No. 14-3286

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KYLE ALEXANDER, *et al.*,
Movants-Appellants,

v.

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee;

BF LABS, INC., *et al.*, Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri
Federal Trade Commission v. BF Labs, Inc., et al.,
Case No. 4:14-cv-00815-BCW
Hon. Brian C. Wimes, D.J.

BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

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SUMMARY

In this civil enforcement action, the FTC alleges that BF Labs violated 15 U.S.C. § 45(a) by committing "deceptive acts and practices" in the marketing of certain specialized computers. The agency seeks financial relief for all consumers

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JURISDICTION

The district court below had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(b) and 1345, and 15 U.S.C. § 53(b). Appellants filed a timely notice of appeal. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Appellants seek to intervene as of right in an FTC enforcement action. In that action, the FTC seeks restitution and other relief for individual victims of deceptive sales of computer equipment. In separate litigation, appellants seek similar relief under state law for a class that consists of the same victims. They sought to intervene in the FTC's case, and the court below denied their motion. The questions presented are:

1. Whether appellants have demonstrat

private right of action under the FTC Act, but intended that the FTC would be the sole enforcer of the statute. *See Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184, 1187 (8th Cir. 1996).

After investigation, the FTC brought this civil law enforcement action alleging that BF Labs, Inc. and three of its officers violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by engaging in "deceptive acts and practices" in connection with the company's marketing of specialized computer equipment used for

Compl. ¶¶ 13-19 (Appx. 33-34); *accord* Alexander Compl. ¶¶ 8-14 (Appx. 122-23).[1] "Delivery delays between six months and one year would significantly

37-38). Moreover, although BF Labs had assured consumers that they could cancel their orders and obtain refunds, consumers frequently found it difficult or impossible to even contact anyone at the company, much less get their money

"rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies," as well as "such other and additional relief as the Court may determine to be just and proper." *Id.* ¶¶ C, D.

2. Putative Class Action Complaint Against BF Labs

On April 4, 2014, appellants Alexander and Symington (collectively, "Alexander") filed a putative class action complaint against BF Labs, Inc., in the U.S. District Court for the District of Kansas. The description of BF Labs' conduct set forth in Alexander's complaint is largely the same as that in the FTC's complaint. *Compare* Alexander Compl. ¶¶ 8-37 (Appx. 122-26) *with* FTC Compl. ¶¶ 11-36 (Appx. 32-38). Alexander's complaint also alleges that BF Labs represented to both plaintiffs that inventory "was available"; that the computers were "in production" and would be "available for shipping soon"; that "shipping [had already] begun"; or that customers would likely receive the equipment "within 'two months' after ordering." ¶¶ 40-42, 49 (Appx. 126-28). In fact, Alexander himself never received any mining equipment at all, and Symington received the equipment seven months after he had ordered it – by which time the difficulty of mining new Bitcoins had substantially increased and the value of the equipment had declined commensurately. ¶¶ 45, 51-53 (Appx. 126-28). Meanwhile, BF Labs told them and other consumers that it was "testing"

equipment that they had already purchased, when in fact it was running those machines to mine Bitcoins that it retained for itself. ¶¶ 32-33 (Appx. 125-26).

Alexander asks to represent a proposed class consisting of "all persons who pre-paid [BF Labs] for Bitcoin mining equipment." ¶ 54 (Appx. 128). That is the same group of consumers for whom the FTC seeks restitution in its case. FTC Compl. ¶ 42; *id.*, Prayer for Relief ¶¶ A, C-D (Appx. 39-40); *see also infra* pp. 23-24. The Kansas district court has not yet acted on their motion to certify a class.

Alexander contends that BF Labs violated the Kansas Consumer Protection Act, K.S.A. §§ 50-626, 50-627, and 50-634 (*see* ¶¶ 58-74 (Appx. 131-34)), and alleges several causes of action based on the common law of Kansas (*see* ¶¶ 75-105 (Appx. 134-40)). The compl 50602 Tw(my[eleges sev)-6.103 047 TD see

3. Preliminary Proceedings

On September 18, 2014, at the Commission's request, the district court in the present case issued an *ex parte* temporary restraining order. Appx. 50-82. The TRO froze defendants' assets, appointed a temporary receiver, and stayed "any action to establish or enforce any claim, right, or interest… against [BF Labs]… including, but not limited to,… [c]ommencing, prosecuting, continuing, entering, or enforcing any suit or proceeding" (Appx. 75). The court below extended these provisions in stipulated orders entered on September 30 (Appx. 207) and October 2 (Appx. 259-92). On October 22, 2014, the district court in Kansas granted the temporary receiver's motion to stay all proceedings in the Alexander case (Supp. Appx. 38-46), but limited this stay to 60 days (

inadequate representation'…. to overcome this presumption." Order at 2-3 (quoting *Little Rock School Dist. v. North Little Rock School Dist.*, 378 F.3d 774, 780 (8th Cir. 2004)). The district court concluded that Alexander had failed to make such a showing. *Id.* at 3.

The district court held that "the FTC will adequately protect [Alexander's] interests," and noted that "[t]he FTC's actions to date have effectively preserved [BF Labs'] assets, thereby protecting the interests of all customers." *Id.* Alexander's "disagreements with the FTC's litigation strategy," the court found, do "not make [their] interest[s] distinct" from those the agency is seeking to protect. *Id.* (citing *Little Rock School Dist.*, 378 F.3d at 781). But the court denied the motion without prejudice. "As the case progresses and issues become more concrete," Alexander "can seek leave to intervene (as of right or permission) to the extent necessary and proper." *Id.* at 4. Alexander appeals from that ruling.[2]

[2] The district court also denied the alternative request for permissive intervention pursuant to Fed. R. Civ. P. 24(b). Order at 3-4. Alexander does not challenge that determination.

5. Proceedings Subsequent To The Notice Of Appeal

On December 12, 2014, the district court denied the FTC's motion for a preliminary injunction (Doc. #201) (Supp. Appx. 13-25).[3] Eleven days later, the district court dissolved the temporary restraining order, directed that BF Labs' preexisting management resume day-to-day control of the company's assets and operations, wound down the temporary receivership, and terminated the stay on other lawsuits against the company (Doc. #219) (Supp. Appx. 31-34). The Kansas district court then lifted its stay of Alexander's case and allowed that litigation to resume. Order of December 30, 2014 (Supp. Appx. 47-58).

SUMMARY OF ARGUMENT

There is no private right of action under the FTC Act. Congress decided that the Federal Trade Commission will be the sole enforcer of the Act, and allowing Alexander to intervene in the FTC's enforcement action would amount to an end-run around that decision. As courts have recognized in analogous circumstances, sound policy counsels against such a result except in compelling circumstances. Alexander provides no good reason to interv

1. Alexander lacks Article III standing because the FTC's enforcement causes him no injury in fact. Because the FTC Act provides no private right of action, Alexander has no direct interest in the question whether BF Labs violated the FTC Act or the appropriate remedy for any such violation. Moreover, Alexander will suffer no concrete and particularized injury from the government's case. His allegations that the possible remedies in the FTC enforcement action will interfere with his own litigation depend on a chain of speculative events too conjectural to establish standing. His allegations of harm caused by the TRO are wrong because the TRO (which has since been dissolved) benefited the class by preserving assets.

2. Alexander fails the test for intervention as a matter of right under Rule 24(a)(2) because he can show neither a sufficient interest in the litigation nor that the FTC inadequately represents his interests.

Alexander's economic interests in the outcome of this case are insufficient to warrant mandatory intervention. His concern that money paid to satisfy an FTC judgment would impair BF Labs' ability to satisfy additional judgments in the Kansas case is unfounded. The same consumers would receive relief under either this case or the putative class action. They would benefit to the extent either or both lawsuits yield financial redress for the injuries they incurred.

Under Rule 24(a)(2), courts presume that the government adequately represents the interests of would-be intervenors. Here, that presumption should apply even more strongly, since the FTC seeks relief not simply for the general public, but for the very consumers that Alexander wishes to represent. Moreover, intervention could interfere with the FTC's ability to prosecute this matter in a way that will best serve the public interest. Thnt adeqe for8(ateproigaul)4.2trj-g thobjectivesthor Eo7

will cause an injury in fact that (2) is caused by the complained-of behavior and (3) will be redressed by a favorable judicial decision. *ACLU of Minn. v. Tarek ibn Ziyad Academy*, 643 F.3d 1088, 1092 (8th Cir. 2011); *accord National Parks Conservation Ass'n*, 759 F.3d at 975 (power plant operator had standing to intervene because "if the court here grants … relief, then [the intervenor] would unavoidably be harmed").

Alexander founders on the first prong of that test because he cannot show that the FTC's case would cause an injury that is "concrete and particularized" and is "actual or imminent, not conjectural or hypothetical." *Mausolf v. Babbit*, 85 F.3d 1295, 1301 (quoting *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 834 (8th Cir. 2009), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). That is the case for two distinct reasons.

First, Alexander has no "concrete or particularized" interest in the FTC's suit to hold BF Labs liable for violating the FTC Act, because, as the Supreme Court has made clear, a party that does "not possess any official authority to directly enforce [a statute]…. [has] "no personal stake in… its enforcement" against others that would be needed "to create a case or controversy under Article III." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013). "Because an intervenor participates on an equal footing with the original parties to a suit, a

movant for leave to intervene under Rule 24(a)(2) must," like "the original parties," be "entitled to have the court decide the merits of the dispute." *Mausolf*, 85 F.3d at 1300-01 (quoting *Allen v. Wright*, 468 U.S. 737, 750-51 (1982), and *Building and Constr. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994)). Alexander has no independent entitlement to have the court decide whether BF Labs violated the FTC Act or what remedies to impose for any such violation.

Second, and equally important, alleged injuries that are merely "potential" or based on "speculation" are insufficient to establish standing. *Mausolf*, 85 F.3d at 1302 (citing *Lujan*, 504 U.S. at 567, and *Sierra Club v. Robertson*, 28 F.3d 753, 758-60 (8th Cir. 1994)). The harms Alexander claims from the FTC's enforcement action do not meet that standard. Alexander alleges that, if the FTC's action results in rescission of contracts between BF Labs and its customers, then he and the putative consumer class will be unable to recover damages under Kansas law. Br. 27; *id*. 20-21, 29, 32-34, 39. That harm is speculative. Before it could come to pass, the FTC must win its case, the district court in Missouri must order rescission of contracts, the Alexander class must be certified by the district court in Kansas, the class must win its case, and the Kansas court must rule that the judgment in the FTC's case precludes additional recovery under Kansas law. Alexander's standing

thus depends on “a highly attenuated chain of possibilities” that “does not satisfy

on a "hypothetical outcome" of a lawsuit. *Metro. St. Louis Sewer Dist.*, 569 F.3d at 834, 836. *See also Curry*, 167 F.3d at 422 (a "potential harm" that is "only [a] possibility" that "might" affect an intervenor does not convey standing).[5]

Alexander further argues that a contract rescission remedy would preclude him from seeking to compel BF Labs to deliver the equipment ordered rather than returning of the money paid for it. Br. 32, 34. Even if that were true, it does not amount to a cognizable injury. This Court has established that payment of a "monetary equivalent" adequately "take[s] the place of the specific property to be returned." *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991).

It is also speculative whether the disposition of this case could thwart Alexander from pursuing his class action claims. Regardless whether the district court in this case adopts all, some, or none of the remedies the FTC has proposed, Alexander could continue to pursue his Kansas state-law claims. A decision in this case could preclude Alexander's Kansas law claims only where "(1) the issue sought to be precluded [in a later case] is identical to the issue previously

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[5] In any event, the district court denied intervention without prejudice. Although the court found allegations of harm "too remote at this stage of the proceedings to justify intervention," it left open the possibility that, "[a]s the case progresses and issues become more concrete" intervention could be appropriate in the future. Order at 4.

decided;… (2) the party sought to be estopped was either a party or in privity with a party to the prior action; and (3) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action." *Ripplin Shoals Land Co. v. U.S. Army Corps of Eng'rs*, 440 F.3d 1038, 1044 (8th Cir. 2006) (numbering altered). None of these factors would be satisfied in this context.

Alexander cannot show any "actual" or "concrete" injury stemming from the district court's temporary restraining order and appointment of a receiver. He argues at length that the TRO and the receiver's actions to enforce it caused harm to him (as well as the consumers he seeks to represent in his putative class action). Br. 27-28; *see id*. 9, 12-16, 17-20. But the point of the TRO and the receivership was to preserve assets to maximize recovery by victims – a *benefit* to the class. As the district court properly recognized, by "effectively preserv[ing]" BF Labs' assets, the TRO and receivership "protect[ed] the interest of all consumers." Order at 3. Moreover, even if those restrictions had caused any cognizable injury in fact sufficient to convey standing in the past, they no longer do. On December 23, 2014, the district court dissolved the TRO and terminated the receivership. Supp. Appx. 26-30.

II. ALEXANDER FAILS TO SATISFY THE RULE 24(a)(2) CRITERIA FOR INTERVENTION AS OF RIGHT

Rule 24(a)(2) requires parties seeking intervention as a matter of right to show that "(1) [they have] a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and (3) the interest is not adequately protected by the existing parties to the litigation." *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997). Alexander fails the second and third prongs of that test.

A. The FTC's Case Will Not Impair Alexander's Interests

This court requires a "cognizable interest" in order to intervene under Rule 24. An interest is cognizable under Rule 24(a)(2) only where it is direct, substantial, and legally protectable. An economic interest in the outcome of the litigation is not itself sufficient to warrant mandatory intervention. An interest that is contingent upon the occurrence of a sequence of events before it becomes colorable is also not sufficient to satisfy Rule 24(a)(2). *Medical Liability Mutual Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008-09 (8th Cir. 2007) (quotation marks and citations omitted) *accord Standard Heating & Air Conditioning*, 137 F.3d at 571.

Alexander fails that test for the same reason that he lacks standing. The principal claim of harm is that an award to the FTC of contract rescission will deny

the class recovery under state law. Br. 32-33. Whether Alexander or the putative class will be affected by the FTC's enforcement action is contingent on the sequence of hypothetical events described above. The same goes for Alexander's claim that actions taken by the temporary receiver will prejudice the interests of

efforts. For those reasons, Alexander's reliance (Br. 34-35) on *SEC v. Flight Transp. Corp.*, 699 F.2d 943 (8th Cir. 1983), is misplaced. There, the same pool of money was claimed by different groups of people and not, as here, by different entities representing the same claimants.

B. Alexander Has Not Overcome The Presumption That The FTC Will Adequately Protect His Interests

"When the persons attempting to intervene… are [doing so] only to protect the interests" of individuals who are already represented by an existing party in the case, there is a "presumption of adequate representation" under Rule 24. *Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1999). When a government agency is "already a party to the suit [and] has an obligation to represent the interests of the party seeking to intervene," the would-be intervenor bears an even "heavier burden" to rebut this presumption. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1168 (8th Cir. 1995) (citing *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1000 (8th Cir. 1993)). The FTC is "charged by law with representing the interest" of the would-be intervenors, and "representation will be presumed adequate unless special circumstances are shown." 7C Wright & Miller, Fed. Prac. & Proc. Civ. § 1909 (3d ed.).

The presumption should be especially strong in an FTC enforcement action. As described at page 1 above, Congress created the FTC to protect consumers and

gave it an array of powers to carry out that mission. Notably, Congress did not grant private citizens a right of action under the FTC Act. *See Back Yard Burgers*, 91 F.3d at 1187; *accord R.T. Vanderbilt Co. v. Occupational Safety & Health Review Comm'n*, 708 F.2d 570, 574 n.5 (11th Cir. 1983) (even though "consumers and members of the public [are] the beneficiaries of the statute, [they] are not provided a private right of action" under the FTC Act); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 989 (D.C. Cir. 1973). Intervention by private parties in an FTC enforcement action would amount to an end-run around Congress's decision that the FTC be the only enforcer of the FTC Act.

In the analogous context of antitrust enforcement, the Supreme Court has articulated "the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government." *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 693 (1961). Relying on *Sam Fox*, this Court has held that antitrust enforcement authorities "must retain considerable discretion in controlling government litigation and in determining what is in the public interest." *United States v. Assoc. Milk Producers, Inc.* [illegible]

of the Government." *Id*. Allowing the government to litigate its actions without intervention would avoid "encumbering government antitrust suits with a multitude of collateral issues" and would "assur[e] … the government full control of the prosecution and settlement of such public antitrust actions." *Int'l Mort. & Inv. Corp. v. Von Clemm*, 301 F.2d 857, 862 (2d Cir. 1962).

For purposes of intervention, similar considerations logically apply to enforcement of the FTC Act's prohibition on unfair and deceptive acts and practices. FTC enforcement cases involve exercise of the government's discretion to prosecute a matter in a way that will best serve the public interest. Indeed, Congress allowed private parties to sue under the antitrust laws, but created no such private right of action under the FTC Act.

We are aware of no case in which a private litigant has been permitted to intervene in an FTC consumer protection enforcement action. The issue does not appear to have arisen in the courts of appeals, but district courts that have faced the matter have uniformly denied intervention to consumers who stood to receive redress under the FTC's actions, but nonetheless intended to bring separate suits against the same defendants. *See, e.g., FTC v. American Telnet, Inc.*, 188 F.R.D. 688 (S.D. Fla. 1999); *FTC v. First Capital Consumer Membership Svcs., Inc.*,

206 F.R.D. 358 (W.D.N.Y. 2001); *FTC v. Med Resorts Int'l, Inc.*, 199 F.R.D. 601 (N.D. Ill. 2001).

Alexander has not nearly overcome the presumption against intervention. There is little significant distinction between the class action case and the FTC's that renders the FTC an inadequate representative of the class's interests. In those circumstances, there is no good reason to question the district court's conclusion that "the FTC will adequately protect" Alexander's interests. Order at 3.

The FTC's enforcement action seeks much of the same relief for the same group of people as the putative Alexander class. Specifically, the FTC seeks financial redress for consumers who were "required… to pay up-front… the entire amount of an order at the time the order is placed," FTC Compl. ¶ 25, but did "not receiv[e] their prepaid [Bitcoin] mining machine[s]." ¶ 29 (Appx. 36-37). Alexander seeks financial redress for a proposed class that "consist[s] of all persons who pre-paid Defendant for Bitcoin mining equipment." Alex. Compl. ¶ 54 (Appx. 128).[6] Moreover, the FTC seeks "restitution, the refund of monies paid, and the disgorgement of ill-gotten monies." FTC Compl. Prayer for Relief

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[6] Alexander mischaracterizes a statement by FTC counsel during oral argument that the FTC seeks to represent a "broader pool of victims." Br. 36 (citing Appx. 303). In context, it is evident that the broader pool refers to the entire class of victims as opposed to Alexander and Symington themselves.

¶¶ C, D (Appx. 40). Alexander similarly seeks "restitution," "disgorgement," and compensatory damages for consumers' "ascertainable loss[es], including … purchase price." Alexander Compl. ¶¶ 72, 83, 93, 105, & Prayer for Relief ¶ (c) (Appx. 134, 136, 138, 139, 140).

Alexander contends that the FTC does not represent his interests because he seeks amounts and forms of relief beyond what the FTC seeks. Specifically, he claims that equitable remedies under the FTC Act are "but a subset of… the remedies available" under Kansas law, Br. 32, including "compensatory damages, consequential damages, and punitive damages," Br. 34. He also contends that the FTC's request for rescission of contracts is inconsistent with his request for damages (a claim that fails for the reasons set forth at page 15 above).

As the district court recognized, those matters amount to "disagreements ta 1dnder Ks3oeiitigation strategy." Order at3. This Court has established that a "proposed intervenor cannot rebut nderpresumption of representation by merely disagreeing ta 1dnderiitigation strategy or objectives of nderparty representing him." *Chiglo v. City of Preston*, 104 F.3d at 188. "It is not sufficient that the party seeking intervention merely disagrees wa 1dnderiitigation strategy… of nderparty representing its interests" or prefers to seek remedies that ndergovernment agency has declined to pursue. *Little Rock School Dist.*, 378 F.3d at 780 (citation omitted).

The types of strategy differences identified by Alexander are thus insufficient to make the "strong showing" required to show that the two parties' interests "are distinct and cannot be subsumed within the public interest represented" by the FTC. *Id.*; *accord Jenkins v. Missouri*, 78 F.3d at 1272, 1276. And there is no reason that the class cannot pursue remedies in its case that go beyond what the FTC seeks. *See supra* at 16-17.

Indeed, even when entities whose interests are aligned with a private litigant seek to intervene, they cannot establish

despite prospective intervenors' disagreement with the terms of a consent decree agreed to by the Justice Department).

Alexander is flatly wrong in asserting that the FTC does not adequately

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order.

Respectfully submitted,

/s/ David L. Sieradzki

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January 16, 2015

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I certify that the foregoing Brief of Plaintiff-Appellee Federal Trade Commission contains 5,919 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii). This Brief was prepared using Microsoft Word 2010, in 14-point Times New Roman font, which is a proportionally-spaced type style. It thus complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b), the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the technical requirements of 8th Cir. R. 28A(h)(2).

/s/ David L. Sieradzki

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January 16, 2015

Certificate of Service

Pursuant to Fed. R. App. P. 25(a)(2)(B), and 8th Cir. R. 28A(a), I certify that on January 16, 2015, I filed the foregoing Brief for Appellee using the Court's Electronic Filing System. All participants in the case, listed below, are registered EFS users and will receive service through the EFS system. Pursuant to 8th Cir. R. 28A(d), I will serve a paper copy on each counsel listed below within 5 days of

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/s/ David L. Sieradzki

January 16, 2015