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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FEDERAL TRADE COMMISSION and UTAH DIVISION OF CONSUMER PROTECTION, Plaintiffs, v. ZURIXX, LLC, *et al.* Defendants.	**FTC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS** Case No. 2:19-cv-00713-DAK-EJF District Judge Dale A. Kimball Magistrate Judge Evelyn J. Furse

PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

The Complaint alleges that for more than six years Defendants[1] deceptively marketed and sold real estate investing products and services to tens of thousands of consumers, many of whom were left in financial ruin because of Defendants' unlawful conduct. Defendants have moved to partially dismiss the Complaint, arguing that the Federal Trade Commission ("FTC") cannot seek equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), including disgorgement of any ill-gotten gains that Defendants have reaped from their unlawful conduct. That is not the law of this Circuit. In *FTC v. Freecom Commc'n, Inc.* and *FTC v. LoanPointe, LLC* (unpublished), the Tenth Circuit held that Section 13(b) authorizes the FTC to seek, and this Court to award, monetary relief. These cases are controlling and dispositive.[2]

II. BACKGROUND

The Complaint alleges that, since at least July 2013, Defendants operated a deceptive scheme to entice consumers into purchasing a sequence of increasingly expensive real estate investment training programs and related products that "purport to allow consumers to make thousands of dollars in profit using the Zurixx system." (Compl. ¶ 6). The Zurixx "system" consists of two flipping strategies: "fix and flips" and "wholesale flips." A "fix and flip" involves purchasing and renovating property before selling it to an end user. A "wholesale flip" involves acquiring an interest in a property and then transferring that interest to a wholesale buyer who will, in turn, fix and flip the property. (Compl. ¶ 7).

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[1] Defendants, also referred to herein as "Zurixx," include Zurixx, LLC, Carlson Development Group, LLC, CJ Seminar Holdings, LLC, Zurixx Financial, LLC, and officers Cristopher A. Cannon, James M. Carlson, and Jeffrey D. Spangler.

[2] Defendants also moved to dismiss in part claims brought by the Utah Division of Consumer Protection ("Division") under Utah state statutes. The Division is filing a separate response to address those arguments.

To entice consumers to purchase its products, Zurixx routinely hosted free live events that feature celebrities from house flipping and home renovation television programs, who indicate that their team of experts will teach consumer how to make money by following the celebrities' purported system of real estate investing. (Compl. ¶¶ 8, 36-40). In fact, in numerous instances during the free events Zurixx taught consumers very little, if anything, about how to make thousands of dollars in profit by investing in real estate. (Compl. ¶ 41).

During the free events, Zurixx repeatedly represented that consumers who sign up for its 3-day workshop were likely to earn thousands of dollars in profit, often with little risk, time, or effort. (Compl. ¶¶ 42, 47-48). Zurixx promised that consumers would learn all they needed to know at the 3-day workshop to make thousands of dollars in profit through real estate investing. (Compl. ¶¶ 50-52). Zurixx's earnings, "little time and effort," and "learn all you need to know" claims were false or unsubstantiated. (Compl. ¶¶ 43, 49, 52).

To further persuade consumers, Zurixx backed up its earnings and other representations with a money-back guarantee—consumers who did not make a "minimum of three" times the price of the 3-day workshop within six months would receive their money back. (Compl. ¶ 9, 54). However, Zurixx failed to disclose the material conditions that Zurixx required consumer to meet in order to receive a refund of the money that they paid for the 3-day workshop, and it also failed to inform consumers that in order to receive a refund of the 3-day workshop payment, they had to sign Zurixx's form settlement agreement, which prohibited them from filing a complaint about Zurixx or its products with regulators or posting reviews regarding Zurixx on the Internet. (Compl. ¶¶ 56-61). Zurixx also represented that consumers who purchase the workshop will receive 100% funding for their real estate investments regardless of their credit history. (Compl. ¶ 44-45). These claims too were false or unsubstantiated. (Compl. ¶ 46)

At the 3-day workshops, Zurixx continued to represent that consumers were likely to make thousands of dollars in profit through real estate investing with little time and effort. (Compl. ¶¶ 68-72, 79-82). Zurixx used much of the workshop to tell consumers they need to purchase one of its three "advanced" packages in order to make thousands of dollars through real estate investing. (Compl. ¶ 64). Zurixx told attendees that the "retail" prices of the Gold, Platinum, and Diamond packages were $35,972, $45,997, and $73,973 respectively, but that those packages could be purchased at the workshop at discount prices of $21,297, $26,297, and $41,297 respectively. (Compl. ¶¶ 64-66). It sold these "advanced" packages and related products, such as on-site mentoring or one-on-one telephone coaching, with virtually the same misrepresentations it made at the free events. (Compl. ¶ 67).

At the 3-day workshop, Zurixx routinely instructed consumers to contact credit card issuers in order to obtain new credit cards or increases in credit limits on existing cards to fund real estate deals. (Compl. ¶ 74). Zurixx's presenters instructed workshop attendees to represent to credit card issuers income that was significantly higher than the consumer's current income. (Compl. ¶ 75). Zurixx had no reasonable basis for the earnings projections it instructed consumers to submit to credit issuers. (Compl. ¶ 77). In numerous instances, Zurixx told consumers to use the newly obtained credit cards or increased credit limits to pay for its advanced packages. (Compl. ¶ 78).

The four corporate defendants operated as a common enterprise while engaging in the unlawful conduct alleged in the Complaint. (Compl. ¶ 26). Consequently, each of them is jointly and severally liable for the alleged unlawful conduct. (Compl. ¶ 26). The individual defendants formulated, directed, controlled, or had the authority to control Zurixx's alleged unlawful conduct. (Compl. ¶ 26).

Plaintiffs commenced this action on October 1, 2019, and simultaneously moved, *ex parte*, for a temporary restraining order and preliminary injunction to enjoin Zurixx's unlawful conduct. After a hearing, the Court granted the TRO that, *inter alia*, halted the law violations, imposed an asset preservation provision for the corporate Defendants, and appointed a temporary monitor. (ECF 24). On November 1, 2019, the Court approved a Stipulated Preliminary Injunction (ECF 54) that converted the temporary monitor into a receiver and imposed an asset freeze over the corporate Defendants, and asset preservation over the individual defendants. (ECF 54).

The Complaint contains four counts brought by the FTC against all Defendants, alleging deceptive practices in violation of Section 5 of the FTC Act, in Counts One to Three, and violation of the Consumer Review Act, 15 U.S.C. § 45(b), in Count Four. Defendants have moved to dismiss the FTC's claims for equitable monetary relief as to all Defendants in Counts One to Three. Defendants have not moved to dismiss Count Four.

III. ARGUMENT

"Dismissal under Rule 12(b)(6) is appropriate only if the complaint, viewed in the light most favorable to plaintiff, lacks enough facts to state a claim to relief that is plausible on its face." *United States ex rel. Reed v. KeyPoint Gov't Solutions*, 923 F.3d 729, 764 (10th Cir. 2019) (citations and internal quotations marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "In deciding whether the plaintiff has adequately stated a claim for relief," courts "view the totality of the circumstances as alleged in the complaint in the light most favorable to [the plaintiff], accepting the plaintiff's well-pled facts as true and drawing all reasonable inferences in the non-

moving party's favor." *Abdi v. Wray*, 942 F.3d 1019 (10th Cir. 2019) (citations and internal quotations marks omitted).

A. Defendants Ask the Court to Ignore Binding Tenth Circuit Precedent Holding That Section 13(b) Allows for Equitable Monetary Relief

The second proviso of Section 13(b) of the FTC Act reads: "*Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). In *FTC v. Freecom Communications, Inc.*, ("*Freecom*"), the Tenth Circuit addressed this grant of authority and held:

> Section 13(b), 15 U.S.C. § 53(b), provides the remedy for a § 5 violation. Although § 13(b) does not expressly authorize a court to grant consumer redress (i.e., refund, restitution, rescission, or other equitable monetary relief), § 13(b)'s grant of authority to provide injunctive relief carries with it the full range of equitable remedies, including the power to grant consumer redress. In cases where the FTC seeks injunctive relief, courts deem any monetary relief sought as incidental to injunctive relief.

401 F.3d 1192, 1202 n.6 (10th Cir. 2005) (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-69 (11th Cir. 1996), and *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994)).[3] The Court reiterated this holding in *FTC v. LoanPointe, LLC*, explaining that "a district court's authority to award disgorgement under § 13(b) falls within its general equitable jurisdiction to 'decide all relevant matters in dispute and to award complete relief.'" 525 F. App'x 696, 699 (10th Cir. 2013) (unpublished) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946)).

[3] In *Freecom*, the Tenth Circuit vacated an attorneys' fees award against the FTC. In doing so, the Court analyzed "the record evidence and underlying substantive law" to determine whether the FTC's claims, which sought "both injunctive relief and ancillary relief in the form of consumer redress," lacked "legal or factual basis," concluding that the evidence could have presented facts "justifying both injunctive relief and consumer redress." 401 F.3d at 1201-02 & n.6, 1207-08. *Freecom's* pronouncements about the FTC Act therefore are part of the case's holding.

Defendants ask the Court to disregard this binding Tenth Circuit precedent and, instead, to follow the contrary interpretation in a recent, wrongly-decided, panel opinion from another circuit, *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019) ("*Credit Bureau*"), which departed from a consensus of other Circuit Court decisions (including the Seventh Circuit's own prior holdings) to find that monetary relief is not allowed under Section 13(b). Defendants' argument has four variations:

1. Section 13(b) only specifies a permanent injunction and "courts may not read additional remedies into statutes that have complex remedial statutory schemes, such as the FTC Act" (Partial Motion to Dismiss ("MTD") at 5-7);

2. Tenth Circuit precedent to the contrary should be disregarded because it is "based on the same outdated understanding of equitable relief that the Seventh Circuit concluded was contrary to modern Supreme Court precedent" (MTD at 11);

3. The remedial scope of Section 13(b) is limited to future violations (MTD at 10); and

4. Monetary relief under Section 13(b) is precluded because it renders the express grant of authority to seek redress under Section 19 superfluous (MTD at 6-7).

The Court should deny Defendants' motion because binding Tenth Circuit precedent, applying longstanding principles of statutory construction and equity jurisprudence, holds that Section 13(b) authorizes equitable monetary relief. *Freecom*, 401 F.3d at 1202 n.6; *accord LoanPointe*, 525 F. App'x at 699 (unpublished).

Defendants argue that the Tenth Circuit reached its determination in *Freecom* by relying on *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989), and that the Seventh Circuit overruled *Amy Travel* in *Credit Bureau* (MTD at 11). This assertion is incorrect. Neither *Freecom* nor *LoanPointe* cite *Amy Travel* to determine that Section 13(b) authorizes monetary relief. Instead, the Tenth Circuit relied on decisions from the Supreme Court, and from the Eleventh, Ninth, and Second Circuits, which have not been overturned. *Freecom*, 401 F.3d at 1202 n.6; *LoanPointe*, 525 F. App'x at 699. *Freecom* retains its force, and district courts are

"bound to … follow Tenth Circuit precedent[.]" *United States v. Spedalieri*, 910 F.2d 707, 709 & n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit, regardless of its views concerning the advantages of the precedent of our sister circuits.").

B. The Tenth Circuit Has Rejected the Reasoning and Interpretation of Precedent That the Seventh Circuit Panel Adopted in *Credit Bureau*

Freecom and *LoanPointe* are rooted in the principles expressed by the Supreme Court in *Porter*, which held that when a statute authorizes the district court to issue an injunction, the court may exercise "all the inherent equitable powers" necessary for "the proper and complete exercise of that jurisdiction," including the award of monetary relief. 328 U.S. at 397-99. *Porter* held that "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id*. at 399. The Supreme Court later emphasized that when Congress grants a court the power to issue an injunction, it "must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960). The Supreme Court also cited *Porter* for the principle that "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake[,]'" including the power to "'accord full justice' to all parties." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (quoting *Porter*, 328 U.S. at 398).

Until *Credit Bureau*, every Court of Appeals that considered whether Section 13(b) authorizes monetary relief agreed that it did—including the Tenth Circuit.[4] The *Credit Bureau*

[4] *E.g.*, *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598-99 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished);

panel justified departing from nearly 40 years of consensus based on its claim that the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) – issued 23 years earlier – "displaces the rationale of our precedent." The panel stated, "Since *Meghrig*, the [Supreme] Court has adhered to [a] more limited understanding of judicially implied remedies," *id.* at 781 (citations omitted), and "[w]hatever strength *Porter* and *Mitchell* retain, *Meghrig* clarifies that they cannot be used as … a license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure." *Id.* at 782. The *Credit Bureau* panel "recognize[d] that this conclusion departs from the consensus view of [its] sister circuits," and justified its departure by asserting that "most circuits adopted their position by uncritically accepting our holding in *Amy Travel*," which the panel claimed "became the standard." *Id.* at 779, 785.

In fact, *Amy Travel* was not the genesis for the long line of appellate decisions holding that Section 13(b) authorizes equitable monetary relief. Rather, decisions from the Eleventh and Ninth Circuits, each engaging in an in-depth analysis of Section 13(b) and principles of equity jurisdiction, predated (and were cited by) *Amy Travel*. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434-35 (11th Cir. 1984); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982); *see Amy Travel*, 875 F.2d at 571-72 (citing *U.S. Oil & Gas* and *Singer*). While neither *Freecom* nor *LoanPointe* cited *Amy Travel* in holding that Section 13(b) authorizes monetary relief, the cases cited by the Tenth Circuit, including *Gem Merch.*, 87 F.3d at 468-470, and

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FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); *Freecom*, 401 F.3d at 1202 n.6; *Gem Merch.*, 87 F.3d at 468-470; *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). Even the Seventh Circuit was in repeated agreement. *E.g.*, *FTC v. Trudeau*, 579 F.3d 754, 771 (7th Cir. 2009); *FTC v. Think Achievement Corp.*, 312 F.3d 259, 262 (7th Cir. 2002); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997).

Bronson Partners, 654 F.3d at 365-67, conducted a substantive analysis of the issue, including considering *Porter* and Section 13(b)'s language in context with Section 19.

As an out-of-circuit decision, *Credit Bureau* is nonbinding. And it is not properly characterized as persuasive because the Tenth Circuit has considered and rejected its reasoning and taken precisely the opposite view of the meaning of *Meghrig*. In *United States v. Rx Depot, Inc.*, the Tenth Circuit applied the interpretive framework set forth in *Porter* and *Mitchell* to determine whether Section 332(a) of the Federal Food, Drug and Cosmetics Act, 21 U.S.C. §§ 301-397, ("FDCA") authorized equitable monetary relief. Section 332(a) grants courts "jurisdiction to restrain violations [of the FDCA,]" *id.* § 332(a), and the Court explained: "under *Porter* and *Mitchell*, when a statute invokes general equity jurisdiction, courts are permitted to utilize any equitable remedy to further the purposes of the statute absent a clear legislative command or necessary and inescapable inference restricting the remedies available." 438 F.3d 1052, 1055 (10th Cir. 2006) (discussing *Mitchell*, 361 U.S. at 291-92) (emphasis added). The presumption this principle dictates is clear. Once general equity jurisdiction is invoked, all equitable remedies are presumed, unless a court then determines that there is a "clear legislative command" or "necessary and inescapable inference" to the contrary.

Particularly relevant here is that the Tenth Circuit in *Rx Depot* explicitly rejected the contention that *Meghrig* changed the *Porter/Mitchell* analysis. Rather, says the Tenth Circuit, the Supreme Court in *Meghrig* "merely identified … a statute that fit into the exceptions recognized by *Porter* and *Mitchell*." *Rx Depot*, 438 F.3d at 1055-57 & n.3 ("For these reasons, the general rule announced in *Porter*, and followed by *Mitchell* and *Meghrig*, guides our analysis.") (citing *Meghrig*, 516 U.S. at 483-88).

Moreover, *Meghrig* involved a private citizen seeking restitution in a dispute between private parties, not a government enforcer suing to vindicate public harm under a statute designed to protect the public interest. The Tenth Circuit credited this public-private distinction to distinguish *Meghrig*. *Rx Depot*, 438 F.3d at 1056-57 ("*Meghrig*'s restrictive view of the remedies available … is likely due in part to the private nature of actions brought under the provision." (discussing *Porter*, 328 U.S. at 398)).

C. *Rx Depot* Dictates How to Construe Statutes Authorizing Equitable Relief

The cases Defendants cite as corroborating the purported interpretive change that *Meghrig* represents are inapplicable to Section 13(b). They involve different operative language,[5] address the breadth of a given civil[6] or criminal statute,[7] or determine the availability

[5] For example, in *Great-West Life & Annuity Ins. Co. v. Knudson*, the Supreme Court construed the phrase "other appropriate equitable relief," which has no parallel in Section 13(b), as actually limiting remedies to those that were "typically" available in equity. The dispute concerned a contractual right to an indemnification payment, and the Court denied the plaintiff's request for specific performance because contracts were typically remedied through damages at law. 534 U.S. 204, 209-211, 221 (2002). *Cf. Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-57 (1993) (suggesting "whatever relief a common-law court of equity could provide" would have been allowed absent the qualifying language above). In *Miller v. French*, the Supreme Court applied *Porter* but saw the word "shall" ("shall operate as a stay") in the Prison Litigation Reform Act as "unmistakably" demonstrating Congress's intent to deprive courts of the power to ignore a statutorily-mandated stay. 530 U.S. 327, 340-41 (2000).

[6] *Time Warner Entm't Co., LP v. Everest Midwest Licensee, LLC*, 381 F.3d 1039, 1050, 1055-56 (10th Cir. 2004) (applicability of FCC home wiring regulations); *Stacy S. v. Boeing Co. Empl. Health Benefit Plan (Plan 626)*, 344 F. Supp. 3d 1324, 1330-31, 1334-35 (D. Utah 2018) (notification requirements under ERISA); *Giles Constr. LLC v. Toole Inventory Solution, Inc.*, No. 12-cv-37, 2015 WL 3755864, at *3 (D. Utah June 16, 2015) (declining to expand coverage of Computer Fraud and Abuse Act).

[7] *United States v. Sturm*, 673 F.3d 1274, 1279-80 (10th Cir. 2012) (scope of coverage of child pornography statute); *United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008) (scope of coverage of false statements statute); *United States v. Fronk*, No. 13CR484 DAK, 2014 WL 3513164, at *4-7 (D. Utah July 11, 2014) (scope of coverage of alcoholic beverage regulation). *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 576-584 (2006) (retroactive applicability of Detainee

of implied rights of action rather than remedies.[8] Both the Supreme Court and the Tenth Circuit recognize this analytical distinction. *See, e.g., Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65-66 (1992) ("As we have often stated, the question of what remedies are available under a statute that provides a private right of action is analytically distinct from the issue of whether such a right exists in the first place.… Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action, … we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.… This principle has deep roots in our jurisprudence." (citations omitted)); *Rx Depot*, 438 F.3d at 1057 n.3 ("[A] general grant of equity jurisdiction has long been recognized as authorizing courts to employ all their traditional equitable powers.… Thus, there is a statutory anchor for the equitable remedies here that is not present in cases where private rights of action are implied." (citing *Porter*, 328 U.S. at 398)).

By contrast, in reaffirming the interpretive strictures of *Porter* and *Mitchell*, *Rx Depot* reconciled the statutory construction principles applicable when determining equitable remedies and is therefore controlling. *Rx Depot* provides the following six guideposts:

Treatment Act); *United States v. Livesay*, 600 F.3d 1248, 1250-51 (10th Cir. 2010) (statutory confinement options for defendant acquitted on mental health grounds).

[8] *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) (refusing to create an implied private right of action); *Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533-34 (1989) (refusing to create a private right of action for federal employees under Title VII of the Civil Service Reform Act); *United States v. Jantran, Inc.*, 782 F.3d 1177, 1182-83 (10th Cir. 2015) (declining to find *in personam* implied cause of action); *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1309-10 (10th Cir. 2012) (finding no cause of action for employment discrimination under Title II of Americans with Disabilities Act). *Cf. Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284-85 (1998) (requiring knowledge for vicarious liability under preexisting implied right of action in Title IX of the Education Amendments of 1972).

First: Monetary relief under Section 13(b) must be considered in conjunction with monetary relief authorized by other sections of the FTC Act—contrary to Defendants' assertions, (MTD at 8, 9, 11, 14-15). *Rx Depot* notes that, under *Mitchell*, the basis for determining equitable remedies is the statutory language granting injunctive authority itself. *Rx Depot*, 438 F.3d at 1055 ("The [*Mitchell*] Court relied exclusively on language in the statute granting courts authority 'for cause shown to restrain violations of [the Fair Labor Standards Act].'").

Second: The Tenth Circuit also specifically addressed the lack of broadening language authorizing equitable remedies at large, holding that "such inclusive language is not required." *Id.* (citing, *inter alia*, *Mitchell*, 361 U.S. at 291). Defendants mistakenly argue otherwise based on the lack of such language in Section 13(b). (MTD at 7-8, 11, 13).

Third: The Tenth Circuit has rejected Defendants' assertion, (MTD at 8-11, 14), that authorizing equitable monetary relief when a statute specifies an injunction would be "implying" a remedy. *Rx Depot*, 438 F.3d at 1059 ("As the Court noted in *Mitchell,* '[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted *cognizant of the historic power of equity* to provide complete relief in the light of statutory purposes.… Thus, *we need not infer* any remedies; rather, all equitable remedies are available unless Congress' express provision of other remedies creates a necessary and inescapable inference that those remedies are exclusive.'" (quoting *Mitchell*, 361 U.S. at 291-92) (emphasis added)). Because *Porter* and *Mitchell* were decided in 1946 and 1960, respectively, Congress passed Section 13(b) in 1973 knowing that a reference to injunctive relief carries the full range of equitable remedies. *Id.*; *see Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").

Fourth: *Rx Depot* rejected Defendants' assertion, (MTD at 10), that *Meghrig* limits equitable relief to prospective remedies only: "[*Meghrig*] did not explicitly overrule *Mitchell*'s holding that backward-looking remedies are permitted under a grant of authority to restrain violations." *Rx Depot*, 438 F.3d at 1058 ("[W]e do not think the presence of the term 'restrain' in a statutory grant of general equity jurisdiction is dispositive evidence of Congress' intent to limit remedies to those that are forward-looking." (discussing *Meghrig*, 516 U.S. at 483-87)). Moreover, this directionality distinction is artificial when it comes to equitable monetary relief, because "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter*, 328 U.S. at 400; *see Rx Depot*, 438 F.3d at 1058 ("When disgorgement is ordered to prevent future violations of the law it is a forward-looking remedy.").

Fifth: The Tenth Circuit reiterated that "'equitable powers assume an even broader and more flexible character' in suits involving the public interest" such as "an enforcement action by the government to protect the public." *Rx Depot*, 438 F.3d at 1057 (quoting *Porter*, 328 U.S. at 398, and factually distinguishing *Meghrig* as "a controversy between private parties" under "private causes of action"). Defendants disregard this guidance by advocating for a narrow construction of Section 13(b). (MTD at 11, 13.)

Sixth: The Tenth Circuit also made clear that just because a statutory scheme specifies restitution through an administrative process does not mean Congress intended to foreclose or limit equitable relief by other means. The FDCA allows restitution for certain medical devices as part of an administrative process subject to specified prerequisites, yet the Tenth Circuit held in *Rx Depot*: "We decline to read the FDCA's grant of expanded administrative powers as a diminishment of the federal courts' judicial powers under a grant of general equity jurisdiction."

Rx Depot, 438 U.S. at 1060 (discussing 21 U.S.C. § 360h(b)(2)(C)). Defendants wrongly oppose monetary relief under Section 13(b) based on this very comparison.

Applying these principles and the analysis dictated by *Porter/Mitchell/Meghrig*, the Tenth Circuit considered the authority "to restrain violations" in Section 332(a) and concluded that the language authorized equitable monetary relief, finding: (i) Section 332(a) invokes equity jurisdiction, (ii) disgorgement is a "traditional equitable remedy," (iii) the FDCA "does not contain a clear legislative command or compel a necessary and inescapable inference precluding disgorgement," and (iv) disgorgement was not inconsistent with (and actually furthered) the FDCA's purpose, which is "to protect the public health." *Id.* at 1058, 1061.

This analysis applies equally to Section 13(b) of the FTC Act, a public interest statute enforced by the government.[9] Section 13(b) has analogous operative language granting injunction authority that includes equitable monetary relief,[10] and as explained in Section III.D below, there is no basis to find a clear legislative command or necessary and inescapable inference to the contrary, because the enforcement structure that Congress created provides for monetary relief in different ways for different reasons.

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[9] The FDCA provides for criminal enforcement, civil monetary penalties, administrative remedies, and seizure of nonconforming products. *E.g.*, 21 U.S.C. §§ 333, 334, 350a(e)(1)(B), 360h(b) & (e), 360pp(a) & (b). Despite these alternatives, the Tenth Circuit held that disgorgement was authorized by the "general equity jurisdiction" conferred in Section 332(a) and that the existence of these other remedies "does not create a necessary and inescapable inference" that Congress intended to preclude equitable monetary relief. *Rx Depot*, 438 F.3d at 1060. The FTC Act likewise provides for redress, civil penalties, administrative relief, and, for the reasons described in the main text, equitable monetary relief and is no more complex or comprehensive than the FDCA. 15 U.S.C. §§ 45(b), 45(l), 45(m), 53(b), 57b(b).

[10] *See supra* Section A.

D. Equitable Monetary Relief Under Section 13(b) is Part of a Multi-Path Enforcement Structure

"The Commission is charged with the protection of the public interest," *Double Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268, 270 (10th Cir. 1965), and "[t]he primary purpose of § 5 [of the FTC Act] is to lessen the harsh effects of *caveat emptor*" and "to protect the consumer public." *Freecom*, 401 F.3d at 1202. *Caveat emptor* "can no longer be relied upon as a means of rewarding fraud and deception and has been replaced by a rule which gives the consumer the right to rely upon representations of facts as the truth." *Id.* Therefore, the FTC Act "prohibits 'unfair or deceptive acts or practices in or affecting commerce,' 15 U.S.C. § 45(a)(1), and vests the FTC with authority to prevent such practices by issuing cease-and-desist orders, *id.* § 45(b), by prescribing rules, *id.* § 57a(a)(1)(B), and by seeking injunctive relief in federal district court, *id.* § 53(b)." *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009). Defendants see a conflict between the first enforcement method, which begins with an administrative proceeding under Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), followed by an optional proceeding for monetary relief in district court under Section 19, 15 U.S.C. § 57(b), and the third enforcement method which is solely a judicial process under Section 13(b), 15 U.S.C. § 53(b). Specifically, Defendants argue that monetary relief under Section 13(b) renders redress under Section 19 "superfluous," (MTD 6-7), but these mechanisms are not mutually exclusive. Rather, Congress created multiple enforcement paths to provide the FTC with choices for how best to carry out its mandate.

First, we know Congress created multiple enforcement options because Congress said so in the statutory text. Section 19 was enacted two years after Section 13(b) and contains a saving clause unambiguously stating that remedies under Section 19 are "in addition to, and not in lieu

of" other remedies, and that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e).[11]

Second, Sections 13(b) and 19 coexist because they provide alternative methods of enforcing substantive law violations, one of which is an administrative process with ancillary judicial support and the other is purely judicial. Section 19 allows the FTC to obtain certain forms of monetary relief in federal court after an administrative proceeding concludes or in cases where a defendant has violated an FTC trade regulation rule. When the Commission seeks to apply the FTC Act in a new or novel setting, it can elect to proceed administratively, because this allows the Commission an opportunity to "further expand upon the prohibitions of the [FTC] Act," S. Rep. No. 93-151, at 30–31 (1973), with the Commission's findings of fact and conclusions of law reviewed deferentially on appeal. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).[12] Following such actions, the FTC may go to court and seek monetary relief

[11] *Credit Bureau* concluded that Section 19's saving clause did not preserve equitable monetary relief under Section 13(b) because "acts cannot be read to destroy" themselves and equitable monetary relief under Section 13(b) would "effectively nullif[y]" Section 19. 937 F.3d at 775 (citations omitted). *Credit Bureau's* analysis of the saving clause is mistaken because it overlooks the plain meaning of the clause, misses that Section 19 and Section 13(b) serve complementary purposes as described in the main text above, and ignores Section 19's legislative history. The Senate conference report confirms the purpose of the saving clause and Congress's understanding that the FTC Act contained other avenues for redress: "The section is intended to *supplement* the ability of the Commission to *redress* consumer and other injury resulting from violations of its rules or of section 5(a) of the Federal Trade Commission Act." S. Conf. Rep. No. 93-1408 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 7755, 7774 (emphasis added). Section 19's legislative history also shows that Congress understood that courts' equity powers attached regardless of whether Congress mentioned them: "While this section enumerates several types of relief which may be granted, *the nature of the relief authorized is limited only by the nature of the injury done and the remedial powers of the court. The enumeration of specific types of relief available are not exclusive and do not limit the Commission in pleading, or the court in fashioning, other appropriate remedies*." *Id.* at 7773 (emphasis added).

[12] Pending the outcome of the administrative proceeding, the FTC can obtain a preliminary injunction if necessary in district court under the first proviso of Section 13(b).

under Section 19. In these follow-on proceedings, the FTC's findings of fact from the administrative case are deemed "conclusive," 15 U.S.C. § 57b(c)(1), but the flip side of this deference is that monetary relief is allowed only when a "reasonable man" would have known that the practices subject to the administrative order were "dishonest or fraudulent," 15 U.S.C. § 57b(a)(2). This means that for evolving industries and novel applications, where the FTC sees a need to comment on the prohibitions of the FTC Act, the FTC receives deference to apply its expertise in an administrative action but can obtain monetary relief only when it can demonstrate sufficient scienter to show the fairness of such relief in such matters.

On the other hand, Section 13(b)'s second proviso streamlines cases for situations when the FTC does not need to expand upon the FTC Act's substantive prohibitions and receive deference to its findings. In such cases, Section 13(b)'s second proviso allows for efficient process and better utilization of resources by authorizing the FTC to bypass the administrative process and proceed directly in federal court for complete relief.[13] Under Section 13(b), the FTC receives less deference but is not subject to the scienter requirements of Section 19.

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[13] The legislative history confirms that the second proviso is an independent grant of authority for the Commission, in its discretion, to seek judicial remedies instead of administrative relief:

> Section [13(b)] authorizes the granting of a temporary restraining order or a preliminary injunction without bond pending the issuance of a complaint by the Commission under section 5[.] … Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently.

S. Rep. No. 93-151, at 30-31; *see United States v. JS & A Group, Inc.*, 716 F.2d 451, 456-57 (7th Cir. 1983) (discussing senate report); *H.N. Singer*, 668 F.2d at 110-11 (same).

The remedies themselves also differ. Unlike Section 13(b), whose remedies are solely equitable, Section 19 authorizes equitable remedies as well as "payment of damages" which is a legal remedy unavailable under Section 13(b). 15 U.S.C. § 57b(b).

Thus, Sections 13(b) and 19 authorize distinct types of relief and alternative procedures for achieving them depending on the FTC's enforcement goals. These important differences are not nullified by the availability of monetary relief under both sections.

After Section 19 was enacted in 1975, Congress has twice ratified the FTC's authority to obtain equitable monetary relief under Section 13(b). The first was in 1994, years after courts recognized the availability of such relief, when Congress expanded the statute's venue and service-of-process provisions. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat. 1691 (Aug. 26, 1994). As it amended Section 13(b), Congress let stand the many existing judicial decisions allowing monetary relief under the statute. The Senate report accompanying the legislation recognized that Section 13(b) authorizes the FTC to "go into court … to obtain consumer redress." S. Rep. No. 103-130, at 15-16 (1993). When Congress amends a statute but retains certain statutory language that courts have interpreted in a particular way, Congress is deemed to have accepted and ratified that judicial interpretation. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015).

The second was in 2006, when Congress codified the existing judicial understanding of Section 13(b) at the time it enacted the U.S. Safe Web Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372 (Dec. 22, 2006) (codified in various sections of Title 15, U.S.C.). There, Congress expanded the FTC's enforcement authority against certain practices abroad by adding a new provision to Section 5 stating: "All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this

paragraph, **including restitution** to domestic or foreign victims." 15 U.S.C. § 45(a)(4)(B) (emphasis added). Here, too, Congress would have known about the consensus of appellate decisions permitting equitable monetary relief under Section 13(b). *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2520.

For these reasons, Section 13(b)'s grant of authority to issue injunctions also authorizes the full range of equitable remedies including monetary relief, and there is nothing in the language, structure, or history of the FTC Act indicating a "clear legislative command" or "necessary and inescapable inference" to the contrary. Defendants' motion to dismiss Counts One to Three as to equitable monetary relief should be denied.

Respectfully submitted,

Date: December 17, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2019, I electronically filed the foregoing **FTC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS** with the Clerk of Court using CM/ECF, which will send a notice of electronic filing to counsel of record.

/s/ *Amanda Grier*
Amanda Grier