No. 12-16265

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Federal Trade Commission,
Plaintiff-Appellee,

v.

Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Arrastia, John – Receiver

Bookstein, Merrill A. – Counsel for HSP defendants

Coffey, Kendall B. – Counsel for Defendants-Appellants

Coffey Burlington, P.L. – Counsel for Defendants-Appellants

Crawford, Kelly M. – Sheef & Stone,

Independent Association of Businesses

International Marketing Agencies, LP

International Marketing Management, LLC

JW Marketing Designs, LLC

Koonce, Charlene – Receiver

Magnolia Health Management Corporation

Magnolia Technologies Corporation

Mancuso, Nathan G.

Meland, Russin, & Budwick – Counsel for receiver John Arrastia

Metzler, Theodore (Jack) – FTC Attorney

Rosquete, Armando – Counsel for Defendants-Appellants

Scola, Jr., Hon. Robert N

Scheef & Stone LLP – Counsel for receiver Charlene Koonce

Shonka, David – FTC Acting General Counsel

Snow, Hon. Lurana S.

Steves, Sterling – Hill, Gilstrap, P.C., counsel for Suzanne Wood

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Wood, Ann R.

Wood, Avis S.

Wood, Delphine L.

Wood, Gary D.

Wood, James C.

Wood, James J.

Wood, LLC

Wood, Michael J.

Wood, Tressa K.

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1. Whether the district court committed clear error in finding that the FTC is likely to succeed in proving violations of the FTC Act and the Telemarketing Sales Rule, or abused its discretion in granting the preliminary injunction.
2. Whether the district court abused its discretion in freezing assets amounting to less than two percent of appellants' sales of association memberships falsely marketed as health insurance.
3.

Statement of the Case

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

This case involves a massive telemarketing scheme in which

1, 7.) The district court granted the TRO, which covered not only appellants (the "IAB defendants"), but also several parties associated with the largest telemarketers of the IAB plan, Health Service Providers (the "HSP defendants"). (Docket No. 17.) The HSP defendants stipulated to a preliminary injunction. (Docket No. 71.) The IAB defendants did not, and following a hearing the district court granted a preliminary injunction prohibiting them from continuing their deceptive practices, maintaining the asset freeze, and appointing a receiver. (Docket No. 72.) The IAB defendants appeal from the entry of that order and from the subsequent denial of their motion seeking permission to continue marketing their membership plan. (Docket Nos. 106, 150.)

B. Statement of the Facts.

1. IAB And The Marketing Of Its Membership Plans.

The appellants in this case are six corporate entities[1] and five individuals. The corporate entities all did business as "IAB," using as their front organization the "Independent Association of Businesses," a purported non-profit corporation founded by Appellant James C. Wood

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[1] Independent Association of Businesses; IAB Marketing Associates, LP; International Marketing Agencies, LP; International Marketing Management, LLC; JW Marketing Design, LLC; HealthCorp International, Inc.; and Wood, LLC.

and organized under the laws of the District of Columbia.[2] (Docket No. 45-1 at 1.) Although the front entity was ostensibly a tax exempt nonprofit under Section 501(c)(6) of the Internal Revenue Code, it funneled all of its revenue to two for-profit IAB companies, IAB Marketing Associates, LP, and International Marketing Agencies, LP. Those companies were in turn part of a complex ownership web with the other corporate entities, which were all ultimately owned by—and distributed their profits to—Appell

IAB's revenue came almost entirely from selling memberships in the association through deceptive telemarketing. (Docket No. 44 at 15.) The telemarketing leads were generated by websites visited by consumers looking for health insurance—many of whom were uninsured, paying very high premiums for health insurance after losing their jobs, approaching retirement age, or suffering from pre-existing conditions. (*E.g.*, Consumers 2, 3, 4, 7 (Docket No. 49-1 at 107, 122, 125, 145); Consumers 12, 13, 14, 15, 17 (Docket No. 49-2 at 29, 33-34, 77, 98, 114); Consumer 28 (Docket No. 50-1 at 104); Consumers Pollworth, Palmer, Edinger, Watts, Anton, Brown, Norton (Docket No. 50-2 at 1, 39, 44, 50, 59, 69); Consumer 30 (Docket No. 56-1 at 19); Docket No. 52-2 at 76-89, 96.) For example, one website advertised for IAB under the title "Affordable Health Insurance For Pre-Existing Conditions," stating, "IAB has the solution" to the "epidemic" of small or home-based businesses operating without insurance due to high costs or pre-existing conditions. (Docket No. 52-2 at 96.) The website falsely stated that "we can provide you with *an actual health insurance policy* for as little as 64.95 per month . . . Yes, you read that right." (*Id.* (emphasis added).)

Another lead-generation website, eHealthInsurance.com, used the banner, “Get Health Insurance Anytime. Anywhere.” (Docket No. 52-2 at 65.) Yet another, used and paid for by the HSP defendants, “greathealthplan.net,” promised “Quality Health Care You Can Afford! Guaranteed!”, warning consumers, “Don they were calling in response to the consumers' requests for information on health coverage. (*E.g.*, Docket Nos. 51-1 at 90, 106, 119; 41-2 at 68; 41-4 at 43.) After gathering or confirming information about the consumers' health, finances, and insurance needs they informed consumers that they could offer them a plan that would be available immediately even to people with pre-existing medical conditions. (*E.g.*, Consumers 2, 3, 4, 7 (Docket No. 49-1 at 107, 122, 125, 145); Consumers 9, 10, 11, 12, 14, 15, 16, 17 (Docket No. 49-2 at 5, 16, 28, 29, 77, 98, 103, 114-15); Consumers 18, 28 (Docket No. 50-1 at 12, 104); Consumer 30 (Docket No. 56-1 at 19-20); Docket No. 51-1 at 26, 34, 94, 119.) They claimed that for a one-time fee of $50 to several hundred dollars and a monthly payment from $40 to $1,000 the consumers would receive an

The telemarketers' misrepresentations to consumers were blatant. In undercover calls by FTC investigators, telemarketers stated: "[T]here

Consumer 20 (Docket No. 50-1 at 28-29); Consumer Shinen (Docket No. 50-2 at 47); Docket Nos. 51-1 at 53; 51-2 at 12, 17-18, 31, 42-43; 51-3 at 28, 81, 84.)

The telemarketers pressured consumers to purchase immediately by falsely stating that the program is "only available in guaranteed acceptance periods, but they are sold first come first served." (Docket No. 51-1 at 29-31.) They encouraged some consumers to drop their traditional health insurance, promising that they would pay less for similar or better coverage. (Consumer 1 (Docket No. 49-1 at 11-15); Consumers 23, 26 (Docket No. 50-1 at 51-52, 78-80); Consumers Pollworth, Frappier, Palmer, Watts, Dodds (Docket No. 50-2 at 1-2, 13-14, 39-40, 50, 88).) When consumers asked to see something in writing before they purchased, the telemarketers offered a host of fabricated reasons for refusing to provide it, including that the phony "guaranteed acceptance period" might close before they were able to respond, or that they could not provide written materials because IAB is "a nonprofit company." (Docket

(Docket No. 50-2 at 72, 88, 92, 96, 112); Docket Nos. 51-1 at 103, 112; 51-3 at 23, 85, 107; 53-3 at 82).)

When consumers were convinced by these lies to purchase the plan, the telemarketers asked for their bank account or credit card number—which would be automatically charged with IAB's monthly fees—and guided them through a recorded verification process in which they were asked a series of yes or no questions about the purchase. Although the verification was ostensibly to ensure the consumers understood what they were purchasing, the telemarketers coached the consumers to answer "yes" to the questions even if they wanted to add information or ask a question. For example, one telemarketer told an FTC investigator posing as a consumer looking for health insurance that "the health care plan policy is not considered major medical because you're getting it from a non-profit," and instructed that "during the recording, that statement's going to be made and you're going to be asked to confirm and answer yes to the questions." (Docket No. 51-2 at 43-44.) The telemarketer went on, "Please don't add any information because it will confuse the machine and it will make us start over . . . . So, if any questions pop up in your head while we're recording, just write them down and I'll be more than glad to answer them in[] detail when the machine is finished talking to you." (*Id.*) This form of coaching was not an aberration—it was based on an HSP script. (Docket Nos. 41-2 at 70; 57-3 at 49.)

2. IAB's Actual Membership Plan.

Once the sale was complete, consumers were sent a packet of information congratulating them and providing information on what they had purchased—not health insurance but membership in IAB. (*E.g.*, Docket No. 49-1 at 24-26.) However, the welcome letter confusingly stated that members have "access to tremendous savings" on "medical benefits" as well as "limited insured benefits," and came with one or more membership cards. (*E.g.*, Consumer 1, (Docket No. 49-1 at 24); Consumers 9, 10, 13 (Docket No. 49-2 at 14, 23-24, 44-47).) Some of the cards consumers received (like the medical discount plan card) stated that "[t]his is not insurance," but others (like the IAB membership card) did not include this disclosure, or stated in confusing doubletalk, "Your membership has insured health benefits." (*See id.*; Consumer Frappier, (Docket No. 50-2 at 17).) The cards also used the vernacular familiar from medical insurance cards, providing a “member number” and “group number.” (*See id*.)

IAB membership generally consisted of a bundle of “benefits” provided by third parties under contract with IAB, but was not health insurance. The bundle varied depending on the particular plan the telemarketer sold and the state in *might* be eligible for reimbursement for some of the costs. (*Id.* at 5; Docket No. 45-1 at 37-40.) Consumers who tried to use these benefits often found that providers listed on IAB's website were no longer in business, did not accept the plan, did not accept new patients, were otherwise unavailable, or that the services they needed were not covered. (*E.g.*, Consumer 1 (Docket No. 49-1 at 13); Consumers 8, 9, 13 (Docket No. 49-2 at 2, 5, 34, 35-36); Consumers 20, 23 (Docket No. 50-1 at 29-30, 54); Consumers Faulkner, Edinger, Shinen, Coufal (Docket No. 50-2 at 36, 44, 47, 68); Docket No. 52-1 at 185.)

3. Consumers' Experience After Purchasing A Membership.

After receiving IAB's materials many consumers realized they had been duped, that membership in IAB was not health insurance after all, and called IAB to cancel. (*E.g.,* Consumers 4, 7 (Docket No. 49-1 at 126, 145-46); *see also* Docket Nos. 41-3 at 119, 121; 41-4 at 235-63 (cancellation logs).) Other consumers did not realize the truth at first and cancelled only after they tried to use the plan by visiting a doctor, when they developed a medical cond

37); Consumers 18, 28, 29 (Docket No. 50-1 at 11-16, 104-08.) These consumers often had IAB's fees automatically debited for months or

Consumers' reason for canceling was most often that they thought they had purchased health insurance.[5] (*E.g.*, Docket No. 44 at 12 n.23.) When they called to cancel or to inquire about benefits, IAB used various stalling tactics to attempt to "save the sale" and continue receiving fees. For example, consumers were told that they could not cancel unless they had other health insurance (Consumer 1 (Docket No. 49-1 at 16)), that they could not cancel until they received their membership package (Consumer 17 (Docket No. 49-2 at 116); Consumer Anton (Docket No. 50-2 at 60-61)), or that they could not cancel until they returned the membership package (Consumer Edinger (Docket No. 50-2 at 45)). When consumers complained that their doctors would not take their IAB insurance, IAB often put them off by claiming it would attempt to negotiate for a lower rate (Consumer 14 (Docket No. 49-2 at 81)), or by telling them the provider had filled out the claim forms wrong (Consumer 1 (Docket No. 49-1 at 14-17); Consumer 16 (Docket No. 49-2 at 107-08).)

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[5] IAB's Vice President of Marketing described the "usual" number of complaints she received from consumers who thought they had bought a "70/30 or 80/20 plan"—*i.e.*, traditional health insurance—was "several calls a day." (Docket No. 41-1 at 28.)

Consumers also complained about difficulties in receiving a full refund when they cancelled. (Docket No. 44 at 12 n.23.) For some consumers the runaround lasted until they were beyond IAB's 30-day refund period, or they simply gave up, considering themselves lucky to be rid of IAB. (*E.g.*, Consumer 28 (Docket No. 50-1 at 105).) Though IAB claims it had a "generous" refund policy, in fact the policy was *not* to issue refunds to consumers, even if they cancelled within 30 days, unless they specifically asked for a refund.[6] (Docket No. 41-1 at 56-57.) IAB eventually made its enrollment fees nonrefundable. (Docket No. 41-1 at 174-75.)

4. IAB's Telemarketers.

IAB's telemarketing was done mostly through third-party call centers and independent sales associates. Though IAB admits only that some "rogue" telemarketers may have made misrepresentations, IAB relied primarily on two call centers, which were both the source of numerous complaints to IAB about their deceptive practices. (*See* Docket Nos. 45-1 at 10, 56-57, 52-1 at 37; *e.g.*, Docket Nos. 41-1 at 34,

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[6] IAB issued refunds only to about 37% of those who canceled during the o.965 0 TD

46-53, 102; 52-1 at 87-89.) Those call centers were Health Service Providers ("HSP," IAB's codefendant in this case), and United States Benefits. In August, 2010, United States Benefits ceased operations pursuant to a stipulated preliminary injunction after the FTC brought suit to halt its deceptive telemarketing practices. *See FTC v. United States Benefits, LLC,* No. 3:10-0733 (M.D. Tenn. Sept. 26, 2011). Thereafter, more than half of IAB's new sales came from HSP. (*See* Docket Nos. 44 at 15; 45-1 at 10, 56-57.) IAB also permitted independent sales associates to sell IAB memberships through telemarketing, but these telemarketers misrepresented IAB membership as health insurance just like the call centers did. (*E.g.*, Docket Nos. 41-1 at 27-31; 44 at 12 n.23; 54-1 at 228.)

IAB's relationships with United States Benefits and HSP—its largest producers by a wide margin—were particularly close, and its business was substantially intertwined with the two companies.

IAB and United States Benefits. The head of IAB, James C. Wood, and the head of United States Benefits, Tim Thomas, had a longstanding friendship and business relationship. (Docket No. 52-1 at 34, 79.) When United States Benefits was to be the subject of a television exposé about its deceptive practices, Mr. Thomas turned to James C. Wood for advice.[7] (*Id.* at 90-93.) The two companies were also closely tied together. For example, IAB facilitated United States Benefits's telemarketing activities by financing its lease of a predictive dialer—a telephone system that dials multiple numbers and connects answered calls to telemarketers. (*Id.* at 34.) IAB provided support and maintenance for the dialer and IAB management handled any problems. (*Id.* at 94-95.) IAB also offered advice on how to circumvent

IAB and HSP. As with United States Benefits, James C. Wood had a longstanding relationship with Roy and Judy Hamilton, who headed HSP, and they often exchanged lengthy emails, telephoned, and met in person. (*E.g.*, Docket Nos. 41-1 at 114, 177-86, 197-99, 212; 41-3 at 39, 43-44, 134.) IAB and HSP collaborated in particular on ways to increase new memberships and reduce cancellations by “saving sales.”

believed that the problem was that IAB's customer service department did not try hard enough to "save" those sales, and proposed that HSP's sales people would take over IAB's customer service. IAB agreed to the arrangement, and so in March, 2010, customers who bought IAB memberships based on HSP's misrepresentations were directed back to those very same sales people when they sought to learn about their benefits. (*Id.* at 106.) Cancellations went down initially (Docket No. 41-3 at 154), but within a year the positions reversed, and IAB resumed customer service.[8] (*See* Docket No. 41-1 at 104-05, 219; Docket No. 41-2 at 129.) The following year, HSP again took over IAB's customer service as IAB's "retention department." (Docket No. 41-1 at 149.) During this latter period, HSP represented itself as "in charge of all IAB/HSP members' needs" and asked for contact information so that it could deal directly with IAB's vendors. (*Id.*) Customers who called IAB customer service were redirected by "hotline" to HSP. (*Id.* at 155.)

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[8] During the discussion of cancellations in this period, James C. Wood candidly admitted that consumers want "more than what we offer." (Docket No. 41-1 at 105.)

5. The Individual Appellants.

Each of the individual appellants—James C. Wood, his sons Joshua and Jacob, and James's brother Gary—played a key role in the monitored, and directed responses to complaints and inquiries from state regulators. (*E.g.*, Docket Nos. 41-1 at 20-23, 85-91, 100; 52-1 at 87-89.) He also received reports of complaints from consumers about IAB's telemarketers, including United States Benefits, HSP, and independent sales associates. (*E.g.*, Docket Nos. 41-1 at 27-31, 34, 161-62; 41-3 at 109-110, 234-38.) He also received and closely monitored reports of cancellations and knew which telemarketers' sales were cancelling. (*E.g.*, *id.* at 32, 46-53.) And he spearheaded IAB's relationship with HSP and United States Benefits, often meeting personally, telephoning, and exchanging high-level emails with their owners about the business. (*E.g.*, *id.* at 60-61, 107-09, 114-16; Docket No. 41-2 at 210.)

James C. Wood also participated in and had knowledge of the deceptive practices of IAB and its telemarketers. For example, through his dealings with state regulators and his receipt of customer complaints and "secret shopping" results, James knew that HSP and United States Benefits represented IAB membership as traditional health insurance. He also received reports of independent telemarketers using fake names and representing themselves as being from IAB. (*E.g.*, Docket No. 41-1 at 213-17.) Despite knowing that customers were deceived into buying IAB memberships, he agreed to make the enrollment fee nonrefundable—ensuring that IAB and HSP would profit from every deceptive sale—stating that with the change "we will all come out much much better." (*Id.* at 174-75, 177-78.) He also approved removing contact numbers for the third party providers of IAB's benefits—making it more difficult for consumers to get accurate information about their "benefits," and approved HSP's takeover of customer service. (*Id.* at 177.) James's view of IAB's deceptive practices is summed up by his response when informed that IAB was listed on a website as one to avoid for healthcare scams: "no big deal." (*Id.* at 40.)

Jacob Wood was likewise a corporate officer at IAB with significant authority over the company's business. In 2006, Jacob's title was President of IAB Marketing Associates; in 2009 it was CEO and Managing Director. (Docket Nos. 52-1 at 17; 53-1 at 69.) Jacob was involved in setting corporate policies like pricing and commissions (Docket No. 41-1 at 166), and with developing new lines of business (*id.* at 62). He was also heavily involved in other important aspects of IAB's business, like its relationship with telemarketers. (*E.g.*, *id.* at 9, 27-31; Docket No. 41-3 at 138-39, 142, 148-49, 229.)

Jacob participated in and had knowledge of the deceptive practices of IAB and its telemarketers. For example, in 2009, Jacob received a complaint from a customer who believ

insurance agent who understood the requirements for selling IAB memberships that included “insured benefits.” (Docket No. 41-1 at 73-79.) Nevertheless, in an article he wrote for his father’s blog, Joshua explained how telemarketers who were not licensed insurance agents could use misleading language to sell IAB as insurance. (*Id.*) In the article, Joshua acknowledges that IAB’s marketers told consumers that membership would give them “the ability to obtain ‘limited benefit health insurance.’” (*Id.* at 78.) He then advised them that they could still do that, suggesting that they use careful wording to represent it as “access” to “insured benefits”—encouraging the false inference that consumers could get actual health insurance. (*Id.*)

Joshua was aware of the many complaints about the marketing of IAB membership. He was copied on numerous high-level communications regarding IAB’s relationship with HSP, including the number of cancellations and the decisions to do away with refunds and remove contact information for third-party benefit providers. (*E.g.*, *id.* at 32, 119-21, 177-78.) He was also involved in important IAB matters like developing new lines of business (*id.* at 82), IAB’s relationships with third party benefit providers (*e.g.*, *id.* at 24-25, 36-37), licensing matters (*e.g.*, *id.* at 82), and supervising the third-party verification process after Gary Wood left the company. (*Id.* at 43-44.) Joshua also served as the Chairman of IAB's retirement plan and set company policies regarding the plan. (*Id.* at 24-26.)

Like his brother and nephews, Gary Wood played an important managerial role in the company, and like them he was aware of and participated in the deceptive practices of IAB and its telemarketers. He held the title of Vice President or Special Operations Manager, and his responsibilities included dealing with complaints forwarded by state regulators (*e.g.*, Docket Nos. 41-1 at 25-26; 52-1 at 84), negotiating agreements and maintaining relationships with telemarketers (particularly United States Benefits and HSP) (*e.g.*, Docket Nos. 41-2 at 130-31; 41-3 at 188-91, 193-96; 52-1 at 19, 28, 96-97, 101, 116), overseeing IAB's third-party verification (*e.g.*, Docket No. 41-1 at 64, 130, 189-94, 237), approving telemarketers' scripts (*id.* at 237), and handling customer service issues relating to HSP. (*Id.* at 130.)

Gary was familiar with the deceptive sales of IAB memberships by several means. In addition to seeing consumer complaints from consumers, state regulators, and IAB's vendors (*e.g.*, Docket Nos. 41-3 at 197-98; 52-1 at 87-89), Gary reviewed HSP's deceptive lead-generation web site, greathealthplan.net, and forwarded it to Jacob and James C. Wood. (Docket No. 41-1 at 65-66.) He also acted as a "secret shopper," initiating a telephone call to HSP in which the telemarketer said that IAB membership was "almost the same" and "really no difference" from Blue Cross Blue Shield. (*Id.* at 112.) Gary also participated in the deceptive practices by facilitating the live transfer of calls between the United States Benefits and IAB's customer service departments, blurring the line between the two companies and enabling deceptive attempts to "save sales." (Docket No. 52-1 at 81-83.)[9]

6. Consumer Harm.

The court-appointed monitor engaged an accounting firm to analyze the financial transactions of the IAB and of the Woods. (*See* Docket No. 45-1 at 46-47.) The monitor concluded that from 2007 to 2012, IAB received gross sales income from memberships of more than $125 million.[10] (Docket No. 121 at 19, 23.) Of this, the Woods personally received more than $10 million. (Docket No. 45-1 at 58.) James C. Wood received $6.3 million (from 2009-2012), Jacob Wood received $2.5 million, Joshua Wood received nearly $1.4 million, and Gary Wood (who ceased working for the company in April 2011) received $225,000. (*Id.*; Docket No. 121 at 22.) The Woods' assets collectively included nineteen cars, including a Lamborghini, three Porsches, three Mercedes Benzes, two Cadillacs, a Lexus, and a classic 1932 MG; two boats; real estate in Texas, California, and Lake Tahoe, Nevada; and $500,000 worth of art and jewelry. (Docket No. 45-1 at 74-78.)

The total unencumbered assets of all of the IAB defendants subject to the asset freeze, as reported by the monitor and receiver, amounted to about $2.3 million, with only $1.17 million in liquid assets, less than two percent of the amount consumers spent on IAB memberships during the relevant period. (Docket No. 121 at 1, 4-5.)

Consumers duped into purchasing IAB memberships believing they were health insurance often suffered far greater losses than the fees they paid IAB. Not only did they incur thousands of dollars of medical bills that they could not afford, the stressful revelation that

limited time, and from charging more than a nominal enrollment fee. IAB entered into a consent decree with similar terms in the Illinois case. *See generally id*. (Docket No. 52-1 at 151-164; 191-97, 201-21.)

C. Procedural History.

In September 2012, the FTC filed suit against the IAB defendants and the HSP defendants, seeking an ex parte temporary restraining order, asset freeze, a receiver over the HSP defendants, a monitor to oversee the IAB defendants, and an order to show cause why a preliminary injunction should not be entered. (Docket Nos. 1, 7.) The FTC initially sought a monitor rather than a receiver over the IAB defendants in order to determine their level of complicity in the telemarketing misrepresentations. The district court granted the motion for a temporary restraining order, including appointing a receiver for the HSP defendants and a monitor over the IAB defendants, and directing the monitor to report on the latter's compliance with the order.[12] (Docket No. 17.) The court's asset freeze entitled each individual defendant to use $4,000 for living expenses until the preliminary injunction hearing. (*Id*.)

[12] Contrary to appellants' suggestion, the monitor was appointed by the district court and is answerable only to the court.

Despite the $4,000 allowance, within a week the IAB defendants requested that the court unfreeze their assets so that they could pay unspecified, uncalculated "normal business and personal expenses" and attorney's fees. (Docket No. 25 at 3-4.) In its response to the request the FTC detailed its estimate (based on the information gathered to that point) that the consumer harm in this case would exceed $70 million.[13] (Docket No. 32 at 5-6.) The FTC described how the "enormous amount of injury" dwarfed the amount of defendants' frozen assets. (*Id.*) The FTC noted that "there is an enormous gap between the frozen assets and the amount likely needed to compensate consumer victims." (*Id.*) The district court granted the motion in part, permitting $75,000 to be unfrozen to pay legal fees, expenses, and costs.[14] (Docket No. 73 at 1-2.)

[13] This estimate was based on a preliminary review of the appellants' sworn financial statements, federal tax filings, and IAB's revenues; the estimate was subsequently revised to $125 million based on the monitor's analysis of IAB's gross sales from January 1, 2007. (Docket No. 121 at 19.)

[14] Although the individual defendants did not initially quantify their request for personal living expenses, they did so after the court issued its preliminary injunction. (*See* Docket No. 110.) In that motion James C. Wood claimed monthly expenses of $15,521.04, the equivalent of more than $186,000 annually; Joshua Wood claimed $7,801 of monthly expenses ($93,612 annually); and Jacob Wood claimed $11,330 ($135,960 annually), including $2,300 monthly for private school tuition. (Docket No. 110-1 at 1-10.)

The district court held a hearing on the preliminary injunction, at which the FTC presented the declarations of seventy-one consumers attesting to IAB's deceptive practices and violations of the Telemarketing Sales Rule, and voluminous documentary evidence from the presented in its reply brief on the preliminary injunction and in its opposition to appellants' motion to remove the asset freeze—that the consumer harm shown by the record exceeded the frozen assets by an order of magnitude. (Tr. 171; *see also* Docket Nos. 41 at 5; 32 at 5-6.)

The District Court's Ruling. The district court found there was "good cause" to believe that appellants "have engaged in and are likely to engage in acts or practices that listed five such violations: (1) that appellants "made, or caused [to be made] false and misleading statements to induce persons to pay for services"; (2) that they initiated or caused another to initiate "numerous telephone calls to telephone numbers listed on the Do Not Call Registry or to consumers who have previously stated to the telemarketers that they do not wish to receive calls made by, or on behalf of [the appellants]"; (3) that appellants "failed to pay the required fees for access to the [Do Not Call] Registry"; (4) that they "initiat[ed] numerous telephone calls to consumers in which they failed to promptly connect the consumers who answered the call with a sales representative"; and (5) that they "caused telemarketers to deliver numerous prerecorded messages to consumers who have not previously provided them with an express written agreement authorizing" such calls. (*Id.*)

With regard to the individual appellants, the district court found that the FTC was likely to prevail in showing that they "are individually liable and properly subject to an asset freeze," in that they "have, or have had, the ability to control the [corporate defendants] because each is an officer, manager, or majority shareholder of one or more [corporate defendants]," and that they "either had knowledge of

"Preliminary injunctions are, by their nature, products of an expedited process often based upon an underdeveloped and incomplete evidentiary record," and "the trial court is in a far better position . . . to evaluate that evidence." *Id.* Accordingly, this Co

agents, and because it knew about the misrepresentations and had authority to control them. Each of the Woods is jointly and severally liable with IAB because there was abundant evidence that (1) though only participation *or* control is necessary, they both participated in IAB's and the telemarketers' illegal conduct and were corporate officers of IAB with authority to control it; and (2) they knew about the deceptive marketing and other violations. In light of the evidence, the district court's finding that the FTC is likely to succeed on the merits was not clearly erroneous.

Appellants' arguments to the contrary do not withstand scrutiny. *First*, their bare assertion that there was not enough evidence against them does not even attempt to engage the record before the district court—which showed participation, control, and knowledge by each of the Woods. *Second*, appellants' argument for a new set of heightened standards in preliminary injunction proceedings is without legal foundation and inappropriate in this case, where the cessation of their business operations was effected by the disinterested court-appointed receiver. *Third*, appellants' attempt to blame their victims is contrary to this court's admonition that "caveat emptor is simply not the law."

Fourth, appellants' assertion that IAB membership was valuable is contrary to the evidence showing their high cancellation rate and this have been authorized. And the mere holding in this Court's unpublished disposition that the asset freeze in a different case was too broad does not apply here, where the evidence showed that all or nearly all of IAB's sales were likely the product of its deceptive practices. *Infra*, part II.

3. The district court had jurisdiction over IAB's deceptive scheme. Though appellants attempt to invoke the McCarran-Ferguson Act's exemption of the "business of insurance" from the FTC Act, they do not meet any prong of the Supreme Court's definition of the "business of insurance." Moreover, under Supreme Court precedent McCarran-Ferguson does not apply to interstate activities, and all or nearly all of IAB's sales were in interstate commerce. *Infra*, part III.

Argument

I. The District Court Did Not Abuse Its Discretion In Entering The Preliminary Injunction.

The FTC Act permits a permanent injunction where the FTC shows "that, weighing the equities and considering the likelihood of ultimate success, [granting the injunction] would be in the public interest." 15 U.S.C. § 53(b) (2009). The district court has authority under Section 13(b) to order not just injunctive relief, but also ancillary equitable remedies, including equitable monetary relief. *FTC v. Gem*

Merchandising Corp., 87 F.3d 466, 468 (11th Cir. 1996). This authority includes "the power to order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible." *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984).

"To obtain a preliminary injunction . . . the FTC need not satisfy the traditional equity standard that courts impose on private litigants—the FTC need not prove irreparable harm." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991). Instead, the FTC Act requires only that the "district court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities." *Id*. The district court did not commit clear error in finding a substantial likelihood that the FTC would succeed on the merits against IAB and the Woods, or that the equities involved support the preliminary injunction, and it did not abuse its discretion in entering the order.

A. The FTC Is Likely To Succeed In Showing That Appellants Violated The FTC Act And That The Woods Are Individually Liable.

Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices. 15 U.S.C. § 45(a). An act or practice is deceptive if (1) there is a representation; (2) the representation is likely to mislead consumers acting reasonably under the circumstances; and (3) the representation is material. *FTC v. Tashman*

In addition, "[u]nder the FTC Act, a principal is liable for the misrepresentations of his agent acting within the scope of the agent's actual or apparent authority." *FTC v. Stefanchik*, 559 F.3d 924, 930 (9th Cir. 2009), quoting *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1438 (9th Cir. 1986).

Here, the record before the district court thoroughly supported its finding that the FTC is likely to succeed in showing that IAB and the Woods violated Section 5(a) of the FTC Act and the Telemarketing Sales Rule. The voluminous documentary evidence, consumer affidavits, and consumer testimony showed that IAB and its telemarketers made numerous material representations that were likely to deceive, including that membership in IAB was traditional health insurance or its equivalent, that consumers would be covered despite pre-existing conditions, that the coverage would be comprehensive, and that it was available for a limited time. *See supra* pp. 6-12. While IAB claims that these misrepresentations were attributable to a few rogue telemarketers (Opening Br. 21), the evidence showed the opposite. IAB's own customer service manager confirmed that IAB knew its memberships were being sold with these lies but simply turned a blind eye. (Tr. at 82.)

IAB is liable for its own violations of the FTC Act. IAB's misleading membership materials perpetuated the telemarketers' misrepresentations and permitted consumers to conclude that IAB membership was health insurance or its equivalent. And IAB itself made numerous misrepresentations about its benefits and cancellation policies that were material to consumers and induced them not to cancel when they learned they did not get the health insurance they had been sold. IAB is also liable prohibited by the Act may keep its ill-gotten gains so long as its own employees do not make the misrepresentations themselves. *See Tashman*, 318 F.3d at 1277; *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

Second, even if there were such a requirement, IAB would be liable for the acts of its telemarketers because they were IAB's agents acting within their actual

complaints through various state regulatory agencies, or from their third-party vendors. *See id.* at 23-28. Each of the Woods knew about these complaints, and they also knew that the deception was pervasive because IAB's members cancelled at a rate nearly equal to its new enrollments. *See id.* The district court thus did not clearly err in finding that the FTC established the Woods' knowledge of the deception, reckless indifference, or a high probability of fraud and intentional avoidance of the truth.

In the face of this overwhelming evidence, appellants offer a smattering of arguments against the district court's order, none of which shows that the court committed clear error in its findings or abused its discretion in granting the preliminary injunction.

First, appellants' conclusory argument that the FTC failed to overcome its burden and that there was "no evidence" of their participation, knowledge, or control of the deceptive acts (Opening Br. 4, 21, 28, 29), is contrary to the voluminous record before the district court, and does not show that the court clearly erred or abused its discretion.

Second, appellants suggest a host of new standards for entering a preliminary injunction and asset freeze in FTC cases—*i.e.*, that the court should only enter an injunction where "guilt beyond a reasonable doubt of a criminal violation" is shown (Opening Br. at 26), or only where the FTC's probability of success is "truly compelling" (*id.* at 27) or "compelling and overwhelming" (*id.* at 26), and that the FTC must show that consumer complainants were "reasonable,"[16] "representative," "typical," and "justified." (Opening Br. 25, 29-30.) But appellants do not attempt to show how these new standards are consistent with, much less compelled by, this Court's precedents. Those precedents properly permit a district court to enter a preliminary injunction in an FTC case so long as there is a probability of success on the merits and the injunction is in the public interest. *University Health*, 938 F.2d at 1217.

IAB argues that the heightened standards it proposes are necessary where a preliminary injunction shuts down a business, but it

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[16] Though appellants cite *Tashman* for the purported requirement that FTC prove each consumer was "reasonable," *Tashman* does not impose such an impracticable burden. Rather, *Tashman* requires that the *representation* is of the kind that consumers acting reasonably would rely on. 318 F.3d at 1278. Here, the representation that IAB membership was health insurance is precisely the kind of representation that someone looking for health insurance would rely on.

multitudes of consumers purchased IAB memberships believing they were health insurance. Though appellants attempt to fault customers for believing their deceptive representations, this Court has held to the contrary; "caveat emptor is simply not the law." *Tashman*, 318 F.3d at 1277.

Fourth, appellants argue that IAB membership provided valuable benefits, and that by their calculation the value of those benefits exceeded the cost of membership. (Opening Br. 28-29.) But the courts have roundly rejected the argument that the purported value of a product excuses deception in selling it. "[A] dishonest jeweler who represented that the rhinestones he sold were diamonds" cannot limit the customer's recovery "'to the difference between what they paid and a fair price for rhinestones.'" *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004), quoting *FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993). This is "because if the customers had known the truth, they might not have bought any rhinestones at all." *Id.*

Moreover, this Court has held that whether consumers "received a useful product," or even "received the product at a competitive price" is not the issue when sales are procured by misrepresentations. *McGregor* *v. Chierico*, 206 F.3d 1378, 1388-1389 (11th Cir. 2000). Instead, the issue is "whether the seller's misrepresentations tainted the customer's purchasing decisions." *Id.* This Court thus agreed with the Ninth Circuit's decision in *Figgie*, that in such cases "the fraud in the selling, not the value of the thing sold, is what entitles consumers . . . to full refunds." *Id*. Moreover, despite Appellant's assertion that their members received valuable benefits, the members apparently disagreed, cancelling as fast—or faster—than IAB's telemarketers could induce them to sign up. *See supra* pp. 14-15.

In sum, appellants offer no persuasive argument that the district court's findings that the FTC is likely to succeed on the merits were clearly erroneous, or that it abused its discretion in entering the preliminary injunction.

II. The District Court Did Not Abuse Its Discretion In Freezing Appellants' Assets.

The district court's authority under the FTC Act to issue an injunction carries with it the full range of equitable remedies available to the court, including the power to grant equitable monetary relief. *Gem Merchandizing*, 87 F.3d at 468-69. The court likewise "may order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible." *Id.* at 469. The burden for showing the amount subject to an asset freeze "is light." *ETS Payphones*, 408 F.3d at 735. The FTC need only present "'a reasonable approximation of a defendant's ill-gotten gains'" and "'[e]xactitude is not a requirement.'" *Id.*, quoting *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004). "[A]ny risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Calvo*, 378 F.3d at 1217.

Here, the court-appointed monitor engaged an accounting firm to analyze IAB's revenues, finding (before the preliminary injunction was issued) that the company received more than $70 million—later revised to $125 million—from the sale of IAB memberships. There is no dispute that United States Benefits and HSP sold IAB's memberships using deceptive telemarketing, nor that these call centers were IAB's key producers of new sales by a wide margin during the relevant period. *Supra* p. 17. The sum of unencumbered assets subject to the asset freeze, on the other hand, amounted to only $2.3 million. (Docket No. 121 at 5.) The frozen assets thus represented less than two percent of

cancelled their IAB memberships at about the same rate that they enrolled, and that the frozen assets represented less than three percent of (the monitor's then-current estimate of) total sales.

There was no credible evidence—and certainly no evidence that it would have been an abuse of discretion not to credit—that a substantial number of IAB members bought their memberships without the taint of misrepresentations or continued as members while fully aware of IAB's actual benefits.[18] In these circumstances it takes no complex calculation to determine that any reasonable approximation of the ill-gotten gains would far exceed the amount frozen, and that the asset freeze was thus within the district court's discretion.

Second, appellants argue that a "reasonable approximation" of harm must account for the alleged value of IAB membership, because "a consumer who pays . . . $100 in membership dues but receives $150 worth of benefits has no injury, and the recipient of the $100 has not been unjustly enriched." (Opening Br. 34.) But this argument would permit the dishonest jeweler to profit by selling rhinestones as

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[18] IAB's asserted evidence of satisfied members came only from the testimony of James C. Wood and from unverified "testimonials" from individuals who cannot be identified or who were IAB sales associates.

diamonds. *Kuykendall*, 371 F.3d at 766; *Figgie*, 994 F.2d at 606. As this Court has held, however, "the fraud in the selling, not the value of the thing sold," is what entitles consumers to redress. *McGregor*, 206 F.3d at 1388-1389.

Appellants also attempt to rely on the Second Circuit's decision in *FTC v. Verity International*, 443 F.3d 48 (2d Cir. 2006), for their proffered requirement that the court must subtract "valid, authorized, and approved purchases" from any reasonable estimate of harm. (Opening Br. 33.) But *Verity* involved circumstances far different from this case. There the gravamen of the violation was that defendants imposed charges for pornographic telephone services on subscribers who may not have authorized the charges. The Second Circuit ruled that sales to subscribers who had authorized the charges must be excluded because, as to those consumers, there was no violation. 443 F.3d at 69. But here the violation lies in the pervasive misrepresentations that were used to sell IAB memberships; those misrepresentations violated the FTC Act, and warrant redress to deceived consumers, even if some of those consumers purportedly found some value in the membership.

The district court was well within its discretion to conclude that an asset freeze amounting to less than 3% of IAB's receipts was appropriate where they were shown to have a more than 100% cancellation rate. Appellants presented no evidence that would have compelled the district court to find that more than 97% of IAB's sales were untainted by telemarketers' lies; without such evidence, the court's asset freeze order cannot have been excessive.

III. The District Court Had Jurisdiction Over This Matter.

Irony notwithstanding, appellants' final argument is that the district court lacked jurisdiction over their deceptive practices because some of IAB's membership plans included some so-called "insured benefits." Accordingly, they argue, the court is divested of jurisdiction by the McCarran-Ferguson Act.

Not so.

IAB's activities do not fall under McCarran-Ferguson because it was not engaged in the "business of insurance" as required by the Act and because the sale of its memberships was completely or almost completely interstate.

Section 2(b) of the McCarran-Ferguson Act provides that the FTC Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." 59 Stat. 33 (1945), as amended, 61 Stat. 448 (1947). The Supreme Court has articulated three criteria to determine whether a particular practice is part of the "business of insurance": (1) "whether the practice has the effect of transferring or spreading a policyholder's risk;" (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured;" and (3) "whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002 (1982).

Not surprisingly, appellants ignore this standard because they fail all three factors.

First, membership in IAB does not result in shifting any risk between a policyholder and an insured.

U.S. 205, 225-226, 99 S.Ct. 1067 (1979) (Company offering members access to prescription discounts was not within McCarran-Ferguson.).

Second, and for the same reason, IAB'

This case is also outside the scope of McCarran-Ferguson because most or all of IAB's business was interstate. In *FTC v. Travelers Health Association*, the Supreme Court held that the Act's conditional exemption of the business of insurance from certain federal regulation "to the extent that such business is . . . regulated by State Law," means "regulation by the State in which the deception is practiced and has its impact." 362 U.S. 293, 298-99, 80 S.Ct. 717 (1960). The Court rejected a broad application of the Act that would have applied to "a single State's attempted regulation of its domiciliary's extraterritorial activities." *Id.* at 297-98.

Here, there was no state where there could be "regulation by the State in which the deception is practiced and has its impact." *Id.* at 298-99. IAB was located in Texas; HSP was located in Florida; and United States Benefits was located in Tennessee. Any domicilu9.s B licenses in many jurisdictions (including licenses to sell *medical discount plans*, which are not regulated by state *insurance* regulators (*see* Opening Br. 16)), that would not bring IAB, its telemarketers, and its customers together such that the misrepresentations at the heart of this case would be subject to effective regulation by the states "within their respective boundaries." *Cf. FTC v. National Cas. Co.*, 357 U.S. 560, 564, 78 S.Ct. 1260 (1958) (advertising distributed by local agents in a single state may effectively regulate

Respectfully submitted,

May 10, 2013

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Certificate of Compliance

I, Theodore (Jack) Metzler, certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) in that it contains 12,015 words.

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Certificate of Service

I certify that I filed the foregoing with the Court's Appellate CM-ECF System on this date, and that I caused the foregoing to be served through the CM-ECF system on the following counsel of record for defendant-appellants, who are registered ECF users:

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