IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

10-10715 and 10-12901 (Consolidated)

Federal Trade Commission v. Bishop, Nos. 10-10715, 10-12901 (consolidated)

PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION•S CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rules 26.1 and 28-1(b), this is to certify that the following is a complete list of individuals and entities known to have an interest in the above-captioned appeal:

Bishop, Richard A.

Bishop, Teresa A.

Bishop, Claire Rose

Bishop, Kaley Marie

Bishop, Sarah Jane

Bungo, Larrisa L. … FTC Assistant Regional Director, East Central Region

Caldwell, Tyna

Daly, John F. … FTC Deputy General Counsel for Litigation

DePaul, Sara Catherine … FTC Attorney

Crowder Law Group, P.A.

D•Alemberte & Palmer, P.L.L.C.

D•Alemberte, Talbot … Attorney

Federal Trade Commission

Federal Trade Commission v. Bishop, Nos. 10-10715, 10-12901 (consolidated)

Felman, James E. … Attorney

Hegedus, Mark S. … FTC Attorney

Kessler, Jonathan L. … FTC Attorney

Kynes, Markman & Felman, P.A.

Lewis, Kathleen

Lewis & White, P.L.C.

McCoun, Thomas B., III … U.S. Magistrate Judge

McDaniel, J. Brent

Meltzer, Bruce

Meltzer Law Group, P.A.

Merryday, Steven D. … U.S. District Court Judge

Milgrom, Michael … FTC Attorney

Optimum Business Solutions, LLC, d/b/a Attorney Finance Services

Palmer, Patsy … Attorney

Panek, Christopher D. … FTC Attorney

Rose, Michael B. … FTC Attorney

Shonka, David C. … FTC Principal Deputy General Counsel

Steiger, Jon Miller … FTC Regional Director, East Central Region

STATEMENT OF ORAL ARGUMENT

The Federal Trade Commission believes that oral argument will assist the Court in resolving issues presented in this appeal.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

A. Nature of the Case, the Course of Proceedings, and the Disposition Below 1

B. Statement of Facts 3

1. The Deceptive Loan Modification Scheme 3

2. Bishop and the Other Defendants 10

C. Proceedings Below 17

1. Entry of Preliminary Injunction and Asset Freeze 17

2. Motions to Modify Asset Freeze 21

SUMMARY OF ARGUMENT 22

ARGUMENT 25

I. THE DISTRICT COURT PROPERLY ENJOINED BISHOP•S UNLAWFUL CONDUCT AND FROZE HIS ASSETS PENDING AN ADJUDICATION ON THE MERITS 25

A. Standard of Review 25

B. The District Court Did Not Abuse Its Discretion in Enjoining Bishop From Participating in Loan Modification and Foreclosure Relief Services 25

1. The Commission is Likely to Succeed in Showing that WDR•s Loan Modification Scheme Was Deceptive 27

2. The Commission is Likely to Succeed in Showing that Bishop Is Responsible for and Should Be Enjoined from Deceptive Activities 32

a. Bishop participated in and had control over WDR•s deceptive conduct 32

b. Bishop is responsible for the conduct of a common enterprise 35

c. Bishop likely would engage in deceptive marketing activities in the future 38

C. The District Court Did Not Abuse Its Discretion in Freezing Bishop•s Assets 40

1. The Asset Freeze Was Amply Justified Under Established Standards 40

2. Bishop•s Arguments for Further Limiting the Asset Freeze are Premature and Incorrect 46

a. The asset freeze should remain in place until the District Court has addressed the merits of Bishop•s liability 46

b. Bishop•s liability for WDR•s deception is not limited to the share of funds he received 48

II. THE DISTRICT COURT DID NOT HAVE JURISDICTION TO MODIFY THE ASSET FREEZE 54

A. Standard of Review 54

B. The Court•s Decision in 10-10715 Will Moot the Relief Sought in 10-12901..... 55

C. The District Court Did Not Have Jurisdiction to Grant the Requested Relief 56

CONCLUSION 60

TABLE OF AUTHORITIES

CASES PAGE

Anderson v. United States,
317 F.3d 1235 (11th Cir. 2003) 54

* Cases principally relied upon.

FTC v. Cyberspace, LLC,
453 F.3d 1196 (9th Cir. 2006) 31

FTC v. Febre,
128 F.3d 530 (7th Cir. 1997) 48

FTC v. Figgie Int'l,
994 F.2d 595 (9th Cir. 1993) 48

**FTC v. Gem Merch. Corp.*,
87 F.3d 466 (11th Cir. 1996) 26, 42, 48, 53

FTC v. H.N. Singer, Inc.,
668 F.2d 1107 (9th Cir. 1982) 26

FTC v. Kitco of Nevada, Inc.,
612 F. Supp. 1282 (D. Minn. 1985) 42

FTC v. Minuteman Press,
53 F. Supp. 2d 248 (E.D.N.Y. 1998) 31

**FTC v. Nat'l Urological Group, Inc.*,
645 F. Supp. 2d 1167 (N.D. Ga. 2008) 52

**FTC v. Nat'l Urological Group, Inc.*,
356 Fed. Appx. 358; 2009 U.S. App. LEXIS 27388
(11th Cir. Dec. 15, 2009) 52

FTC v. Pantron I Corp.,
33 F.3d 1088 (9th Cir. 1994) 42

FTC v. Peoples Credit First, LLC,
2006-1 Trade Cas. (CCH) ¶ 75,192, 2005 U.S. Dist. LEXIS 38545
(M.D. Fla. Dec. 18, 2005), *aff'd*, 244 Fed. Appx. 942,
2007 U.S. App. LEXIS 17429 (11th Cir. Jul. 19, 2007) 30, 52

**FTC v. Publ'g Clearing House*,
104 F.3d 1168 (9th Cir. 1997) 32, 42, 43

* Cases principally relied upon.

FTC v. Sec. Rare Coin & Bullion Corp.,
931 F.2d 1312 (8th Cir. 1991) 26

FTC v. Sw. Sunsites, Inc.,
665 F.2d 711 (5th Cir. 1982) 50, 51

FTC v. Tashman,
318 F.3d 1273 (11th Cir. 2003) ..... 5th Ci

* Cases principally relied upon.

FTC v. World Wide Factors, Ltd.,
882 F.2d 344 (9th Cir. 1989) 26, 27, 45

Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr S.A.,
377 F.3d 1164 (11th Cir. 2004) 55

Great-West Life & Annuity Co. v. Knudsen,
534 U.S. 204, 122 S. Ct. 708 (2002) 49, 50

**Griggs v. Provident Consumer Discount Co.*,
459 U.S. 56, 103 S. Ct. 400 (1982) 57

Ideal Toy Corp v. Sayco Doll Corp.,
302 F.2d 623 (2d Cir. 1962) 57

In re Kraft, Inc.,
114 F.T.C. 40, 1991 FTC LEXIS 38 (1991),
aff'd, 970 F.2d 311 (7th Cir. 1992) 27

Lewis v. Tobacco Workers' Int'l Union,
577 F.2d 1135 (4th Cir. 1978) 57

**Najjar v. Ashcroft*,
273 F.3d 1330 (11th Cir. 2001) 55

In re Nat'l Credit Mgmt.,
21 F. Supp. 2d 424 (D.N.J. 1998) 27

**Natural Res. Defense Council v. Sw. Marine, Inc.*,
242 F.3d 1163 (9th Cir. 2001) 57, 58, 59

Ochran v. United States,
273 F.3d 1315 (11th Cir. 2001) 36

Removatron Int'l Corp. v. FTC,
884 F.2d 1489 (1st Cir. 1989) 30

* Cases principally relied upon.

**SEC v. ETS Payphones, Inc.*,
408 F.3d 727 (11th Cir. 2005) 25, 44, 46

SEC v. Kirkland,
2006 U.S. Dist. LEXIS 65145 (M.D. Fla. Sept. 12, 2006) 58

SEC v. Unique Fin. Concepts, Inc.,
196 F.3d 1195 (11th Cir. 1999) 25

Sammons v. Polk Cnty. School Board,
2006 U.S. Dist. LEXIS 2538 (M.D. Fla. Jan. 12, 2006) 57

**Schewchun v. United States*,
797 F.2d 941 (11th Cir. 1986) 56

In re Telebrands Corp.,
140 F.T.C. 278 (2005), *aff'd*,
Telebrands Corp. v. FTC

* Cases principally relied upon.

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100, 89 S. Ct. 1562 (1969) 38

FEDERAL STATUTES

Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq* 51

Employee Retirement Income Security Act of 1974 (ERISA),
29 U.S.C. § 1132(a)(3) 49

Federal Trade Commission Act

15 U.S.C. § 45 1

* Cases principally relied upon.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court abused its discretion in preliminarily enjoining the appellant-defendant•s conduct when it determined that the Federal Trade Commission would likely succeed on the merits of its claim that he was liable for his extensive participation in deceptive practices.

2. Whether the district court abused its discretion in ordering a preliminary injunction, including a freeze of appellant-defendant•s assets, where his likely monetary liability exceeded the assets• value.

3. Whether the district court had jurisdiction to grant the substantial alteration of an asset freeze order sought by appellant-defendant during the pendency of his appeal from that order.

STATEMENT OF THE CASE

A. B o o C , C o o o , o o

This appeal arises from an action by the Federal Trade Commission (FTC or Commission), pursuant to Sections 5, 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45, 53(b), and 57b, and the FTC•s Telemarketing Sales Rule, 16 C.F.R. Part 310 (2009), seeking temporary, preliminary and permanent injunctive relief, as well as equitable monetary relief, for the Defendants• deceptive marketing and sale of

mortgage loan modification and foreclosure relief services.[1] After granting a temporary restraining order (TRO) and asset freeze, D.19, the District Court on December 14, 2009, granted the FTC•s request for a preliminary injunction, including continuation of the asset freeze. D.67. The District Court concluded that the FTC had met its burden of demonstrating •a substantial likelihood of success on the meritsŽ and •that the equities weigh in favor of issuing a preliminary injunction.Ž D.60 at 14, 17; D.67.[2]

The District Court subsequently rejected the motions of Defendant Richard

[1] •D.#Ž refers to the document number and •D.# at #Ž refers to the document number plus page number from the District Court•s record.

[2] The District Court•s December 14, 2009, Order (D.67) •adoptedŽ the Magistrate•s Report and Recommendation (D.60). Accordingly, this brief attributes the Report and Recommendation•s findings and conclusions to the District Court itself.

The present interlocutory, consolidated appeals arise before the close of discovery and challenge the District Court•s entry of the preliminary injunction and rejection of Bishop•s request for modification of the asset freeze. In No. 10-10715, Bishop principally claims that the District Court should have held a hearing on whether a nexus existed between the frozen assets and the deceptive activity. In No. 10-12901, he challenges the District Court•s determination that it had no jurisdiction to consider his motion to modify the asset freeze due to the pendency of this appeal.

B.

This case involves Defendants• mortgage loan modification and foreclosure relief business, which operated through deception and misrepresentations. Until the District Court ordered it shuttered, the business bilked consumers of more than $4 million. After describing the business, the FTC will set forth Defendant Bishop•s pivotal roles in the business•s formation, operation and direction.

1. The Deceptive Loan Modification Scheme

Defendant Washington Data Resources (WDR) purported to offer mortgage loan modification and foreclosure relief services, using a network of attorneys.

D.32-2 at 2-4; D.32-3 at 1; D.116 at 3.[3] Working closely with Nationwide Mortgage Services, Inc. (Nationwide), a company owned by Defendant Bishop that provided marketing, promotion and mailing services, D.31-3 at 26; D.43-1, WDR sent postcards to consumers that informed recipients that they may qualify for •the new government bailout to refinance your current mortgage and reduce your interest rate.Ž D.5-2 at 2.

The postcards were an element of the deceptive scheme. On one side, they bore a •Date of Record,Ž •Document Number,Ž •Case Number,Ž and the homeowner•s county, D.5-2 at 2; D.117 at 4, although the information apparently did not relate to official governmental records. D.8 at 2-3. The postcards also referred to government programs, D.165 at 51, such as •Fresh StartŽ (D.5-2 at 2), •New StartŽ (D.117 at 4-5), and •Hope4HomeownersŽ (D.5-2 at 3). The postcards• message expressed urgency, telling homeowners to •call immediatelyŽ because •this may be your final notice.Ž D.5-2 at 3; D.117 at 4.

The reverse side of the postcards was encouraging about prospects for mortgage relief. It identified the homeowner as •pre-qualified.Ž D.5-2 at 3; D.117 at 5. One postcard stated that the •Hope4Homeowners program *will enable* you to

[3] As explained below in Part 2 of the Statement of Facts, WDR was both a registered corporation and a name used by another entity, Jackson Crowder & Associates (JCA), which itself later became Defendant Crowder Law Group.

either refinance your existing loan or restructure your loan to reduce your interest rate and lower your mortgage payment.Ž D.5-2 at 3 (emphasis added). Another stated that •[y]ou have been selected to receive this offer to help relieve you from the burden of overdue mortgage payments, past medical and credit card debt.Ž D.117 at 5. The postcards referred to relief programs as •GovernmentŽ (D.5-2 at 3) or •federalŽ (D.117 at 5), and bore the signature of individuals identified as attorneys. D.5-2 at 3; D.117 at 5. In the eyes of desperate homeowners facing possible foreclosure, the attorneys• signatures likely lent legitimacy and an aura of truthfulness to those representations. Homeowners receiving the postcards believed the offers involved government programs. D.12 at 2; D.14 at 2.

The postcards• misrepresentations were reinforced by WDR•s sales agents when homeowners called the toll-free number on the card. D.5-2 at 2-3; D.117 at 4-5.[4] The sales agents described the loan modification program as •similar to the Obama program,Ž D.8 at 17, and told them that WDR would get them into a government program. D.15 at 2. Although, when asked directly, one sales agent denied that WDR was affiliated with the government, D.6 at 23, other sales agents did not seek to disabuse callers of the impression of government affiliation. D.7 at

[4] Although the sales agents had titles such as •legal assistantŽ and •paralegal,Ž D.6 at 23, they had no legal experience or formal legal training. D.115 at 3.

6-40; D.8 at 7-20. Indeed, homeowners thought that they were talking to the government, D.14 at 2, or that WDR was •federally backed,Ž D.116 at 37.

WDR•s sales agents promised results, stating (similarly to the postcards) that WDR would •reduce the interest rates ƒ reduce the principal balances ƒ reduce their monthly mortgage payments.Ž D.8 at 10; *see also* D.6 at 19-20, 23, 25; D.115 at 31. They gave examples of allegedly successful interest rate and mortgage payment reductions. D.8 at 18-19; D.11 at 1-2; D.15 at 2; D.16 at 2. They promised results within 60-90 days, if not sooner. D.6 at 21; D.11 at 1; D.12 at 2-3; D.16 at 2. Although they offered no guarantees, the sales agents were encouraging:

> Nothing•s guaranteed (inaudible) except for, you know, taxes and you … or, you know, death for that matter. I mean, we do pretty much have a very good turnaround. (D.6 at 25.)

> So, I can•t say that I can guarantee anything, but, you know, if you•re in the situation you are right now and you•re being pretty truthful with me and you have not received any kind of sale date from your lender, I don•t see any why they wouldn•t be able to get you current on this. (D.6 at 26.)

> We•ve been working with lenders nationwide helping hundreds and thousands of homeowners just like you to get their finances back on track. (D.7 at 27-28.)

WDR required homeowners desiring its services to sign an •Application for Legal ServicesŽ (Application), D.11 at 31, D.14 at 8, D.117 at 6, and to pay

$2,000, D.6 at 30; D.7 at 28. Although the Application stated that there was •no guarantee that Law Firm can accomplish this goal [prevention of foreclosure] for Client,Ž D.116 at 52, no statement in the Application modified the postcards• and sales agents• pitch. In response to homeowner requests to review the Application prior to purchase, WDR sales agents would refuse to send it unless the homeowners had provided sales agents with a credit card number or payment, stating, for example:

> Those are legal, sacred documents. They•re not going to release it, you know, without you … without some type of commitment from you. ƒ You know, because that•s releasing our attorney•s information, their contact information, your payments, what we can do for you and so forth.

D.6 at 31;*see also* D.12 at 2; D.15 at 2-3; D.16 at 2.

The Application purported to retain an attorney on behalf of the homeowner in the homeowner•s state, D.14 at 3, 5-6, 8, and to become effective when the attorney accepted the representation. D.14 at 8. In reality, the attorney identified in the Application had no role in providing the loan modification service, apart from an initial acceptance phone call. D.116 at 3. Sales agents instructed homeowners to send financial information and communicate with WDR directly. D.11 at 3. WDR, not the attorneys named in the Application, contacted the mortgage companies. D.12 at 6.

WDR referred to the attorneys named in the Application and on the postcards as •Outside Attorneys,Ž D.32-2 at 3, 5, and entered into •Outsourcing AgreementsŽ with them. D.116 at 3, 17-20. Although these agreements purported to put the attorneys in control of all matters, including advertising and refunds, in reality WDR called the shots. D.116 at 4-6; D.12 at 5-6. For example, contrary to the Outsourcing Agreement, WDR made advertising, cancellation and refund decisions. D.116 at 4-6. The Outsourcing Agreement provided that Outside Attorneys would receive up to $200 of the $2,000 homeowners paid, D.116 at 31, a small amount reflecting their minimal role in the loan modification services.

WDR instructed homeowners to stop making mortgage payments while WDR purportedly negotiated the loan modification. D.12 at 3. When homeowners contacted WDR about the status of their loan modifications, however, WDR either did not return their calls or would provide little information. D.11 at 3-5; D.15 at 3; D.117 at 2. WDR•s unresponsiveness left homeowners in the dark, thus forestalling their discovery of WDR•s deceptive conduct. D.117 at 2-3. Its directive that homeowners stop making mortgage payments put homeowners further in arrears, often hastening foreclosure actions. D.11 at 6-7; D.12 at 2, 6; D.15 at 2, 4. WDR•s failure to provide the promised loan modification is demonstrated by the several hundred thousand dollars in refunds WDR claims to

[5] Bishop estimated that WDR/Crowder Law Group had 2,336 clients.

with Defendant Douglas Crowder to set up a law firm that would provide bankruptcy services through a network of attorneys in a number of states. D.8 at 69-70; D.36-2 at 3; D.115 at 1-3. Like MAS, it had its headquarters in Clearwater, even though Crowder was based in California. D.8 at 37-70; D.115 at 3. The firm, which was initially called Jackson Crowder & Associates (JCA) and would later change its name to Crowder Law Group (D.8 at 49-51), also operated using the •Washington Data ResourcesŽ name. D.116 at 12.[9] Bishop •set up the administrative, hiring, marketing, and insurance lines along with providing the furniture, equipment and software.Ž D.32-5 at 1. Bishop estimated the software•s value at •over $300,000.Ž D.36-2 at 3. Bishop also contributed MAS•s job procedure manual to the firm. D.115 at 21, 23; D.36-2 at 3. According to Bishop: •We did it with all my money, all my equipment, and I worked for free for four or five months.Ž D.124 at 55-56.

Defendants Brent McDaniel, Tyna Caldwell, and Kathleen Lewis worked at JCA/WDR as senior managers. D.115 at 2. McDaniel served as its Director of Sales, Caldwell as its Senior Vice President, and Lewis, as its accountant/Finance

[9] Although WDR was not incorporated until late 2008, D.8 at 74-75, it did not operate independently of JCA. D.74 at 2; D.116 at 12. Because JCA also operated as •Crowder Law Group,Ž this brief will refer to the WDR enterprise using one or a combination of the names, depending upon the context.

Manager. D.115 at 2; D.152-9 at 1. McDaniel, Caldwell and Lewis, however, were not employed by JCA/WDR. Rather, they were employed by another of Bishop•s firms, RABC Services, Inc., which •leasedŽ them to JCA/WDR. D.86, PX-24 at 2, D.124 at 86, 114.

In an attempt to remain behind the scenes,[10] Bishop did not become a principal of JCA/WDR. Instead he took money out of the firm via a Marketing Agreement with his own company, Nationwide. D.124 at 56-58; D.43-1. According to Bishop, •my scheme of being rewarded for doing that was to have a brokering … you know, to not … to broker the marketing piece and make my profit that way.Ž D.124 at 56-57. He also received income and health benefits for himself and his family through RABC. D.84, DX-17 at 12 (Statement 1, Form 1040, Wage Schedule); D.124 at 59, 114; D.152-6.

After setting up JCA/WDR•s operations, Bishop claims to have vacated the offices, D.36-2 at 3, but he remained a presence, visiting at least twice a month between June and December 2008 to discuss •the marketing and general business matters.Ž D.32-2 at 2. His integral role was evident to an attorney working at JCA/WDR:

---

[10] Because it was unaware of Nationwide•s and RABC•s existence when it filed the complaint in this action, the FTC did not name Bishop•s firms as defendants.

> A non-attorney, who I knew only as Rick B., seemed to have a lot of authority and influence, though I understood this role to be that of a business consultant. Rick B. had his own office in a corner of the suite and when he moved out, shortly after I joined the firm, Douglas Crowder took over his office.

D.115 at 2.

Bishop could remain involved in the business without being physically on the premises, however, because of his employment of senior managers and longstanding relationships with them. Through RABC, he employed McDaniel, Caldwell and Lewis. D.86, PX-24 at 2; D.115 at 2; D.124 at 86, 114. Bishop described McDaniel, WDR•s President (D.8 at 71-75), as his •nearest living friend.Ž D.84, DX-19 at 3. Lewis •he had known for years.Ž D.32-5 at 2. She worked for JCA, WDR, AFS, Nationwide and RABC. D.5-3 at 9; D.31-2 at 23, 26; D.115 at 2; D.152-6; D.152-9. She signed checks for AFS and Nationwide. D.31-2 at 23, 24-26. Indeed, Bishop•s close working relationships with Lewis and McDaniel pre-dated the JCA/WDR activities; they had also worked for MAS. D.71-2 at 9; D.152-6 at 1.

Bishop claims (now) that he thought it was a bad idea for JCA to begin loan modifications as WDR. D.36-2 at 4; D.165 at 30.[11] At the time, however, Bishop

[11] The move into loan modifications was the apparent motivation for incorporating WDR as it own entity, D.32-3 at 1, even if its operations remained fully integrated with JCA, D.74 at 2; D.116 at 3, 12.

continued •leasingŽ McDaniel, Caldwell and Lewis to the enterprise, D.124 at 114, receiving both income and benefits in return. D.152-6 at 1-4; D.84, DX-17 at 12 (Statement 1, Form 1040 Wage Schedule). Bishop also entered into a new Marketing Agreement with WDR directly to promote and market WDR•s loan modification activities. D.32-5 at 2; D.43-1. WDR compensated Bishop at a per-postcard rate for these services, as well as for office equipment, furniture, and his software and database. D.43-1 at 1. The software and database were particularly important to the enterprise•s ability to track clients. D.124 at 18, 26-27.

The Marketing Agreement defined Bishop•s and Nationwide•s responsibility for the advertising used to promote the WDR loan modification services. In the Article entitled, •Services Provided by Nationwide,Ž Bishop agreed that:

> Any advertising used by Nationwide to obtain new clients will be reviewed by the attorney named on the advertising before being used. All advertising will be truthful and not misleading, and will comply with such legal and ethical guidelines as WDR or any law firm it services may inform Nationwide of. Nationwide will keep a copy of all advertising used, together with the dates, media and locations of its use, for a two year period from the date of its last use.

D.43-1, Art. 2.b. Despite Bishop•s contractual obligation to ensure that •[a]ll advertising will be truthful and not misleading,Ž *id.*, and despite his experiences with MAS, which gave him knowledge that WDR•s postcards were likely deceptive, Bishop did not review them for content. D.165 at 33-34.

Bishop also had control and knowledge of WDR•s business activities through AFS. Bishop acquired AFS shortly after it began handling money for WDR. D.5-3 at 6; D.32-2 at 3, 5. From March to July 2009, during which time Bishop was AFS•s owner, AFS collected over $1.2 million from consumers for the deceptive loan modification activities. D.5-3 at 6; D.32-5 at 2; D.152-7; D.152-11 at 2.

All of these businesses, whether or not owned by Bishop, functioned as a common enterprise. D.74 at 2. JCA, WDR, AFS, Nationwide and RABC all operated from 28870 U.S. Highway 19 North in Clearwater, Florida. D.8 at 23-24, 33-34, 69-72; D.31-2 at 23; D.124 at 101-02; D.152-6 at 1; D.152-7 at 1.[12] They shared telephone numbers. D.7 at 6 (Crowder Law Group/866-404-4921), D.31-2 at 23 (Nationwide/866-404-4921); D.116 at 28 (WDR/866-404-4921); D.14 at 7 (JCA/866-565-8545), D.152-8 at 1 (AFS/866-565-8545), D.152-10 (WDR/866-565-8545). They transferred money among one another. D.31-2 at 23-24 (Nationwide to AFS and vice versa); D.84, DX-14 at 6, 13, and 15 (Nationwide to

[12] In the loan modification scheme•s earlier incarnation, MAS and Nationwide operated from offices less than 2 miles down the street at 26810 U.S. Highway 19 North. D.31-3 at 24, 45, 54.

TCBA).[13] Employees for the common enterprise answered telephones using a number of interchangeable names, including •Legal Support ServicesŽ (D.6 at 6; D.7 at 7; D.8 at 9), •law officesŽ (D.12 at 2), •Crowder Law GroupŽ (D.7 at 14), •Washington Data ResourcesŽ (D.12 at 5), or •Attorney Financial ServicesŽ (D.12 at 5). •Washington Data ResourcesŽ was also represented to Outside Attorneys as simply another name for •Jackson Crowder & Associates.Ž D.116 at 3, 12. McDaniel himself did not distinguish among the companies, listing his employer as •WDR-Crowder Law Group,Ž D.71-2 at 8.

By mid-2009,[14] Bishop appeared to be trying to distance himself further from WDR•s loan modification activities. Although the timing remains uncertain, at least by mid-May 2009, RABC had become TCBA, for which Lewis appears to have worked. D.152-6; D.124 at 114. TCBA continued paying the salaries of WDR•s senior personnel. D.115 at 2; D.71-2 at 3; D.124 at 114. Bishop even removed himself as a TCBA employee, but TCBA then employed his wife, which

[13] As discussed below, RABC became TCBA sometime in mid-2009. D.124 at 114.

[14] In the same time frame, Crowder sold his JCA/Crowder Law Group interest to Defendant Bruce Meltzer. D.8 at 35-39.

D.152-7. Although Nationwide had apparently stopped providing services to WDR, D.86, PX-24 at 2, Lewis still informed Bishop when she paid invoices for mailings performed for WDR. D.152-8.

Over time, it became undeniable that Bishop was directly responsible for WDR•s affairs. On July 24, 2009, Lewis informed Attorney Marlow White that Bishop had instructed that a new retainer agreement should be in WDR•s name. D.152-9. On July 27, 2009, Attorney White wrote Lewis about the retainer agreement, stating:

> After the retainer is exhausted, WDR will replenish the retainer at an amount agreed upon by Rick Bishop and myself as a subsequent minimum retainer; after that is exhausted, WDR will replenish again as Rick Bishop and I agree, and so forth.

D.152-10.

C. o B o

1. Entry of Preliminary Injunction and Asset Freeze

On November 13, 2009, the District Court granted, in part, the FTC•s motion for a TRO with asset freeze. D.19. On November 18, 2009, the District Court entered stipulated preliminary injunctions with asset freezes as to Defendants Meltzer, Caldwell, Lewis, AFS and Crowder Law Group, D.29, followed by one as to Defendant McDaniel on December 4, 2009, D.54.

On December 7, 2009, Magistrate Judge McCoun issued his Report and Recommendation regarding a preliminary injunction as to Bishop. D.60. He

Magistrate Judge McCoun stated that •even in those cases where the Defendants achieved a loan modification for a client, such was accomplished through a scheme employing a deceptive business model and reliant on deceptive and misleading mass mailings and telemarketing activities to generate clients and profits.Ž *Id.* at 10 (footnotes omitted). In addition to finding the postcards deceptive, he concluded that the sales agents• •pitch clearly suggested an expertise which would help the consumer save his/her home,Ž even if there was no guarantee of results. *Id.* at 11 n.8.

Magistrate Judge McCoun rejected Bishop•s denial of involvement in the deceptive activity. He noted Bishop•s significant contributions in setting up the enterprise and his continued involvement after WDR began the loan modification scheme, including disbursing significant sums of money to WDR while managing AFS and brokering mailings for WDR. *Id.* at 13-14. Regarding Bishop•s knowledge of WDR•s deception, Magistrate Judge McCoun observed that, given Bishop•s experiences with MAS, Bishop •surely could appreciate on his own the deceptive and misleading nature of the message being sent consumers.Ž *Id.* at 14. He concluded: •On the evidence presented, the FTC has met its burden of demonstrating a substantial likelihood of success on the merits as against [Bishop].Ž *Id.*

existed as of November 13, 2009 or, if acquired after that date, are •derived from the activities which are the subject of this action or from activities prohibited by this order.Ž*Id.* at 8. Bishop, however, was (and is) not prohibited from accessing lawful income or earnings obtained after entry of the order. *Id.* at 8.

On February 12, 2010, Bishop filed a notice of appeal of the preliminary injunction order, D.103, which is docketed as No. 10-10715.

2. Motions to Modify Asset Freeze

A week before the District Court entered the preliminary injunction and continued the asset freeze as to him, Bishop moved to modify or dissolve the TRO•s asset freeze. D.59. In its December 14, 2009, order, the District Court referred the matter to Magistrate Judge McCoun. D.67 at 2. Following an evidentiary hearing, D.124, Magistrate Judge McCoun issued an •OrderŽ on January 15, 2010, which rejected Bishop•s request to modify the freeze but permitted him $9,500 per month for living expenses for January, February and March 2010. D.91 at 5.

Bishop appealed Magistrate Judge McCoun•s Order, D.104, which this Court docketed as No. 10-10716. On April 8, 2010, this Court dismissed No. 10-10716*sua sponte* for lack of jurisdiction, because Magistrate Judge McCoun•s Order, which had not been adopted by the District Court, was not a final,

appealable order. D.139. On April 15, 2010, Bishop requested the District Court to •review and rule on the magistrate•s order,Ž but the District Court rejected the request as an •untimely objection.Ž D.141.

On April 30, 2010, Bishop filed a motion asking that the asset freeze be modified and reduced to just $128,910. Docs. 147, 148. The District Court denied his motion on June 15, 2010. D.168. It concluded that the issues identified by Bishop in his motion were also pending on appeal, and therefore that it did not have jurisdiction to modify the injunction as requested by Bishop. *Id.* at 5. The District Court further stated that •even if this court retained jurisdiction, Bishop

Because of WDR•s misrepresentations, homeowners believed that they would be assisted through government-affiliated programs, but in many instances, WDR, which had no governmental affiliation, did not provide the promised relief. WDR•s scheme mirrored prior deceptive loan modification activities that Bishop had run, and he was pivotal in engineering, promoting, and acting on behalf of the WDR enterprise. Given his participation and control in the enterprise, his demonstrated tendency towards deceptive telemarketing, and the public equities strongly favoring the FTC, the District Court did not err in concluding that the FTC would likely succeed on the merits regarding Bishop•s personal liability for WDR•s deceptive activities and, thus, that he should be enjoined.

The District Court•s asset freeze was an eminently reasonable exercise of its equitable jurisdiction at the preliminary injunction stage to ensure its ability to provide ultimate, complete relief. The District Court correctly refrained from addressing Bishop•s claim that the freeze should be limited to just the funds he claims to have received from his co-Defendants. This Court should similarly refrain from adjudicating the scope of the asset freeze, so that the District Court may resolve the many outstanding issues that bear on the question.

If it does reach the issue, the Court should reject Bishop•s claim that his liability is limited to just a fraction of the amount that consumers lost to the WDR

scheme. The cases on which he relies involved wholly dissimilar factual situations and most were under different statutory schemes. In those cases, some or all of the funds sought as •restitutionŽ had been paid to or from third parties who were strangers to the litigation. By contrast, here all of the funds in question were paid directly by consumers to the Defendants, who acted in concert and are jointly and severally liable for the resulting consumer injury.

The Court should dismiss appeal No. 10-12901 as moot. Even if the Court were to find that the District Court had jurisdiction to modify the asset freeze that was on appellate review, its decision in No. 10-10715 will make any remand in No. 10-12910 unnecessary. Assuming it reaches the question of the District Court•s jurisdiction, this Court should hold that the District Court lacked jurisdiction. Under Federal Rule of Civil Procedure 62(c), a district court may modify an injunction, pending appellate review, only in order to maintain the *status quo*. Bishop sought to alter the *status quo* by significantly reducing the assets subject to the freeze. His requested relief would have required the District Court to decide the same issues pending in No. 10-10715.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENJOINED BISHOP•S UNLAWFUL CONDUCT AND FROZE HIS ASSETS PENDING AN ADJUDICATION ON THE MERITS

A. *o* *S*

The scope of review of an order granting preliminary injunctive relief, including an asset freeze, is particularly narrow. *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 425 F.3d 964, 968 (11th Cir. 2005). An order granting preliminary relief can be overturned only upon a showing of an abuse of discretion. *See, e.g.*, *United States v. Endotec, Inc.*, 563 F.3d 1187, 1194 (11th Cir. 2009); *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999). While the district court•s conclusions of law are subject to *de novo* review, underlying factual findings are reviewed for clear error. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 731 (11th Cir. 2005); *Unique Fin. Concepts, Inc.*, 196 F.3d at 1198.

B. *o* *o* *A* *o* *E* *o* *B* *o* *o* *C* *o* *o* *o* *o* *o* *o* *S*

The order at issue in this appeal is in aid of an action for a permanent prohibitory injunction and monetary equitable relief under Section 13(b) of the FTC Act, which states that •in proper cases the Commission may seek, and after

proper proof, the court may issue a permanent injunction." 15 U.S.C. § 53(b). In an action such as this one, the district court has authority to impose the full range of equitable remedies, including monetary equitable remedies such as restitution and rescission. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984); *accord*, *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9th Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111-13 (9th Cir. 1982). Because the district court is

Virgin Islands Paving, Inc. 714 F.2d 283, 286 (3d Cir. 1983). Under Section

Mgmt., 21 F. Supp. 2d 424, 441 (D.N.J. 1998).

Defending the WDR enterprise, Bishop accuses the FTC and the District Court of failing to examine the •entire transactionŽ involving the loan modification services. Br. 38. In fact, the FTC•s and the District Court•s analyses were consistent with FTC Act law concerning deception, focusing on the •net impressionŽ of WDR•s representations. •The determination is not restricted to a consideration of what impression an expert or careful reader would draw from the advertisements, but rather involves viewing the advertisement as it would be seen by the public generally which includes the ignorant, the unthinking and incredulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.Ž *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1010 (N.D. Ind. 2000) (internal citations omitted), *aff'd*, 312 F.3d 259 (7th Cir. 2002). Representations targeted to an identifiable group of consumers, such as homeowners in financial distress, should be evaluated from the vantage point of that group. *In re Telebrands Corp.*, 140 F.T.C. 278, 291 (2005), *aff'd*, *Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006); *Cliffdale*, 103 F.T.C. at 179.

Bishop asserts that the FTC and the District Court focused on selected phrases on the postcards or on statements made during the sales pitch, while

ignoring other statements, such as in the Application. Br. 38-41m22yn fact, the FTC placed all of the evidence that Bishop claims was ignored before the District Court. For example, the Application was attached to a number of the consumer declarations, along with the postcardsm22D.5-2 at 2-3;2D.13 at 4-11;2D.14 at 5-15; D.116 at 50-58m22Despite these materials … indeed, because of them … consumers remained under the impression that WDR would lower their interest rates and reduce their mortgage payments via government programsm22D.12 at 2;2D.14 at 2;2 D.115 at 5.

Bishop similarly claims that the sales agents made clear that WDR was not associated with the government and that they made no guarantees. Br. 41m22The FTC submitted multiple consumer declarations describing homeowners• impressions that WDR was government-affiliated and would likely provide the promised reliefm22D.12 at 2;2D.14 at 2;2D.115 at 5. If sales agents denied any connection to the government, it appears they did so only if askedm22D.6 at 23;2D.7 at 6-41;2D.8 at 7-21m22As for mentions that results were not guaranteed, those isolated statements could not overcome the impression left by the sales agents• otherwise encouraging pitch.

Even if individual phrases on the postcard, in the Application, or during the

sales pitch were literally true,[16] Br. 38-41, such phrases do not remove the deceptive nature of Defendants• conduct. *FTC v. Peoples Credit First, LLC*, 2006-1 Trade Cas. (CCH) ¶ 75,192, 2005 U.S. Dist. LEXIS 38545, at *21-*22 (M.D. Fla. Dec. 18, 2005), *aff'd*, 244 Fed. Appx. 942, 2007 U.S. App. LEXIS 17429, at **5 (11th Cir. Jul. 19, 2007) (•technically or literally trueŽ words in mail piece not persuasive in light of material implication of entire mail piece); *see also Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989). The District Court was clearly aware of the statements that Bishop claims were literally true. D.60 at 10-11 & especially n.8. It did not abuse its discretion, however, in concluding that the FTC was likely to succeed on the merits given the consumer declarations that they were deceived, D.11 at 6; D.12 at 2; D.14 at 2, or testimony from the Defendants themselves that names like •New StartŽ or •Fresh StartŽ referred to federal programs. D.165 at 51.

Bishop next claims that the District Court•s acknowledgment that WDR apparently completed some loan modifications and made some refunds renders the entry of the preliminary injunction erroneous. Br. 44. As a matter of law,

---

[16] Bishop also argues on appeal that the postcards• red, black and yellow color scheme •is not characteristic of government notices.Ž Br. 39. Bishop cites no evidence for this novel claim. The FTC anticipates that a survey of government agencies• notices would reveal a wide range of color choices.

however, some success is not a defense to an FTC Act violation. *Amy Travel*, 875 F.2d at 572. Similarly, the payment of refunds does not sanitize a defendant•s unlawful practices or preclude the Commission from seeking equitable relief. *See, e.g.*, *FTC v. Cyberspace, LLC*, 453 F.3d 1196, 1201-02 (9th Cir. 2006); *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002).

Bishop further contends that, because news articles reported that loan modifications are difficult to obtain, even through government programs, WDR•s scheme should be deemed legitimate. Br. 44-45. First, even if programs to offer loan modification assistance for a fee are legitimate, defendants can still violate the FTC Act if such programs are offered in a deceptive manner, which the District Court concluded was likely the case here. *See, e.g.*, *Tashman*, 318 F.3d at 1277; *FTC v. Minuteman Press,* 53 F. Supp. 2d 248 (E.D.N.Y. 1998). Second, defendants are routinely found to have engaged in deception when they promote a product or service by misrepresenting the ease with which results can be achieved. *See Think Achievement*, 144 F. Supp. 2d at 1012; *FTC v. Trudeau*, 579 F.3d 754, 764-66 (7th Cir. 2009). Bishop•s claim that •success in mortgage loan modification depends largely on the good faith of lending institutionsŽ (Br. 45) contrasts sharply with WDR•s encouraging postcards and the claims of success made by WDR•s sales agents. On this record, it was not erroneous for the District

Court to conclude that the FTC would likely prevail in showing that the WDR enterprise was deceptive.

2. The Commission is Likely to Succeed in Showing that Bishop Is Responsible for and Should Be Enjoined from Deceptive Activities

The District Court concluded that Bishop •played a significant role in the development and operations of JCAŽ and that •[h]e continued to make significant contributions after the formation of WDR and AFS.Ž D.60 at 14. It also enjoined Bishop from engaging in further deceptive activities pending the resolution of the case. *Id.* at 16-17. As shown below, the District Court•s decisions were not an abuse of discretion.

a. Bishop participated in and had control over WDR•s deceptive conduct

An individual may be held liable for injunctive relief for a corporation•s violations of the FTC Act, if a court finds that the individual (1) participated in the deceptive practices or (2) had authority to control them. *FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997); *Amy Travel*, 875 F.2d at 573. Bishop claims that he had only a peripheral role in the WDR enterprise and that he did not control, operate or manage its loan modification activities. Br. 43, 47. He says that his roles were limited to helping set up JCA, brokering a mailing contract for

WDR, and owning and operating AFS for some months in 2009. Br. 46-47. The evidence shows that Bishop was far more active than he admits.

Without Bishop, there would not have been a WDR loan modification scheme. Bishop provided valuable start-up capital to JCA/WDR. He •set up the administrative, hiring, marketing, and insurance lines along with providing the furniture, equipment and software.Ž Doc 32-5 at 1. By his own admission, they •did it with all my money, all my equipment. ƒŽ D.124 at 55-56. The software and database were particularly valuable to the enterprise•s ability to track clients, and Bishop estimated the software•s value at •over $300,000.Ž D.36-2 at 3; D.124 at 18, 26-27. Bishop also employed JCA/WDR•s senior staff (McDaniel, Caldwell and Lewis) and •leasedŽ them to JCA/WDR. D.86, PX-24 at 2; D.115 at 2; D.124 at 86, 114.

When JCA/WDR moved into loan modifications, it continued using equipment, software, and a database Bishop had developed for MAS•s deceptive marketing. D.32-2 at 2-4; D.32-5 at 1. Rather than simply receive payment for his contribution, Bishop agreed to promote WDR under the Marketing Agreement that paid him for his services as well as use of his assets. D.32-5 at 2; D.43-1. Through the Agreement•s specification of •Services Provided by Nationwide,Ž Bishop also agreed to ensure that •[a]ll advertising will be truthful and not misleading.Ž D.43-

1, Art. 2.b. Because of this provision, Bishop was in a position to refuse advertising that was not truthful or that was misleading. He might also have forbade WDR•s use of his valuable computer equipment, software, and database. He had the means to monitor and exercise control over WDR•s marketing efforts and its operations more generally.

Bishop also maintained a noticeable presence in the WDR operation. Even after he supposedly started to work from home, Bishop continued to visit the WDR offices at least twice a month to discuss •the marketing and general business matters,Ž D.32-2 at 2, and a JCA/WDR employee observed that Bishop •seemed to have a lot of authority and influence.Ž D.115 at 2. Bishop deepened his involvement when he assumed ownership of AFS, which was the banking arm of the WDR enterprise. As owner, he signed the checks that distributed the money AFS had collected from homeowners who had signed up for WDR•s loan

Bishop had control over and participated in the activities of Nationwide, RABC, JCA, AFS and WDR, several of which entities either employed or were owned by McDaniel, Caldwell and Lewis at one time or another. See pages 10-17, *supra*. The entities thus shared officers, not to mention offices, D.8 at 23-24, 33-34, 69-72; D.31-2 at 23; D.124 at 101-02; D.152-6 at 1; D.152-7 at 1. They operated as units of a single entity: Bishop engineered the start-up and provided the information technology, D.32-5 at 1; D.36-2 at 3; D.115 at 21, 23; D.124 at 55-56; AFS served as the accounts receivable/payable department, D.8 at 23-24, 31-32; D.32-2 at 3; RABC was the senior management, D.115 at 2; D.124 at 114; and Nationwide was the marketing department, D.43-1. There was also no real separation in the enterprise•s public face or internal operations. D.71-2 at 8; D.116 at 3, 12. Sales agents used names such as Crowder Law Group, WDR and AFS interchangeably, D.6 at 6; D.7 at 7, 14; D.8 at 9, D.12 at 2, 5; D.116 at 3, 12. The entities transferred funds among themselves. D.31-2 at 23-25; D.84, DX-14 at 6, 13, and 15.

Given the common ownership, control and operation of the entities making up WDR, Bishop cannot shield himself from liability by claiming Nationwide and AFS were independent. They were part of a common enterprise that engaged in deceptive practices for which Bishop should be held liable.

c. Bishop likely would engage in deceptive marketing activities in the future

In light of these showings that WDR engaged in widespread deception and

violations.Ž *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259.

Bishop•s conduct showed a readiness to resume deceptive loan modification activities. At the same time that he was shutting down MAS because of state law enforcement actions against it, Bishop began to set up JCA/WDR. D.31-3 at 4-5, 7; D.32-5 at 1. He •again became directly involved in the same type of business,Ž D.60 at 16, including by promoting WDR•s loan modification services, owning and operating AFS, and acting on behalf of WDR. He had set up corporations

C· B o ’ A C o o A o

The District Court properly froze Bishop•s assets at the preliminary injunction stage to ensure its ability to provide final relief, and it correctly refrained from addressing Bishop•s claim that the freeze should be limited just to funds he received through Nationwide. This Court should similarly refrain from adjudicating the scope of the asset freeze, so that the District Court may resolve the many outstanding issues that bear on the question. If it does reach the issue, the Court should reject Bishop•s claim that his liability is limited to just a fraction of the amount that consumers lost to the WDR scheme he orchestrated. The cases on which he relies have no bearing on FTC Act liability for a deceptive scheme in which consumer funds were first paid directly to Defendants acting in concert and then shared among them.

1. The Asset Freeze Was Amply Justified Under Established Standards

Bishop claims that, prior to freezing his assets, the District Court should have held a •nexus hearingŽ concerning the relationship between those assets and the Defendants• deceptive conduct. Br. 25, 28. No such hearing was required, because the FTC fully justified the asset freeze under established legal standards, which require only that the Commission show: (1) that it is likely to prevail in

imposing monetary equitable relief on Bishop; and (2) that the asset freeze it seeks is •a reasonable measure to preserve the *status quo* in aid of the ultimate equitable relief claimed.Ž *United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 497 (4th Cir. 1999).

In *U.S. Oil & Gas Corp.*, the Court recognized the authority of the district court under Section 13(b) •to issue a preliminary injunction, including a freeze of assets, during the pendency of an action for permanent injunctive relief.Ž 748 F.2d at 1434. An interim freeze prevents dissipation of funds that may be needed to satisfy a final judgment for equitable monetary relief. *See United States v. First Nat'l City Bank*, 379 U.S. 378, 385, 85 S. Ct. 528, 532 (1965). Moreover, •when interim equitable relief is authorized *and the public interest is involved*, the doctrine applies that •courts 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.Ž *Rahman*, 198 F.3d at 497 (quoting *First Nat'l City Bank*, 379 U.S. at 383, 85 S. Ct. at 531)).

All the prerequisites for such relief are present here. As shown above, the FTC made a strong showing that it was likely to prevail in its claims that Defendants violated the FTC Act, and that the deceptive marketing of WDR•s loan modification services netted Defendants over $4 million in fees. Section 13(b)

provides the district court with express authority to grant equitable relief with respect to that consumer injury. *See U.S. Oil & Gas*, 748 F.2d at 1432. •A corporation is liable for monetary relief under section 13(b) if the F.T.C. shows that the corporation engaged in misrepresentations or omissions of a kind usually relied on by reasonably prudent persons and that consumer injury resulted.Ž *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994).

Once corporate liability is established, Bishop can be held jointly and severally liable for the equitable monetary relief ordered, if he has knowledge of WDR•s deceptive activities. *Gem Merch.*, 87 F.3d at 470; *Publ'g Clearing House*,

solicitations,Ž and that •[t]here is a great deal of similarity between the MAS mail solicitations and the mail pieces later used by Defendants.Ž *Compare* Pl. Exs. 1 and 9 *with* Pl. Ex. 19 at 8.Ž D.60 at 14 n.12. Bishop would have noticed the similarities and recognized the postcards• deceptive content, when he examined the postcards pursuant to his responsibilities under the Marketing Agreement. Thus, he knew, or should have known, that the WDR postcards were deceptive. Bishop also had knowledge of the enterprise•s activities, because he ran AFS for a significant portion of the time that the WDR loan modification enterprise operated and disbursed significant sums of money. D.5-3 at 6; D.31-2; D.32-5 at 2; D.152-7.

Moreover, Bishop can be liable if he had reckless indifference to the truth or falsity of the misrepresentations. *Publ'g Clearing House*, 104 F.3d at 1171. He testified that he d,Ž 79Ž, 1 0 TDrf4learing Houseined the

[18] Bishop is not shielded from liability by the Marketing Agreement•s requirement that the advertising be •reviewed by the attorney named on the advertising before being used.Ž D.43-1, Art. 2.b. •Obtaining the advice of counsel [does] not change the fact that the business [is] engaged in deceptive practicesŽ and is •not a valid defense on the question of knowledge.Ž *Amy Travel*, 875 F.2d at

$7 million of assets was necessary given the SEC•s reasonable approximation that defendants• liability amounted to $19 million. 408 F.3d at 736. It follows that the District Court•s freezing approximately $1 million of Bishop•s assets to satisfy his potential liability in excess of $4 million was not an abuse of discretion.[20]

Finally, Bishop has not supported his claim that there are equities in his favor that could justify denying or limiting the freeze. See Br. 37, 56-57. When weighing the equities between the public interest in protecting consumers from loan modification scams and Bishop•s private interest, the public equities are accorded much heavier weight. *World Wide Factors*, 882 F.2d at 347. The District Court authorized Bishop to receive from the frozen assets $9,500.00 per month through the pendency of this appeal. D.168 at 8. The Bishops are also free to earn income in countless lawful endeavors. D.67 at 8. Such employment income, combined with the $9,500 per month they receive from the frozen assets, should produce considerable revenues to support their household while the freeze is in place. In light of the income and revenues Bishop is receiving and the substantial injury Defendants caused, the District Court did not err in finding that

[20] Even if the Court were to conclude that Bishop is personally liable only for the revenues the enterprise earned from consumers while Bishop owned AFS, which amounted to more than $1.2 million (D.152-11 at 2), the assets subject to the freeze would still be of lesser value.

the FTC had met its burden that the equities favored preliminary injunctive relief, including a freeze. D.60 at 17.

2. Bishop•s Arguments for Further Limiting the Asset Freeze are Premature and Incorrect

As shown in the preceding section, the Commission amply established the •nexus between the assets sought to be frozen *ƒ* and the ultimate relief requested,Ž *Rahman*, 198 F.3d at 496-97, in accordance with the flexible standard recognized by this Court in *ETS Payphone*. Bishop nevertheless argues that the District Court should have further limited the extent of the freeze, on the basis of his contention that his liability would ultimately be limited to disgorgement of funds that he personally received from his co-Defendants. As shown below, his substantive argument is incorrect. As a threshold matter, however, the District Court correctly

Court has expressly recognized that contested issues regarding the scope of potential liability need not be resolved, early in the litigation, in order to impose and affirm a freeze. For example, in *FTC v. Levy*, 541 F.3d 1102 (11th Cir. 2008), after declaring that the district court could freeze a defendant•s assets to ensure the adequacy of equitable relief, the Court stated: •At this point, we cannot be sure whether the district court will order a disgorgement remedy … and, if it does, in what amount.Ž *Id.* at 1114. It thus refused to address the scope of the asset freeze *Id.*

Bishop•s appeal comes to the Court in precisely the same posture as in *Levy*. The Commission has made a strong preliminary showing that Bishop is likely to be liable for relief based on the full extent of the WDR deceptive scheme; Bishop has

b. Bishop•s liability for WDR•s deception is not limited to the share of funds he received

This Court and other circuits have repeatedly recognized a defendant•s liability for the full amount of consumer losses to remedy violations of the FTC Act. *Gem Merch.*, 87 F.3d at 467-70 (affirming award based on consumers• losses and additional order of disgorgement); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (•Courts have regularly awarded, as equitable ancillary relief, the full amount lost by consumers.Ž); *FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) (•the fraud in the selling, not the value of the thing sold, is what entitles consumers *f* to full refundsŽ) *See* Parts I.B.2.a., I.B.2.b. and I.C.1, *supra*.

Bishop, however, argues that the proper measure of restitution is •monies received *from* the offending enterprise.Ž Br. 30 (emphasis added). Bishop bases this argument on an improper extension of principles discussed in cases addressing wholly dissimilar factual situations, mostly under entirely different statutory schemes. All of those cases dealt with situations in which some or all of the amounts sought as •restitutionŽ were never in the hands of any defendant in the action, or had come from third parties. Even assuming the correctness of those decisions,[21] they have no bearing where, as here, all of the funds at issue were paid

[21] *But see* note 22, *infra*.

by consumers to Defendants who, acting in concert, then shared these ill-gotten gains through the web of entities they had created.

Bishop starts by quoting at length from *Great-West Life & Annuity Co. v. Knudsen*, 534 U.S. 204, 122 S. Ct. 708 (2002), while failing to offer any cogent explanation of its applicability here. Br. 30-31. In fact, *Great-West* involved an action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(3), in which a retirement plan sought to enforce a contractual provision against a plan participant, under which it was claimed that she was obligated to turn over to the plan funds she had received from a third party. 534 U.S. at 208, 122 S. Ct. at 711-712. The Supreme Court ruled that the relief sought in such an action would be legal in nature, and not equitable restitution … and, therefore, not authorized by the ERISA provision. *Id.* at 210, 221, 122 S. Ct. at 712-13, 718-19.

The Second Circuit subsequently ruled that the principles discussed in *Great-West* should be extended to impose limits on monetary liability under the FTC Act, at least in the very unusual situation presented there. *FTC v. Verity International, Ltd.*, 443 F.3d 48 (2d Cir. 2006), involved unfair and deceptive practices in the telephonic sale of adult entertainment content. The Second Circuit held that, for those transactions in which the consumers paid monies to third-party

telecommunications carriers, which had paid only a portion of those monies to defendants and were not themselves defendants in the action, recovery under the FTC Act was limited to disgorgement of the funds actually received by the defendants. *Id.* at 68.

Bishop does not rely significantly on *Verity*, and understandably so. In this case, no middleman interceded between consumers and the Defendants; rather, WDR, through AFS, received payments of $2,000 directly from each consumer for loan modification services. The Defendants then shared the more than $4 million in proceeds through the entities they had created, which, as discussed above, amounted to a common enterprise. *See* Part I.B.2.b., *supra*. Even assuming that *Verity* was correctly decided on its own facts, it offers no support to Bishop•s arguments here[22].

---

[22] In fact, the Commission submits that *Verity* was incorrectly decided, and that the Second Circuit erred in applying the *Great-West* holding to a wholly dissimilar legal context. *Great-West* concerned ERISA, •a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation•s *private* employee benefit system.Ž 534 U.S. at 209, 122 S. Ct. at 712 (citations and internal quotation markets omitted; emphasis added). The *Great-West* Court further emphasized its reluctance to interfere with •ERISA•s carefully crafted and detailed enforcement scheme.Ž *Id.* at 209, 122 S. Ct. at 712. In contrast, Section 13(b) of the FTC Act seeks to further the broad *public* goals of that Act, and does so principally by relying on the courts• expansive equitable powers. *See FTC v. Sw. Sunsites*, 665 F.2d 711, 718 (5th Cir. 1982) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 397, 66 S. Ct. 1086, 1089 (1946)); *Porter*, 328 U.S. at 397-98, 66 S. Ct. at 1089 (•equitable jurisdiction is not to be denied or limited in the

In *CFTC v. Wilshire*, 531 F.3d 1339 (11th Cir. 2008), also relied upon by Bishop (Br. 31-33), this Court addressed the issue of monetary equitable relief under another statute, but in a context that also involved third-party transactions. There, the Commodity Futures Trading Commission (CFTC) sought monetary relief for the benefit of investors, based on violations of the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq*. The consumer losses for which the CFTC sought redress were not limited to payments made to the defendants for their services. Rather, the consumer losses occurred in open-market transactions, into which the investors were fraudulently induced to enter. In other words, while the defendants received fees for their unlawful services, the recipients of much of the money lost by consumers were other investors in anonymous commodity trades who were not defendants in the action. In those circumstances, this Court …*Verity*, although not *Great-West* … ruled that equitable monetary relief must be limited to

---

absence of a clear and valid legislative commandŽ). Application of the reasoning of *Great-West* to the FTC Act not only fails to account for major differences between the statutory schemes, but would also invite subterfuges by which entities engaged in unfair and deceptive acts would structure their activities in an effort to limit the liability of various defendants. Such a result would imperil the Commission•s statutory mission to protect the public interest by invoking •the historic power of equity to provide *complete* relief in the light of statutory purposes.Ž *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92, 80 S. Ct. 332, 334-35 (1960) (*quoted in Sw. Sunsites*, 665 F.2d at 718 (emphasis added)).

disgorgement of the funds received by defendants. 531 F.3d at 1345.[23]

Since its decision in *Wilshire*, this Court has properly declined the opportunity to limit restitution under the FTC Act to the defendant•s unjust gain. In *FTC v. National Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), the district court concluded:

> Restitution is intended to return the injured party to the *status quo* and is measured by the amount of loss suffered by the victim. *Transnet Wireless Corp.*, 506 F. Supp. 2d at 1217. Requiring the defendants to return the profits that they received rather than the costs incurred by the injured consumer would be the equivalent of making the consumer bear the defendants• expenses. The court will not make the victimized consumers shoulder such a burden.

645 F. Supp. 2d at 1212-13. On appeal, this Court affirmed, on the basis of the •well-reasoned decision and the judgment of the district court.Ž *FTC v. Nat'l Urological Group, Inc.*, 356 Fed. Appx. 358; 2009 U.S. App. LEXIS 27388 he tretpp1 9.2

---

[23] The Court also relied on *Waldrop v. Southern Company Services, Inc.*, 24 F.3d 152 (11th Cir. 1994). That case is even further afield from the present one, dealing with the treatment of backpay. As this Court noted, •it has long been the general rule that back wages are legal relief in the nature of compensatory damages.Ž *Id.* at 158.

Merch., 87 F.3d at 467)). The Court should continue to limit *Wilshire* to the

Supp. 2d 1304, 1312 (S.D. Fla. 2005). In remanding the case for re-determination of monetary relief based upon defendants• unjust gain, this Court did not require that Wilshire•s personal liability be limited to whatever income he might have received from the company he controlled. *Wilshire*, 531 F.3d at 1345. Bishop here argues for that very result.

Furthermore, as discussed above, the Commission is likely to prevail in its contention that all of the Defendants here constituted a common enterprise. *See* Part I.B.2.b., *supra*. Nothing in *Wilshire* or *Great-West* addresses that issue, or even suggests that joint and several liability should be denied in these circumstances.

II. THE DISTRICT COURT DID NOT HAVE JURISDICTION TO MODIFY THE ASSET FREEZE

A.

In the second appeal, No. 10-12901, Bishop claims that the District Court had subject matter jurisdiction to significantly modify the preliminary injunction, even though his appeal from that injunction was already pending before this Court. Br. 47-48. This Court reviews the district court•s determination that it lacked subject matter jurisdiction *de novo*. *Anderson v. United States*, 317 F.3d 1235, 1237 (11th Cir. 2003).

B. o ' o 10-10715 oo o 10-12901

This Court should dismiss Bishop•s second appeal as moot. •A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.Ž *Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (internal quotations and citations omitted); *see also Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1172 (11th Cir. 2004) (decision in one consolidated appeal controlled relief available in the second, thus mooting the second). Here, the Court•s decision in the first appeal regarding the asset freeze, No. 10-10715, will obviate any meaningful relief in the second, No. 10-12901.

In the second appeal, Bishop asks the Court to reverse the District Court•s conclusion that it lacked jurisdiction to hear Bishop•s motion to modify the asset freeze. If the Court were to agree, it would presumably remand the case so the District Court could rule on the merits of the motion. This Court•s decision in the first appeal, however, would make any such remand unnecessary.

If the Court were to conclude in the first appeal that the District Court did not abuse its discretion in freezing Bishop•s assets, that decision would control the District Court•s consideration of the motion to modify; there would be no grounds for modification, and a remand in the second appeal would be superfluous. If the

Court were to conclude that the District Court did abuse its discretion in freezing Bishop•s assets, it would presumably remand the case to the District Court for re-determination of the asset freeze. In the latter case, Bishop would receive the very relief he is seeking in the second appeal. Accordingly, because in the second appeal the Court will be unable to give meaningful relief, it should be dismissed as moot.

If it does not dismiss the second appeal as moot, the Court should affirm the District Court•s conclusion that it lacked jurisdiction over Bishop•s motion, because Bishop did not seek to maintain the *status quo*. Rather, he sought to dramatically alter it.

Bishop claims that the District Court had jurisdiction to rule on his motion to modify the asset freeze, entered as part of the December 14, 2009, preliminary injunction (D.67), during the pendency of his appeal of the same order. Br. 47. But •the filing of a timely and sufficient notice of appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of the appeal.• *Schewchun v. United States*, 797 F.2d 941, 942 (11th Cir. 1986). The Supreme Court has explained:

Sammons v. Polk Cnty. School Bd., 2006 U.S. Dist. LEXIS 2538, at *6 (M.D. Fla. Jan. 12, 2006).

The District Court entered the preliminary injunction freezing Bishop•s assets to preserve its ability to provide relief following adjudication of his liability. Without the asset freeze, Bishop could dissipate assets needed to provide equitable monetary relief for the injury to consumers caused by Defendants• deceptive loan modification scheme. The District Court•s action protects Bishop•s assets from dissipation.

The District Court could modify the asset freeze only in support of the *status quo*, *i.e.*, the existing asset freeze. *See Sw. Marine*, 242 F.3d at 1166-68; *SEC v. Kirkland*, 2006 U.S. Dist. LEXIS 65145, at *1-*2 (M.D. Fla. Sept. 12, 2006). Bishop, however, did not seek preservation of the existing asset freeze. Rather, he sought to reduce by a significant amount the assets subject to the freeze to include only those assets from •the limited time period during which Bishop was brokering the postcard mailings.Ž Br. 55. Such a modification bears no resemblance to the more precise definition of •surface waterŽ approved in support of the *status quo* in *Sw. Marine*, 242 F.3d at 1168, or the identification of real property purchased with funds subject to a receivership approved in *Kirkland*, 2006 U.S. Dist. LEXIS 65145, at *1-*2. Instead, Bishop•s modification would gut, not preserve, the *status*

quo.

Contrary to Bishop•s claim (Br. 56), his motion also would have mooted issues pending in this appeal, thus interfering with the Court•s jurisdiction. To have granted the relief Bishop sought, the District Court would have had to accept Bishop•s claims that (1) he played only a limited role in the WDR enterprise, which conducted a legitimate business, and had only limited profits from it, *see* D.148 at 2, 6-11, and (2) that restitution under the FTC Act must be measured by the defendant•s unjust gains, *see* D.148 at 4-5. The FTC•s arguments set forth above and Bishop•s arguments in his own brief (see Br. 28-47) demonstrate conclusively that these issues are the ones pending in this appeal. The District Court•s ruling on them would have •materially alter[ed] the status of the case on appeal.Ž *Sw. Marine*, 242 F.3d at 1166 (internal quotation marks and citation omitted). It therefore had no jurisdiction to rule on Bishop•s motion.

Finally, Bishop states that the •District Court has authority to modify the asset freeze on the basis of new and revised factual information which alters the *status quo*.Ž Br. 49. But •[a] district court cannot generally accept new evidence or arguments on the injunction while the validity of the injunction is on appeal.Ž *Coastal Corp.*, 869 F.2d at 820 (citing *State of New York v. NRC*, 550 F.2d 745, 758 (2d Cir. 1977)). Accordingly, Bishop•s •newŽ facts were not relevant to the

District Court•s jurisdiction.

CONCLUSION

For the foregoing reasons, the District Court•s decisions should be affirmed.

JON MILLER STEIGER
Director

WILLARD K. TOM
General Counsel

LARISSA L. BUNGO
Assistant Director

JOHN F. DALY
Deputy General Counsel for Litigation

JONATHAN L. KESSLER
MICHAEL MILGROM
SARA C. DEPAUL
CHRISTOPHER D. PANEK
East Central Region
Federal Trade Commission
1111 Superior Ave., Suite 200
Cleveland, OH 44114

/s/ Mark S. Hegedus
MARK S. HEGEDUS
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
(202) 326-2115
mhegedus@ftc.gov

September 27, 2010

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). It is proportionally spaced and contains 13,990 words, as counted by the WordPerfect word processing program.

September 27, 2010

/s/ Mark S. Hegedus
Mark S. Hegedus

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2010, I electronically filed the foregoing Brief for Plaintiff-Appellee Federal Trade Commission at the ECF website for the United States Court of Appeals for the Eleventh Circuit. On the same day, I also sent an original and six paper copies of the foregoing Brief by

[1] Attorney D•Alemberte requested service via USPS to his post office box.