IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

09-13098-GG

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

HOME ASSURE, LLC., et al.,
Defendants,

MICHAEL TRIMARCO and NICOLAS MOLINA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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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 attorneys, persons, and entities known to have an interest in the outcome of this appeal:

B Home Associates, LLC, Defendant

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Federal Trade Commission, Appellee

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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 preliminary injunction and an asset freeze. The district court's jurisdiction is derived from 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. § 53(b).

On April 16, 2009, the district court entered a preliminary injunction freezing the assets of the individual defendants, Nicolas Molina and Michael Trimarco, pending a determination of the merits of the Commission's complaint. Doc. 65, RE Tab 65. A notice of appeal from the asset freeze order was timely filed on June 15, 2009. Doc. 103. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED

1. Whether, having determined that the Federal Trade Commission was likely to succeed on the merits of allegations that deceptive practices had occurred in violation of the Federal Trade Commission Act and that an interim asset freeze was in the public interest, the district court exceeded its statutory authority or abused its equitable discretion by ordering an interim freeze without an accompanying preliminary injunction against conduct.

2. Whether, before the parties have fully developed the record, it is premature to consider the argument that frozen funds must be traced directly back to the proceeds of alleged unlawful practices.

3. Whether, assuming that arguments relating to the need to trace frozen assets back to alleged unlawful practices are not premature, the district court properly ordered an interim freeze without first determining that the funds were traceable directly back to alleged unlawful practices.

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 court to enter an *ex parte* temporary restraining

[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

Tab 54. He concluded that the evidence demonstrated a "substantial likelihood" that, even taking into account some "evidence of customer satisfaction," the Commission would prevail on the allegations that the defendants had made material misrepresentations to consumers that they would stop foreclosure or, if they were not successful, refund homeowners' service fees. Doc. 54 at 10, RE Tab 54 at 10.

With regard to the liability of the individual defendants, appellants Michael Trimarco and Nicolas Molina, Magistrate Judge McCoun found that "their involvement in the formation and initial development of the company, including its financing, IT structure, business, and marketing strategies," and "[their] authority within the corporate structure" demonstrated that they knew about Home Assure's practices and about enforcement actions in which two states had alleged those practices were unlawful.[10] Doc. 54 at 11, RE Tab 54 at 11. Accordingly, applying

[10] Minnesota filed a complaint in April 2008, alleging that Home Assure had made false, misleading, or deceptive statements to consumers and received advance fees for foreclosure relief services in violation of state law. Doc. 5, Exh. 1 at 12 & Att. P. Home Assure did not respond to discovery requests or appear for scheduled conferences. Doc. 5, Exh. 1 at 12 & Atts. Q, R at 1. In December 2008, the Minnesota court entered a default judgment against Home Assure, granting the Attorney General's request for a permanent injunction, restitution, civil penalties, and attorneys' fees. *Id.* Att. R at 1-5.

North Carolina filed a complaint in October 2008, alleging that Home Assure and Michael Grieco had engaged in unfair and deceptive acts and practices and received advance fees for foreclosure assistance in violation of state law. Doc.

established standards for finding individual liability, he concluded that "the evidence [was] adequate to demonstrate the likelihood of success on this element of the FTC's proof as against these individuals." *Id*.

Magistrate Judge McCoun concluded that it was a "close issue" whether the equities weighed in favor of issuing a preliminary injunction against conduct. *Id*. He noted that Home Assure had wound down its business and that the FTC had not shown that the business history of the individual defendants was "contrary to that represented in their affidavits." Doc. 54 at 11-12, RE Tab 54 at 11-12. Additionally, he noted, the individual defendants "appear[ed] to be sophisticated businessmen" who, in opposing the FTC's motion, attempted to establish they had suffered "a sizable loss on their investment." Doc. 54 at 12, RE Tab 54 at 12. Based on these findings, Magistrate Judge McCoun concluded that there was "no clear showing that [the defendants] intended to re-enter this type business" and, accordingly, concluded that a balancing of the equities "[did] not favor the FTC * * *." Doc. 54 at 12, 13, RE Tab 54 at 12, 13. Furthermore, he reasoned, "a preliminary injunction [against conduct] can not properly issue [when] the FTC is unable to demonstrate that [the defendants] are currently violating, or are apt to violate, any provision of law enforced by the FTC." Doc. 54 at 13, RE Tab 54 at

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5, Exh. 1 at 12 & Att. S. The North Carolina action resulted in a consent judgment for a permanent injunction and restitution.

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] the pervasive nature of their deceptive practices, and the ease of their re-entry into the business warranted a preliminary injunction. Doc. 61 at 10-18.

After considering the parties' objections and hearing oral argument, the district court issued an order granting in part and denying in part the FTC's motion for preliminary relief. Doc. 65, RE Tab 65. Specifically, the district court denied the Commission's motion to the extent that it requested a preliminary injunction against the deceptive acts and practices alleged in the complaint. Doc. 65 at 10, RE Tab 65 at 10. However, the court granted the Commission's motion for an

[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.* Nonetheless, the court granted them leave to "move to exclude or exempt additional assets" upon full compliance with the disclosure provisions of the TRO. *Id*. The district court provided two additional avenues for appellants to obtain relief from the asset freeze – (1) to substitute a surety bond; or (2) to seek immediate relief from extraordinary hardship by filing a motion for "selective

[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.

relief" from the freeze order. *Id*. Appellants Trimarco and Molina did not pursue any one of those options. Instead, on June 15, 2009, they filed the instant appeal. Doc. 103.

With their appeal from the asset freeze order pending in this Court, appellants filed a "Renewed Motion for a 'Nexus' Hearing and to Modify and/or Dissolve the Asset Freeze" before the district court. Doc. 133. The district court held that it lacked jurisdiction to entertain the motion, noting that it raised the same issues that appellants proposed raising in this interlocutory appeal. Doc. 136 at 2.[13]

On November 5, 2009, appellants filed a motion before this Court requesting a remand of the "nexus issue" to the district court. This Court denied that motion on December 7, 2009.

B. Statement of Facts

1. Marketing and Sales Representations

Home Assure promoted and sold a mortgage foreclosure rescue service to consumers throughout the United States, targeting homeowners who, facing foreclosure, searched the Internet for help and advice. Consumers were led to Home Assure's website – www.homeassure.com – where it touted its experience in

[13] On December 23, 2009, appellants filed a notice of appeal of that order. Doc. 145. It has been docketed as No. 09-16466-GG.

negotiating with lenders and stopping foreclosures. *See* Doc. 5, Exh. 1 at 5-7 & Atts. C-E. Home Assure promised consumers:

> 100% SATISFACTION GUARANTEED OR YOUR MONEY BACK We firmly stand behind our promise to help you. If we are unable to negotiate a reasonable plan With [sic] your lender, to stop foreclosure, or remove your delinquency, we will refund your money.

Doc. 5, Exh. 1 at 12 & Att. S at 4 Exh. 3; *see also* Doc. 5, Exh. 1 at 7 & Att. D ("[I]f we are unable to negotiate a plan with your lender that improves your situation or gives you a viable strategy to avoid or stop foreclosure, we will refund 100% of your money * * * No questions asked!"). Home Assure encouraged consumers to call for a "free consultation," or to complete and submit an online form with contact and mortgage-related financial information.[14]

The promised "free consultation" was a sales pitch from a Home Assure salesperson,[15] touting Home Assure's ability to stop foreclosure and negotiate loan

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[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.

[15] Company personnel were given phone "message left" scripts to use when they were unable to reach the consumer. One such script obviously was designed to catch the consumer's attention by dramatizing the urgent nature of the situation:

> We can help you save your home and get you back in good standing with your lender but the sooner we can get started the much better our chances are because *as I'm sure you know the lender is currently proceeding against you towards a foreclosure and a sheriff sale date and late fees and attorney fees are compounding daily towards you.*

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 them to get consumers "fully paid up and taking the service." Doc. 61-6 at 5. These "hard sell" tactics preyed on the fear and the embarrassment of losing a home to foreclosure:

> I want to tell you something, this is not meant to upset you, but I have to be honest. Here is what happens next: the Sheriff shows up and takes you and your kids and all of your personal belongings and physically removes you from your house. Putting you and your belongings on the sidewalk in front of your house for all of your neighbors to see!

Id. at 6.

In fact, the whole operation was focused heavily on sales volume, as reflected in Home Assure's marketing expenses[19] and expectations for sales representatives to achieve a specific volume of sales on a consistent basis.[20] Home Assure's sales representatives accepted payment from homeowners who had no source of income, or were unable to provide complete details about their financial

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[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 "formal written plan" prior to payment until late in the life of the scheme – *i.e.*, just prior to their decision in September 2008 to wind down the business. Doc. 38-2 at 4; Doc. 38-3 at 4; Doc. 38-4 at 9. Such practice is not mentioned in any of the sworn consumer declarations (Doc. 5, Exhs. 4-16), or on Home Assure's website (Doc. 23-4). Indeed, the single "formal written plan" appended to the Grieco declaration is dated August 27, 2008 – less than one month before Home Assure decided to wind down the business. Doc. 38-4 at 11.

In any event, to the extent it was used at all, the "formal written plan" was actually a letter in which Home Assure informed the consumer that it had obtained

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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.

3 Att. A. Home Assure then relied on provisions in the "Working Agreement" to evade the service commitments and refund guarantees that they had highlighted in marketing their program.[26]

For example, according to the "Working Agreement," the mere "act, method or process of solving a problem, the answer to a problem, explanation, clarification, etc." would constitute a "solution," thus ensuring that Home Assure could claim that even the most minimal effort on behalf of homeowners satisfied its obligations under the contract. Doc. 5, Exh. 5 at 3, Att. A at 2. Home Assure also watered down and limited its service commitment to merely "attempt[ing] to prevent the loss of [customer's] home through foreclosure through several methods." *Id*.

Most notably, by contrast to the 100% "no questions asked" refund that Home Assure featured on its website and touted in its sales calls, the Working Agreement contained multiple "NO REFUND" provisions covering a broad and ill-defined range of situations. Those provisions purported to nullify Home Assure's

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[26] There are two versions of the "Working Agreement" in the record. Starting about March 2008, the text of the "Working Agreement" was modified so as to further restrict Home Assure's 100% money back guarantee. *Compare* Doc. 5, Exh. 5 at 3, Att. A at 3 *with* Exh. 16 at 3, Att. A at 4 (no refunds for short sales and deeds in lieu of foreclosure); *compare* Doc. 5, Exh. 5 at 3, Att. A at 3 *with* Exh. 16 at 3, Att. A at 3 (increase in processing fee from $250 to $500).

The discussion in the accompanying text relates to provisions that appear in both versions of the "Working Agreement."

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 be submitted within 90 days of enrollment, enabling Home Assure to avoid a refund claim simply by dragging out the process until 90 days had elapsed. Doc. 5, Exh. 5 at 3 & Att. A at 5.

3. Failure to Provide Promised Foreclosure Relief Services

Once consumers signed the Home Assure "Working Agreement," Home Assure told them to stop contacting their lenders and stop making payments on their loans.[27] In many cases, Home Assure then left consumers in the dark.[28] In many

[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 two months had passed without Home Assure contacting the consumer's lender – during which time the consumer received a foreclosure notice – a manager claimed that Home Assure had not yet failed to provide the promised service. Doc. 5, Exh. 15 at 4-6.

In the end, notwithstanding its touted expertise and success, Home Assure in many or most cases did not stop the impending foreclosures. Indeed, in some cases, Home Assure did not even contact lenders or engage in settlement discussions. Doc. 5, Exh. 4 at 2, Exh. 12 at 3. In other cases, Home Assure claimed falsely that documents had been forwarded to lenders. Doc. 5, Exh. 5 at 4-5, Exh. 12 at 3. Other consumers, after waiting for weeks or months, were offered solutions that homeowners could have negotiated themselves, were contrary to the terms

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").

5, Exh. 8 at 3, Exh. 16 at 4. In other cases, Home Assure penalized homeowners for contacting their lenders. For example, in one case, after a consumer contacted his lender and learned about Home Assure's failure to do anything, Home Assure later used that contact as a basis for denying him a refund. Doc. 5, Exh. 7 at 5, 8.[30] In another case, a Home Assure representative authorized a consumer to continue to use her attorney in an attempt to stay foreclosure, but later claimed that the action she had approved earlier violated the "Working Agreement" and, therefore, that the consumer was not entitled to a refund. Doc. 5, Exh. 9 at 3-4.[31]

In one particularly egregious case, Home Assure did nothing for more than two months, and then, contrary to its promise to the homeowner, negotiated a loan "modification" that required payment of a $13,000 delinquency immediately and a $300 increase in monthly payments to cover other late fees and attorney costs. Doc. 5, Exh. 15 at 2, 6. Home Assure then refused to honor its 100% money back guarantee; in response to a BBB complaint filed on the date the home was being

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[30] In opposing the Commission's motion for a preliminary injunction, the defendants contended, citing the Grieco declaration, that one of the consumer declarants had refused Home Assure's offer of a refund. Doc. 38-4 at 6. In fact, Home Assure told the consumer he could take $750 (*i.e.*, 50%) or nothing. Doc. 5, Exh. 7 at 6.

[31] Although Home Assure did not provide any assistance for the consumer, it claimed, in response to a BBB service and refund complaint, that the consumer had not let the company do its job. Doc. 5, Exh. 9 at 5.

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 absence of an interim freeze, appellants, by transferring or dissipating their assets, could undermine completely the court's ability to provide effective final relief. Appellants owned and controlled Home Assure and participated knowingly in its deceptive practices. Accordingly, it was likely that, after a trial on the merits, they would be found jointly and severally liable for equitable monetary relief to remedy Home Assure's deceptive practices. Given these circumstances and the court's finding of a likelihood of success, the district court's decision to freeze their personal assets, thus ensuring there would be funds to satisfy a final judgment, was well founded and not an abuse of discretion. The court's preliminary determination that appellants' were not likely to re-enter the business, and therefore that a preliminary injunction against conduct was not necessary, did not deprive the court of authority to enter a "stand-alone" freeze. Because courts may grant final monetary relief in an action under Section 13(b) of the FTC Act, they may also grant related equitable interim relief, such as asset freezes.

Lastly, appellants' contention that the court, before freezing assets, must find a nexus between the assets and the challenged practices is not well founded. Even if such an inquiry would ever be appropriate, it would require further development of the factual record and therefore is best addressed after a trial on the merits. 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.

B. Having Found the Commission Was Likely to Succeed on the Merits, the District Court's Preliminary Determination that the Challenged Practices Were Not Likely to Recur Did Not Nullify the Court's Inherent Equitable Authority to Freeze Assets

1. Nothing in the text of the FTC Act prohibits a stand-alone asset freeze

The principal contention in this appeal is that, under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the district court had no authority to enter a "stand-alone" asset freeze. Specifically, according to appellants, Section 13(b)(1) "should have doomed the asset freeze" because the district court made no finding that appellants were "apt to engage in on-going or future violations of the FTC Act." Br. 18. Furthermore, they contend, because an asset freeze is a form of a preliminary injunction, the district court lost its authority to freeze their assets once it determined the FTC had not shown a likelihood of recurrence of the challenged conduct and, based on that preliminary determination, denied the Commission's request for a preliminary prohibitive injunction. Br. 16-22. As shown below, nothing in Section 13(b)(1) imposes such constraints. To the contrary, even where there is little likelihood a Section 13(b) defendant will re-enter the challenged business, the district courts – to protect their ability to order equitable *final* relief – may order an interim freeze.

Section 13(b)(1) authorizes the Commission to file a complaint for equitable

relief when it has "reason to believe" that "that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission * * *." 15 U.S.C. § 53(b)(1). The "reason to believe" determination, however, is merely "a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." *See FTC v. Standard Oil Co.*, 449 U.S. 232, 241, 101 S. Ct. 488, 493 (1980). Once the Commission has made that determination and has brought a case invoking a district court's plenary equitable authority, in a permanent injunction proceeding under the second proviso of Section 13(b), the *court's* authority to grant relief, including preliminary relief under Fed. R. Civ. P. 65, is governed by the usual equitable standards.[32] *See*, *e.g.*, *FTC v. Evans Products Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985) ("[W]e must determine whether the FTC has brought a "proper case" that meets the "usual equitable standards" for preliminary relief."); *FTC v. H.N. Singer, Inc.*, 668 F.2d

[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 to grant effective final relief. Doc. 65 at 11, RE Tab 65 at 11.

Even assuming, however, that the district court was *also* required to determine that appellants "[were] violating, or [were] about to violate" before freezing their personal assets, the Commission's showing of appellants' continuing failure to refund consumers' service fees, notwithstanding their "100% money back" guarantees, was enough to satisfy that provision here. *Cf. FTC v. Virginia Homes Mfg. Corp*., 509 F. Supp. 51, 56-57 (D. Md. 1981) (failure to notify warranty holders of their expanded rights is an ongoing violation of the FTC Act and is subject to relief under Section 13(b)).

2. The particular form of an asset freeze order has no bearing on the question whether the court was authorized to order a stand alone freeze

Appellants also contend that because "the basic character of an asset freeze [is] a form of an injunction" (Br. 20-21), it was "nonsensical" for the court to freeze their assets without also providing for a preliminary injunction against the alleged

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.

when it is necessary to do so in order to implement the statutory enforcement scheme. *See, e.g.*, *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2nd Cir. 1990) (approving freeze order even though evidence did not support preliminary injunction against conduct); *Evans Products Co*., 775 F.2d at 1088 (recognizing court's inherent equitable authority to order an interim freeze "when circumstances require" even when "no likelihood of recurrence"); *SEC v. Commonwealth Chem. Sec., Inc*., 574 F.2d 90, 103 n.13 (2nd Cir. 1978) (obligation to disgorge remains even when unlawful conduct is not likely to recur); *SEC v. Blue Bottle Ltd*., 2007 U.S. Dist. LEXIS 95992 at *16-17 (S.D.N.Y. 2007) (recognizing that court may order disgorgement even when an injunction is not appropriate); *SEC v. Penn Central Co*., 425 F. Supp. 593, 599 (E.D.Pa. 1976) (rejecting contention that court can order disgorgement only when it also enjoins conduct).[36]

To summarize, the order at issue in the present appeal is fully consistent with well settled case law. The court made a tentative determination that,

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[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, 1304-08 (2nd Cir. 1971) (disgorgement ordered with respect to both enjoined and non-enjoined defendants).

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 responsibility for the unlawful practices of a business entity he owns and controls. Any other rule would lead to an absurd situation in which, regardless of the egregious nature of a company's past practices, the Commission's ability to enforce the prohibitions of the FTC Act would turn on the ability of those who had used the business to implement their unlawful scheme to make a facially convincing showing of their intent to retire.

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

Appellants contend, in the alternative, that even if the district court were authorized to enter a stand-alone asset freeze, it erroneously froze assets without establishing a "nexus" or factual link between the Commission's claims and the assets to be frozen and did not establish which assets actually came into their possession. Br. 24-25. Even if an argument could be made that such a showing were required in connection with an application for *final* relief, it was premature for appellants to insist on such a showing in connection with an interim freeze. As discussed above, the very purpose of an interim freeze is to prevent the dissipation of funds that may be needed to satisfy a final judgment for equitable monetary relief. A broad temporary freeze may be necessary to preserve the status quo until it is possible, after an opportunity for discovery and an adjudication of the merits, to ascertain the full extent of consumer injury, the benefits that appellants actually derived, the source and nature of their assets, their access to other resources, and the extent of their knowledge of and participation in, or control over, company practices. It therefore was perfectly reasonable, and not an abuse of discretion, for the district court to reject appellants' request for a "nexus hearing." *See, e.g.*, *ETS Payphones*,

Inc., 408 F.3d at 735-36 (amount of funds to be frozen should be determined by reasonable approximation of amount of final judgment, not by whether the funds themselves are traceable).[37]

Appellants' objection to the interim freeze is premature for a separate reason – namely, appellants did not ask the court to release specific assets or to reduce the amount of the freeze. As this Court held squarely in *Levi Strauss & Co.*, 51 F.3d at 987-88, the contention that a district court asset improperly froze funds without tracing them back to the unlawful conduct is premature until a request to release assets has been presented to the district court in the first instance. *Cf. FTC v. Atlantex Associates*, 872 F.2d 966, 970-71 (11th Cir. 1989) (refusing to consider due process challenge to asset freeze given defendants' failure to ask court to release funds). In the present case, the freeze order specifically allowed appellants to petition the district court for a modification that would exempt specific assets. Doc. 65 at 9. Appellants, however, did not pursue that option.

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[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) (requirement of causal connection between property to be disgorged and unlawful conduct is between *amount* of unjust enrichment and *amount* to be disgorged).

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

impose personal liability on [the beneficiary] for a contractual obligation to pay money." 534 U.S. at 210. Accordingly, the Court held, the requested relief was legal, not equitable, and therefore was not authorized under ERISA. 534 U.S. at 221.

Great-West did not purport to address the public remedies at issue under the FTC Act or announce a change in the well established underpinnings of decades of FTC consumer protection law. To the contrary, it emphasized that ERISA is "'a comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's *private* employee benefit system." 534 U.S. at 209 (emphasis added). By contrast to *Great-West*, the present case does not involve enforcement of a private contractual obligation. Rather, it implements a statutory scheme that Congress enacted to protect the public.[38] *See, e.g.*, *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) ("[B]ecause the FTC Act is designed to protect consumers from economic injury, courts have often awarded the full amount lost by consumers * * *."); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) ("A major

[38] Indeed, in 1994, Congress amended Section 13(b) to eliminate certain technical obstacles to the Commission's efforts to protect the economic interests of consumers. Noting, with apparent approval, that "[t]he FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress," the Senate Report concluded that the expansion of venue and service provisions in the reported bill "should assist the FTC in its overall efforts." S. Rep. 103-130, 103d Cong., 1st Sess. (1993) (*reprinted in* 1994 U.S.C.C.A.N. at 1790-91).

purpose of the Federal Trade Commission Act is to protect consumers from economic injuries."). "And since the public interest is involved * * * [the district courts' inherent] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Holding Co*., 328 U.S. 395, 398 (1946); *accord, FTC v. Gem Merchandising Corp*., 87 F.3d 466, 479 (11th Cir. 1996); *U.S. Oil & Gas Corp*., 748 F.2d at 1434.

But even if, as appellants contend, a new and more restrictive concept of equitable restitution arises out of *Great-West*, it has no reasoned application in the present context where, as the district court held, evidence presented in support of the Commission's motion for preliminary relief shows that appellants will likely be jointly and severally liable for Home Assure's deceptive practices.[39] *Cf. Gem*

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[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 from brokerage commissions). Rather, those trades took place in a regulated,

Merchandising Corp., 87 F.3d at 470 ("The fact that the actions for which [the individual defendant] was held liable were performed by [the corporate defendant] does not lessen his individual liability."). To impose on the Commission the difficult and sometimes nearly insurmountable burden of linking the assets of individual defendants to an unlawful scheme they conceived and implemented through a business entity that they control would impede the Commission's efforts to protect the public by rewarding those who – by clever manipulation or other means – can deny receiving any pecuniary benefit as a consequence of their unlawful practices.[40] Nothing in *Great-West* indicates that the Court intended such far-ranging effect.

There is likewise nothing in *Great-West* to support the assertion that "the

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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*e – the hallmark of equitable rescission. That result does not mean, however, that equitable rescission is not a proper remedy in other circumstances. *See Griggs v. E. I. Dupont de Nemours & Co.*, 385 F.3d 440 (4th Cir. 2004) (addressing availability of equitable rescission under ERISA after *Great-West*). There is likewise no inconsistency between the district court's order and the Second Circuit's decision in *FTC v. Verity Int'l Ltd.*, 443 F.3d 48 (2nd Cir. 2006). The issue in *Verity* – whether a final award for equitable monetary relief is properly calculated including funds paid directly to third parties who neither participated in nor controlled unlawful practices – does not arise in the present case.

[40] It would also penalize the Commission for acting early in the life of a deceptive scheme that is causing immediate and substantial economic loss to consumers but, due to high start-up costs, has not yet achieved profitability for those who invested in it.

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 equitable relief to injured consumers are properly considered on the basis of a full record regarding the nature of their

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[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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