**CERTIFICATE OF INTERESTED PERSONS**

**No. 09-13098-GG**

**Federal Trade Commission v. Home Assure, LLC, *et al*.**

Pursuant to Circuit Rules 26.1-1 and 27-1(9), this is to certify that the following is a complete list of all attorn

McCoun III, Thomas B., United States Magistrate Judge

Melman, Leslie Rice, Attorney, Federal Trade Commission

Merryday, Steven D., United States District Judge

Molina, Nicolas, Defendant-Appellant

Shonka, David C., Principal Deputy General Counsel, Federal Trade Commission

Tom, Willard K., General Counsel, Federal Trade Commission

Trimarco, Michael, Defendant-Appellant

Weintraub, Ann F., Attorney, Federal Trade Commission

## STATEMENT OF ORAL ARGUMENT

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

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## STATEMENT OF JURISDICTION

The Federal Trade Commission, an independent agency of the United States, brought an action in the United States District Court for the Middle District of Florida, pursuant to Sections 5 and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 53(b), seeking a permanent injunction against defendants' deceptive sale of foreclosure rescue services and equitable monetary relief for injured consumers. The Commission also sought interim relief, including a in7ured cons8mTcludi(arcoons02 t injudetction5) aStatee Comrirsde Com

## COUNTERSTATEMENT OF THE CASE[1]

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

This interlocutory appeal arises from an action by the Federal Trade Commission ("FTC" or "Commission"), pursuant to Sections 5[2] and 13(b)(2)[3] of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45 and 53(b)(2), seeking a permanent injunction against deceptive practices in the sale of mortgage foreclosure rescue services. The Commission also seeks equitable monetary relief for consumers who, despite the defendants' touted money back and service guarantees, in many cases paid for services they did not receive.

#### 1. The Defendants and Their Operations

The principal defendants include Home Assure, LLC, a Florida limited liability company, and its principals, appellants Michael Trimarco and Nicolas

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[1] Page references in documents in the district court record conform to the pagination in the headers in the Official Court Electronic Filing System. However, citations to pages in documents that are not available electronically on PACER, or that are cited in appellants' brief, are to the document's internal pagination. Also, to avoid confusion, exhibits are cited as "Exh. __," while documents appended to exhibits are cited as "Att. __."

[2] Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices."

[3] The second proviso of Section 13(b)(2) of the FTC Act, 15 U.S.C. § 53(b)(2) vests the district courts with authority to grant a permanent injunction and other equitable relief with respect to violations of any provision of law enforced by the FTC.

Molina.[4] Working from multiple offices and call centers in at least two states,[5] Home Assure, starting in August 2007, marketed and sold mortgage foreclosure rescue programs to consumers nationwide.[6]

Appellant Michael Trimarco was "the company's President and Co-Founder," and appellant Nicolas Molina was its "CEO and Co-Founder." Doc. 5, Exh. 1 at 5 & Att. C; *see also* Doc. 5, Exh. 1 at 12 & Att. Q at 1. Each played major roles in marketing and financial management. Doc. 61-9 at 3 (Trimarco "[w]ill have full time responsibility for tech-ops and financial management" and

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[4] The Commission's complaint also named Brian Blanchard and Michael Grieco, both former managers and 10% owners of Home Assure. Doc. 1 at 3, RE Tab 1 at 3; Doc. 61-9 at 2-3. Messrs. Grieco and Blanchard signed stipulated permanent injunctions prohibiting them from making false or misleading statements in connection with the advertising, marketing, or sale of mortgage loan modification or foreclosure relief services. Docs. 140-41. The complaint also named Brian Blanchard's limited liability company, B Home Associates, LLC (d/b/a Expert Foreclosure), which the Commission alleged was making similar deceptive representations regarding its mortgage foreclosure rescue program. Doc. 1 at 7-9, RE Tab 1 at 7-9. Home Assure and Expert Foreclosure did not enter an appearance or answer the complaint. Accordingly, the district court granted the Commission's motion for an order directing the clerk to enter notices of default. Docs. 93-94.

[5] Appellants' brief states that Home Assure worked out of two offices, a sales and consulting office in Florida and a mitigation services office in North Carolina. Br. 8. The record shows, however, that Home Assure sent contracts to consumers bearing a return address in the Empire State Building; until May 1, 2008, that was the company's mailing address. *See, e.g.*, Doc. 5, Exh. 12 at 2 & Att. A; Doc. 5, Exh. 1 at 4, Att. A.6.

[6] Doc. 5, Exh. 1 at 2, 4-5, 7, 12 & Atts. A.1, A.9, D, Q, T; Doc. 61-9 at 2.

provide "[m]arketing support."); *id*. at 2-3 (Molina "[w]ill have full time responsibility for marketing and lead generation" and have responsibility "for the overall marketing of HomeAssure products and services."). As of August 2007, Trimarco and Molina each owned a 40% share of the business. Doc. 61-9 at 2.

In September 2008, Home Assure began winding down the business – a process that by the end of November 2008 was largely complete. Doc. 38-3 at 4; Doc. 38-4 at 9. Home Assure left homeowners in many cases without providing the promised foreclosure rescue services and without honoring its marketing pledge of money back guarantees. Doc. 5, Exhs. 4-16; Doc. 30-5 at 1-2; Doc. 30-10. In October 2008, as Home Assure was winding down its business, Brian Blanchard, a Home Assure member and manager,[7] opened Expert Foreclosure, hiring several Home Assure employees and taking over registration for the homeassure.com domain name.[8] At least one Home Assure customer, after paying for services, was told by a Home Assure representative that in the future she would

[7] Blanchard was not a member of Home Assure after November 2008, and formally resigned as manager on January 6, 2009. Doc. 38-5 at 3; Doc. 5, Exh. 1 at 4 & Att. A.8.

[8] *Compare* Doc. 5, Exh. 1 at 11 *with* Exh. 1 at 13-14; *compare* Doc. 61-12 at 2 *with* Doc. 61-10 at 2; *see* Doc. 5, Exh. 1 at 14-15 & Atts. X-Y.

be dealing exclusively with Expert Foreclosure.[9]

**2. Proceedings Below**

On March 24, 2009, the Commission, having "reason to believe" that the defendants had engaged, or were engaging in, violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), filed a complaint in the United States District Court for the Middle District of Florida pursuant to the permanent injunction provisions of Section 13(b) of the Act, 15 U.S.C. § 53(b). The complaint alleged that the defendants were engaging in deceptive acts or practices in violation of Section 5(a) by (1) misrepresenting they would stop consumers' foreclosures in all or virtually all instances; and (2) failing in most cases to honor their refund policy when foreclosure was not stopped. Doc. 1 at 9-10, RE Tab 1 at 9-10. The complaint sought a permanent injunction and multiple forms of monetary equitable relief, "including, but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies * * *." Doc. 1 at 11, RE Tab 1 at 11. Contemporaneously with the filing of its complaint, the Commission asked the district claint-1.6(laintoDures)yee of E

[9] Specifically, after speaking with a Home Assure sales representative and paying Home Assure for services in mid-November 2008, the homeowner was told by the representative a short time later that she was being referred to, and would be dealing exclusively with, an employee of Expert Foreclosure. Doc. 50-3 at 1-3. She understood that the two companies "were one and the same, or at least related to each other." *Id*. at 3.

order ("TRO") and asset freeze and an order appointing a temporary receiver. Docs. 4-9.

On March 26, 2009, the district court (per Hon. Steven Merryday) entered a TRO, finding that the FTC had demonstrated a likelihood of success on the merits and good cause to believe that immediate and irreparable injury to the court's ability to grant final monetary relief would occur in the absence of an asset freeze and other interim relief. Doc. 13 at 2-3, RE Tab 13 at 2-3. In addition to restraining and enjoining false and deceptive representations regarding the defendants' foreclosure rescue program (Doc. 13 at 6, RE Tab 13 at 6), the district court appointed a temporary receiver for the corporate defendants and froze the defendants' assets. Doc. 13 at 7-9, 18, RE Tab 13 at 7-9, 18. The district court, *inter alia*, also directed the defendants to make various financial disclosures (Doc. 13 at 16, RE Tab 13 at 16), and to appear and show cause why a preliminary injunction should not issue (1) enjoining the defendants from any further violations and (2) continuing the freeze of their assets pending a decision on the ultimate merits of the Commission's complaint. Doc. 13 at 32-33, RE Tab 13 at 32-33.

On April 8, 2009, after hearing oral argument on the Commission's motion for a preliminary injunction, Magistrate Judge Thomas B. McCoun III issued a report and recommendation and proposed findings and conclusions. Doc. 54, RE

13. Based on this analysis, Magistrate Judge McCoun recommended that the district court deny the FTC's motion for a preliminary injunction governing appellants' conduct, but that it freeze their assets pending an adjudication of the ultimate merits of the complaint, pursuant to the court's inherent equitable authority. Doc. 54 at 15, RE Tab 54 at 15.

The Commission objected to the Magistrate Judge's recommendation to the extent it recommended denying a preliminary injunction as to Expert Foreclosure and Home Assure, who had not appeared or opposed the Commission's motion. Doc. 61 at 4-9. With regard to the individual defendants, the Commission contended that their refusal to comply with the disclosure provisions of the TRO,

[11] At least with respect to the initial set of required financial disclosures, appellants subsequently complied.

interim freeze of appellants' assets, holding, *inter alia*, that the evidence amassed by the Commission demonstrated that it was likely to prevail on the merits of its allegations of deceptive practices, and that immediate and irreparable injury to the court's ability to grant effective final monetary relief for consumers would likely occur in the absence of an order immediately enjoining and restraining appellants from transferring their assets. Doc. 65 at 10-11, RE Tab 65 at 10-11.

In rendering its decision on the Commission's motion for preliminary relief, the district court specifically rejected the notion that its authority to order an interim freeze turned on the FTC's ability to demonstrate a likelihood of recurrence of the alleged unlawful conduct. The court agreed with Magistrate Judge McCoun that, under Section 13(b), the district courts are authorized to grant the full range of equitable remedies, and with his observation that "persuasive authority" has specifically rejected the notion that an asset freeze is unavailable as a stand-alone remedy. Doc. 65 at 4-5, RE Tab 65 at 4-5.

With regard to the *scope* of the freeze, the court also agreed with the Magistrate Judge that it "depends on the equitable relief *ultimately* available if the FTC prevails on the merits." *Id.* (emphasis added). The district court then rejected the proposition that final relief must be limited to Home Assure's net profit, or the individual defendants' salaries. Doc. 65 at 4-5, RE Tab 65 at 4-5. With regard to

appellants' contention that such a limitation was compelled by the decision in *CFTC v. Wilshire Inv. Management Corp*., 531 F.3d 1339, 1345 (11th Cir. 2008), the district court distinguished Section 13(b) of the FTC Act, noting that "'the amount that [the defendants] wrongfully gained' *may equal* the amount consumers paid the defendants." Doc. 65 at 6, RE Tab 65 at 6 (emphasis added). Thus, the court concluded, final relief "may include a refund to the consumer of the full amount paid by the consumer to the defendants." Doc. 65 at 5, RE Tab 65 at 5.

The district court also rejected the proposition that any refunds to consumers must take into account defendants' expenditures for marketing and labor, reasoning that such reductions would undermine the deterrent purpose of Section 13(b). Doc. 65 at 7-8, RE Tab 65 at 7-8. Finally, the court refused to accept the notion that the freeze must be limited to "specific assets directly traceable to the alleged violations." Doc. 65 at 8, RE Tab 65 at 8. Such a limitation, the court explained, "ignore[d] the availability of individual liability for corporate violations of the FTC Act * * *." *Id*. Furthermore, the court held, that limitation was not compelled by the Supreme Court's holding with respect to an insurance company's contractual subrogation rights under the Employee Retirement Income Security Act ("ERISA"), as set forth in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002). Doc. 65 at 8-9, RE Tab 65 at 8-9. As the district

court explained, there was no basis to assume that *Great-West* fundamentally altered federal equity jurisprudence in statutory enforcement actions involving the public interest, as established years earlier in *Porter v. Warner Holding Co*., 328 U.S. 395, 66 S. Ct. 1086 (1946). *Id*.

Based on this analysis, the district court entered an order preliminarily freezing appellants' assets to the extent of $3.7 million each – an amount the court found was a "reasonable approximation" of Home Assure's gross sales less refunds.[12] Doc. 65 at 9, RE Tab 65 at 9. In its ruling, the court emphasized that appellants' "failure to fully comply with the disclosure provisions of the TRO" prevented a "more precise determination of the appropriate amount." *Id.*

[12] The Commission recognized that, after an opportunity for discovery, it would be in a position to make a more precise determination of the appropriate amount. Indeed, after discovery opened, the Commission retained an expert to survey homeowners, provided the results to appellants, and conducted an analysis of the Home Assure database. Appellants, however, never sought to modify the freeze on the basis of that information. Instead, they challenged the district court's authority to order the interim freeze. *See* Docs. 62, 133.

[14] Doc. 5, Exh. 4 at 1, Exh. 5 at 2, Exh. 6 at 2, Exh. 7 at 1, Exh. 8 at 1, Exh. 9 at 1, Exh. 10 at 1, Exh. 11 at 1-2, Exh. 12 at 1, Exh. 13 at 1, Exh. 14 at 1, Exh. 15 at 1, Exh. 16 at 1.

modifications that would result in reasonable, or even lower, monthly payments.[16] Reiterating the bold print guarantees in the websites, sales representatives told consumers they would be entitled to a "full refund" if Home Assure were unsuccessful in stopping foreclosure.[17] Invariably, they highlighted the company's claimed expertise in foreclosure mitigation, its supposed special relationships with mortgage companies, its ostensible success rate, and its purported years of experience working with lenders and negotiating repayment plans.[18]

Home Assure's sales calls emphasized the need for consumers to act quickly and reach an immediate decision. *See* Doc. 61-6 at 2 ("create sense of urgency"); *id*. at 3 ("The Mitigation Department does not have many slots open * * *. If you are not [committed to saving your home], we'll fill your spot with someone who is.")(phone script). Home Assure's training manual provided sales representatives

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Doc. 61-5 at 2 (emphasis added).

[16] Doc. 5, Exh. 7 at 1, Exh. 8 at 1, Exh. 9 at 1, Exh. 11 at 2, Exh. 12 at 2, Exh. 13 at 1-2, Exh. 14 at 2, Exh. 15 at 2, Exh. 16 at 2.

[17] Doc. 5, Exh. 1 at 10-11 & Att. M at 20-21, Exh. 7 at 1, Exh. 9 at 2 ("worst case scenario" 100% refund), Exh. 11 at 2, Exh. 12 at 1, Exh. 14 at 2; Doc. 61-4 at 3 ("[W]e are the only company in the country that offers a 100% money back guarantee in writing. You can go to our website and print it out.")(phone script).

[18] Doc. 5, Exh. 1 at 12 & Att. S at 2-3, Exh. 5 at 2, Exh. 7 at 1, Exh. 8 at 1-2, Exh. 9 at 1-2, Exh. 11 at 2, Exh. 13 at 2, Exh. 14 at 1-2, Exh. 15 at 2-3; Doc. 61-4 at 3 ("Our mediators are the most qualified and experienced in the industry.") and 7 ("Our success rate is somewhere between 95%-98%.")(phone scripts).

with "hard sell statements" and encouraged

[19] Home Assure's marketing and sales expenses far exceeded what it expended for mitigation services. The record shows that it had $1.5 million in third party marketing expenses and $1.1 million in variable labor costs at the Florida sales office. Doc. 38-6 at 3, 5. By contrast, variable labor expenses at the North Carolina mitigation department were only $367,000. *Id.*

[20] Home Assure's office rules provided:

> "You are expected to make at least 1 sale everyday. * * * If you are not able to consistently produce $7,500 on a weekly basis after the first 30 days on the job, this is not the place for you." Doc. 61-2 at 2.

status. Doc. 5, Exh. 8 at 2, Exh. 13 at 2, Exh. 16 at 1-2.[21] They pressured homeowners to make a decision, citing the urgency of the situation and the need to make an "immediate" or "up-front" payment before Home Assure could start to help them.[22]

Contrary to the impression left by appellants' description of Home Assure's sales practices (*see* Br. 5, citing Doc. 38, p. 11 and Exh. 3 ¶ 4 (Doc. 38-4 at 3) (Declaration of Michael Grieco)), Home Assure did not provide consumers a

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[21] Although Home Assure accepted payment from these homeowners, it sometimes cited these deficiencies later as a basis for denying a refund. *See* discussion at p. 24, *infra*.

[22] Doc. 5, Exh. 5 at 2,3, Exh. 9 at 2, Exh. 10 at 1-2, Exh. 12 at 2.

preapproval for a specific loan modification – and not a plan from the lender. However, according to appellants' own description of those practices, at the time the letters were sent to consumers, Home Assure had not yet collected all the information, including consumer financial documents, that Home Assure purportedly presented to lenders for purposes of "persuad[ing] the lender to accept the plan." Doc. 38-4 at 3-4.[23]

**2. Working Agreement**

Consumers who decided to enroll in Home Assure's program paid dearly – from $1,500 to $2,500 (Doc. 1 at 6, RE Tab 1 at 6; Doc. 5, Exhs. 4-16), typically by MoneyGram.[24] They also were required to sign a "Working Agreement."[25] Doc. 5, Exh. 5 at 3 Att. A, Exh. 6 at 2 Att. A, Exh. 7 at 2-3 Att. A, Exh. 8 at 2 Att. B, Exh. 9 at 2 Att. C, Exh. 10 at 2 Att. C, Exh. 12 at 2 Att. A, Exh. 15 at 3-4 Att. A, Exh. 16 at

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[23] Thus, the purported "formal working plan" was not the result of an early and ongoing effort by Home Assure to ensure that its business conformed with state law, as appellants suggest in their brief (Br. 5). Rather, it appears from the timing that the "formal written plan" may have been intended to address the action that Minnesota had filed alleging violations of state law prohibiting foreclosure consultants from collecting advance fees. *See* Doc. 5, Exh. 1 at 12 & Atts. P, Q; Doc. 38-4 at 3, n. 1.

[24] Doc. 61-4 at 4 ("easiest way [to pay] is to go to your closest Wal-Mart and send us a money gram")(phone script).

[25] Consumers sometimes did not receive the "Working Agreement" until after they had paid their fees. *See* Doc. 5, Exh. 5 at 3 & Att. A, Exh. 9 at 2 & Att. C, Exh. 10 at 2 & Att. C, Exh. 12 at 2 & Att. A.

refund guarantees when a homeowner (1) "independently" seeks "a solution which HA has been hired to perform;" (2) provides "incorrect and/or insufficient information" causing results "not satisfactory to the intent" of the working agreement; (3) fails to provide Home Assure with "all information and copies of documents requested" or where "such information is later found to be false or not supportable"; (4) chooses not to "comply with the results of HA's analysis;" or (5) fails to "maintain constant communication with HA" (defined as a failure to respond to Home Assure phone calls or written communications within 24 hours). Doc. 5, Exh. 5 at 3 & Att. A at 3-4. Other provisions required any refund claims to

[27] Doc. 5, Exh. 1 at 10-11 & Att. M at 15, Exh. 7 at 2, Exh. 10 at 1, Exh. 12 at 2, Exh. 15 at 3, Exh. 16 at 3.

[28] Doc. 5, Exh. 4 at 2, Exh. 5 at 4-5, Exh. 6 at 3-4, 5, Exh. 7 at 3-4, Exh. 12 at 2-4, Exh. 14 at 2-5, Exh. 15 at 4-6.

cases, it did not maintain regular contact with homeowners, return their phone calls, or answer e-mails. Doc. 5, Exh. 4 at 2, Exh. 6 at 4-5, Exh. 7 at 4, Exh. 14 at 3, Exh. 15 at 4-6. Some consumers were led to believe that Home Assure was negotiating actively with their lenders when, in fact, their lenders were proceeding with foreclosure, or already had foreclosed. Doc. 5, Exh. 11 at 3, Exh. 15 at 4-5, Exh. 16 at 3-5. Other consumers were told simply that nothing could be done, or that Home Assure did what it could to help when, in fact, the company had not taken any steps to save their homes. Doc. 5, Exh. 9 at 4, Exh. 13 at 4. In one case, after more than

promised by Home Assure's sales staff, had been offered previously, or were obviously unworkable – *e.g*., paying off *all* delinquent mortgage payments and lender fees. *See, e.g.*, Doc. 5, Exh. 5 at 5, Exh. 8 at 3[29], Exh. 12 at 3, Exh. 15 at 6.

Home Assure's breach of its service guarantees stands in contrast to the record of purportedly satisfied homeowners that appellants describe in their brief. *See* Br. 7. However, the only document appellants cite to support their statistics is unsubstantiated, and provides no definition of terms (*e.g*., "resolution"), or information about how they derived those figures from Home Assure's records. *See* Doc. 38, Exh. 3, ¶¶ 10-14, 16 (Doc. 38-4 at 4-5) (Declaration of Michael Grieco).

**4. Failure to Satisfy Refund Guarantees**

Contrary to Home Assure's advertised policies regarding guaranteed refunds, it did not refund consumers' service fees 100% no questions asked. Doc. 5, Exh. 6 at 5, Exh. 9 at 4-5, Exh. 11 at 5, Exh. 12 at 4, Exh. 13 at 5, Exh. 15 at 6-7. Indeed, in some cases, information that consumers had candidly disclosed to, and was accepted by, sales personnel was cited later as a reason for denying a refund. Doc.

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[29] Appellants relied on the Grieco declaration below to support their contention that the consumer declarant had been offered a loan modification. Doc. 38-4 at 6. In fact, while the consumer had been promised an "affordable solution" (Doc. 5, Exh. 8 at 1-2), the loan modification that Home Assure offered him was financially infeasible – *i.e*., a $3,000 initial payment and an increase from $2,100 to $2,850 in his monthly payment. *Id*. at 3 (solution "was more expensive" than the "mortgage payments I was unable to afford").

[30] In opposing the Commission's motion for a preliminary injunction, the defendants contended, citing the Grieco declaration, that one of the consumer

sold, Home Assure claimed that it had done nothing wrong. *Id.* at 6-7. In still other cases, Home Assure simply ignored homeowners' refund requests. Doc. 5, Exh. 6 at 5, Exh. 13 at 4-5. In other instances, Home Assure agreed to a refund after the homeowner had filed a complaint with the Better Business Bureau, or a state agency had intervened. Doc. 5, Exh. 4 at 3, Exh. 5 at 6, Exh. 10 at 3.

## SUMMARY OF ARGUMENT

Evidence presented to the district court in support of the Commission's motion for preliminary relief showed that appellants, Molina and Trimarco, acting through defendant Home Assure, used deceptive representations and high pressure sales techniques to induce desperate homeowners to pay for foreclosure rescue services that many or most consumers never received. Then they wound down the business, leaving homeowners with nothing in the company coffers to satisfy the money-back guarantee they had featured in marketing their program. Although the district court made a preliminary determination that appellants were not likely to re-enter the business, and, therefore, did not preliminarily enjoin their deceptive practices, it nonetheless determined that the Commission was likely to succeed on the merits of its complaint allegations, and thereby become entitled to monetary equitable relief. Given the Commission's likelihood of success and the court's determination, after weighing the equities, that an interim freeze of appellants'

personal assets was in the public interest, appellants' contention that the court could not exercise its equitable jurisdiction to enter a stand-alone freeze order is baseless.

First, appellants' reliance on Section 13(b)(1) of the FTC Act, 15 U.S.C. § 53(b)(1), is misplaced. The requirement that the Commission have "reason to believe" that "a person, partnership, or corporation is violating, or is about to violate" a law it enforces (15 U.S.C. § 53(b)(1)) is a predicate to the Commission's ability to exercise its authority to file a complaint. But, contrary to appellants' contentions, the requirement that the Commission "have reason to believe" does not circumscribe the equitable discretion of the district court in adjudicating the Commission's claims once they are brought. Nor does it modify the usual equitable standards applicable to an action for permanent relief under the second proviso of Section 13(b). Even if the cited provision could be read to impose such a limitation, Home Assure's failure to honor its refund guarantees was an ongoing violation of the FTC Act. Therefore, even though it had exited the market, Home Assure "[w]as violating," and "[w]as about to violate" the Act's prohibitions against unfair or deceptive acts or practices.

Second, the district court did not abuse its discretion in crafting an order that covers appellants' assets up to $7.5 million (approximately $3.7 million each). Notwithstanding revenues of nearly $3.72 million from its foreclosure rescue

business, Home Assure closed its doors, leaving nothing behind. Thus, in the

evidence amassed by the FTC and presented in support of its motion for preliminary relief was sufficient to enable the district court to make a reasonable approximation of the magnitude of a likely final judgment for equitable monetary relief. The district court did not abuse its discretion in relying on that information in setting the amount of the interim freeze.

## ARGUMENT

### I. The District Court Properly Froze Appellants' Assets Pending an Adjudication of the Merits of the Commission's Complaint

#### A. Standard of Review

The scope of review of an order granting preliminary injunctive relief – including an asset freeze – is particularly narrow. *See, e.g.*, *BellSouth Telecomms, Inc. v. MCImetro Access Transmission Servs.*, 425 F.3d 964, 968 (11th Cir. 2005); *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999); *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 986-87 (11th Cir. 1995). As this Court has recognized, 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). While the district court's conclusions of law are subject to *de novo* review, any underlying factual findings are reviewed only 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.

relief when it has "reason to believe" that "that any person, partnership, or corporation is violating, or is about to violate,

[32] Actions for a preliminary injunction under Section 13(b)(2) – in which the Commission seeks *only* preliminary relief during the pendency of an FTC administrative adjudication – are governed by a distinct standard that is *more* generous in affording preliminary relief in the public interest. *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713-14 (D.C. Cir. 2001). Accordingly, appellants' reliance on *FTC v. University Health, Inc.*, 938 F. 2d 1206, 1218 (11th Cir. 1991), is entirely misplaced. Br. 18. *University Health* was an action for a preliminary injunction in aid of a Commission adjudication in a merger case, and says nothing about the district court's authority, pursuant to the permanent injunction (*i.e.*, second) proviso of Section 13(b), to enter a stand-alone asset freeze in aid of a final judgment for monetary equitable relief.

1107, 1111 (9th Cir. 1982) (district court "also has authority to grant whatever preliminary injunctions are justified by the usual equitable standards and are sought in accordance with Fed. R. Civ. P. 65(a)"). The district court applied those principles here, concluding, after considering the likelihood of success and weighing the equities, that an asset freeze was necessary and appropriate to preserve its ability

misconduct. Br. 18. This "all or nothing" approach misconceives entirely the purpose of an asset freeze or similar interim relief in a case governed by principles of equity.

In an equitable action, the power to order preliminary relief derives from the court's authority to award a form of final relief to which that particular form of preliminary relief is reasonably related. Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the particular form of final relief that the interim freeze at issue is reasonably related to, and designed to preserve, is a final order for equitable monetary relief – *e.g.*, disgorgement, rescission, and its monetary equivalent.[33]

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[33] Courts and parties have not been consistent in using these terms, and sometimes refer to them more generally – for example, as "restitution" or "redress." To be more precise, equitable "rescission" seeks to undo a transaction that has been disrupted or tainted by misconduct. *See, e.g., Scheurenbrand v. Wood Gundy Corp.*, 8 F.3d 1547 (11th Cir. 1993); *Arber v. Essex Wire Corp.*, 490 F.2d 414, 422 (6th Cir. 1974). A plaintiff seeking rescission usually must tender what he has received. But when it is not feasible to return the property or service, a money substitute may take its place. *See FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (citing *Nelson v. Serwold*, 576 F.2d 1332, 1339 (9th Cir. 1978)).

Rescission is appropriate in many direct seller cases where undoing the transaction and restoring the parties to the *status quo ante* will achieve complete justice in most cases. When the property or service has no value for the intended purpose, the monetary equivalent of rescission is equal to a refund of the purchase price, less any refunds. *See, e.g., FTC v. National Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1211 n.27 (N.D. Ga. 2008), *aff'd per curiam*, 2009 U.S. App. LEXIS 27388 (11th Cir. 2009). For this reason, in an action seeking equitable monetary relief under Section 13(b), the amount that a defendant wrongfully gains "may equal the amount consumers paid * * *." Doc. 65 at 6; RE Tab 65 at 6.

Accordingly, there is no logic to appellants' contention that the absence of accompanying conduct relief means that a stand-alone freeze is tantamount to a prejudgment attachment. Br. 26. Appellants' reliance on the Supreme Court's decision in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 119 S. Ct. 1961 (1999) and similar authorities is misplaced.[34] *Grupo Mexicano* merely addressed the question whether "in an action for *money damages*, a United States District Court has the power to issue a preliminary injunction" amounting to a freeze of assets. 527 U.S. at 310 (emphasis added). While the Supreme Court answered that question in the negative, it carefully distinguished those cases where, as in the present case, the ultimate relief is *equitable*. As this Court explained in *ETS Payphones, Inc*., 408 F.3d at 747, that distinction – *i.e*., whether final relief is legal or equitable – determines whether a district court may rely on its inherent authority to order an interim equitable remedy, such as an asset freeze.

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[34] This Court's decisions in *Mitsubishi Int'l v. Cardinal Textile Sales, Inc*., 14 F.3d 1507 (11th Cir. 1994) and *Rosen v. Cascade Int'l, Inc*., 21 F.3d 1520 (11th Cir. 1994) are likewise unavailing. *Rosen* and *Mitsubishi* rejected attempts to use equitable interim relief (*i.e*., an asset freeze and constructive trust) in order to secure funds that could be used to satisfy a judgment for legal damages. But, as this Court stated emphatically in *Levi Strauss & Co.*, 51 F.3d at 987, those authorities do not constrain the equitable powers of the district courts where, as here, "[a] request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief." *Id*. at 987.

Indeed, it is precisely because the Commission – under the second proviso of Section 13(b) – seeks final relief in the form of monetary remedies such as monetary rescission or disgorgement that courts have consistently sustained the authority of the Commission to seek, and the district courts to grant, related interim remedies, such as asset freezes. *See, e.g., FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984) (court may exercise traditional equitable powers to order such preliminary relief, including an asset freeze, as may be needed to make final relief possible); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988) (having determined it was probable the FTC would prevail in a "final determination of the merits," court acted within bounds of its discretion in freezing assets). Even where authority to enter a prohibitory injunction against a defendant is lacking entirely – for example, in the case of a nominal defendant who is named solely to aid in the recovery of ill-gotten funds – the district courts, to preserve the future availability of a final disgorgement order, may rely on their inherent equitable powers to impose a preliminary injunction freezing assets. *See, e.g., CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 193 (4th Cir. 2002); *SEC v. Dowdell*, 2002 U.S. Dist. LEXIS 2582 at *10 (W.D. Va. 2002).

Thus, contrary to appellants' contention, the district court's preliminary determination that recurrence of appellants' deceptive practices was unlikely does

not mean that it was "nonsensical" to impose an asset freeze. Appellants are correct that the FTC had asked the district court to impose both remedies.[35] *See* Br. 10. But it does not follow logically that the district court's only option, when it decided there was little likelihood of recurrence, was to provide the Commission with *no* relief. Such an "all or nothing" approach would deny the district court the very flexibility in crafting decrees that the court's equitable powers are supposed to provide. *See, e.g.*, *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1202 (10th Cir. 2009) ("characteristic flexibility of equitable remedies"); *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1337 (11th Cir. 2005) ("breadth and flexibility are inherent in equitable remedies").

Appellants' observation (*see* Br. 18) that in many or most Section 13(b) cases the Commission seeks both a preliminary injunction against conduct and an interim freeze is not helpful either. That observation may be correct, but when courts have determined that the need for preliminary, and or even final, relief against conduct is not necessary, they have not hesitated to freeze assets or award final monetary relief

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[35] As reflected in the Commission's objections to Magistrate Judge McCoun's report and recommendation (Doc. 61 at 10-18), the Commission believed that the evidence presented in support of its motion for preliminary relief supported a determination that the challenged practices are likely to continue pending the litigation in the absence of a prohibitory order. The Commission will present additional evidence on this point in support of a permanent prohibitory injunction.

[36] *See also ICC v. B & T Transp. Co*., 613 F.2d 1182, 1183, 1186 (1st Cir. 1980) (affirming order denying a permanent prohibitory injunction against a firm that had sold its operating rights, but recognizing court's equitable authority to proceed with claim for restitution); *SEC v. Manor Nursing Centers, Inc*., 340 F. Supp. 913, 936 (S.D.N.Y. 1971) (defendants at periphery of scheme ordered to disgorge, but an injunction against conduct was not needed because their unlawful practices were not likely to recur), *aff'd in part and rev'd in part on other grounds*, 458 F.2d 1082 (2nd Cir. 1972); *SEC v. Texas Gulf Sulphur Co*., 446 F.2d 1301,

notwithstanding the Commission's likelihood of success in proving violations of the FTC Act, the evidence presented in support of a preliminary injunction was not sufficient to support a determination that the alleged practices were likely to recur. But given that Home Assure had closed its doors with no assets remaining, the district court was concerned that, without a freeze of appellants' personal accounts, no funds would remain at the conclusion of the proceedings to make recompense to injured consumers.

The cessation of unlawful conduct may obviate prohibitory conduct relief if, in fact, there is little likelihood of recurrence. It is not a proper basis, however, for allowing a defendant to retain and enjoy ill-gotten gains, or avoid altogether district court wasto retain and enj

### 3. It was not an abuse of discretion for the district court to enter an interim freeze without first convening a "nexus hearing" to trace assets

#### a. Appellants' challenge to the district court's authority is premature

[37] *Accord*, *SEC v. Forte*, 598 F. Supp. 2d 689, 693 (E.D. Pa. 2009); *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1370 (S.D. Fla. 2006); *SEC v. Current Fin. Servs*., 62 F. Supp. 2d 66, 68 (D.D.C. 1999); *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995), *aff'd sub nom. SEC v. Estate of Hirshberg*, 173 F.3d 846 (2nd Cir. 1999); *see also SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)

### b. Even if appellants' contention is not premature, their reliance on ERISA law is misplaced

Lastly, appellants contend that the Supreme Court's decision in a private action, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), required the district court, before freezing their assets, to convene a "nexus hearing" to determine whether they were connected to the FTC's claim for relief. Br. 25. According to appellants, all the funds received from consumers were paid to third parties in marketing expenses or exhausted in operating the business. Br. 27. Accordingly, they claim, the assets that came into their possession before Home Assure came into being and their so-called "after acquired" assets were not connected to the claim for relief and therefore, under the principles of *Great-West*, cannot be used "to create an abundant reserve for a potential future judgment." Br. 25-27. As shown below, appellants' reliance on *Great-West* is misplaced.

In *Great-West*, an insurance company brought a private action under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), against the beneficiary of an employee benefit plan, seeking to enforce a contractual subrogation clause in an employee benefit plan. In bringing its action, the insurance company relied on ERISA Section 502(a)(3), which authorizes actions "to obtain other appropriate equitable relief." 534 U.S. at 209. The Supreme Court, however, concluded that the action for reimbursement was not equitable in nature, reasoning that it "[sought], in essence, to

[39] Contrary to appellants' contention (Br. 28 n.4), the district court, by freezing assets without tracing them back to appellants' hands, did not "nullify" this Court's decision in *CFTC v. Wilshire Inv. Management Corp*., 531 F.3d 1339 (11th Cir. 2008). In *Wilshire*, the Court addressed an entirely different question – namely, whether a remedy sought by the Commodity Futures Trading Commission ("CFTC") was properly calculated on the basis of consumer losses instead of the profits that brokers had earned by inducing consumers to purchase futures contracts with deceptive representations about the potential to profit from seasonal market swings. The Court answered that question in the negative, holding that an award of restitution measured in the amount of customer losses is fundamentally a private remedy, and therefore is not a remedy that is available to the CFTC in a statutory enforcement proceeding. *Id*.

The defendants in *Wilshire* acted unlawfully in inducing consumers to engage in trading, but were not themselves parties to the resulting trades (apart

fluctuating market in which trades were taking place between anonymous buyers and sellers. Thus, by awarding a monetary remedy measured by consumer losses, the district court would not restore the *status quo ant*

recovery of dissipated funds is a legal claim for relief." Br. 27. In equitable enforcement actions, the prevailing view is that funds that have been dissipated in operating an unlawful scheme cannot be used as an offset against monetary relief. *See, e.g.*, *SEC v. J.T. Wallenbrook & Assocs.*, 440 F.3d 1109, 1115 (9th Cir. 2006) ("overwhelming weight of authority holds that securities law violators may not offset their disgorgement liability with business expenses") (quoting *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1087 (D.N.J. 1996)).[41] It is difficult to believe that the Court, especially in the context of a private action under ERISA, would have worked such a sea change in prevailing law without signaling that it intended to do so. It would also lead to an incongruous result – namely, it would allow those who control a company and make capital decisions on its behalf – *e.g.*, whether to reinvest revenues and expand operations in anticipation of greater profits down the road – to effectively also control the limits of their liability.

In any event, as discussed above, it is neither necessary nor appropriate for this Court to address such issues at present. Any arguments appellants wish to advance regarding limitations that *Great-West* allegedly imposes on the particular funds that can be used to provide final

[41] *See also FTC v. Febre*, 128 F.3d at 536 (rejecting "net profits" as a basis for calculating equitable monetary relief).

activities and the source of the funds in question. Appellants will have that opportunity, in the course of merits proceedings below that are already well underway. In the meantime, the district court's interim order, which merely secures the *possibility* of full consumer relief, is well within its discretion as a court of equity.

## CONCLUSION

For all the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(b). It is proportionally spaced and contains 11835 words, as counted by the WordPerfect word processing program.

January 22, 2010

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## CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, I electronically filed the foregoing Brief for Plaintiff-Appellee Federal Trade Commision at the Eleventh Circuit Court of Appeal's EDF website. Also on this day an original plus six paper copies of the Brief was sent via overnight delivery to the Court and two paper copies sent to the following:

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