No. 18-1807

RULES

OTHER AUTHORITIES

INTRODUCTION

In Section 13(b) of the FTC Act, Congress gave the FTC broad discretion to sue for a permanent injunction whenever it has "reason to believe that [the defendant] is violating or is about to violate" a law enforced by the Commission. As shown in our opening brief, a vast body of precedent interpreting and applying this statute (and analogous provisions of the securities laws) establishes that once the FTC has exercised its discretion to sue, an injunction is warranted if the defendant has violated the law and there is a reasonable likelihood that the violations will recur. It necessarily follows that the FTC states a claim for injunctive relief where it plausibly alleges a past violation and a likelihood of recurrence. This well-established interpretation of the statute gives meaning to all of its parts and is consistent with both the FTC Act's remedial intent and "the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

ViroPharma, by contrast, proffers a novel and cramped interpretation of Section 13(b) that has never been accepted by any prior court. Under ViroPharma's reading, once a defendant's illegal activity has ceased, the FTC may

purpose of the statute, deviates from equitable principles, and contradicts decades of precedent from the Supreme Court, this Court, and other courts of appeals.

ViroPharma's reading suffers from two major flaws. First, rather than attempting to construe the statute as a coherent whole, ViroPharma plucks out individual words and reads them in isolation, without regard to context or statutory purpose. Thus, ViroPharma looks no farther than the dictionary definition of "about to" to support its assertion that the FTC must plead that a further violation is imminent. Br. 19. The issue here, however, is not the meaning of "about to" in the abstract, but how the phrase "is violating, or is about to violate" applies to a defendant that has already broken the law and has the incentive and means to do so again. Courts have long recognized that in these circumstances, past violations can raise a presumption of future violations. That is why every previous court to address the meaning of "is … or is about to" has concluded that the standard is satisfied where the defendant has already violated the law and is likely to do so again if not enjoined. ViroPharma simply ignores ni9.9 (s)-7.2 (ehn)7.2 (ld7.3 (ato)-1 (i)7.3 g.h

dVTiroPh armread61.5 estd61.5 (h)-181 e wTto ihe"od61.5 uh oftTh

y. Its rgtat theFTsCiyoir sisdts

statute says. Congress authorized the Commission to sue when it has "reason to believe" that the defendant is violating or is about to violate the law. That language authorizes the FTC to sue based on its evaluation of whether the past violations and the defendant's curren

competition gives rise to an inference that it will try to do so again if given the chance. Under the framework set forth in *SEC v. Bonastia*, 614 F.2d 908 (3d Cir. 1980)—which ViroPharma completely ignores—these allegations are more than sufficient to establish a likelihood of recurrence.

Finally, the FTC's claim for monetary equitable relief survives no matter

this case). While dictionaries do not answer this question, precedent does—and every court to consider the issue has equated "is … or is about to" with a reasonable likelihood of recurrence. Far from offering a "plain language" interpretation of Section 13(b), ViroPharma is proposing to graft in a new "imminence" requirement that is flatly contrary to the way the Supreme Court and courts of appeals have read the key language.

The Second Circuit squarely addressed the meaning of "is … or is about to" in *Commonwealth Chemical*, explaining that "[e]xcept for the case where the SEC steps in to prevent an ongoing violation, this language seems to require a finding of 'likelihood' or 'propensity' to engage in future violations." *Commonwealth Chem.*, 574 F.2d at 99 (Friendly, J.). Adopting the formulation in the leading securities law treatise by Professor Louis Loss, the court held that "[t]he ultimate test is whether the defendant's past conduct indicates … that there is *a reasonable likelihood* of further violation in the future." *Id.* (quoting 3 Louis Loss, *Securities Regulation* 1976 (2d ed. 1961)). This holding (which ViroPharma ignores) flows logically from the principle that "fraudulent past conduct gives rise to an inference of a reasonable expectation of continued violations." *SEC v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1100 (2d Cir. 1972). As *Commonwealth Chemical* recognizes, where a defendant has already broken the law and is likely to do so again, it makes perfect sense to say that the defendant "is violating, or is about to violate" the law.

Similarly, in *Evans Products*, the Ninth Circuit examined the phrase "is violating, or is about to violate" in Section 13(b). It concluded that past conduct by itself would not satisfy this standard, but that an injunction would be proper "if the wrongs are ongoing *or likely to recur*." *Evans Prods.*, 775 F.2d at 1087 (emphasis added); *see also id.* at 1088 ("Even though Evans' alleged violations have completely ceased, we must review whether those violations are likely to recur.") ViroPharma not only ignores the key holdings of *Evans Products*; it misrepresents the passage that it does quote.[2]

ViroPharma also ignores the Supreme Court's reading of "about to" in *Aaron v. SEC*, 446 U.S. 680 (1980). *Aaron* held that "[i]n cases where the [SEC] is seeking to enjoin a person '*about* to engage in any acts or practices which ... *will* constitute' a violation of [the securities laws], the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur." *Id.* at 701. The Court did not read "about to" to mean "imminent"; to the contrary, it cited *Commonwealth Chemical* and the Loss treatise, signaling agreement with the likelihood-of-recurrence standard. *Id.*

[2] The Ninth Circuit held that "the statutory language, legislative history, and cases indicate that § 13(b) may not be used to remedy a past violation *that is not likely to recur*." *Evans Prods.*, 775 F.2d at 1089 (emphasis added). ViroPharma quotes this sentence but omits the italicized last phrase. Br. 37.

ViroPharma's disregard for precedent also leads it to overlook this Court's decision in *Bonastia*, which adopted the likelihood-of-recurrence standard in reliance on *Commonwealth Chemical* and similar cases. *Bonastia*, 614 F.2d at 912. There was no ongoing or imminent violation in *Bonastia*; the most recent violations took place more than a year before the SEC filed suit and the defendant had since left the securities business. *Id.* at 910-12. But the Court nonetheless held that the defendant's central role in a five-year fraud scheme showed a likelihood of recurrence that mandated entry of an injunction. *Id.* at 913. The Court could not have reached this result if it construed "about to" as requiring a showing that further violations were imminent. And *Bonastia* does not stand

taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell*, 361 U.S. at 292.

Here, reading "is … or is about to" as implementing a likelihood-of-recurrence standard comports with basic principles of equity, including the rules that "the court's power to grant injunctive relief survives discontinuance of the illegal conduct" and that an injunction is warranted if there is "some cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). By contrast, ViroPharma's interpretation eviscerates those principles, effectively substituting a new rule that if a defendant discontinues its illegal conduct, a court has no power to award relief unless and until another violation is "imminent." ViroPharma points to nothing in the statute (or its legislative history) to indicate that Congress intended "such an abrupt departure from traditional equity practice." *Hecht*, 321 U.S. at 330. Moreover, as shown in our opening brief

address the standard for *relief*, whereas Section 13(b) imposes a stricter standard for *pleading*. Br. 28. That purported distinction makes no sense. To begin with, "is … or is about to" must mean the same thing in either context on ViroPharma's own interpretive theory. Moreover, the standard for *pleading* a claim for relief cannot be higher than the standard for *granting* relief; they are two sides of the same coin. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009); *SEC v. Richie*, No. 5:06-cv-63, 2008 WL 2938678 (C.D. Cal. May 9, 2008). This is evident from the text of Rule 12(b)(6), which allows dismissal for "failure to state a claim upon which relief can be granted." Whether a complaint states a claim thus turns on whether it alleges facts that would justify a court in *granting* relief. ViroPharma cites no case (and we are aware of none) requiring a plaintiff to plead more facts to get into court than it ultimately must prove to obtain relief. If ViroPharma were correct, the complaints in *Bonastia*, *Accusearch*, *Commonwealth Chemical*, and other injunction cases would have been dismissed at the pleading stage, as none of them involved ongoing or imminent misconduct.

showing 'the existence of some cognizable danger of recurrent violation.'" *Id.* (citing Loss, *supra* at 1976-77 & n.4).

Beyond that, the argument fails because Section 5(b) and Section 13(b) were enacted by different Congresses six decades apart. Section 5(b) was part of the original FTC Act of 1914; Section 13(b) was added in 1973. Differences in language between two parts of a statute sometimes indicate that different meanings were intended, but that canon "makes the most sense when the statutes were enacted by the same legislative body *at the same time*." *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (emphasis added). Linguistic variations have little relevance to the interpretation of different sections written years apart. For example, in *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008), the Supreme Court rejected the contention that a provision in the Age Discrimination in Employment Act did not prohibit retaliation because a different provision enacted seven years earlier included a retaliation ban. No such implication could be drawn where the two provisions "were not considered or enacted together." *Id.* at 486; *see also Mattox v. FTC*, 752 F.2d 116, 122 (5th Cir. 1985) (declining to compare statutory provisions enacted 62 years apart).

Moreover, the difference canon is "no more than a rule of thumb." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 156 (2013) (cleaned up). As *Commonwealth Chemical* illustrates, "Congress sometimes uses slightly different

language to convey the same message." *DePierre v. United States*, 564 U.S. 70, 83 (2011); *see also* Scalia & Garner, *supra*, at 170 (legislative drafters may use "different words to denote the same concept"). It is neither surprising nor significant that Congress used slightly different words in 1973 than it used in 1914.

The more pertinent interpretive canon here is that Congress is presumed to be aware of existing judicial interpretations when it passes a new law. *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). When Congress enacted Section 13(b) in 1973, it was well established that "is … or is about to" meant likelihood-of-recurrence under the SEC statutes. As early as 1939, the Seventh Circuit had held that "[w]here there is reasonable ground to apprehend that there will be resumption of illegal activities, a court of equity may issue an injunction even though the activities have ceased." *SEC v. Universal Serv. Ass'n*, 106 F.2d 232, 239-40 (7th Cir. 1939). Later decisions reiterated this rule, which by the early 1960s was deemed black-letter law by the leading securities law treatise. *See SEC v. Culpepper*, 270 F.2d 241, 249 (2d Cir. 1959); *Manor Nursing Ctrs.*, 458 F.2d at 1100; Loss, *supra*, at 1976. Congress's use of the same "is … or is about to" formulation indicates that it intended Section 13(b) to be construed the same way.

4.

in federal court, rather than the FTC's administrative process, and thus meant to

S.o12291 93-o

shown above ViroPharma's proffered interpretation contradicts decades of precedent. Where statutory language is not clear, it is well settled that this Court will "consider the overall object and policy of the statute, and avoid constructions that produce odd or absurd results or that are inconsistent with common sense." *Disabled in Action v. SEPTA*, 539 F.3d 199, 210 (3d Cir. 2008) (citations and internal quotation marks omitted).

In9, 59ig9ay ph8.4rse.5 (o)essotuEMC s l9stto s6 (s)-1oc 0.0016 Tw 2564 -2.2929 Td[((In

of whether courts ultimately agree that the defendant "is violating, or is about to violate" the law.[5]

Courts have uniformly held that a "reason to believe" determination is committed to agency discretion. *See, e.g.*, *Board of Trade v.* CFTC, 605 F.2d 1016, 1025 (7th Cir. 1979); *Standard Oil v. FTC*, 596 F.2d 1381, 1385 (9th Cir. 1979), *rev'd on other grounds*, 449 U.S. 232 (1980). ViroPharma attempts to distinguish these cases on the ground that they did not involve an agency affirmatively suing in federal court, but rather suits against the agency seeking judicial review of a "reason to believe" determination. Br. 24. ViroPharma misreads *Standard*

§§ 1331, 1337(a), and 1345.[7]

proceeding brought by a United States government agency, and it does not implicate any constitutional concerns. Indeed, ViroPharma's whole argument rests on the contention that *Congress* did not accord the FTC power to sue, not that the *Constitution* would forbid an otherwise authorized suit.

Moreover, while a private party must show an injury to its own interests to demonstrate standing, "[i]n a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief." *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990); *see also Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (injury to United States' sovereignty arising from violation of its laws suffices to support a Government lawsuit). Here, the requirements of Article III are satisfied because the FTC alleges that ViroPharma has violated the antitrust laws, is likely to do so again if not enjoined, and continues to retain the proceeds of its illegal actions.

By contrast, *ZF Meritor* was a private antitrust lawsuit by companies claiming injury from the defendant's anticompetitive practices. In the portion that ViroPharma cites, the Court held that the plaintiffs lacked standing to seek an injunction (but not damages) because they had completely withdrawn from the market and had not shown more than a mere possibility that they would reenter it. *ZF Meritor*, 696 F.3d at 300. This holding is inapposite to a suit by the FTC, which need not show injury to its financial interests. ViroPharma appears to rely

on *ZF Meritor* simply to argue that a mere "possibility" it will again violate the antitrust laws is insufficient to support an injunction. That is true but irrelevant. The argument goes to the statutory standard, not the constitutional one. And in any event, the FTC alleges not that it is merely *possible* that ViroPharma will violate the FTC Act again absent an injunction, but that it is *likely*. At the pleading stage, that allegation must be taken as true.

Golden is even farther afield. There, the plaintiff sought a declaration that he could lawfully distribute anonymous handbills against the reelection of a particular congressman. The Court held that there was no justiciable controversy because the congressman had left Congress for the bench and it was thus "most unlikely" that he would run for re-election. *Golden*, 394 U.S.at 109. Even if constitutional considerations of ripeness were pertinent here, the situation in *Golden* bears no resemblance to this case, which involves a government plaintiff that has alleged that ViroPharma is likely to violate the law again, an allegation that must be taken as true.

III. UNDER THE CORRECT LEGAL STANDARD, THE COMPLAINT STATES A CLAIM FOR INJUNCTIVE RELIEF.

In *Bonastia*, this Court established a multifactor test for determining whether a defendant's misconduct is likely to recur, which takes into consideration the number, nature, and severity of past violations as well as the defendant's current circumstances. *Bonastia*, 614 F.2d at 912. The district court considered none of

ViroPharma's factual arguments fail. It claims that the FTC has only

IV. THE COMPLAINT ALSO STATES A CLAIM FOR EQUITABLE MONETARY RELIEF.

In addition to a behavioral injunction, the FTC also seeks equitable monetary relief to redress the effects of ViroPharma's past violations, which cost the public hundreds of millions of dollars. If the Court concludes that the FTC has stated a claim for injunctive relief, then the dismissal should be reversed and there is no need for the Court to separately consider monetary relief. But even if the Court concludes that the FTC has not adequately alleged a likelihood of recurrence, the dismissal must still be reversed as to the claim for monetary relief.

Stripped to its essence, ViroPharma's position is that if a company cheats consumers and then completely stops its illegal activities (even up to the day before an enforcement suit), the FTC is powerless to pursue the matter in equity and the company gets away scot-free. A well-developed body of precedent shows otherwise. The Supreme Court has recognized that courts may grant equitable monetary relief even when then there is no possibility of recurrence at the time the complaint was filed. *See United States v. Moore*, 340 U.S. 616, 620 (1951). This Court applied the same principle in *CFTC v. American Metals Exch. Corp.*, 991 F.2d 71 (3d Cir. 1993), holding that a district court did not err in issuing equitable monetary relief even though an injunction was not proper because there was no likelihood of recurrence. Other courts have applied the same rule in SEC and FTC cases. *See Commonwealth Chem.*, 574 F.2d at 103 n.13 (once a violation has been

established, "a failure … to show the likelihood of recurrence required to justify an injunction" will not "relieve a defendant found to have violated the securities laws from the obligation to disgorge"); *AT&T Mobility*, 883 F.3d at 864 (even if prospective injunction was unavailable, FTC could obtain monetary relief); *Evans Prods.*, 775 F.2d at 1088 (courts have inherent power to grant ancillary equitable remedies "when there is no likelihood of recurrence").

ViroPharma rehashes the "plain language" argument that it makes with respect to injunctive relief. But as shown above—and as the case law amply demonstrates—the language of Section 13(b) is not so rigid and inflexible as ViroPharma believes, and it must be construed in keeping with hundred years of years of equity practice giving courts flexibility to "mould each decree to the necessities of the particular case." *Hecht*, 321 U.S. at 329; *see also Unifund SAL*, 910 F.2d at 1035. Neither the statute nor its legislative history signals any congressional intent to depart from these well-established principles.

ViroPharma also suggests that Section 13(b) does not authorize equitable monetary relief at all. But eight other circuits have squarely held that it does. *See* FTC Br. at 43 n.13. This Court endorsed that conclusion in *FTC v. Magazine Solutions, LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011), and affirmed a $10.2 million restitution judgment in *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007). Binding decisions of the Supreme Court and this Court hold that statutes

authorizing injunctive relief also authorize the award of equitable monetary relief to accord full justice. *See Mitchell*, 361 U.S. at 291-92; *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946); *United States v. Lane-Labs USA, Inc.*, 427 F.3d 219, 225 (3d Cir. 2005). These decisions lead inexorably to the conclusion that monetary relief is available under Section 13(b).

ViroPharma also suggests that *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), "casts doubt" upon the availability of equitable monetary relief. Not so. *Kokesh* held that a disgorgement award under the SEC statutes is subject to a five-year statute of limitations. As ViroPharma concedes, "the Court was not asked to and

CONCLUSION

The judgment of the district court should be reversed and the case remanded.

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

/s/ Matthew M. Hoffman
MATTHEW M. HOFFMAN
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3097
mhoffman@ftc.gov

Of Counsel:
D. BRUCE HOFFMAN
Director, Bureau of Competition

HAIDEE SCHWARTZ
BRADLEY S. ALBERT
MEREDYTH ANDRUS
THOMAS J. DILLICKRATH
JUNE IM
NICHOLAS LEEFER
JOSEPH MATHIAS
JAMES WEINGARTEN

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

August 30, 2018