffs"); *see also Karahalios v. Nat'l Fed'n of Fed. Emps.*, 489 U.S. 527, 533 (1989) ("It is . . . an elemental canon of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.") (quotation marks omitted).

A prominent example is ERISA. Because Congress has established a comprehensive remedial scheme for plaintiffs to enforce their rights under an employee-benefits plan, the Court has refused to infer additional extracontractual damages remedies. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.") (quotation marks omitted). And where two environmental-protection statutes provide private rights of action for injunctive relief but require plaintiffs to notify defendants 60 days before suing, the Court has refused to infer a damages remedy or allow plaintiffs to obtain an

injunction without the requisite notice. *See Nat'l Sea Clammers Ass'n*, 453 U.S. at 15 ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.").

These decisions collided with *Porter* and *Mitchell* in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). Because Brown's challenge centers on *Meghrig*, it warrants close review. There the Court addressed the Resource Conservation and Recovery Act of 1976 ("RCRA"), which permits private parties to sue handlers of "solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The statute authorizes district courts "to restrain" any person who contributes to handling the waste, "to order such person to take such other action as may be necessary, or both." § 6972(a). The question in *Meghrig* was whether § 6972(a) also allowed plaintiffs to recover waste-cleanup costs as restitution.

The Supreme Court refused to find an implied restitutionary remedy. "Under a plain reading of this remedial scheme," the Court explained, plaintiffs could receive "a mandatory injunction, *i.e.*, one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, *i.e.*, one that 'restrains' a responsible party from further violating [the] RCRA." *Meghrig*, 516 U.S. at 484. But neither of these forward-facing remedies "contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.' " *Id.*

The Court reinforced its holding by comparing the RCRA to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42

U.S.C. §§ 9601 *et seq.*, which addresses similar toxic-waste issues. *Meghrig*, 516 U.S. at 485. Unlike the RCRA, CERCLA expressly authorizes monetary relief. 42 U.S.C. § 9607(a)(4). "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs[ ] and that the language used to define the remedies under [the] RCRA does not provide that remedy." *Meghrig*, 516 U.S. at 485.

The Court also pointed to the statute's threshold requirement that a party can sue only when the waste "may present an imminent and substantial endangerment to health or the environment." § 6972(a)(1)(B). "The meaning of this timing restriction [was] plain" to the Court: "[S]ection 6972(a) was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms, not a remedy that compensates for past cleanup efforts." *Meghrig*, 516 U.S. at 485–86.

Finally, the Court looked to "[o]ther aspects of [the] RCRA's enforcement scheme." *Id.* at 486. Unlike CERCLA, the RCRA's citizen-suit provision lacks a statute of limitations or a requirement that any recovered costs must be reasonable. The Court reasoned that "[i]f Congress had intended § 6972(a) to function as a cost-recovery mechanism, the absence of these provisions would be striking." *Id.* The RCRA also halts citizen suits when the EPA or a state pursues an enforcement action, and it requires plaintiffs to give 90-days' notice to potential defendants before suing. *See id.* These two requirements made § 6972(a) a "wholly irrational mechanism" for remedying past harms. *Id.*

The Court then acknowledged the "line of cases holding that district courts retain inherent authority to award any equitable remedy that is not expressly taken away from them by Congress." *Id.* at 487 (citing *Porter*, 328 U.S. 395).

But these cases couldn't support an implied restitution remedy. As the Court put it:

> [T]he limited remedies described in § 6972(a), along with the stark differences between the language of that section and the cost-recovery provisions of CERCLA, amply demonstrate that Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under [the] RCRA. . . . [W]here Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, as Congress has done with [the] RCRA and CERCLA, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute. It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.

Id. at 487–88 (quotation marks omitted). Notwithstanding *Porter*, the Court held that § 6972(a) does not "contemplate the award of past cleanup costs." *Id.* at 488.

Since *Meghrig*, the Court has adhered to this more limited understanding of judicially implied remedies. *See*, *e.g.*, *Great-West*, 534 U.S. at 209 ("We have therefore been especially reluctant to tamper with the enforcement scheme embodied in [ERISA] by extending remedies not specifically authorized by its text.") (quotation marks and alteration omitted); *Miller v. French*, 530 U.S. 327, 340 (2000) (concluding that the plain meaning of a provision expressed the congressional intent to displace equitable authority); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) (holding that the Medicaid Act's provision of a specific remedy and the judicially un-

administrable nature of the relevant statutory provision "preclude[d] the availability of equitable relief" in section 30(A) of the statute); *Gebser*, 524 U.S. at 284 (holding that courts cannot enlarge the "scope of available remedies" under an implied right of action "in a manner at odds with the statutory structure and purpose"). Rather than presuming that Congress authorizes the judiciary to supplement express statutory remedies, the Court now recognizes that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Armstrong*, 135 S. Ct. at 1385.

4. *Revisiting* Amy Travel

As this perhaps drawn-out discussion shows, an exploration of statutory purpose is no longer the Supreme Court's polestar in cases raising interpretive questions about the scope of statutory remedies, and that shift has unsettled *Porter*'s and *Mitchell*'s instruction to "provide complete relief in light of the statutory purposes." *Mitchell*, 361 U.S. at 292; *see also Singer*, 668 F.2d at 1113 (grounding its reading of section 13(b) on this premise). *See generally* Manning, *supra*, at 23 ("[W]here 'the statutory language is clear,' the Court has disclaimed the need even 'to reach arguments based on statutory purpose[ ] [or] legislative history.' " (quoting *Boyle v. United States*, 556 U.S. 938, 950 (2009))); WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 81 (2016) ("We are all textualists. That means that a judge must relate all sources of and arguments about statutory interpretation to a text the legislature has enacted."). Indeed, the Court has "abandoned" its prior understanding that judges must "be alert to provide such remedies as are necessary to make effective the congressional purpose expressed by a stat-

ute." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (quotation marks omitted); *accord Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). It is now well settled that Congress, not the judiciary, controls the scope of remedial relief when a statute provides a cause of action. *See Armstrong*, 135 S. Ct. at 1385 ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.") (quotation marks omitted); Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 465–66 (2010).

Whatever strength *Porter* and *Mitchell* retain, *Meghrig* clarifies that they cannot be used as *Amy Travel* saw them—a license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure. To be sure, the Court still presumes that courts retain their "traditional equitable authority." *Miller*, 530 U.S. at 340. But even under *Porter* and *Mitchell*, this authority comes with an important qualifier: "unless otherwise provided by statute." *Porter*, 328 U.S. at 398; *Mitchell*, 361 U.S. at 291. Unsurprisingly, every appellate court to consider the relationship between *Meghrig*, *Porter*, and *Mitchell* recognizes that *Meghrig* reinforced and clarified this qualifier.

Some circuits have concluded that a statute displaces equitable authority when it specifies a particular remedy. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 632 F.3d 1111, 1121 (9th Cir. 2011) (finding that a statutory provision allowing a person to seek "injunctive relief" acted "to the exclusion of other equitable remedies"); *Landstar Sys.*, 622 F.3d at 1324 (noting that the statute at issue authorized only injunctions and concluding that if it "allowed for restitution or disgorgement, it would have so stated"). Others more narrowly construe

Meghrig as a command that "courts must consider a statute's remedial scheme" when determining whether a statute displaces equitable authority. *See United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 235 (3d Cir. 2005); *see also United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1057 (10th Cir. 2006) (reading *Meghrig* as showing that "a statute's particular characteristics" can displace equitable authority).

The D.C. Circuit thoroughly examined the effect of *Meghrig* in *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005). Harmonizing *Meghrig* and *Porter*, it held that a statute's "comprehensive and reticulated scheme, along with the plain meaning of the words themselves, serves to raise a necessary and inescapable inference, sufficient under *Porter*, that Congress intended to limit relief." *Id.* at 1200 (quotation marks and citation omitted).

We don't need to plant ourselves firmly along this doctrinal spectrum to decide this case. It's inescapable that *Meghrig* not only displaced *Amy Travel*'s categorical approach to judicially implied remedies but also its interpretation of section 13(b). Every one of *Meghrig*'s reasons for refusing to find restitutionary authority in the RCRA applies with equal force to section 13(b).

Like the RCRA, section 13(b)'s plain text doesn't contemplate an award of restitution. *See Meghrig*, 516 U.S. at 484. It authorizes only temporary restraining orders and injunctions. And like the relationship between the RCRA and CERCLA, the relationship between section 13(b), § 45(*l*), and § 57b(b) "is telling." *Id.* at 485. Both § 45(*l*) and § 57b(b) expressly authorize additional equitable remedies. § 45(*l*) ("mandatory injunctions and such other and further equitable relief as [courts] deem appropriate"); § 57b(b) ("such relief as the court finds necessary . . . , [including]

the refund of money or return of property"). Section 13(b) lacks comparable language.

Meghrig also instructs us to interpret remedial language with reference to "the harm at which it is directed." 516 U.S. at 485. While the FTCA's express restitution provisions authorize the Commission to sue for past conduct, to proceed under section 13(b), the Commission must reasonably believe that a person "is violating" or "about to violate" the law. § 53(b)(1); *cf.* § 45(b) (empowering the Commission to bring a cease-and-desist action when it reasonably believes someone "has been or is" violating the act). As with the RCRA, "[t]he meaning of this timing restriction is plain." *Meghrig*, 516 U.S. at 485. Section 13(b) "was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms, not a remedy that compensates" for past violations. *Id.* at 486.

Further, as we've explained, section 13(b) is procedurally incompatible with restitution. For example, before invoking section 13(b), the Commission must reasonably believe that stopping an ongoing or imminent violation is in the public interest. § 53(b)(2). And the statute dissolves a preliminary injunction if the Commission doesn't begin an administrative proceeding before a court-set deadline. § 53(b). But the Commission would have no need for an administrative proceeding if it can get complete restitutionary relief through section 13(b)'s permanent-injunction provision. In short, section 13(b)'s prerequisites, like those in the RCRA, make it a "wholly irrational mechanism" for remedying past harms. *Meghrig*, 516 U.S. at 486.

Relatedly, unlike § 57b(b), section 13(b) has no statute of limitations. The absence of a limitations period in the RCRA was "striking" to the *Meghrig* Court and provided strong evidence that the RCRA's injunction provision did

not implicitly authorize restitution. *Id.* The same is true here.

Section 13(b) also lacks a central feature of the FTCA provisions that expressly permit monetary relief: a notice requirement. When the Commission brings an administrative cease-and-desist action, it can secure restitution only by proving that the violation occurred after its order became final or that "a reasonable man" would have known that the conduct was fraudulent. §§ 45(*l*); 57b(a)(2). And notice is also baked into the Commission's power to promulgate and enforce rules. The Commission must follow detailed procedures before promulgating a final rule. *See id.* § 57a(b)(1) (requiring publication of notice and an informal hearing for rulemaking). Moreover, final rules must "define with specificity" the prohibited acts. § 57a(a)(1)(B).

The Supreme Court has held that similar provisions are crucial to determining the remedial scope of implied rights of action, a closely related context: "It would be unsound . . . for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice." *Gebser*, 524 U.S. at 289. We face the same unsound result here: Reading an implied restitution remedy into section 13(b) allows the Commission to circumvent the FTCA's detailed notice requirements.

Finally, we note that the difference in plaintiffs—private citizens in *Meghrig* and a federal agency here—isn't material. To be sure, when "the public interest is involved in a proceeding," a court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328

U.S. at 398; *accord Kansas v. Nebraska*, 574 U.S. 445 (2015). But the public interest doesn't turn on the identity of the parties involved.

Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 552 (1937), the authority *Porter* cited to invoke the "public interest," is instructive on this point. Even though the suit was between a railroad company and a union, the Court determined that "[m]ore [was] involved than the settlement of a private controversy." *Id.* "The peaceable settlement of labor controversies . . . is a matter of public concern." *Id.*; *see also id.* ("The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy . . . ."). Presaging *Porter*, the Court observed that "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Id.*; *cf. Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 & n.8 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." (citing *Porter*, 328 U.S. at 397–98)).

Under *Virginian Railway Co.*, both *Meghrig* and this case implicate the public interest. Both involve enforcing federal statutory obligations, and both involve matters of "public concern"—environmental cleanup and consumer protection. Even so, *Meghrig* did not find an implied right to restitution in the RCRA. So the fact that the government is the plaintiff here does not affect the analysis. Consider *United States v. Apex Oil Co.*, in which we examined *Meghrig*'s impact on 42 U.S.C. § 6973(a), the RCRA's *government*-suit provision. 579 F.3d 734 (7th Cir. 2009). We did

not draw a distinction between the RCRA's government and citizen-suit provisions. Observing that the provisions use "identical language," we concluded that the RCRA "entitles the government only to require the defendant to clean up the contaminated site at the defendant's expense." *Id.* at 737. We then announced that our "[e]arlier cases, . . . which allowed an award of clean-up costs on the basis of general equitable principles set forth in such cases as *Mitchell v. Robert De Mario Jewelry, Inc.*, and *Porter v. Warner Holding Co.*, are dead after *Meghrig*." *Id.* (citations omitted).

Although section 13(b) doesn't use identical language as the RCRA's citizen-suit provision, *Meghrig* remains materially indistinguishable. So we must pay close attention to its bottom line: "[W]here Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, . . . it *cannot* be assumed that Congress intended to authorize by implication additional judicial remedies . . . ." *Meghrig*, 516 U.S. at 487–88 (emphasis added) (quotation marks omitted); *see also Gebser*, 524 U.S. at 290 ("Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we *cannot* attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions.") (emphasis added).

Our limited analysis in *Amy Travel* doesn't offer a way to distinguish *Meghrig*. It instead requires us to ignore section 13(b)'s text and disregard the FTCA's "elaborate enforcement provisions." In light of the Court's commands in *Meghrig*, our holding in *Amy Travel* is no longer viable. Conversely, reading section 13(b) as authorizing only injunctive relief—that is, reading it to mean what it plainly

says—harmonizes *Meghrig* with *Porter* and *Mitchell*, which also called for a statute-specific and remedy-specific inquiry before authorizing an implied form of relief. *See*, *e.g.*, *Porter*, 328 U.S. at 403 (holding that a separate cause of action for damages was enough to preclude courts from inferring that remedy elsewhere).

We recognize that this conclusion departs from the consensus view of our sister circuits. But when deciding whether we should overturn precedent, "[w]e are not merely to count noses. The parties are entitled to our independent judgment." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995). And we must break from our colleagues. As noted, most circuits adopted their position by uncritically accepting our holding in *Amy Travel*, which expanded on *Elders Grain*, which expanded on *Singer*, which expanded on *Porter* and *Mitchell*. No circuit has examined whether reading a restitution remedy into section 13(b) comports with the FTCA's text and structure. Nor has anyone determined whether § 45 forecloses this remedy. And although some have briefly discussed § 57b, they have done so only to find refuge in the saving clause in § 57b(e). Perhaps most importantly, no circuit has ever considered the effect of *Meghrig* in a section 13(b) case.

We are well aware that we need a compelling reason to overturn circuit precedent. "However, important as *stare decisis* is, it is equally important for us to respect the statutes that Congress has passed and to correct any problems we see in our prior interpretations of those statutes." *Ahng v. All-steel*, 96 F.3d 1033, 1037 (7th Cir. 1996); *see also S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 673 (7th Cir. 2017) (noting that statutory stare decisis "is not without limits"). Even in the realm of statutory interpretation, a Supreme Court decision "on an analogous issue that compels us to

reconsider our position" counts as a compelling reason to overturn precedent. *Glaser*, 570 F.3d at 915. We cannot favor our own decisions over those of the Supreme Court.

Stare decisis alone cannot overcome *Amy Travel*'s clear incompatibilities with the FTCA's text and structure, *Meghrig*, and the Supreme Court's broader refinement of its implied remedies jurisprudence. We therefore hold that section 13(b)'s permanent-injunction provision does not authorize monetary relief.[4]

III. Conclusion

For the foregoing reasons, we VACATE the restitution award. In all other respects, we AFFIRM the judgment.

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[4] Because we hold that section 13(b) doesn't authorize monetary relief, we have no need to consider Brown's alternative arguments that the Commission can't pursue penalties or legal—as distinct from equitable—restitution under section 13(b). *See FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., concurring) (discussing these arguments). We also don't need to consider the district court's asset-freeze determinations.

WOOD, *Chief Judge*, with whom ROVNER and HAMILTON, *Circuit Judges*, join, dissenting from the denial of rehearing *en banc*. For decades, this court has successfully used a local rule, Circuit Rule 40(e), for two important purposes: to highlight a decision to create a conflict in the circuits, and to clean up earlier decisions whose soundness has been undermined by later legislation, Supreme Court activity, or a consensus among our sister circuits. Yet we have taken care not to use Rule 40(e) in a way that defeats our profound commitment to oral argument—a commitment that sets us apart from most of the other circuits, and one that consistently improves the quality of our decisionmaking. The opportunity to ask questions of counsel, to hear the questions of fellow judges, and to have a full debate after argument regularly reveals aspects of a case that even the most thorough reading of the briefs on one judge's part cannot provide.

The majority, however, has chosen to use Rule 40(e) in the case now before us. It is a singularly inappropriate case for that treatment: it overrules not only a long-standing decision from this court, *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989), but it also pays no heed to the fact that eight other circuits agree with the *Amy Travel* approach. See Brief of the Federal Trade Commission at 28 n. 12. Perhaps if a recent Supreme Court decision demanded that sea change, the majority's opinion would be defensible. But there is no such decision. Instead, the majority extrapolates from the line of cases addressing whether a private party has an implied right of action to the issue presented here: whether a government agency, the Federal Trade Commission, which enjoys an express right of action under a statute for injunctive relief, is entitled to a restitutionary remedy that is ancillary to, or part of, the injunction.

To my knowledge, no court has ever tied the hands of a government agency in the way that the majority has done here, and the majority cites none. It has taken this step without the careful consideration that plenary *en banc* review would have provided. I am reminded of the words spoken by Gaius Julius Caesar in 49 B.C.E., as he approached the Rubicon river at the head of his army. He knew that the Roman Senate forbade any armed force to enter Rome. But he decided to flout that command, and as he marched with his troops across the river, he is said to have proclaimed "alea iacta est" – the die is cast. And indeed it was. Caesar's act led to civil war and eventually the end of the Roman Republic; he became dictator for life and inaugurated the Roman Empire. See, *e.g.*, Meaning Behind the Phrase to Cross the Rubicon, https://www.thoughtco.com/meaning-cross-the-rubicon-117548. I devoutly hope that the majority here has not cast the die in a way that will transform Rule 40(e) from an efficiency-promoting rule for relatively routine updates to our circuit law into something that erodes our commitment to plenary consideration, along with oral argument, of every fully counseled case. Time will tell. But the Rule is surely being misused in this case. Perhaps that would not matter if no reasonable person could question the correctness of the majority's reasoning. Regrettably, that is not the case. From the materials now before us, I believe that the court is making a mistake, and it is doing so in a procedurally inappropriate way.

The central issue in the case relates to the proper interpretation of section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes the Commission to sue for injunctive relief. Injunctions come in all shapes and sizes: some are prohibitory, some are mandatory, some include submis-

sion to an equitable master, some include reporting requirements, and many include ancillary measures that are designed to ensure that the injunction is effective. At least since our decision in *Amy Travel*, the Federal Trade Commission has understood that its authority to seek an injunction from the court includes the authority to seek a measure commanding the defendant to disgorge unlawfully acquired money or property. In other words, the injunction may include an order from the court for the disgorgement type of restitution.

Obviously the restitution itself is not an "injunction," any more than the master is an "injunction," or the reporting requirements are an "injunction." The injunction is the order from the court either to do something or to refrain from doing something. Black's Law Dictionary lists 25 different types of injunctions under that general heading. See entry for "injunction," Black's Law Dictionary at 904–05 (10th ed. 2014). The term "injunction" itself is defined simply as "A court order commanding or preventing an action." *Id.* A "mandatory injunction" is one "that orders an affirmative act or mandates a specified course of conduct." *Id.* Nothing whatever in section 13(b) deletes from the list of possible affirmative acts that an injunction may include an order requiring the enjoined party to return ill-gotten gains, or to pay money into a court escrow account, or otherwise to turn over property. That should be enough by itself to show the error in the path the majority has taken.

The majority rejects this straightforward reading of the statute and argues to the contrary that "the textual case in the FTCA against implying restitution in section 13(b) is overwhelming." But more than rhetoric is needed to establish that point. From my standpoint, if the text is

overwhelming at all, I find it overwhelmingly to support the power of the FTC to use any of the tools that Congress gave it, including the one it used here, which entitles it to seek injunctive relief from a court.

The Supreme Court supported the approach I would take in *California v. American Stores Co.*, 495 U.S. 271 (1990). There the question was whether "divestiture is a form of injunctive relief within the meaning of" section 16 of the Clayton Act, 15 U.S.C. § 26. 495 U.S. at 275. After the FTC had decided not to challenge a merger of certain grocery stores in California, the merger was consummated. The next day, however, the State of California filed an action in federal court alleging that the merger violated section 1 of the Sherman Act, 15 U.S.C. § 1, and seeking "an injunction requiring American to divest itself of all of [the acquired firm's] assets and businesses in the State of California." 495 U.S. at 276. The district court had granted a preliminary injunction along those lines, but the Ninth Circuit reversed on the ground that the injunctive relief authorized by the statute did not include divestiture. The Supreme Court reversed the court of appeals, finding that "the statutory language [of section 16] indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." *Id.* at 281. An order of divestiture is almost identical to an order requiring equitable restitution: both require the wrongdoer to turn over property that was unlawfully obtained. Similarly, the language of section 16 of the Clayton Act is not materially different from the language of section 13(b) of the FTC Act. In my view, the majority's approach conflicts with the most closely applicable Supreme Court decision.

This is especially troubling because the majority has not pointed to any case in which the Supreme Court has

said that a federal agency must avoid one type of remedial authority it holds and instead use a different type. That, effectively, is what the majority has done here, in its discussion of the various tools the FTC Act provides for enforcement of the prohibition against unfair or deceptive trade practices. *Ante* at 11. The Commission may use its "cease and desist" power in an administrative proceeding, see FTC Act § 5(b), 15 U.S.C. § 45(b); it may, after providing notice to the Attorney General under section 16 of the FTC Act, 15 U.S.C. § 56, sue someone who violates a cease-and-desist order, see FTC Act § 5(*l*)–(m), 15 U.S.C. § 45(*l*)–(m); it may promulgate rules that define unfair or deceptive practices, FTC Act § 18, 15 U.S.C. § 57a; or it may (as it did here) file a suit in federal court for an injunction, FTC Act § 13(b), 15 U.S.C. § 53(b).

The Supreme Court recognizes that agencies have broad discretion in their choice of which of several authorized procedural tools they wish to use as they carry out their mission. The best-known example of this practice comes from the field of labor law. The National Labor Relations Board has both rulemaking power, see 29 U.S.C. § 156, and adjudicatory powers, see 29 U.S.C. § 160. The Board does not, however, follow the practice of using its rulemaking powers when it announces new rules; it prefers to proceed on a case-by-case basis through the adjudicative process. See, *e.g.*, Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 273 (1991). Over the years people have challenged this choice on the ground that the Board is evading the detailed protections for rulemaking that Congress has provided in the Administrative Procedure Act, 5 U.S.C. § 553, but the Supreme Court has always rejected those arguments. See, *e.g.*, *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416

U.S. 267 (1974), confirming the rule from *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), to this effect. As the *Bell Aerospace* opinion put it, "[t]he views expressed in *Chenery II* and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rule-making and adjudication lies in the first instance within the Board's discretion. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion." 416 U.S. at 294.

I can think of no principled reason why the Labor Board should have that discretion, but the FTC should not. The majority argues to the contrary from a line of cases that is inapposite. It conflates decisions about *which plaintiffs* are authorized to bring a suit (the implied-right-of-action line) with the distinct question about *what remedies* are available to a party that is expressly authorized by statute to sue, as the FTC surely is here. The cases on which the panel relies all involve private enforcement, where the Court has warned us to ensure that we should not permit a facile work-around to a complex enforcement system. See, *e.g.*, *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981). A case involving public enforcement is quite different. If the agency believes that Path A has certain advantages and downsides, while Path B has different plusses and minuses, neither approach should be read out of the statute. Both are available to the agency, and each one will serve its intended functions, constrained by its safeguards.

The majority thinks that it would be "wholly irrational" for Congress to write a statute that provides for restitution

as part of a 13(b) temporary restraining order, preliminary injunction, or permanent injunction, while also spelling out less-streamlined options for the Commission to pursue. But this ignores real differences among its options. Perhaps, because of the risk of dissipation of ill-gotten gains, the Commission might want restitution to begin right away while the case is pending, *e.g.*, through payment into a court-operated escrow account; in order to do that, it can seek a preliminary injunction for the turn-over of funds. In another case, the Commission might prefer to use the cease-and-desist route and develop the factual record through its own administrative processes—ensuring judicial deference to its fact-finding down the road—rather than operate under the thumb of a court.

Branding such a scheme as "wholly irrational" is unwarranted without a more focused examination of why the Commission might choose one route or another—a choice, I reiterate, that we usually allow agencies to make. *Cf. Bell Aerospace*, 416 U.S. at 294–95 (concluding that agency has power to choose adjudication or rulemaking as a means to announce new principles while examining agency's legitimate reasons for pursuing one or the other method of proceeding). Such an inquiry requires a deferential look at why Congress gave the agency a menu of options. That is just what Congress did in the FTC Act. The statute gives the Commission the ability to move unilaterally when it uses its rulemaking or cease-and-desist powers, and to act as a party before the court if it wants a preliminary or permanent injunction. It is not up to us to take away that which Congress gave.

Another inapposite line of cases on which the majority relies addresses implied private rights of action—a problem we surely do not have here. See, *e.g., Alexander v.*

Sandoval, 532 U.S. 275 (2001). Rather than a private party, we have a government agency, and rather than an implied right of action, we have an express statutory provision authorizing the agency to seek injunctive relief. That makes a difference. Indeed, in a number of areas—antitrust, securities regulation, RICO—the Supreme Court has begun drawing a distinction between the breadth of a private right of action and the greater breadth appropriate for public enforcement. Thus, in *RJR Nabisco Inc. v. European Community*, 136 S. Ct. 2090 (2016), the Court found that private parties (including for this purpose the European Community, which had no special governmental status under the applicable law) cannot enforce RICO extraterritorially, but that the U.S. government stands in a different position. The Court made the same point in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004):

> In all three cases [on which the Empagran plaintiffs relied], however, the plaintiff was the Government of the United States. A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission. 15 U.S.C. § 25 . . . . Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief. See *California v. American Stores Co.*, 495 U.S. 271, 295 (1990) ("Our conclusion that a district court has the power to order divestiture in appropriate cases brought [by private plaintiffs] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief . . . ."); 2 P. Areeda,

> Hovenkamp & R. Blair, Antitrust Law ¶¶ 303d–303e, pp. 40–45 (2d ed. 2000) (distinguishing between private and government suits in terms of availability, public interest motives, and remedial scope) . . . . This difference means that the Government's ability, in these three cases, to obtain relief helpful to those injured abroad tells us little or nothing about whether this Court would have awarded similar relief at the request of private plaintiffs.

Id. at 170–71.

The panel's effort to explain why injunctive relief cannot include an order to disgorge money by reference to *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), is no more successful. *Wal-Mart* was a class action case, through and through. Most of it deals with the inappropriateness of a money-damages action under Federal Rule of Civil Procedure 23(b)(3) for the sprawling and unmanageable class that the plaintiffs had proposed. But the Court also addressed the plaintiffs' back-up position, which was their effort to certify a class for backpay claims under Rule 23(b)(2). Subpart (b)(2) of the rule allows a class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Note the emphasis in this language on *general* grounds, and relief that works for the class *as a whole*. As the Court pointed out, that unity of interests is especially critical in a (b)(2) class, because the unnamed class members have no right to notice and the chance to opt out of such a class, yet they would be bound by the outcome of the lawsuit. Those concerns are miles away from what we have in this case.

What the Court said in *Wal-Mart* is that claims for monetary relief cannot be certified "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." 564 U.S. at 360. It went on to explain itself as follows:

> One possible reading of [Rule 23(b)(2)] is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Nagareda, 84 N.Y.U.L.Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. . . .
>
> Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but be-

> cause it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class.

Id. at 360–63.

One cannot read this excerpt—lengthy in order to ensure that the full context comes through—without seeing that the Court was concerned solely about which type of class action should be used where money is concerned. No such problem is possible in the case before us. First, since there is only one plaintiff—the Commission—we have no unnamed class members to worry about. Second, the court in our case does not need to worry about individualized relief. The FTC is itself entitled to seek relief on behalf of those injured by Credit Bureau's misdeeds. *Cf. EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296, 300 (7th Cir. 2002) (EEOC may pursue age-discrimination case against a state entity on behalf of individual employees, even though individual cases would be barred by the state's sovereign immunity).

Credit Bureau must merely turn over to the FTC a single lump sum representing the total restitution due. This is the end of the court's involvement with the equitable relief in this case. As the district court wrote, "[j]udgment in the amount of Five Million, Two Hundred Sixty Thousand, Six

Hundred Seventy-One and Thirty-Six Cents ("5,260,671.36") is entered in favor of the Commission against Defendants, jointly and severally, as equitable monetary relief. Defendants are ordered to *pay to the Commission* [$5,260,671.36]. Such payment must be made within 7 days of entry of this Order . . ." Final Judgment and Order for Permanent Injunction and Other Equitable Relief Against Defendants Credit Bureau Center, LLC and Michael Brown (Kennelly, J.) (June 26, 2018) (emphasis added). It then falls to the Commission to craft a plan to return the ill-gotten gains to each person who was harmed, where possible, and then turn over the remaining money to the Treasury. See FTC Office of Claims and Refunds Annual Report 2017, https://www.ftc.gov/system/files/documents/reports/bureau-consumer-protection-office-claims-refunds-annual-report-2017-consumer-refunds-effectedjuly/redressreportformatedforweb122117.pdf. There is no risk that an unnamed class member's claim would be lost through the operation of the law of preclusion. There is no risk, as in *Wal-Mart*, that the court would need to "reevaluate the roster of class members continually," *id.* at 364. Nor, in contrast to *Wal-Mart*, does this case present the problem of internal conflict within a class. *Id.* at 365. Instead, the restitution issue can be resolved in "one stroke." *Id.* at 350. In sum, nothing in *Wal-Mart* says that an injunction to turn over wrongfully acquired property (here, in the form of money) to a government agency is in any way objectionable.

I next turn to the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), on which the majority relies so heavily. The issue in *Meghrig* was "whether § 7002 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972, authorizes a private cause of action to recover the prior cost of cleaning

up toxic waste that does not, at the time of suit, continue to pose an endangerment to health or the environment." 516 U.S. at 481. In order to answer that question, the Court had to construe the citizen-suit provision of RCRA, 42 U.S.C. § 6972(a). It held that two requirements of section 6972 defeated plaintiff KFC's suit: first, the citizen-suit provision reaches only imminent and substantial harms, not past problems that have been addressed; and second, the remedial language focuses only on the restraint of ongoing clean-up and disposal problems, not on past clean-up costs ("whether [those] are denominated 'damages' or 'equitable restitution' "). 516 U.S. at 484.

This was a pure question of statutory interpretation. The relevant part of RCRA authorized a citizen suit "against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste *which may present an imminent and substantial endangerment to health or the environment*." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). The Court gave that provision its natural reading—that is, as something that did *not* include a remedy for past cleanup costs. *Id.* at 485. It emphasized in that connection the importance of the imminence requirement, which entirely ruled out any form of relief, however labeled, for a fixed sum representing past expenditures. Only in that context did the Court reject the argument that a plaintiff "could seek equitable restitution of money previously spent on cleanup efforts." *Id.* at 487. General rules about equitable powers were of no importance for a statute that drew the temporal line at problems that are "imminent and substantial." *Id.* Interestingly, the Court declined to rule on the question "whether a private party could seek to obtain an injunction requiring

another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced . . . ." *Id.* at 488. That reservation proves that the Court was not ruling out equitable turn-over of funds, period. It was simply saying that *past* expenditures were not covered by the statute in front of it.

So even *Meghrig* itself, a case involving private plaintiffs, did not purport categorically to exclude from injunctive relief an order to make payments. It is thus all the more remarkable that the majority interprets Meghrig to impose such a limitation on the relief that a *government* plaintiff can seek. As the majority acknowledges, "when 'the public interest is involved in a proceeding,' a court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake,' " *ante* at 784, quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). But it then goes on to postulate that "the public interest doesn't turn on the identity of the parties involved." *Id.* That is not accurate. One factor informing the public interest is whether it is the government that is seeking relief. See, *e.g.*, *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7 (2008) (attaching great weight to Navy's interest in realistic training of sailors). The FTC's assessment of the public interest here informs the scope of any injunctive relief it is seeking.

The presence of the government as a litigant is especially important to the public-interest component of the analysis when the government seeks remedies that (1) lie uniquely within its toolbox and (2) are aimed squarely at undoing public harms and preventing future ones through deterrence. As the Second Circuit has noted in a section 13(b) case of its own (discussed in further detail below), this is precisely what the Commission seeks here by way of

an injunction ordering equitable restitution in the form of disgorgement. "[D]isgorgement is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011) (affirming an injunction ordering "restitution" under 13(b) authority and discussing the theory underlying what the court understood to be equitable disgorgement).

The Supreme Court has explicitly recognized this feature of disgorgement in the SEC context. "SEC disgorgement is imposed by the courts as a consequence for violating what we described in *Meeker* as public laws. The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Kokesh v. SEC*, 137 S. Ct. 1635, 198 L.Ed.2d 86 (2017). As the Court acknowledged in *Kokesh*, this understanding of disgorgement permeates the case law of our sister circuits as well. See *SEC v. Teo*, 746 F.3d 90, 102 (3d Cir. 2014) ("[T]he SEC pursues [disgorgement] independent of the claims of individual investors in order to promot[e] economic and social policies") (cleaned up); *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) ("[D]isgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets"). Here, the FTC is seeking to vindicate the public interest through a public-facing remedy aimed at an ongoing harm. That was not the case in *Meghrig*, which was certainly *about* "environmental cleanup" but which rejected a backward-looking remedy that in economic substance sought damages.

The majority also asserts that cases decided since *Meghrig* demonstrate that it represented a sweeping rejection of implied remedies. *Ante* at 33. It cites *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Miller v. French*, 530 U.S. 327 (2000); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), and *Gebser v. Lago Vista Ind. Schl. Dist.*, 524 U.S. 274 (1998), for this proposition. None of those cases, however, addresses the situation before us: a governmental plaintiff with an express right of action, and an agency that seeks an injunction (also expressly authorized) ordering a wrongdoer to disgorge ill-gotten gains.

Great-West was brought by a private party under the Employment Retirement Income Security Act (ERISA) to compel a plan beneficiary to pay over money recovered from a third-party tortfeasor to the plan. The Supreme Court held that the petitioners essentially wanted "to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity." *Id.* at 210. That took their request beyond the bounds of equitable relief; as the Court put it, "an injunction to compel the payment of money past due under a contract was not typically available in equity." *Id.* There is not a hint of contract law in our case, and so *Great*-West is not applicable. *Miller* is equally beside the point. There, Congress had acted explicitly to limit the equitable power of the district courts to enjoin the automatic stay provided by the Prison Litigation Reform Act. 530 U.S. at 331. The Supreme Court held that the statute did not permit district courts to override that provision with a "stay of the stay," which is what the private litigants sought. No such effort to undo a congressional prohibition exists in our case. *Armstrong* and *Gebser* are even further

afield. Armstrong holds only that neither the Supremacy Clause (Art. VI, cl. 2 of the Constitution) nor the Medicaid Act confers a private right of action on providers of rehabilitation services, whether for injunctive relief or anything else. *Gebser* actually does recognize a limited implied private right of action for sexual harassment of schoolchildren. In short, nothing in *Meghrig*, and nothing in the cases following *Meghrig*, comes close to holding that a government agency acting pursuant to express authority to seek injunctive relief cannot ask for a mandatory injunction requiring turn-over of money.

Given our decision to cast off a precedent that has guided both this court and other courts of appeals for decades, I add a word about our now-abandoned decision in *Amy Travel*, which held that the FTC is authorized to obtain restitution as part of the injunctive relief covered by section 13(b). I already have explained why I believe that ruling to be correct. My comments here address the majority's effort to trivialize the fact that eight of our sister circuits agree with *Amy Travel*'s holding. They brush off this consensus with the accusation that these courts have done so unthinkingly.

I find that charge quite unwarranted. In the interest of space, I focus on only one of those other cases: the Second Circuit's opinion in *Bronson*, 654 F.3d 359 (Lynch, J.). There, the FTC brought suit for an injunction against Bronson for engaging in deceptive advertising of weight-loss products. The district court "entered a permanent injunction against Bronson and ordered it to pay $1,942,325 in monetary equitable relief plus statutory interest." *Id.* at 362. Bronson argued, just as Brown and Credit Bureau have here, that section 13(b) did not permit a court to order monetary relief. The Second Circuit rejected that argu-

ment, along with the narrower point that traceability of the ill-gotten gains was essential. But it did so only after a thorough and thoughtful consideration of Bronson's argument.

After first noting that section 13(b) of the FTC Act permits the FTC to seek permanent injunctive relief, the Second Circuit noted that "courts have consistently held that 'the unqualified grant of statutory authority to issue an injunction under [S]ection 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits.' " 654 F.3d at 365. The Second Circuit explicitly joined that consensus, holding that section 13(b) of the FTC Act permits courts to grant ancillary equitable relief, including equitable monetary relief. *Id.*

The court then turned to the argument that any kind of monetary award would be "an impermissible legal, rather than equitable, award, because the [district] court failed to identify particular funds in the defendants' hands that were specifically traceable to the fraudulently marketed products." *Id.* at 369. After a lengthy and scholarly discussion of the law of restitution, the Second Circuit concluded that the disgorgement ordered in the case before it was a permissible adjunct to the injunctive relief authorized by section 13(b). This was so because "the district court's award satisfies the requirements of equitable disgorgement . . . ." *Id.* at 370.

The court went on to confirm that "disgorgement is a well-established remedy in the Second Circuit," often used in actions under section 21(e) of the Securities Exchange Act of 1934. That statute, which "authorizes an action to enjoin violations of the securities laws, also permits the district court to award disgorgement as an equitable ad-

junct to its injunctive decree." *Id.* at 372. Importantly, "disgorgement—at least when sought by public agencies such as the SEC and the FTC—has several features that make it distinct from the remedies available to private litigants seeking to press common law claims." *Id.* That is because "disgorgement is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions." *Id.* That feature also plays a significant role in the case before us.

The Second Circuit also took note of another distinction that I, too have stressed: "public entities [are not] required to make any particular effort to compensate the victims that they *can* identify," because the victim is the government, not the individual persons. *Id.* at 373. It added, "While agencies may, as a matter of grace, attempt to return as much of the disgorgement proceeds as possible, the remedy is not, strictly speaking, restitutionary at all, in that the award runs in favor of the Treasury, not of the victims." *Id.* In my view, this point underscores why the restitutionary payment bears no resemblance to individual money damages to the injured parties.

Whatever else one might want to say about the Second Circuit's analysis in *Bronson*, it is surely impossible to characterize it as a drive-by ruling or one that was not carefully considered and thoroughly explained. I find it quite persuasive. It demonstrates to me why both we and our sister circuits up until this time have understood that the injunctions authorized by section 13(b) can include a restitutionary component.

Finally, I want to emphasize that even if we were interpreting this statute on a blank slate, rather than upending decades of precedent and creating a split with eight other circuits, the majority's reading of section 13(b) is still not

persuasive. The majority grounds its argument in the contrast between the injunctive relief explicitly authorized in section 13(b) and the remedies available to the agency if it opts to use its cease-and-desist powers under section 5 of the FTC Act or to punish violators of promulgated rules under section 19. (Section 5 of the Act is codified at 15 U.S.C. § 45, while section 19 is codified at 15 U.S.C. § 57b. The majority uses the U.S. Code cites for sections *other* than 13(b); my analysis below uses the same scheme for ease of cross-reference with the majority's opinion.)

As the majority sees things, we must read 13(b)'s grant of injunctive authority extremely narrowly given that section 57b(b) specifically mentions "the refund of money or return of property" as a form of relief the court can order, and 45(*l*) allows courts to "grant mandatory injunctions and such other and further equitable relief as they deem appropriate." I do not quibble with the overarching principle that "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion [of words in different sections of the same Act]." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (quotation marks omitted). But a close look at the two contrasting sections reveals that this is not a straightforward case of a list comprised of "A, B, and C" and another consisting of only "A and B."

I begin with section 57b(b), which lays out remedies for violations of final rules. Our first clue that this subsection should not be read to limit the scope of injunctive relief in a 13(b) action is that courts are directed in 57b(b) to "grant such relief as the court finds necessary to *redress injury* to consumers or other persons, partnerships, and corporations . . ." (emphasis added). These are largely backward-facing remedies. As discussed above, courts have long

recognized that disgorgement of ill-gotten gains—the sort of equitable restitution at issue here—is a forward-looking remedy aimed at deterrence. Making consumers whole is a possible, but not inevitable, consequence of a disgorgement order. "[T]he primary purpose of disgorgement orders is to deter violations of the [ ] laws by depriving violators of their ill-gotten gains." *Bronson*, 654 F.3d at 373, quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). (Notably, section 57b(b) actually *prohibits* courts from imposing "any exemplary or punitive damages.") Second, while section 57b(b) lists some more forward-looking remedies, such as "public notification respecting the rule violation or the unfair or deceptive act or practice," this language only highlights how strained it is to read section 57b(b) as a limitation on courts' 13(b) injunctive authority. Would a court issuing a 13(b) injunction be powerless to order a violator to post "public notification respecting the . . . unfair or deceptive act or practice," simply because this remedy is listed in another subsection? Surely not.

It is also important to recall that the list in 57b(b) is merely illustrative: courts are authorized to order relief that "may include, but shall not be limited to," the listed remedies. This subsection is thus a poor candidate (at best) for the *expressio unius* canon. (Compare "Visitors may bring pets into the park on weekdays" with "Animals that visitors are permitted to bring into the park on weekends may include, but shall not be limited to, dogs, cats, snakes, monkeys, and alligators." Could weekday visitors not bring dogs?) The savings clause in the same section is the *coup de grâce* for the majority's reasoning. It cautions that "Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. *Nothing in this section shall be*

construed to affect any authority of the Commission under any other provision of law." *Id.* § 57b(e) (emphasis added). That says it all: the non-exhaustive examples of relief Congress chose to mention in one section do not limit what a court may or may not include pursuant to another section—for instance, a 13(b) injunction.

The list of remedies available to the FTC in a cease-and-desist action, spelled out in section 45(*l*), also provides little help for the majority. True, this section authorizes the FTC to "grant mandatory injunctions and such other and further equitable relief as they deem appropriate . . ." But so what? Some forms of equitable relief make sense as standalone remedies, injunction or no injunction. In contrast, equitable remedies are available under 13(b) only if (1) a plaintiff satisfies the demanding burden of demonstrating why an injunction should issue, see *eBay Inc. v. MercExchange*, L.L.C., 547 U.S. 388 (2006); and (2) the court is able to justify the relief it is ordering as a proper adjunct to the injunctive decree. By allowing courts to issue "such other and further equitable relief," section 45(*l*) clarifies that courts have a wide range of equitable relief available to them, no matter whether plaintiffs managed to obtain an injunction or, if an injunction has issued, whether the remedies are appropriate means of enforcing the decree. Under 45(*l*), a court could order an accounting or some sort of specific performance whether or not the requirements for a mandatory injunction had been satisfied.

There are further weaknesses in the majority's reading of the statute, but I have said enough to show that its approach is far from the most straightforward even if we did not have decades of precedent, eight other circuits, and *American Stores* on the other side. The FTC Act spells out a finely crafted system of enforcement powers and remedies. The majority's interpretation upends what the agency

and Congress have understood to be the status quo for thirty years, and in so doing grants a needless measure of impunity to brazen scammers like the defendant in this case.

I end where I began: This is an important case, and it deserves plenary consideration, not the truncated process that Rule 40(e) provides for appropriate cases. The court's refusal to rehear this case *en banc* has, I fear, led us into error. I therefore dissent from the decision not to give this case plenary *en banc* consideration.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

FEDERAL TRADE COMMISSION, *Plaintiff*,
v.
CREDIT BUREAU CENTER, LLC, A LIMITED LIABILITY COMPANY, FORMERLY KNOWN AS MYSCORE LLC, ALSO DOING BUSINESS AS EFREESCORE.COM, CREDITUPDATES.COM, AND FREECREDITNATION.COM, MICHAEL BROWN, INDIVIDUALLY AND AS OWNER AND MANAGER OF CREDIT BUREAU CENTER, LLC, DANNY PIERCE, INDIVIDUALLY, AND ANDREW LLOYD, INDIVIDUALLY, *Defendants*.

Case No. 17 C 194
June 26, 2018

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

The FTC alleges that Danny Pierce and Andrew Lloyd operated a deceptive marketing campaign on behalf of Michael Brown and Credit Bureau Center, LLC (CBC). The campaign directed consumers to CBC websites. The FTC alleges these websites misled consumers into enrolling in a monthly credit monitoring service that cost $29.94 per month. The FTC contends this conduct violated several consumer protection laws. Pierce and Lloyd agreed to entry of a preliminary injunction against them, and after an evidentiary hearing, the Court issued a preliminary injunction against CBC and Brown on February 21, 2017. *See FTC v. Credit Bureau Center, LLC*, 235 F. Supp. 3d 1054 (N.D. Ill. 2017). The parties have now cross-moved for summary judgment.

Background

The Court briefly reviews the background to this case, relying on the parties' filings and LR 56.1 statements. In these statements, the defendants have failed to provide "a concise response" to the FTC's statements of fact using "specific references to the affidavits, parts of the record, and other supporting materials relied upon[.]" LR 56.1(b)(3)(B). *See also Malec v. Sanford*, 191 F.R.D. 581, 585 (N.D. Ill. 2000) ("The purpose of the 56.1 statement is to identify for the Court the evidence supporting a party's factual assertions in an organized manner: it is not intended as a forum for factual or legal argument.").

The FTC offers facts describing negative feedback to CBC in the form of phone calls, e-mails, and credit card chargebacks. The FTC also offers facts that Brown received e-mails from particular parties involved in CBC's business that notified him of the Craigslist advertising scheme. Though the defendants' burden is to rebut these facts through contrary evidence that show the existence of a genuine factual dispute, the defendants have failed to do so. Instead they rely on an unsupported theory that it is the *customers* who were defrauding *CBC* by lying about the websites' deceptive character and other irrelevant or unfounded responses. This does not meet the requirements of Local Rule 56.1. Thus the Court deems as admitted Defs.' Resp. to Pl.'s Stmt. of Facts ¶¶ 57-61, 72-73, 80-82, 89, and 100.

I. CBC and Brown

Michael Brown is the owner, director, and sole employee of CBC. Independent contractors fulfilled many of CBC's marketing, sales, and customer service functions. CBC owned and operated several websites, including Credit-

Updates.com, FreeCreditNation.com, and eFreeScore.com. For a monthly subscription fee, customers can access credit scores, credit reports, and a credit monitoring service. CBC does this through two lines of business: a "white label/co-branding" line, in which other businesses can offer CBC's services under their own name, and an affiliate marketing line, in which marketers direct customers to CBC sites. Affiliates who marketed CBC's services were compensated based on the volume of customers they referred. The practices of two affiliates are at issue in this suit: Danny Pierce and Andrew Lloyd.

II. Craigslist marketing

Pierce became an affiliate for CBC in January 2014. As an affiliate marketer, Pierce received an identification number by which Brown could track the volume of his referrals and determine compensation. Several months after Pierce began working as an affiliate for CBC, he asked Brown to create specific websites to which he could direct the customers he referred. CBC created these websites on December 1, 2015. The websites, which are described in detail later in this decision, advertised that consumers could obtain a "free credit score and report." In smaller type, the websites disclosed that signing up for these services would enroll the customer in a monthly credit monitoring service for $29.94 per month.

Pierce, working as an affiliate marketer for CBC, contracted out some marketing functions to Andrew Lloyd. Lloyd began posting to Craigslist ads of attractive rental properties. Interested customers were invited to e-mail the "landlord" for additional information. The response e-mails were routed to Lloyd, who responded as though he were the landlord (which he wasn't). In the reply, Lloyd would ask the customer to obtain a credit report through the

CBC websites and would promise to set up a tour of the rental property once the customer had a credit report in hand. If interested, the customer would then sign up for CBC's services and then follow up with the "landlord"—but would never receive a reply. (One of these e-mails has been attached to this opinion as Appendix I; screenshots of one of the CBC websites has been attached as Appendix II.) As Pierce later testified, he knew that Lloyd was posting "phony ads," as Lloyd was "not renting these places out," was "not a realtor" and "doesn't own the place. . . . He has no connection to this property." D.E. 206, Defs.' Ex. C at 73 (Pierce Dep.).

The marketing effort proved extremely effective. Pierce was the most successful of CBC's affiliate marketers: his efforts resulted in 2,741,268 visitors to CBC's websites. (The next largest affiliate produced 369,869 visitors.) Pierce's traffic generated $6.8 million in revenue for CBC.

But the effort, unsurprisingly, also generated significant customer complaints. Customers complained that they were never connected with a landlord after obtaining a credit report and that they did not realize that they had been enrolled in CBC's credit monitoring service. A contractor who provided customer services for CBC logged numerous calls from dissatisfied customers. CBC also received customer e-mails complaining about the Craigslist marketing. In response, CBC's customer service often denied that CBC was involved in the marketing effort or that CBC paid affiliate marketers for referrals. Many customers also asked their credit card company to reverse the CBC charges. Brown also received direct e-mails from many individuals about the Craigslist marketing program.[1]

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[1] Because the Court does not rely on any facts contained in customer complaints submitted to the Better Business Bureau (BBB), it need

III. Procedural posture

Customers also directed their complaints to the FTC, which commenced an investigation into CBC. The FTC sued CBC, alleging that the Craigslist marketing program and the CBC websites violated several consumer protection laws. On January 11, 2017, Judge Sharon Johnson Coleman, acting as emergency judge, imposed a temporary restraining order on the defendants, restraining them from continuing the marketing program and freezing their assets. The FTC then moved for a preliminary injunction. As indicated earlier, Pierce and Lloyd agreed to the motion. CBC and Brown contested it, but the Court entered a preliminary injunction against them on February 21, 2017.

Discussion

Both parties have moved for summary judgment. Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material issue of fact." Fed. R. Civ. P. 56(a). There is a genuine issue of material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005).

I. Liability of CBC

The FTC contends that CBC violated section 5 of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a)(1); the Restoring Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. § 8403; and the Free Credit Reports Rule. 15 U.S.C. § 1681j(g)(1); 12 C.F.R. § 1022.138. The Court reviews each contention in turn.

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not resolve whether the BBB complaints or the affidavit submitted by Erin McCool, a BBB employee, are admissible.

A. FTCA

The FTCA prohibits "unfair or deceptive acts or practices in or affecting commerce[.]" 15 U.S.C. 45(a)(1). "The FTC may establish corporate liability under section 5 with evidence that a corporation made material representations likely to mislead a reasonable consumer. The FTC is not, however, required to prove intent to deceive." *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) (citations omitted). A misrepresentation is material if it makes it more likely that the consumer will choose the product being advertised. *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). The FTC contends that CBC violated the FTCA through (1) the Craigslist marketing scheme that Pierce and Lloyd carried out and (2) the credit report websites that CBC operated. (Because the websites are virtually identical, the Court refers to "website" in the singular for ease of reference.) The FTC has moved for summary judgment on its allegations under the FTCA.

1. Craigslist marketing

First, the FTC contends the Craigslist advertising campaign violated the FTCA. No reasonable jury could find that the Craigslist scheme did not involve unfair or deceptive practices, as it was rife with material misrepresentations that were likely to deceive a reasonable consumer. *Bay Area Bus. Council, Inc.*, 423 F.3d at 635. Pierce and Lloyd's marketing effort consisted of two parts, both of which were materially misrepresentative. First, they posted to Craigslist advertisements of attractive rental properties with an e-mail address for interested renters to contact. But the properties either did not exist or the market-

ers did not have authority to rent them. Second, when an interested renter asked about a property, Lloyd responded with a form e-mail that promised a tour of the property once the renter obtained a credit report. But customers found that, credit report in hand, there was no landlord that would provide a tour. There is, therefore, no genuine dispute that the Craigslist scheme was misrepresentative. Moreover, the misrepresentations were material, as the properties themselves and the requirement that a prospective renter first obtain a credit report before touring the property made it more likely that a reasonable consumer would choose to request a credit report from CBC. *Cyberspace.Com LLC*, 453 F.3d at 1201.

The FTC has established that CBC is liable for the Craigslist campaign carried out on its behalf; no reasonable jury could find otherwise. "Principals are liable for the misrepresentations of their agents under the FTC Act." *FTC v. Lifewatch Inc.*, 176 F.Supp.3d 757, 779 (N.D. Ill. 2016) (*citing FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988)). "To bind the principal, the agent must have either actual authority, apparent authority, or the principal must ratify [the agent's] actions." *Anetsberger v. Me. Life Ins. Co.*, 14 F.3d 1226, 1234 (7th Cir. 1994).

Although the defendants initially contested whether Pierce and Lloyd acted as agents with actual authority, apparent authority, or CBC's ratification, they now concede that CBC ratified Pierce and Lloyd's conduct by accepting the benefits of their efforts while aware of their misconduct. *See* Defs.' Am. Reply in Supp. of Defs.' Mot. for Summ. J. at 1 n.1 ("Defendants will not address the FTC's argument on ratification as to CBC's corporate liability.").

But even if the defendants had not conceded the point, the Court would find that CBC ratified Pierce and Lloyd's conduct. To establish that CBC ratified the affiliates' conduct, the FTC must demonstrate that CBC knew of the conduct but provided "long-term acquiescence" by accepting "the benefits of an allegedly unauthorized transaction." *Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co.*, 376 F.3d 664, 677 (7th Cir. 2004) (internal quotation marks and citation omitted). No reasonable jury could find that CBC did not know of the affiliates' fraudulent conduct. Consumers called to complain about the Craigslist advertisements and "landlord" e-mails that prompted them to enroll in CBC's service, sent e-mails to the same effect, and initiated chargebacks. CBC could easily trace these complaints to Pierce and Lloyd's practices. Not only could CBC track the traffic it received back to Pierce through an identification number, CBC could also determine that approximately 89 percent of its chargebacks were attributable to Pierce's traffic.

Despite this, CBC continued to permit Pierce and Lloyd to market on its behalf. CBC could have terminated Pierce's affiliate arrangement whenever it liked, yet it never did so, despite mounting complaints. Thus CBC was aware of the Craigslist scheme but continued to accept the traffic (and revenues) generated by that conduct. As Pierce testified, he never stopped the Craigslist ads because he "assumed that it was fine, because Mike Brown wanted the traffic. He continuously took the traffic, and I just went based on that[.]" D.E. 206, Defs.' Ex. C at 74 (Pierce Dep.). The Court concludes there is no issue for trial on the question of agency. The Craigslist campaign was materially misrepresentative, and CBC ratified Pierce and Lloyd's conduct.

2. CBC website

Next, the FTC contends that the website to which the interested renters were directed to obtain a credit report also violated the FTCA.[2] To determine whether the website was misrepresentative, the Court first identifies what claims the website conveys. *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 957-58 (N.D. Ill. 2006). "In determining what messages or claims [the website] communicates to reasonable consumers, the Court looks to the overall, net impression made by the advertisement[.]" *Id.* at 958 (*citing FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965)). Next, the Court determines if those claims are misrepresentative, that is, if they have a "tendency" or "capacity" to deceive a reasonable customer. *FTC v. US Sales Corp.*, 785 F.Supp. 737, 745 (N.D. Ill. 1992). "[M]isrepresentations . . . need not be made with an intent to deceive." *World Travel Vacation Brokers*, 861 F.2d at 1029 (citation omitted). The parties dispute whether consumers must exercise reasonable care when subjected to express misrepresentations, but the Court need not resolve this dispute to decide the issue.

First, the Court finds that, based on the net impression conveyed by the website, the website claims that consumers who enroll in the service will obtain a free credit score—not that they will enroll in a credit monitoring service with monthly charges. The first page that consumers see, the landing page, features a banner that states: "Get Your Free Credit Score and Report as of [the date on which the site was visited]." There are three panels that describe

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[2] The FTC directs the Court to the images of the websites located at D.E. 11, Pl.'s Ex. 4. The defendants do not contest that these are the proper sites to analyze; therefore, the Court restricts its analysis to these sites. Because the sites are virtually identical, only the eFreeScore.com images are included in Appendix 2 to this opinion.

the offer: the left panel shows a "Sample Score"; the central panel asks the consumer to add his or her information, which is submitted through a button that states "Your Score—Now!"; and right panel describes the benefits of CBC's service, which promises instant and secure access to one's credit score. If the website is visited via a desktop computer, the website also states "Monthly membership of $29.94 automatically charged after trial[,]" in light gray text against a white background. This text is not found on the mobile version of the website. The landing page does not describe what the membership entails. If a consumer scrolls down the page, the website displays in small text: "Monitoring services may take up to 3 days to become active so this service within your membership may not be available during the whole 7-day trial period."

On the next page, the consumer is invited to enroll by completing several fields, including name, address, e-mail address, and phone number. The website contains two questions in a panel to the right of these fields: "What is a good Credit Score?" and "Will I find errors on my credit report?" Consumers are then directed to a page in which they may enter their payment information. The largest test on the page is the website logo. There is a large banner in black text below the logo; it reads, "Your credit score is ready once we confirm your identity!" Below that is a bright-green graphic consisting of a check mark and text stating "Located Credit File." Above the fields into which consumers may enter payment information, the website requests: "Tell us which card you would like to use for your $1.00 refundable processing fee and membership[.]" Below all of the payment information is a paragraph of small-sized text. The paragraph begins with a heading that reads "Payment Information" and then includes the following text:

> When you place your order here you will begin your membership in [the website]. You will be billed $1.00 today and start your trial membership. After your 7-day trial period you will be charged $29.94 every month. If you wish to cancel just call us at [the customer service number] to stop your membership.

D.E. 11, Pl.'s Ex. 4 at 15, 43, 65. Consumers may complete the transaction by clicking a large, orange button with "Submit & Continue" superimposed over it. There is no description of what membership entails.

Although CBC contends that the membership disclosures are sufficient to change the website's impression, courts routinely hold that explanatory text is insufficient to cure a misleading description unless the text changes the overall impression. *See Cyberspace.Com*, 453 F.3d at 1200-01; *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 301 (7th Cir. 1979). Here, the net impression is that consumers are signing up to obtain a free credit score, not enrolling into a costly monthly service.[3] The website lacks any description of the monthly membership; consumers can discern that submitting payment information will enroll them in the membership only by reviewing text that is smaller and less noticeable than the surrounding text. In *FTC v. Johnson*, 96 F.Supp.3d 1110 (D. Nev. 2015), the court considered a website that prominently advertised the customer's ability to access grant money and a free CD. *Id.* at

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[3] Indeed, the Court could not put it much better than the defendants do: "The overall net impression created by the website is that the consumer is signing up for a free credit score and can cancel within seven (7) days [if] they don't want to continue the service." Defs.' Resp. to Pl.'s Mot. for Summ. J. at 20. Notably absent from this impression is any sense of *what* service CBC will render through a monthly subscription.

1141. The website actually signed the consumer up for a membership program, but "[c]laims about grant money and free CDs always overwhelm these brief mentions of . . . memberships[.]" *Id.* The Court concludes that CBC's website presents a similar situation, in which "brief mentions" of a costly service are "overwhelm[ed]" by other advertising. No reasonable jury could conclude that the website conferred the net impression that consumers were enrolling in a monthly credit monitoring service.

Because the website claimed that consumers were obtaining a free credit score and report, not a membership in a monthly credit monitoring service, the website was misrepresentative. Moreover, this was a material misrepresentation, as consumers would be less likely to enroll if they knew they were signing up for a $29.94 monthly service of unknown utility instead of than a free credit score and report. No reasonable jury could find otherwise.

Further buttressing this conclusion is the *pervasive* evidence of consumer confusion. Proof of actual deception is "highly probative" evidence of a misleading or deceptive practice. *Cyberspace.Com*, 453 F.3d at 1201. *See also Bay Area Bus. Council*, 423 F.3d at 635 (considering evidence of consumer confusion in analyzing an FTCA violation); *Amy Travel Serv.*, 875 F.2d at 575 (same). The FTC has offered a variety of evidence indicating consumers did not realize they had enrolled in a monthly credit monitoring service until they found CBC charges on their bank statements. Defs.' Resp. to Pl.'s Stmt. of Facts ¶ 61. Numerous consumers provided declarations that generally described their experience requesting a free credit score and noticing an unexpected $29.94 charge several days later. *Id.* Many customers also asked their credit card company to reverse CBC charges, which is known as a "chargeback." Since

December 2015, CBC has had over 10,000 chargebacks. *Id.*¶ 73. The reasonable inference from these chargebacks is that consumers did not realize they enrolled in a monthly membership service and, when they saw the membership charges, asked the credit card company to withdraw the payment. *Amy Travel Serv.*, 875 F.2d at 574-75 (noting that "excessive credit card chargebacks" are a "signal[ ]" of consumer "trouble").

The defendants propose a different inference: that all of these customers were engaged in "friendly fraud," in which they purposefully signed up CBC's services and then falsely claimed deception in order to get out of paying for the membership services for which they had enrolled. But the CBC presents no admissible evidence that would support this proposition, and the Court does not consider the "friendly fraud" theory to be the sort of reasonable inference to which CBC is entitled as the non-moving party. The defendants also note that there is evidence that some customers knew they were expected to pay a $1 processing fee for their credit report. Because this notice was contained in the same paragraph as one of the notices of the credit monitoring service, the defendants conclude that some customers knew of the credit monitoring service. But the requirement is not that "every customer" was deceived by the defendant, just "that some customers actually misunderstood the thrust of the message." *World Travel Vacation Brokers*, 861 F.2d at 1029. The Court concludes that the FTC is entitled to summary judgment.

B. ROSCA

Under ROSCA, it is unlawful to charge consumers using a negative option feature unless the seller satisfies certain requirements. A negative option feature is "a provision [in an offer] under which the customer's silence or

failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w). The seller must establish that (1) the material terms of the transaction are "clearly and conspicuously" disclosed and (2) the seller obtains the consumer's "express informed consent." 15 U.S.C. § 8403.[4] ROSCA also establishes that a violation of the statute is also a violation of a rule promulgated under the FTCA. *Id.* § 8404(a). CBC employed a negative option feature, as consumers who requested their free credit report had seven days to opt out of the credit monitoring program before they were enrolled. The FTC contends that it is entitled to summary judgment, as no reasonable jury could find that the disclosure of the negative option feature was clear and conspicuous or that CBC obtained consumers' express informed consent.

But CBC contends that it is entitled to summary judgment, as Brown designed CBC's website by reference to another site created through an FTC consent decree. The Court disagrees with the premise of CBC's argument, that an attempt to conform to conduct approved under a consent decree renders the conduct lawful. "The entering of a consent decree . . . is not a decision on the merits and therefore does not adjudicate the legality of any action by a party thereto." *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 312 (7th Cir. 1976). Rather than analyze whether CBC's website is sufficiently similar to this other website, the Court determines if any reasonable jury could find that CBC satisfied ROSCA's requirements.

In ROSCA, Congress did not define what satisfies the requirement of "clear[ ] and conspicuous[ ] disclos[ure]" of

[4] ROSCA also includes a third element that is not at issue in this case.

"all material terms of the transaction." 15 U.S.C. § 8403. But other courts have routinely noted that that a disclosure in small type is unlikely to be clear or conspicuous when accompanied by type that is larger, bolded, or italicized. *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 725 (7th Cir. 2008) (small type is not conspicuous when "the bulk of the page contains much larger type"); *Cole v. U.S. Capital*, 389 F.3d 719, 730 (7th Cir. 2004) (text that "appears to be designed to ensure minimal attention by the reader" is not clear or conspicuous); *FTC v. Health Formulas, LLC*, No. 2:14-cv-01649-RFB-GWF, 2015 WL 2130504, at *17 (D. Nev. May 6, 2015) (disclosures of a negative option were not clear or conspicuous, as the disclosures were "either buried in fine print on the payment page of Defendants' websites or stated in separate Terms and Conditions documents"). As discussed above, CBC embedded its disclosures into pages with larger, bolded text that promised "free" credit reports and scores. The disclosures were not prominent when compared to the rest of the page. Indeed, the disclosures appear "designed to ensure minimal attention by the reader." *Cole*, 389 F.3d at 730. For this reason, the Court is unconvinced by CBC's repeated mention that the text was in twelve-point font: the analysis of the disclosure is necessarily contextual, meaning that the Court must consider the text, whatever size it is, in relation to the other elements on the page. The FTC is entitled to summary judgment; no reasonable jury could find that the disclosures were clear and conspicuous.

ROSCA also requires CBC to obtain a consumer's "express informed consent" before entering into a negative option. CBC contends that it can satisfy this standard, as a consumer is notified of the negative option at three points: on the landing page, the payment page, and in a welcome e-

mail to those who enroll. The welcome e-mail is obviously unhelpful to CBC's case, as that e-mail *follows* the transaction, so it cannot affect whether the consumer rendered express informed consent before entering into the negative option.

CBC's remaining contentions are also insufficient. The Court concludes that summary judgment is warranted where, as here, the website is virtually devoid of *any* mention of the service aside from the statement that the customer is to be billed for it. Except for a handful of disclosures that the consumer will be enrolled in a service that costs $29.94 per month, the consumer would not know that CBC was offering a service. And there is no description of what the service constitutes or why it is beneficial. A website that fails to provide a consumer any information about a service cannot obtain a consumer's express *informed* consent to purchase that service. CBC suggests that credit monitoring was a "bonus" for consumers, but the Court overrules this rather odd argument. If credit monitoring was a "bonus" that CBC had not promised consumers, then consumers could not have expressly consented to be billed for a service they had not been told about.

In sum, the FTC is entitled to summary judgment on its ROSCA claim because no reasonable jury could find that CBC "clearly and conspicuously" disclosed that the site involved a negative option transaction or that consumers rendered their express informed consent.

C. Free Credit Report Rule

The FTC also brings a claim under the Free Credit Report Rule, which requires any advertisement for a free credit report to disclose that a consumer may obtain a free credit report annually as of right under federal law. 15U.S.C. § 1681j(g)(1); 12 C.F.R. § 1022.138. Because it is

undisputed that there was no notice of the as-of-right annual free credit report, the only question before the Court is whether CBC advertised a free credit report.

Given that CBC website contained a banner advertising a "free credit score and report," one could justifiably ask what there is to discuss. But the defendants present two arguments against the application of the Free Credit Report Rule. First, the defendants contend that the formatting of their advertisement of a "free credit score and report" places their site outside the reach of the Rule. They note that the text is split into two lines and that the text is colored differently: "free credit score" is in orange text, but "and report" is in black text. CBC contends there is a clear implication: the black lettering of "report" indicates that it, unlike the orange-lettered "free credit score," is not free.

But the defendants' proposed "black-letter" rule runs smack into the reality of actual black-letter law. Under "generally accepted rules of syntax," an initial modifier applies to each noun or phrase in a conjunctive series. *Wash. Educ. Ass'n v. Nat'l Right to Work Legal Def. Found., Inc.*, 187 F. App'x 681, 682 (9th Cir. 2006) (citing The American Heritage Book of English Usage ch. 2 ¶ 10 (Houghton Mifflin 1996)). Any reasonable consumer would read "free" as modifying both "credit score" and "report," no matter the color of the text or its formatting.

Next, CBC argues that the Free Credit Report Rule applies to advertisements of free credit reports alone; it does not apply to advertisements of CBC's services, which include a credit report, score, *and* credit monitoring service. The defendants argue that the FTC, while promulgating the relevant rule, rejected the use of the term "consumer report" because it swept broadly enough to include credit scores. *See* Free Annual File Disclosures, 75 Fed.

Reg. 9725, 9732 (Mar. 3, 2010) (originally to be codified at 16 C.F.R. § 610, now codified at 12 C.F.R. § 1022.130). Because the FTC purposefully excluded ads for free credit scores from the scope of the Free Credit Report Rule, their service—which includes access to a credit score—is also outside the scope of the Rule. But the FTC, in adopting the rule, expressly addressed and rejected this argument:

> Several commenters urged the Commission to clarify that section 610.4 does not apply to advertisements for every bundle of products or services that may include a "free credit report." . . . The Commission disagrees that the types of bundled products do not cause consumer confusion. Indeed, *the Commission believes that advertising for bundled products that promote free credit reports, in addition to other products and services, such as credit monitoring, is the very type of advertising that is likely to confuse consumers.*

Id. at 9733 (emphasis added). CBC's service is therefore within the ambit of the Free Credit Report Rule.

In their reply brief, the defendant raised two additional arguments against the application of the Free Credit Report Rule: the FTC was required to first issue a cease-and-desist letter before suing under the Rule, and any violation of the Rule is without damages. "[A]rguments raised for the first time in the reply brief are waived." *Mendez v. Perla Dental*, 646 F.3d 420, 423-24 (7th Cir. 2011). The Court concludes that FTC is entitled to summary judgment on its Free Credit Report Rule claim.

Although the defendants have asserted in their summary judgment briefing several of the defenses they raised in their answer, their briefs do not discuss at least four: the FTC's failure to mitigate; standing; mootness; and bad

faith/unclean hands. First Am. Answer at 7-11. Particularly when the FTC has presented unrebutted arguments against these defenses, the Court is not required to "construct arguments regarding the Defendants' affirmative defenses." *Ramada Franchise Sys., Inc. v. Royal Vale Hosp. of Cincinnati, Inc.*, No. 02 C 1941, 2005 WL 435263, at *10 (N.D. Ill. Feb. 16, 2005). The Court finds the defendants cannot defeat summary judgment through these defenses.

In sum, the Court concludes that the FTC is entitled to summary judgment on each of its claims brought under the FTCA, ROSCA, and the Free Credit Report Rule.

II. Brown's personal liability

The next issue is whether Brown is personally liable for the conduct for which CBC is liable. To establish Brown's personal liability, the FTC must prove three elements: (1) CBC's corporate liability (which the Court has just found); (2) Brown's knowledge of the practices; and (3) Brown's control over or direct participation in the practices at issue. *Amy Travel Serv.*, 875 F.2d at 573. The FTC can satisfy the knowledge element by presenting "evidence that the individuals 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." *Bay Area Bus. Council*, 423 F.3d at 636 (internal quotation marks and citations omitted).

The FTC's claims rest on two practices or acts. First is the creation of the CBC websites, which contain misrepresentations about the monthly subscription service. No reasonable jury could find that Brown did not know of these misrepresentations, as he wrote and edited the contents of the websites. Brown also controlled the practice in

question: he owned, operated, and controlled the websites at issue, as he was the sole member, managing director, and owner of CBC. Pl.'s Resp. to Defs.' Stmt. of Facts ¶ 3. Brown is personally liable for the violations associated with this conduct.

Second is the Craigslist marketing scheme, in which Pierce and Lloyd posted false Craigslist advertisements of attractive rental properties and required interested customers to obtain credit reports through CBC websites. The Court concludes that there is no genuine issue for trial here; the evidence is such that no reasonable jury could not find that Brown was not, at the very least, recklessly indifferent towards or intentionally ignorant of the truth. *Bay Area Bus. Council*, 423 F.3d at 636.

Pierce and Lloyd sent e-mails purportedly from landlords to induce interested customers to request their credit reports through CBC; Brown admits he knew that Pierce and Lloyd did not have any relationship with actual landlords. But Brown claims that it does not follow that he knew that Lloyd's e-mails were false. Rather, Brown argues he believed that Lloyd was acting as an affiliate for others who wanted to rent out their properties, just as Pierce acted as an affiliate for CBC.

But this argument cannot account for the numerous signals Brown that received indicating that Pierce and Lloyd were not acting on behalf of actual landlords or advertising real properties. Brown received an e-mail on April 29, 2015 from a contractor who "happened to notice this fake ad for apartment to get credit report", Defs.' Resp. to Pl.'s Stmt. of Facts ¶ 81; a forwarded e-mail from a person who "flagg[ed] for removal vast number of fake ads your people are putting on Craiglist [sic] . . . I have also been in contact with more than several of the legitimate

rental properties that you are using as bait to entice people to come to your site," *id.* ¶ 82; an e-mail on September 17, 2015 from his customer service contractor regarding complaints about the Craigslist postings, *id.*; and an e-mail on November 15, 2015 from a company asking for removal of its logo from CBC's website, given its "deceptive listings" on Craigslist, *id.* ¶ 89.

Additionally, Brown was aware of the campaign's fraudulent character through the voluminous consumer complaints that CBC received via customer calls, *id.* ¶ 57; e-mails, *id.* ¶ 58; and credit card chargebacks. *Id.* ¶ 72 (noting that 72 percent of the 16,828 chargebacks were attributable to Pierce). Brown contends he was not told about these complaints, but the Court finds that argument particularly weak, as the evidence shows that Brown specifically requested his customer service contractor *not* to escalate real estate-related customer complaints to him. *Id.* ¶ 84. "To claim ignorance in the face of the consumer complaints . . . amounts to, at the least, reckless indifference to the corporations' deceptive practices." *Bay Area Bus. Council*, 423 F.3d at 638.

Still, Brown downplays the significance of all of this evidence through a variety of arguments: Pierce and Lloyd's e-mails were not obviously false, given their purported relationship with a real estate website known as RentFind; the e-mails Brown received from others about the Craigslist campaign were not adequately specific to notify him of fraud; the consumer complaints were not properly forwarded to him; and some of the consumer complaints appeared (to him) to be mere "friendly fraud." But, taken together, no reasonable jury could consider all of this evidence without finding that Brown, having received all these signals of fraud, was either recklessly indifferent toward or

intentionally ignorant of Pierce and Lloyd's fraudulent practices.

Brown not only knew about the Craigslist scheme; he had the ability to control it. As the chief officer of CBC, Brown had "[a]uthority to control the company," given his "active involvement in business affairs." *Amy Travel Serv.*, 875 F.2d at 573. Brown may contend he could not control Pierce or Lloyd but, through the click of a button, Brown had the ability to stop receiving the customers that they referred. As Brown testified, "I'm able to tell Pierce and set limits on how much I want to accept. It's my business, my website." *Id.* ¶ 100. As in *Bay Area Business Council*, in which the Seventh Circuit held the defendant personally liable in part because he personally controlled who would conduct telemarketing, the Court holds Brown personally liable because he controlled whether Pierce and Lloyd could continue their conduct. *Bay Area Bus. Council*, 423 F.3d at 637. The Court concludes that the FTC is entitled to summary judgment on the question of Brown's personal liability.

III. Injunctive relief

The FTC has requested equitable relief in the form of a permanent injunction against CBC and Brown and equitable monetary relief. The Court reviews each request in turn.

A. Permanent injunction

Under 15 U.S.C. § 53(b), the FTC may seek a permanent injunction to restrict a defendant from future violations of the FTCA. To obtain a permanent injunction, "the moving party need only show that there is a reasonable likelihood of future violations in order to obtain relief." *SEC v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982). This standard is distinct from the ordinary standard for injunc-

tive relief. *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). In assessing whether there is a reasonable likelihood of future violations, the Court must consider (1) the gravity of the harm, (2) the extent of CBC and Brown's participation, (3) the nature of the infraction and the likelihood that they may become involved in similar conduct in the future; (4) any recognition of culpability; and (5) the sincerity of assurances against further violations. *Holschuh*, 694 F.2d at 144; *Hunt*, 591 F.2d at 1220.

The Court finds a reasonable likelihood of future violations. First, the gravity of the harm was significant, as CBC and Brown's deceptive practices caused customers to lose millions of dollars on an unwanted service and to needlessly expose their sensitive personal and financial information, including their credit card and Social Security numbers. Moreover, both CBC and Brown were deeply involved in these practices. Third, CBC and Brown's ongoing participation in the credit information industry increases the likelihood that similar conduct could occur again, as these schemes are easy to facilitate. The Court notes that, after the onset of this litigation, it held Brown in contempt for violating the preliminary injunction, which barred him from, among other things, operating a website with a negative option feature without first obtaining express informed consent, processing payments from CBC customers, or transacting any business as CBC. *See* D.E. 106. Though Brown argues that he was misadvised by attorneys when he engaged in this conduct, the Court only relies on this fact to show the ease with which parties can engage in this conduct, not to show Brown's scienter.

Finally, Brown's ongoing litigation of this claim in the face of significant contrary evidence—and the assertion that it is the *consumers* who engaged in misconduct

through "friendly fraud"—undercuts any belated recognition of culpability or assurance that similar misconduct will not happen again. The Court concludes that a permanent injunction against CBC and Brown is proper.

Brown argues that the FTC's proposed injunction should be narrowed in two ways. First, he contends that the injunction should not apply to all of CBC's websites, just those created to receive traffic referred from Pierce and Lloyd. Brown also contends that he should not be enjoined, as he was fooled by Pierce and Lloyd into believing the properties existed, just like CBC's dissatisfied customers. The Court declines to narrow the injunction in either respect. First, the injunction should extend to all sites, as the Court has found a reasonable likelihood of future violations, and any site could be used to facilitate a similar scheme. Second, as already discussed, no reasonable jury could find that Brown did not know of, and have control over, Pierce's practices. Just because it was Pierce and Lloyd who directly facilitated the Craigslist marketing does not mean that Brown should escape an injunction. Brown has not presented a viable reason that he should not be subject to a permanent injunction.

B. Equitable monetary relief

In addition to the permanent injunction, the FTC seeks relief from CBC and Brown in the amount of consumer losses. "The district court's power to grant a permanent injunction also includes the power to grant other ancillary relief," which "includes the power to order repayment of money for consumer redress as restitution or [rescission]." *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997) (citing *Amy Travel Serv.*, 875 F.2d at 571). In line with substantial precedent, the Court concurs with the FTC and orders equitable relief in the amount of consumer losses. *See, e.g., FTC*

v. Trudeau, 579 F.3d 754, 771 (7th Cir. 2009) ("Consumer loss is a common measure for civil sanctions in contempt proceedings and direct FTC action"); *Febre*, 128 F.3d at 536 ("A major purpose of the Federal Trade Commission Act is to protect consumers from economic injuries. Courts have regularly awarded, as equitable ancillary relief, the full amount lost by consumers.") (citation omitted); *Amy Travel Serv.*, 875 F.2d at 571-72 (same).

CBC and Brown introduce an array of arguments against the FTC's position, which the Court groups into four contentions: the Court lacks the authority to order restitution; the FTC cannot trace the funds, which it must do to obtain restitution; the FTC's proposed relief would violate the Eighth Amendment's prohibition on excessive fines and fees; and the FTC has overstated the amount of losses.

First, CBC and Brown contend that the FTC has requested restitution, but the Court lacks authority under section 13(b) of the FTCA, 15 U.S.C. § 53(b), to provide this relief. Section 13(b) only authorizes the Court to "enjoin any such act or practice" that violates the FTCA. CBC and Brown contend that this provision does not expressly encompass restitution and that the Supreme Court case law that authorized a broad interpretation of this language has been undercut. CBC and Brown concede that the Court "has previously ruled on and generally denied" this contention, but they contend that, had the Court fully considered the legislative history or the text of section 13(b), it would have found in favor of this argument. Defs.' Resp. to Pl.'s Mot. for Summ. J. at 23. The Court disagrees. CBC and Brown still rely upon what this Court already described as a "considerable overstatement" of *Kokesh v. SEC*, 137 S.Ct. 1635 (2017). *See* D.E. 183 at 2 (Order on

Defs.' Mot. to Modify Prelim. Inj.). The plain language and legislative history arguments do not change the Court's view on this point, especially in light of the Seventh Circuit authority that continues to control the disposition of this issue before this Court. *See*, *e.g.*, *Trudeau*, 579 F.3d at 772; *Febre*, 128 F.3d at 534; *Amy Travel Serv., Inc.*, 875 F.2d at 571-72.

Next, CBC and Brown contend that the FTC's request for "equitable monetary relief" is a request for restitution. But, CBC and Brown contend, restitution is unavailing, as the FTC must be able to trace the funds it identifies for restitution, and here the funds have been commingled. CBC and Brown urge the Court to consider several cases in which courts declined to order restitution because the funds requested were not traceable. *See*, *e.g.*, *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S.Ct. 651, 658, 662(2016) (remanding restitution order in ERISA litigation to determine whether funds were dissipated); *Alexander v. Bosch Auto. Sys., Inc.*, 232 F. App'x 491, 501 (6th Cir. 2007) ("Plaintiffs seeking equitable restitution have the burden of establishing that the funds they seek are traceable and readily identifiable.").

But CBC and Brown elide a significant distinction between the cases cited and the present case. When restitution is ordered as an equitable remedy, it is "directed against some specific thing; they give or enforce a right to or over some specific thing." *Montanile*, 136 S.Ct. at 658-59. CBC and Brown rely primarily on ERISA cases in which plaintiffs seek to reclaim benefits from a defunct employer. ERISA is distinguishable from the FTCA in a significant way: ERISA only authorizes equitable restitution, not legal restitution. The FTCA authorizes legal restitution, which does not impose the same tracing require-

ments. *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 601 (9th Cir. 2016) ("the tracing requirements for 'equitable' restitution do not apply in § 13(b) actions"); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373-74 (2d Cir. 2011) (in ordering monetary relief under the FTCA, a district court need not "apply equitable tracing rules to identify specific funds in the defendant's possession that are subject to return"). CBC and Brown contend that these cases are not convincing, as they have been undercut by *Kokesh*. But, as the Court has already noted, it has rejected this reading of *Kokesh*; the Court need not interrogate it in greater depth. The Court concludes that, even if the funds at issue were commingled with other CBC funds, the FTC is not barred from obtaining restitution.

Third, Brown contends that the permanent injunction and the proposed restitution would violate his Eighth Amendment rights. But the order of restitution is not a "fine," nor would it be "grossly disproportional," as Brown must show to establish an Eighth Amendment violation. *See United States v. Bajakajian*, 524 U.S. 321, 339-40 (1998). Brown cites to *SEC v. Metter*, 706 F. App'x 699 (2d Cir. 2017), but the case is not helpful to his position, as the Second Circuit concluded there was no Eighth Amendment violation in an order that "almost precisely equaled the gains from the illicit conduct." *Id.* at 704. Here, the FTC's proposed order is also "directly keyed" to Brown's misconduct. *Id.* The Court overrules Brown's Eighth Amendment argument.

Finally, CBC and Brown challenge how the FTC calculated the amount of losses. The FTC began its calculation with the amount of revenue obtained through traffic that Pierce directed to CBC: $6,832,435.81. The FTC subtracted the amount of refunds CBC paid to customers ($414,860.77),

chargebacks that customers successfully obtained ($394,903.68), and the amount already paid by Pierce and Lloyd in settlement of their claims ($762,000), for a net of $5,260,671.36. CBC and Brown present several arguments against this amount.

First, they contend that the revenues must be limited to the period beginning after CBC created websites to which Pierce could direct his traffic. The Court disagrees: the amount of liability is based on the duration of the campaign of misrepresentation conducted through the Craigslist marketing scheme, not the existence of certain websites. The date on which certain websites became active is irrelevant to the calculation.[5]

Next, CBC and Brown contend that the amount of restitution should be limited to the customers referred by Pierce. The description of how the FTC calculated losses refutes this argument; the losses are already based on revenue obtained through traffic that Pierce referred.

Third, they contend that the FTC should deduct the revenue obtained from customers who contacted CBC's customer service but then chose not to cancel their credit membership. The FTC argues that a setoff would be inappropriate, as CBC lied to customers about its involvement in the Craigslist marketing scheme. *See, e.g.,* Defs.' Resp. to Pl.'s Stmt. of Facts ¶ 60 (recording of a CBC customer service employee telling a customer, "We don't . . . do any Craigslist posts. . . . [W]e're not affiliated with any third party companies posting any rental ads or anything like

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[5] Defendants arguably raise an additional point in their reply brief asking the Court to dismiss any claims relating to CBC's "pre-existing" websites. Defs.' Am. Reply in Supp. of Defs.' Mot. for Summ. J. at 8. This argument is underdeveloped and, to the extent it is a new point, defendants forfeited it by failing to raise it in the initial brief.

that."). The Court concurs: CBC and Brown are not entitled to keep the revenue obtained from customers who were retained through additional misrepresentations.

Fourth, CBC and Brown contend that the losses should be limited to the period during which Brown had actual notice of the purported scheme. They contend that Brown did know of the fraudulent marketing until he saw complaints from the Better Business Bureau on June 30, 2016. CBC and Brown's argument is unpersuasive. First, they do not point to any authorities supporting the premise that liability can only attach to particular losses of which the defendant was specifically aware; the Seventh Circuit only requires that a defendant be "adequately alerted . . . to the corporation's deceptive trade practices." *Bay Area Bus. Council*, 423 F.3d at 637. But no reasonable jury could conclude that Brown only learned of Pierce's campaign on June 30, 2016. As the record makes clear, Brown was e-mailed in April 2015—just months after the campaign began—by a contractor with concerns about the campaign. As already discussed, this e-mail was joined by numerous other signs of misconduct, all of which occurred well before June 30, 2016. The Court declines to reduce the loss figure on this ground.

CBC and Brown also ask the Court to set off business expenses and the loss of CBC revenues. But restitution seeks to protect consumers from "economic injuries" by recovering the full amount of consumer loss. *Febre*, 128 F.3d at 536. The Court does not think it appropriate to reduce consumer recovery in order to compensate the defendants for the costs of administering a service that relied upon misrepresentations to consumers.

Conclusion

For the foregoing reasons, the Court grants the FTC's motion for entry of summary judgment against Credit Bureau Service, LLC and Michael Brown [dkt. no. 192]. The Court will separately enter the FTC's proposed final judgment and order. The status hearing set for June 29, 2018, the final pretrial conference set for July 12, 2018, and the trial set for July 16, 2018 are vacated.

APPENDIX I

Hello,

Thank you for wanting more information on our rental. You were the second to e-mail from our advert. The first person I showed did not need to move due to school. We just finished all new renovations and are now prepared to lease with flexible terms.

I know that you need the exact address of the property but we do want not to disclose the address before you're qualified. We have had a string of break-ins, squatters and thefts at our other properties. We want to avoid that with this rental because of the renovations that have cost lots of money.

We have plenty of garage parking and utilities are factored into the rent price. The appliances in the kitchen and laundry room are yours to keep. You have the option to customize your paint color and flooring prior to your arrival.

If you would like to set up an appointment, go to the link below and request a copy of your report. We use this site since it's trusted, quick and haven't had any problems printing out the report. All you need to do is fill out the form and you get your report. We are not concerned with any negatives, its more of a formality for us. Simply get your report by CLICKING HERE

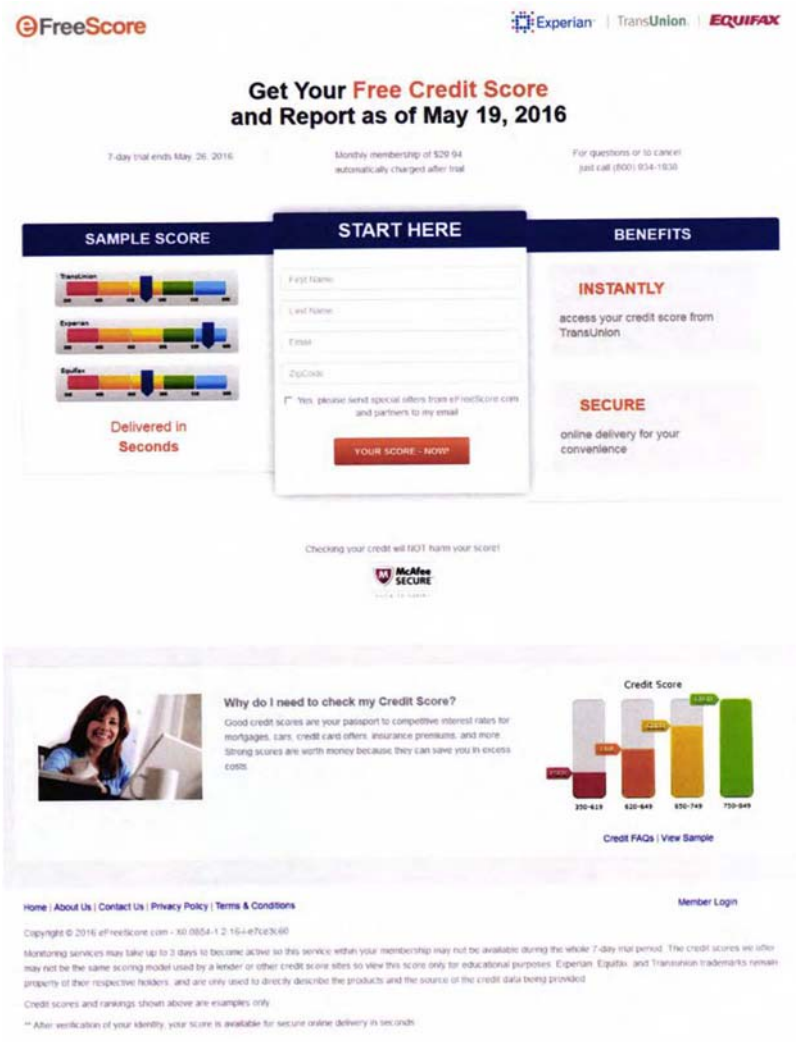
Do not send me the report over email, bring it to the tour. We want to rent fast. We are waiving the security deposit and giving half the first months rent.

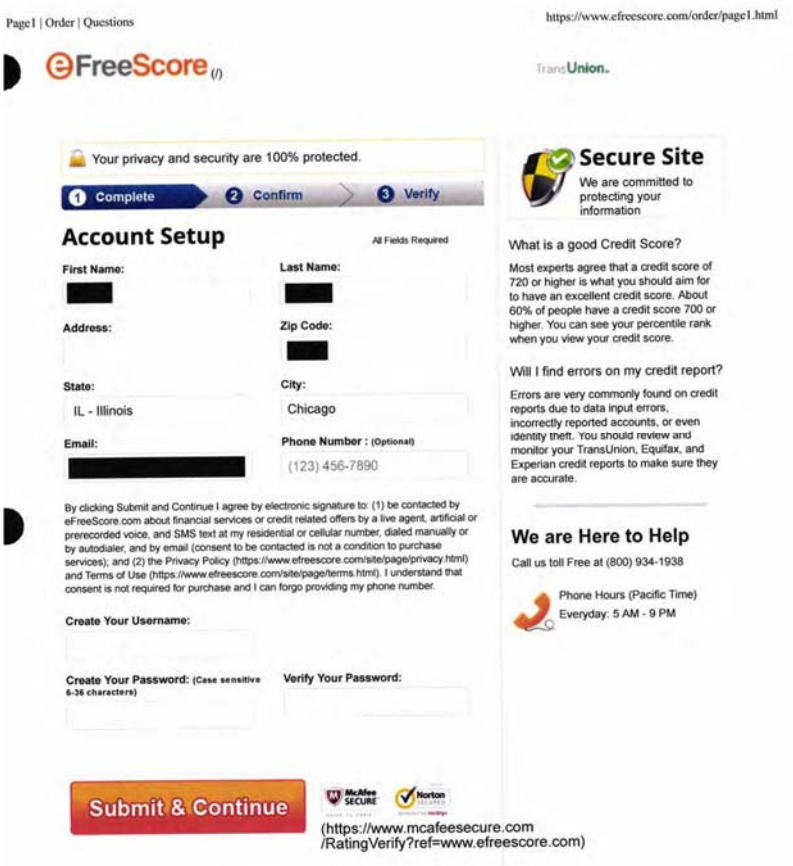
Let me know when you have an updated version of your report. Then I'll schedule you for a showing.

Thanks again,

Joyce

APPENDIX II


eFreeScore
Experian | TransUnion | EQUIFAX
Get Your Free Credit Score
and Report as of May 19, 2016
7-day trial ends May. 26, 2016
Monthly membership of $29.94
automatically charged after trial
For questions or to cancel
just call (800) 934-1930
SAMPLE SCORE
START HERE
BENEFITS
Delivered in
Seconds
First Name
Last Name
Email
ZipCode
Yes, please send special offers from eFreeScore.com
and partners to my email
YOUR SCORE - NOW!
INSTANTLY
access your credit score from
TransUnion
SECURE
online delivery for your
convenience
Checking your credit will NOT harm your score!
McAfee
SECURE
Why do I need to check my Credit Score?
Good credit scores are your passport to competitive interest rates for
mortgages, cars, credit card offers, insurance premiums, and more.
Strong scores are worth money because they can save you in excess
costs.
Credit Score
300-619
620-649
650-749
750-949
Credit FAQs | View Sample
Home | About Us | Contact Us | Privacy Policy | Terms & Conditions
Member Login
Credit scores and rankings shown above are examples only.



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eFreeScore (/)

TransUnion.

Your privacy and security are 100% protected.

1 Complete 2 Confirm 3 Verify

Account Setup

All Fields Required

First Name: [redacted]

Last Name: [redacted]

Address:

Zip Code: [redacted]

State: IL - Illinois

City: Chicago

Email: [redacted]

Phone Number : (Optional) (123) 456-7890

By clicking Submit and Continue I agree by electronic signature to: (1) be contacted by eFreeScore.com about financial services or credit related offers by a live agent, artificial or prerecorded voice, and SMS text at my residential or cellular number, dialed manually or by autodialer, and by email (consent to be contacted is not a condition to purchase services); and (2) the Privacy Policy (https://www.efreescore.com/site/page/privacy.html) and Terms of Use (https://www.efreescore.com/site/page/terms.html). I understand that consent is not required for purchase and I can forgo providing my phone number.

Create Your Username:

Create Your Password: (Case sensitive 6-36 characters)

Verify Your Password:

Submit & Continue

McAfee SECURE Norton

(https://www.mcafeesecure.com /RatingVerify?ref=www.efreescore.com)

Secure Site

We are committed to protecting your information

What is a good Credit Score?

Most experts agree that a credit score of 720 or higher is what you should aim for to have an excellent credit score. About 60% of people have a credit score 700 or higher. You can see your percentile rank when you view your credit score.

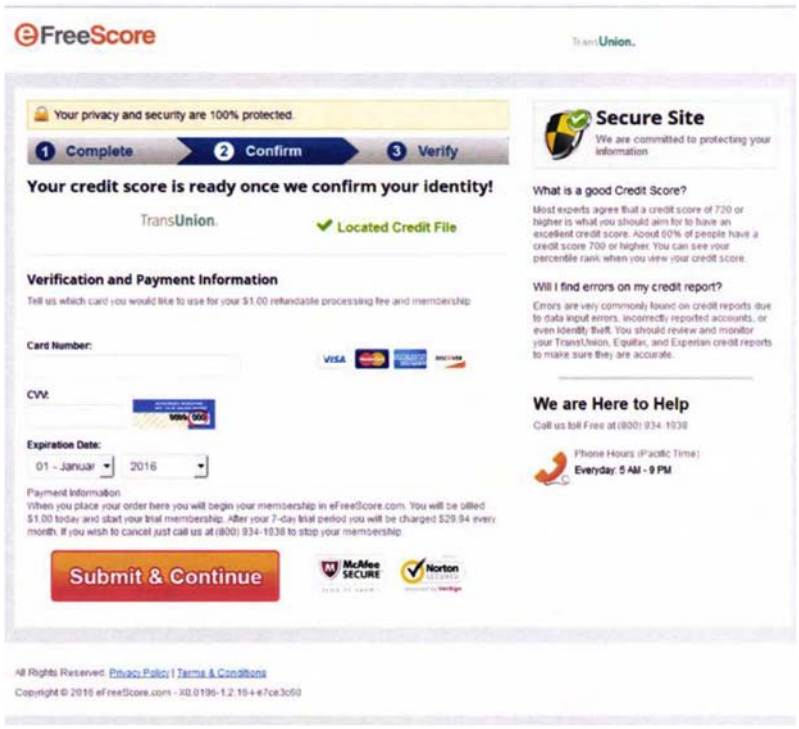
Will I find errors on my credit report?

Errors are very commonly found on credit reports due to data input errors, incorrectly reported accounts, or even identity theft. You should review and monitor your TransUnion, Equifax, and Experian credit reports to make sure they are accurate.

We are Here to Help

Call us toll Free at (800) 934-1938

Phone Hours (Pacific Time)
Everyday: 5 AM - 9 PM


eFreeScore
TransUnion.
Your privacy and security are 100% protected.
1 Complete
2 Confirm
3 Verify
Your credit score is ready once we confirm your identity!
TransUnion.
Located Credit File
Verification and Payment Information
Tell us which card you would like to use for your $1.00 refundable processing fee and membership
Card Number:
CVV:
Expiration Date:
01 - Januar
2016
Payment Information
When you place your order here you will begin your membership in eFreeScore.com. You will be billed $1.00 today and start your trial membership. After your 7-day trial period you will be charged $29.94 every month. If you wish to cancel just call us at (800) 934-1938 to stop your membership.
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Secure Site
We are committed to protecting your information
What is a good Credit Score?
Most experts agree that a credit score of 720 or higher is what you should aim for to have an excellent credit score. About 60% of people have a credit score 700 or higher. You can see your percentile rank when you view your credit score.
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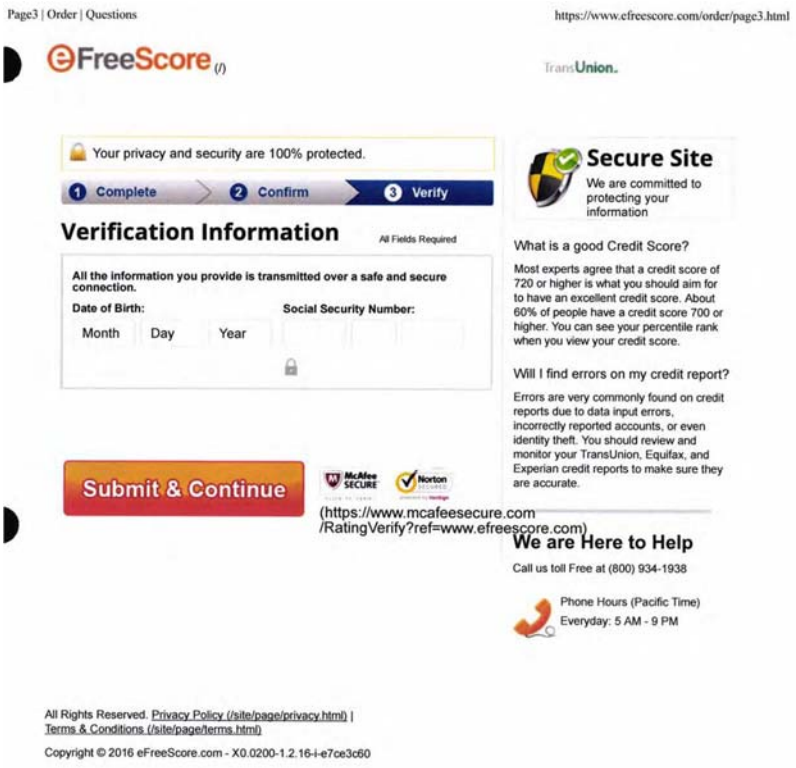

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eFreeScore (/) TransUnion.

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1 Complete 2 Confirm 3 Verify

Verification Information All Fields Required

All the information you provide is transmitted over a safe and secure connection.

Date of Birth: Month Day Year

Social Security Number:

Submit & Continue

(https://www.mcafeesecure.com/RatingVerify?ref=www.efreescore.com)

Secure Site
We are committed to protecting your information

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Most experts agree that a credit score of 720 or higher is what you should aim for to have an excellent credit score. About 60% of people have a credit score 700 or higher. You can see your percentile rank when you view your credit score.

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Errors are very commonly found on credit reports due to data input errors, incorrectly reported accounts, or even identity theft. You should review and monitor your TransUnion, Equifax, and Experian credit reports to make sure they are accurate.

We are Here to Help

Call us toll Free at (800) 934-1938

Phone Hours (Pacific Time)
Everyday: 5 AM - 9 PM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

FEDERAL TRADE COMMISSION,
Plaintiff(s),

v.

CREDIT BUREAU CENTER, LLC, ET AL.,
Defendant(s).

Case No. 17 C 194

Judge Matthew F. Kennelly

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s) and against defendant(s) in the amount of $,
which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s) and against plaintiff(s).

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment entered in favor of plaintiff Federal Trade Commission and against defendants Credit Bureau center, LLC and Michael Brown as stated in the attached Final Judgment and Order for Permanent Injunction and Other Equitable Relief.

This action was (check one):

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Matthew F. Kennelly on a motion.

Date: 6/26/2018 Thomas G. Bruton, Clerk of Court
Pamela J. Geringer, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Matthew F. Kennelly

FEDERAL TRADE COMMISSION,
Plaintiff

v.

CREDIT BUREAU CENTER, LLC, A LIMITED LIABILITY COMPANY, FORMERLY KNOWN AS MYSCORE LLC, ALSO DOING BUSINESS AS EFREESCORE.COM, CREDITUPDATES.COM, AND FREECREDITNATION.COM, MICHAEL BROWN, INDIVIDUALLY AND AS OWNER AND MANAGER OF CREDIT BUREAU CENTER, LLC, DANNY PIERCE, INDIVIDUALLY, AND ANDREW LLOYD, INDIVIDUALLY,
Defendants.

Case No. 17 C 194
JUDGE KENNELLY
MAGISTRATE JUDGE VALDEZ

FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF AGAINST DEFENDANTS CREDIT BUREAU CENTER, LLC AND MICHAEL BROWN

Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), filed its Complaint for Permanent Injunction and Other Equitable Relief ("Complaint"), pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b). The FTC now having filed its Motion for Summary Judgment Against Defendants Credit

Bureau Center, LLC and Michael Brown ("Defendants"), and the Court having considered the FTC's motion, and supporting exhibits, and the entire record in this matter, the FTC's motion is hereby granted, and IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

FINDINGS

1. This Court has jurisdiction over this matter.

2. The Complaint charges that Defendants participated in deceptive and illegal acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45; Section 4 of the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. § 8403; Section 612(g) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681j(g); and the Free Annual File Disclosures Rule, 16 C.F.R. Part 610 ("Free Reports Rule"), recodified at 12 C.F.R. §§ 1022.130-1022.138, in the advertising, marketing, promoting, offering for sale, or sale of credit monitoring services.

3. The Court now finds that Defendants have violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by falsely representing to consumers, expressly or by implication, that a residential property described in an online ad is currently available for rent from someone consumers can contact through that ad, and the property will be shown to consumers who obtain their credit reports and scores through Defendants' website.

4. The Court further finds that Defendants have violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by representing to consumers, expressly or by implication, that they are offering consumers their credit scores and reports for free, while failing to disclose or disclose adequately to consumers, material terms and conditions of the offer, including: (a) that Defendants will automatically enroll consumers in a negative option continuity plan with addi-

tional charges; (b) that consumers must affirmatively cancel the negative option continuity plan before the end of a trial period to avoid additional charges; (c) that Defendants will use consumers' credit or debit card information to charge consumers monthly for the negative option continuity plan; (d) the costs associated with the negative option continuity plan; and (e) the charges.

5. The Court further finds that Defendants have violated Section 4(1) of ROSCA, 15 U.S.C. § 8403(1), by charging or attempting to charge consumers for Defendants' credit monitoring service through a negative option feature while failing to clearly and conspicuously disclose all material terms of the transaction before obtaining consumers' billing information.

6. The Court further finds that Defendants have violated Section 4(2) of ROSCA, 15 U.S.C. § 8403(2), by charging or attempting to charge consumers for Defendants' credit monitoring service through a negative option feature while failing to obtain consumers' express informed consent before charging their credit card, debit card, bank account, or other financial account.

7. The Court further finds that Defendants have violated Section 612(g)(1) of the FCRA, 15 U.S.C. § 1681j(g)(1), and the Free Reports Rule, 12 C.F.R. § 1022.138, by failing to prominently disclose in advertisements for free credit reports that free credit reports are available under federal law from AnnualCreditReport.com or (877) 322–8228, and by operating websites offering free credit reports, including eFreeScore.com and CreditUpdates.com, without displaying across the top of each page that mentions free credit reports, and across the top of each page of the ordering process, the prominent disclosure required by the Free Reports Rule, 12 C.F.R. § 1022.138, to inform consumers of

their right to obtain a free credit report from AnnualCreditReport.com or (877) 322–8228.

8. It is proper to enter this Final Judgment and Order for Permanent Injunction and Other Equitable Relief Against Defendants ("Order") to prevent a recurrence of Defendants' violations of Section 5 of the FTC Act, 15 U.S.C. § 45, Section 4 of ROSCA, 15 U.S.C. § 8403, Defendants' net sales to consumers (total sales minus refunds and chargebacks) amounted to at least $6,022,671.36 from the conduct alleged in the Commission's Complaint; and the Commission has recovered $762,000 from Defendants' affiliate marketers Danny Pierce and Andrew Lloyd.

10. The Commission is therefore entitled to equitable monetary relief against Defendants in the amount of $5,260,671.36, for which Defendants are jointly and severally liable.

11. This Order is in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law.

12. Nothing in this Order shall affect the compensatory sanction previously entered against Defendant Michael Brown in the civil contempt order dated July 18, 2017 (Dkt. 106).

13. Entry of this Order is in the public interest.

DEFINITIONS

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

1. "Affiliate" means any person, including third-party marketers, who participates in an affiliate program.

2. "Affiliate Network" means any person who provides another person with affiliates for an affiliate program or whom any person contracts with as an affiliate to promote any product, service, or program.

3. "Affiliate Program(s)" means (a) any arrangement under which any marketer or seller of a product, service, or program pays, offers to pay, or provides or offers to provide any form of consideration to any Defendant, either directly or indirectly, to (i) provide the marketer or seller with, or refer to the marketer or seller, potential or actual customers; or (ii) otherwise market, advertise, or offer for sale the product or service on behalf of the marketer or seller; or (b) any arrangement under which any Defendant pays, offers to pay, or provides or offers to provide any form of consideration to any third party, either directly or indirectly, to (i) provide any Defendant with, or refer to any Defendant, potential or actual customers; or (ii) otherwise market, advertise, or offer for sale any product, service, or program on behalf of any Defendant.

4. "Mobile Application" means any software application that can be installed on a mobile device.

5. "Billing Information" means any data that enables any person to access a consumer's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

6. "Charge," "charged," or "charging" means any attempt to collect money or other consideration from a consumer, including but not limited to causing billing information to be submitted for payment, including against a consumer's credit card, debit card, bank account, phone bill, or other account.

7. "Clear(ly) and conspicuous(ly)" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways: a. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the com-

munication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

b. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

c. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

d. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

e. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

f. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

g. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

h. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

8. "Close Proximity" means immediately adjacent to the triggering representation. In the case of advertisements disseminated verbally or through audible means, the dis-

closure shall be made as soon as practicable after the triggering representation.

9. "Corporate Defendant" means Credit Bureau Center, LLC, a Delaware limited liability company, formerly known as MyScore LLC, and also doing business as eFreeScore.com, CreditUpdates.com, and FreeCreditNation.com, and its successors and assigns.

10. "Credit Monitoring Service" means any service, plan, program or membership that includes, or is represented to include, alerts or monitoring of changes to consumers' credit files, credit reports, or credit scores.

11. "Defendants" means Credit Bureau Center, LLC, formerly known as MyScore LLC, also doing business as eFreeScore.com, CreditUpdates.com and FreeCreditNation.com, and its successors and assigns, and Michael Brown, individually, collectively, or in any combination.

12. "Free Credit Report" means a file disclosure prepared by or obtained from, directly or indirectly, a nationwide consumer reporting agency, including without limitation Equifax, Experian or TransUnion, that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.

13. "Individual Defendant" means Michael Brown, by whatever names he may be known.

14. "Negative Option Feature" means, in an offer or agreement to sell or provide any good or service, a provision under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the seller or provider as acceptance or continuing acceptance of the offer.

15. "Preliminary Injunction" means the Preliminary Injunction as to Defendants Credit Bureau Center, LLC and Michael Brown entered on February 21, 2017 (Dkt. No. 59).

16. "Receiver" means Robb Evans & Associates LLC, appointed as Receiver pursuant to Section VII of the Preliminary Injunction, and any deputy receivers named by the Receiver.

17. "Receivership Defendant" means Credit Bureau Center, LLC, a Delaware limited liability company, formerly known as MyScore LLC, and also doing business as eFreeScore.com, CreditUpdates.com, and FreeCreditNation.com, and its successors and assigns, as well as any subsidiaries, affiliates, divisions, or sales or customer service operations, and any fictitious business entities or business names created or used by these entities.

18. "Telemarketing" means any plan, program, or campaign which is conducted to induce the purchase of any product, service, plan, or program by use of one or more telephones, and which involves a telephone call, whether or not covered by the Telemarketing Sales Rule, 16 C.F.R. Part 310.

19. "TRO" means the Ex Parte Temporary Restraining Order With Asset Freeze, Appointment of a Receiver, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue, entered in this matter on January 11, 2017 (Dkt. No. 16).

I. BAN ON NEGATIVE-OPTION CREDIT MONITORING SERVICES

IT IS ORDERED that Defendants, whether acting directly or indirectly, are permanently restrained and enjoined from advertising, marketing, promoting, offering for sale, or selling, or assisting in the advertising, marketing,

promoting, offering for sale, or sale of any Credit Monitoring Service with a Negative Option Feature.

II. PROHIBITION AGAINST MISREPRESENTATIONS

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, offering for sale, or sale of any good or service, are permanently restrained and enjoined from misrepresenting, or assisting others in misrepresenting, expressly or by implication, any material fact, including, but not limited to:

A. That a residential property described in an online ad is currently available for rent from someone consumers can contact through that ad;

B. That a residential property will be shown to consumers who obtain their credit reports or scores from any particular source;

C. The purpose of any communication with consumers; or

D. Any other fact material to consumers concerning any good or service, such as: the total costs; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics.

III. PROHIBITED AFFILIATE PROGRAM ACTIVITIES

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting

directly or indirectly, in connection with the advertising, marketing, promoting, offering for sale, or sale of any good or service through an Affiliate Network or Program that a Defendant owns, operates, or controls, or through an Affiliate or Affiliate Network to which a Defendant provides or offers to provide any payment or other form of consideration, are permanently restrained and enjoined from failing to:

A. Require each Affiliate and/or Affiliate Network to provide the following identifying information:

1. In the case of a natural person, the Affiliate's or Affiliate Network's first and last name, physical address, country, telephone number, email address, and complete bank account information as to where payments are to be made to that person;

2. In the case of a business entity, the Affiliate's or Affiliate Network's name and any and all names under which it does business, state of incorporation, registered agent, and the first and last name, physical address, country, telephone number, and email address for at least one natural person who owns, manages, or controls the Affiliate or Affiliate Network, and the complete bank account information as to where payments are to be made to the Affiliate or Affiliate Network;

3. If Defendants have access to certain Affiliates only through an Affiliate Network, then Defendants shall contractually require each Affiliate Network to obtain and maintain from those Affiliates the identifying information set forth in Subsections A.1 and A.2 of this Section prior to the Affiliate's or Affiliate Network's participation in any Defendant's Affiliate Program.

B. As a condition of doing business with any Affiliate or Affiliate Network or such Affiliate or Affiliate Network's acceptance into any Defendant's Affiliate Program: (a)

provide each such Affiliate or Affiliate Network a copy of this Order; (b) obtain from each such Affiliate or Affiliate Network a signed and dated statement acknowledging receipt of this Order and expressly agreeing to comply with this Order; and (c) clearly and conspicuously disclose in writing that engaging in acts or practices prohibited by this Order will result in immediate termination of any Affiliate or Affiliate Network and forfeiture of all monies owed to such Affiliate or Affiliate Network; *provided, however*, that if Defendants have access to certain Affiliates only through an Affiliate Network, then Defendants shall contractually require that the Affiliate Network provide the information required by this Subsection to each of those Affiliates and retain proof of the same prior to any such Affiliate being used in any Defendant's Affiliate Program; and if any Defendant should acquire an entity that has an existing program of selling through Affiliates, the entity must complete all steps in this Subsection prior to Defendant's acquisition of the entity.

C. Require that each Affiliate or Affiliate Network, prior to the public use or dissemination to consumers of any marketing materials, including, but not limited to, advertisements, websites, emails, and pop-ups used by any Affiliate or Affiliate Network to advertise, promote, market, offer for sale, or sell any goods or services, provide Defendants with the following information: (a) copies of all marketing materials to be used by the Affiliate or Affiliate Network, including text, graphics, video, audio, and photographs; (b) each location the Affiliate or Affiliate Network maintains, or directly or indirectly controls, where the marketing materials will appear, including the URL of any website; and (c) for hyperlinks contained within the marketing materials, each location to which a consumer will be

transferred by clicking on the hyperlink, including the URL of any website. Defendants shall also require each Affiliate or Affiliate Network to maintain and provide to Defendants upon request records of the dates when the marketing materials are publicly used or disseminated to consumers. *Provided, however*, that if Defendants have access to certain Affiliates only through an Affiliate Network, then Defendants shall contractually require that the Affiliate Network obtain and maintain the same information set forth above from each of those Affiliates who are part of any Defendant's Affiliate Program prior to the public use or dissemination to consumers of any such marketing materials, and provide proof to such Defendant of having obtained the same.

D. Promptly review the marketing materials specified in Subsection C of this Section as necessary to ensure compliance with this Order. Defendants shall also promptly take steps as necessary to ensure that the marketing materials provided to Defendants under Subsection C of this Section are the marketing materials publicly used or disseminated to consumers by the Affiliate or Affiliate Network. If a Defendant determines that use of any marketing materials does not comply with this Order, such Defendant shall inform the Affiliate or Affiliate Network in writing that approval to use such marketing materials is denied and shall not pay any amounts to the Affiliate or Affiliate Network for such marketing, including any payments for leads, "click-throughs," or sales resulting therefrom. *Provided, however*, that if Defendants have access to certain Affiliates only through an Affiliate Network, then Defendants shall contractually require that the Affiliate Network comply with the procedures set forth in this Subsection as to those Affiliates.

E. Promptly investigate any complaints that any Defendant receives through any source to determine whether any Affiliate or Affiliate Network is engaging in acts or practices prohibited by this Order, either directly or through any Affiliate that is part of any Defendant's Affiliate Program.

F. Upon determining that any Affiliate or Affiliate Network has engaged in, or is engaging in, acts or practices prohibited by this Order, either directly or through any Affiliate that is part of any Defendant's Affiliate Program, immediately:

1. Disable any connection between the Defendant's Affiliate Program and the marketing materials used by the Affiliate or Affiliate Network to engage in such acts or practices prohibited by this Order;

2. Halt all payments to the Affiliate or Affiliate Network resulting from such acts or practices prohibited by this Order; and

3. Terminate the Affiliate or Affiliate Network; *provided, however*, Defendants shall not be in violation of this Subsection if Defendants fail to terminate an Affiliate Network in a case where Defendants' only access to an Affiliate who has engaged in acts or practices prohibited by this Order is through an Affiliate Network and Defendants receive notice that the Affiliate Network immediately terminated the Affiliate violating this Order from any Defendant's Affiliate Program.

IV. PROHIBITION AGAINST MISREPRESENTATIONS RELATING TO NEGATIVE OPTION FEATURES

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting

directly or indirectly, in connection with promoting or offering for sale any good or service with a Negative Option Feature, are permanently restrained and enjoined from misrepresenting or assisting others in misrepresenting, expressly or by implication:

A. Any cost to the consumer to purchase, receive, use, or return the initial good or service;

B. That a consumer will not be Charged for any good or service;

C. That a good or service is offered on a "free," "trial," "sample," "bonus," "gift," "no obligation," "discounted" basis, or words of similar import, denoting or implying the absence of an obligation on the part of the recipient of the offer to affirmatively act in order to avoid Charges, including where a Charge will be assessed pursuant to the offer unless the consumer takes affirmative steps to prevent or stop such a Charge;

D. That consumers can obtain a good or service for a processing, service, shipping, handling, or administrative fee with no further obligation;

E. The purpose(s) for which a consumer's Billing Information will be used;

F. The date by which a consumer will incur any obligation or be Charged unless the consumer takes an affirmative action on the Negative Option Feature;

G. That a transaction has been authorized by a consumer;

H. Any material aspect of the nature or terms of a refund, cancellation, exchange, or repurchase policy for the good or service; or

I. Any other material fact.

Compliance with this Section is separate from, and in addition to, the disclosures required by Sections V and VI of this Order.

V. REQUIRED DISCLOSURES RELATING TO NEGATIVE OPTION FEATURES

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service with a Negative Option Feature, are permanently restrained and enjoined from:

A. Representing directly or indirectly, expressly or by implication, that any good or service that includes a Negative Option Feature is being offered on a free, trial, no obligation, reduced, or discounted basis, without disclosing Clearly and Conspicuously, and in Close Proximity to, any such representation: 1. The extent to which a consumer must take affirmative action(s) to avoid any Charges: a) for the offered good or service, b) of an increased amount after the trial or promotional period ends, and c) on a recurring basis;

2. The total cost (or range of costs) the consumer will be Charged and, if applicable, the frequency of such Charges unless the consumer timely takes steps to prevent or stop such Charges; and

3. The deadline(s) (by date or frequency) by which the consumer must affirmatively act in order to stop all recurring Charges.

B. Obtaining Billing Information from a consumer for any transaction involving a good or service that includes a Negative Option Feature, without first disclosing Clearly and Conspicuously, and in Close Proximity to where a consumer provides Billing Information: 1. The extent to which a consumer must take affirmative action(s) to avoid

any Charges: a) for the offered good or service, b) of an increased amount after the trial or promotional period ends, and c) on a recurring basis;

2. The total cost (or range of costs) the consumer will be Charged, the date the initial Charge will be submitted for payment, and, if applicable, the frequency of such Charges unless the consumer timely takes affirmative steps to prevent or stop such Charges;

3. The deadline(s) (by date or frequency) by which the consumer must affirmatively act in order to stop all recurring Charges;

4. The name of the seller or provider of the good or service and, if the name of the seller or provider will not appear on billing statements, the billing descriptor that will appear on such statements;

5. A description of the good or service;

6. Any Charge or cost for which the consumer is responsible in connection with the cancellation of an order or the return of a good; and

7. The simple cancellation mechanism to stop any recurring Charges, as required by Section VII of this Order.

C. Failing to send the consumer: 1. Immediately after the consumer's submission of an online order, written confirmation of the transaction by email. The email must Clearly and Conspicuously disclose all the information required by Subsection B of this Section, and contain a subject line reading "Order Confirmation" along with the name of the product or service, and no additional information; or

2. Within 2 days after receipt of the consumer's order by mail or telephone, a written confirmation of the transaction, either by email or first class mail. The email or letter must Clearly and Conspicuously disclose all the infor-

mation required by Subsection B of this Section. The subject line of the email must Clearly and Conspicuously state "Order Confirmation" along with the name of the product or service, and nothing else. The outside of the envelope must Clearly and Conspicuously state "Order Confirmation" along with the name of the product or service, and no additional information other than the consumer's address, the Defendant's return address, and postage.

VI. OBTAINING EXPRESS INFORMED CONSENT

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service with a Negative Option Feature, are permanently restrained and enjoined from using or assisting others in using Billing Information to obtain payment from a consumer, unless Defendant first obtains the express informed consent of the consumer to do so. To obtain express informed consent, Defendants must:

A. For all written offers (including over the Internet or other web-based applications or services), obtain consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the Negative Option Feature, and no other portion of the offer. Defendant shall disclose Clearly and Conspicuously, and in Close Proximity to such check box, signature, or substantially similar method of affirmative consent, only the following, with no additional information: 1. The extent to which a consumer must take affirmative action(s) to avoid any Charges: a) for the offered good or service, b) of an increased amount after the

trial or promotional period ends, and c) on a recurring basis;

2. The total cost (or range of costs) the consumer will be Charged and, if applicable, the frequency of such Charges unless the consumer timely takes affirmative steps to prevent or stop such Charges; and

3. The deadline(s) (by date or frequency) by which the consumer must affirmatively act in order to stop all recurring Charges.

B. For all oral offers, prior to obtaining any Billing Information from the consumer:

1. Clearly and Conspicuously disclose the information contained in Section V.B of this Order; and

2. Obtain affirmative unambiguous express oral confirmation that the consumer a) consents to being Charged for any goods or services, including providing, at a minimum, the last four (4) digits of the consumer's account number to be Charged, b) understands that the transaction includes a Negative Option Feature, and c) understands the specific affirmative steps the consumer must take to prevent or stop further Charges.

For transactions conducted through telemarketing, Defendants shall maintain for 3 years from the date of each transaction an unedited voice recording of the entire transaction, including the prescribed statements set out in Subsection B of this Section. Each recording must be retrievable by date and by the consumer's name, telephone number, or Billing Information, and must be provided upon request to the consumer, the consumer's bank, or any law enforcement entity.

VII. SIMPLE MECHANISM TO CANCEL NEGATIVE OPTION FEATURE

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service with a Negative Option Feature, are permanently restrained and enjoined from failing to provide a simple mechanism for the consumer to: (1) avoid being Charged, or Charged an increased amount, for the good or service; and (2) immediately stop any recurring Charges. Such mechanism must not be difficult, costly, confusing, or time consuming, and must be at least as simple as the mechanism the consumer used to initiate the Charge(s). In addition:

A. For consumers who entered into the agreement to purchase a good or service including a Negative Option Feature over the Internet or through other web-based applications or services, Defendants must provide a mechanism, accessible over the Internet or through such other web-based application or service that consumers can easily use to cancel the product or service and to immediately stop all further Charges.

B. For consumers who entered into the agreement to purchase a good or service including a Negative Option Feature through an oral offer and acceptance, Defendants must maintain a telephone number and a postal address that consumers can easily use to cancel the product or service and to immediately stop all further Charges. Defendants must assure that all calls to this telephone number shall be answered during normal business hours and that mail to the postal address is retrieved regularly.

VIII. REQUIRED DISCLOSURES RELATING TO FREE CREDIT REPORTS

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with offering Free Credit Reports, are permanently restrained and enjoined from failing to include disclosures that meet all of the following requirements:

A. General requirements for disclosures: The disclosures covered by Subsection B of this Section shall contain only the prescribed content and comply with the following requirements: 1. All disclosures shall be Clear and Conspicuous;

2. All visual disclosures must be parallel to the base of the advertisement or screen;

3. Program-length television, radio, or Internet-hosted multimedia advertisement disclosures shall be made at the beginning, near the middle, and at the end of the advertisement; and

4. If the locator address AnnualCreditReport.com or toll-free telephone number (877) 322-8228 authorized under federal law changes in the future, the new address or telephone number shall be substituted in the disclosures required by this Section within a reasonable time.

B. Medium-specific disclosures: All offers of Free Credit Reports shall include the disclosures required by this Section: 1. Television advertisements: All advertisements for Free Credit Reports broadcast on television shall include the following disclosure in Close Proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law." The visual dis-

closure shall be at least four percent of the vertical picture height and appear for a minimum of four seconds.

2. Radio advertisements: All advertisements for Free Credit Reports broadcast on radio shall include the following disclosure in Close Proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

3. Print advertisements: All advertisements for Free Credit Reports in print shall include the following disclosure in the form specified below and in Close Proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW." Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from AnnualCreditReport.com or (877) 322-8228, the ONLY authorized source under Federal law." Each letter of the disclosure text shall be, at minimum, one-half the size of the largest character used in the advertisement.

4. Websites: Any website offering Free Credit Reports must display the disclosure set forth in Subsections B.4.a, B.4.b, and B.4.e of this Section on each page that mentions a free credit report and on each page of the ordering process. This disclosure shall be visible across the top of each page where the disclosure is required to appear; shall appear inside a box; and shall appear in the form specified below:

a. The first element of the disclosure shall be a header that is centered and shall consist of the following text: "THIS NOTICE IS REQUIRED BY LAW. Read more at consumerfinance.gov/learnmore." Each letter of the header shall be one-half the size of the largest character of the

disclosure text required by Subsection B.4.b of this Section. The reference to consumerfinance.gov/learnmore shall be an operational hyperlink, underlined, and in a color that is a high degree of contrast from the color of the other disclosure text and background color of the box.

b. The second element of the disclosure shall appear below the header required by Subsection B.4.a of this Section and shall consist of the following text: "You have the right to a free credit report from AnnualCreditReport.com or (877) 322–8228, the ONLY authorized source under Federal law." The reference to AnnualCreditReport.com shall be an operational hyperlink to the centralized source, underlined, and in the same color as the hyperlink to consumerfinance.gov/learnmore required in Subsection B.4.a of this Section;

c. The color of the text required by Subsections B.4.a and B.4.b of this Section shall be in a high degree of contrast with the background color of the box;

d. The background of the box shall be a solid color in a high degree of contrast from the background of the page and the color shall not appear elsewhere on the page;

e. The third element of the disclosure shall appear below the text required by Subsection B.4.b of this Section and shall be an operational hyperlink to AnnualCreditReport.com that appears as a centered button containing the following language: "Take me to the authorized source." The background of this button shall be the same color as the hyperlinks required by Subsections B.4.a and B.4.b of this Section and the text shall be in a high degree of contrast to the background of the button;

f. Each character of the text required in Subsections B.4.b and B.4.e of this Section shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner;

g. Each character of the disclosure shall be displayed as plain text and in a sans serif font, such as Arial; and

h. The space between each element of the disclosure required in Subsections B.4.a, B.4.b, and B.4.e of this Section shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner. The space between the boundaries of the box and the text or button required in Subsections B.4.a, B.4.b, and B.4.e of this Section shall be, at minimum, twice the size of the vertical height of the largest character on the page, including characters in an image or graphic banner.

5. Mobile Applications: Any Mobile Application offering Free Credit Reports must comply with the requirements set forth in Subsection B.6 of this Section.

6. Internet-hosted multimedia advertising: All advertisements for Free Credit Reports disseminated through Internet-hosted multimedia in both audio and visual formats shall include the following disclosure in the form specified below and in Close Proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW." Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from AnnualCreditReport.com or (877) 322–8228, the ONLY authorized source under Federal law." If the advertisement contains characters, the visual disclosure shall be, at minimum, the same size as the largest character on the advertisement.

7. Telephone requests: When consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement that represents

Free Credit Reports are available at the number, consumers must receive the following audio disclosure at the first mention of a free credit report: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or (877) 322–8228, the only authorized source under Federal law."

8. Telemarketing solicitations: When telemarketing sales calls are made that include offers of Free Credit Reports, the call must include at the first mention of a free credit report the following disclosure: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or (877) 322–8228, the only authorized source under Federal law."

IX. MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment in the amount of Five Million, Two Hundred Sixty Thousand, Six Hundred Seventy-One and Thirty-Six Cents ($5,260,671.36) is entered in favor of the Commission against Defendants, jointly and severally, as equitable monetary relief.

B. Defendants are ordered to pay to the Commission Five Million, Two Hundred Sixty Thousand, Six Hundred Seventy-One and Thirty-Six Cents ($5,260,671.36). Such payment must be made within 7 days of entry of this Order by electronic funds transfer in accordance with instructions provided by a representative of the Commission.

C. Within 7 days of entry of this Order: 1. Defendant Michael Brown is ordered to pay to the Commission all funds in the Bank of America, N.A. account ending "2356" held by Michael Brown;

2. Defendant Michael Brown is ordered to pay to the Commission all funds in the FirstBank Puerto Rico account ending "9599" held by Michael Brown; and

3. Defendant Michael Brown is ordered to liquidate and pay to the Commission the entire balance of Michael Brown's Merrill Lynch SEP IRA account ending "6422," less any fees owed to Merrill Lynch on that account or any amount Merrill Lynch is legally required to withhold.

To effect such payments, the Court directs that the entities holding the funds shall, immediately upon receiving notice of this Order, remit the funds to the Commission by electronic funds transfer or otherwise in accordance with directions provided by a representative of the Commission.

D. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, with the Court's prior approval, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Defendants have no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection.

X. PROHIBITION ON COLLECTING ON ACCOUNTS

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are permanently restrained and enjoined from Charging or attempting to Charge consum-

ers for any Credit Monitoring Services marketed or sold prior to entry of this Order, and from selling, assigning, or otherwise transferring any right to Charge for any Credit Monitoring Services marketed or sold prior to entry of this Order.

XI. CUSTOMER INFORMATION

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

A. Failing to provide sufficient customer information to enable the Commission to efficiently administer consumer redress. Defendants represent that they have provided this redress information to the Commission. If a representative of the Commission requests in writing any information related to redress, Defendants must provide it, in the form prescribed by the Commission, within 14 days.

B. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that any Defendant obtained prior to entry of this Order in connection with the advertising, marketing, promoting, offering for sale, or sale of Credit Monitoring Services; and

C. Failing to destroy such customer information in all forms in their possession, custody, or control within 30 days after receipt of written direction to do so from a representative of the Commission.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent re-

quested by a government agency or required by law, regulation, or court order.

XII. COMPLETION OF RECEIVERSHIP

IT IS FURTHER ORDERED that the appointment of the Receiver pursuant to the Preliminary Injunction is hereby continued in full force and effect as modified by this Section.

A. The Receiver is directed and authorized to accomplish the following within 90 days after entry of this Order, but any party or the Receiver may request that the Court extend the Receiver's term for good cause:

1. Take any and all steps that the Receiver concludes are appropriate to wind down the affairs of the Receivership Defendant;

2. Complete the process of taking custody, control and possession of all assets of the Receivership Defendant, including without limitation any funds in bank accounts or payment processing reserve accounts;

3. Complete, as necessary, the liquidation of all assets of the Receivership Defendant;

4. Prepare and submit a report describing the Receiver's activities pursuant to this Order, and a final application for compensation and expenses; and

5. Distribute to the Commission all remaining liquid assets at the conclusion of the Receiver's duties, in partial satisfaction of the monetary judgment set forth in this Order.

B. Upon completion of the above tasks, the duties of the Receiver shall terminate, and the Receiver shall be discharged.

XIII. ORDER ACKNOWLEDGEMENTS

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

A. Each Defendant, within 7 days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 5 years after entry of this Order, Individual Defendant for any business that such Defendant, individually or collectively with any other Defendant, is the majority owner or controls directly or indirectly, and Corporate Defendant, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order, and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 7 days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Defendant delivered a copy of this Order, that Defendant must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

XIV. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendants make timely submissions to the Commission:

A. One year after entry of this Order, each Defendant must submit a compliance report, sworn under penalty of perjury. 1. Each Defendant must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Defendant; (b) identify all of that Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and

Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendant (which Individual Defendant must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Defendant is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Individual Defendant must: (a) identify all telephone numbers and all physical, postal, email and Internet addresses, including all residences; (b) identify all business activities, including any business for which Individual Defendant performs services whether as an employee or otherwise and any entity in which Individual Defendant has any ownership interest; and (c) describe in detail Individual Defendant's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership;

B. For 20 years after entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: 1. Each Defendant must report any change in: (a) any designated point of contact; or (b) the structure of Corporate Defendant or any entity that Defendant has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Defendant must report any change in: (a) name, including aliases or fictitious name, or

residence address; or (b) title or role in any business activity, including any business for which Individual Defendant performs services whether as an employee or otherwise and any entity in which Individual Defendant has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Each Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Defendant within 14 days of its filing.

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

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *FTC v. Credit Bureau Center, LLC, et al.*, FTC Matter No. X170014.

XV. RECORDKEEPING

IT IS FURTHER ORDERED that Defendants must create certain records for 20 years after entry of the Order, and retain each such record for 5 years. Specifically, Corporate Defendant and Individual Defendant for any business that Individual Defendant, individually or collectively with any other Defendant, is a majority owner or controls

directly or indirectly, must create and retain the following records:

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

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

C. Records relating to Affiliates or Affiliate Networks, including all names, addresses, and telephone numbers; dollar amounts paid or received; and information used in calculating such payments;

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

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

F. Copies of all marketing materials, documents, and information received pursuant to Subsection III.C of this Order; and all written approvals or denials of marketing materials made pursuant to Subsection III.D of this Order; and

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

XVI. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendants' compliance with this Order, including any failure to transfer any assets as required by this Order:

A. Within 14 days of receipt of a written request from a representative of the Commission, each Defendant must: submit additional compliance reports or other requested

information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

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

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

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Defendant, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1).

XVII. RETENTION OF JURISDICTION

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

SO ORDERED this 26th day of June, 2018.

Honorable Matthew F. Kennelly
United States District Judge

RELEVANT STATUTORY PROVISIONS

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides, in relevant part:

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

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

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

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

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

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

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

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

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

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

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

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

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

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

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

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so

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

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

* * *

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

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or

neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

* * *

Section 13 of the Federal Trade Commission Act, 15 U.S.C. 53, provides, in relevant part:

§ 53 False advertisements; injunctions and restraining orders

* * *

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe--

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

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

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the

defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

* * *

Section 19 of the Federal Trade Commission Act, 15 U.S.C. 57b, provides, in relevant part:

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

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

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

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

(b) Nature of relief available

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; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

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

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

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

(d) Time for bringing of actions

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

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

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