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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.

**PLAINTIFF FTC'S NOTICE OF
SUPPLEMENTAL AUTHORITY
REGARDING PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
MOTION TO CERTIFY FOR APPEAL**

Case No. 2:19-cv-00713-DAK-EJF

District Judge Dale A. Kimball
Magistrate Judge Evelyn J. Furse

Plaintiff Federal Trade Commission ("FTC") respectfully submits this Notice of Supplemental Authority under District of Utah Civil Rule 7-1(b)(4).

Attachment 1 is Judge Barlow's March 25, 2020 Order Denying Defendants' Motion to Certify in *FTC v. Nudge, LLC, et al.*, Case No. 2:19-cv-00867-DBB-EJF. Attachment 2 is the transcript of the March 24, 2020, hearing in that case. Judge Barlow's pertinent ruling and analysis on Defendants' Motion to Certify for Appeal can be found in Attachment 2 at pages 68 through 73.

At the time of filing their Memorandum in Opposition to Defendants' Motion to Certify for Appeal (ECF 121), Plaintiffs did not have the written order or transcript, and stated:

Recently, on March 24, 2020, U.S. District Court Judge Barlow denied certification of the same remedy question raised here by the same defense counsel making the same arguments. *FTC v. Nudge, LLC*, No. 2:19-CV-0086-DBB-EJF, Minute Entry for Proceedings Held before Judge David Barlow (March 24, 2020) (ECF 114). Plaintiffs expect to provide the written order or hearing transcript to this Court when available.

Id. at 2, n. 1.

Plaintiffs now provide the written order (Attachment 1) and hearing transcript (Attachment 2) to this Court because Judge Barlow's ruling and analysis denying the *Nudge* defendants' motion to certify for interlocutory appeal is pertinent to the Plaintiffs' arguments in their Memorandum.

Respectfully submitted,

Date: April 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically filed the foregoing Notice of Supplemental Authority 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

ATTACHMENT 1

March 25, 2020, Order Denying Defendants' Motion to Certify
FTC v. Nudge, LLC, et al., Case No. 2:19-cv-00867-DBB-EJF

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

FEDERAL TRADE COMMISSION, and
UTAH DIVISION OF CONSUMER
PROTECTION,

Plaintiffs,

v.

NUDGE, LLC; RESPONSE MARKETING
GROUP; BUYPD, LLC; BRANDON B.
LEWIS; RYAN C. POELMAN; PHILLIP W.
SMITH; SHAWN L. FINNEGAN; and
CLINT R. SANDERSON,

Defendants.

ORDER

- **DENYING [91] DEFENDANTS’
MOTION TO STAY**
- **DENYING [97] DEFENDANTS’
MOTION TO CERTIFY**
- **DENYING [107] DEFENDANTS’
MOTION FOR PROTECTIVE
ORDER**

Case No. 2:19-cv-00867-DBB-EJF

District Judge David Barlow

Before the court are three related motions filed by Defendants. First, Defendants request an order staying proceedings in this action until the Supreme Court issues a decision in *Liu v. Sec. & Exch. Comm’n*, No. 18-1501, 2019 WL 5659111 (U.S. Nov. 1, 2019).¹ Second, Defendants moved to certify for interlocutory appeal under 28 U.S.C. § 1292(b) this court’s order denying Defendants’ motion to dismiss.² Third, Defendants move for a protective order “adjourning their obligation to respond to Plaintiffs’ discovery requests” and postponing a scheduled deposition “until after the Supreme Court issues its opinion in *Liu*.”³ The court considered the briefing, relevant law, and argument presented at the hearing on March 24, 2020.

¹ Defendants’ Motion to Stay Proceedings Pending Supreme Court Review (ECF No. 91).

² Defendants’ Motion to Certify for Appeal, under 28 U.S.C. § 1292(b), Order on Defendants’ Partial Motion to Dismiss (ECF No. 97); *see* Order Denying Defendants’ Partial Motion to Dismiss (ECF No. 93); Defendants’ Partial Motion to Dismiss (ECF No. 58).

³ Defendants’ Motion for Protective Order at 1 (ECF No. 107).

For the reasons stated on the record, Defendants' Motion to Stay Proceedings Pending Supreme Court Review is DENIED (ECF No. 91); Defendants' Motion to Certify for Appeal, under 28 U.S.C. § 1292(b), Order on Defendants' Partial Motion to Dismiss is DENIED (ECF No. 97); and Defendants' Motion for Protective Order is DENIED (ECF No. 107).

Signed March 24, 2020.

BY THE COURT



David Barlow
United States District Judge

ATTACHMENT 2

March 24, 2020 Hearing Transcript
FTC v. Nudge, LLC, et al., Case No. 2:19-cv-00867-DBB-EJF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:)	
)	
FEDERAL TRADE)	
COMMISSION, UTAH)	
DIVISION OF CONSUMER)	
PROTECTION,)	
)	
Plaintiffs,)	
)	
vs.)	Case No.
)	2:19-CV-00867
NUDGE LLC a Utah)	
limited liability)	
company, et al,)	
)	
Defendants.)	
-----)	

BEFORE THE HONORABLE DAVID B. BARLOW

March 24, 2020

Telephonic Hearing on Defendants' Motion to
Amend/Correct, Motion to Dismiss to Certify for
Appeal, Motion to Stay

Appearances of Counsel:

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1 **Salt Lake City, Utah**

March 24, 2020

2 (1:01 p.m.)

3 THE COURT: We're on the record in case
4 number 2:19-CV-867, the *FTC and Utah Division of*
5 *Consumer Protection versus Nudge, et al.*

13:03:20

6 Let me say to everybody right here at the
7 beginning, that because we're holding this hearing
8 telephonically, we'll need to be extra careful not to
9 talk over each other. You all know that that can be
10 a problem even in person, but on the phone it will be
11 a bit more tricky.

13:03:32

12 Would counsel please make their appearances
13 for the record starting with counsel for Plaintiffs.

14 MR. WING: This is Robert Wing for the Utah
15 Division of Consumer Protection.

13:03:52

16 MR. MCLEAN: This is Kevin McLean also for
17 the Utah Division of Consumer Protection.

18 MR. LASKY: Brian Lasky for the Federal Trade
19 Commission.

13:04:08

20 MR. MILLER: This is Christopher Miller for
21 the Federal Trade Commission.

22 MR. DIACOSAVVAS: This is Savvas Diacosavvas
23 for the Federal Trade Commission.

24 THE COURT: All right.

13:04:25

25 For the Defendants?

1 MR. GORDON: Good afternoon, Your Honor.
2 This is Leonard Gordon from the Venable firm. With
3 me are my colleagues Douglas Baldrige, Stephen
4 Freeland and Alexandria Megaris. And also with us is
13:04:39 5 our colleague from the Parsons Behle firm Erik
6 Christiansen.

7 THE COURT: Thanks very much.

8 So we're present today for a hearing on three
9 related motions which Defendants have filed, the
13:04:53 10 motion to stay, a motion to certify for interlocutory
11 appeal, Court's previous order denying Defendants
12 previous motion to dismiss, and a motion for a
13 protective order.

14 Let me ask right before we get started, as an
13:05:07 15 additional administrative matter, if counsel would
16 identify themselves by name every time a new person
17 speaks. I think that will help our court reporter
18 take everything down.

19 I also want to say, before we get started,
13:05:20 20 that I have, of course, studied your briefs and the
21 cases, as well as conducted additional case law
22 research. But you should feel free to present your
23 arguments in whatever way you feel is most effective.

24 And with that, Defendants, these are your
13:05:34 25 motions, so you may proceed with your argument. If I

1 have any questions, I'm not going to ask them while
2 you're speaking, I will wait, instead, to ask them
3 after you're done.

13:05:47

4 MR. GORDON: Thank you, Your Honor. Again,
5 this is Leonard Gordon on behalf of the Defendants
6 from the Venable firm.

13:06:02

7 If Your Honor pleases, I would like to start
8 with the 1292 motion because I think that's the most
9 important motion substantively, and I think the other
10 motions flow from that motion.

13:06:16

11 And I should say at the onset that we
12 appreciate the Court hearing the motion
13 telephonically and making accommodations for us to be
14 able to present these arguments to you given all that
15 is going on in the world today.

16 THE COURT: It's my pleasure.

17 MR. GORDON: And I will try very hard not to
18 step over you. Sorry. I am from New York, so that's
19 a real challenge for me.

13:06:28

20 We're moving the Court to certify Judge
21 Shelby's denial of the Defendants' partial motion to
22 dismiss as to the issue of whether the Federal Trade
23 Commission can utilize Section 13(b) of the Federal
24 Trade Commission Act to obtain monetary relief. We
25 believe Judge Shelby's ruling should be so certified

13:06:46

1 because it involves a controlling question of law as
2 to which substantial grounds for difference of
3 opinion exists, and an immediate appeal will
4 materially advance the termination and progress of
5 this litigation.

13:07:03

6 The issue of whether Section 13(b) of the
7 Federal Trade Commission Act provides the FTC with
8 the ability to obtain monetary relief is a subject of
9 a circuit split. The Tenth Circuit has never really
10 addressed the issue. They have accepted the FTC's
11 presentation of the issue, but they have never
12 grappled with the issue, they've never had a
13 Defendant who has challenged that authority, and the
14 matter is now at the Supreme Court in various
15 iterations.

13:07:20

13:07:32

16 It is a matter of the utmost importance and
17 will undoubtedly guide the future of this case and,
18 we believe, if the Tenth Circuit reaches the issue
19 correctly, will advance its termination.

13:07:48

20 To put matters in context, in this case the
21 Federal Trade Commission seeks equitable monetary
22 relief of approximately half a billion dollars. So
23 we think that the notion that -- that whether or not
24 that relief should be in the case is both first
25 important, and if it is not in the case, will

13:08:06

1 certainly advance the termination of litigation.

2 Whether Section 13(b) of the Federal Trade
3 Commission Act provides for equitable monetary relief
4 we think is the controlling question of law. Using
5 the standard that Judge Shelby set forth in the
6 *Roberts v CR England* case, it is serious to the
7 conduct of the litigation that affect the ability of
8 the district court to render a binding decision or
9 materially affect the outcome of the litigation in
10 the district court and it may save time for the
11 district court and time and expense for the litigant.

12 It lists the kinds of cases, the kinds of
13 decisions that have been deemed to be controlling
14 questions of law. In the *Suntrust Bank* case we cite,
15 issues about a precedential value for a large number
16 of cases, that is certainly the case here.

17 THE COURT: Mr. Gordon, apologies for the
18 interruption. I think because we're doing this
19 telephonically rather than in person, the connection
20 that we have with you is good but not excellent. So
21 if you would slow down a little bit, that will help
22 on our end.

23 MR. GORDON: I will. I apologize.

24 THE COURT: Not at all. Please proceed.

25 MR. GORDON: Sure. The *Ahrenholz*,

1 A-H-R-E-N-H-O-L-Z, case that we cited made clear the
2 questions of law, the statutory interpretation
3 constitute, or can constitute, controlling questions
4 of law.

13:09:39

5 In examining this issue, as in those
6 instances of cases of statutory interpretation, it
7 makes sense to start with the statute. Section 13(b)
8 of the FTC Act was added in the early '70s.

13:10:06

9 THE COURT: I'll ask everyone except for
10 Mr. Gordon to mute their lines while he is speaking.
11 Thanks.

12 Okay. Would everyone, except for Mr. Gordon,
13 please mute their lines. Thanks.

14 Mr. Gordon, you may proceed.

13:10:39

15 MR. GORDON: Thank you, Your Honor.

13:11:01

16 As I was saying, Section 13(b) of the FTC Act
17 was added in the early securities, it was actually
18 added as part of the Trans Alaskan Pipeline Act. It
19 was added to allow the Federal Trade Commission to go
20 to federal district court to enjoin mergers while the
21 Federal Trade Commission adjudicated the legality of
22 that merger in the administrative proceeding.

13:11:20

23 For the first 60 years of its existence, the
24 Federal Trade Commission conducted almost all of its
25 litigation in administrative proceedings before

1 administrative law judges housed within the Federal
2 Trade Commission building. In the early '70s,
3 congress recognized that especially in the merger
4 context the speed with which an administrative law
13:11:40 5 proceeding might move did not allow for stopping a
6 merger that might violate Section 7 of the Clayton
7 Act. This was before Congress enacted the
8 Hart-Scott-Rodino Act. So --

9 THE COURT: Mr. Gordon, I'm going to have to
13:11:54 10 ask you to slow down, again, just a little bit. It
11 is not your fault. It is just hard to do this
12 telephonically and the connection is blurring out
13 some of your words. So a little bit more slowly,
14 please.

13:12:07 15 MR. GORDON: Yes, Your Honor. I apologize.
16 Section 13(b) begins with when the commission
17 has reason to believe that someone has violated or is
18 about to violate the law, they can go to court to get
19 an injunction pending the completion of the
13:12:28 20 administrative adjudication.

21 At the end of that section there is what is
22 called the Second Proviso of Section 13(b) that
23 provides, quote, "That in proper cases the Commission
24 may seek, and that after proper proof a court may
13:12:49 25 issue a permanent injunction," close quote. An

1 injunction is not monetary damages.

2 Overtime, the Federal Trade Commission has
3 taken that grant of injunctive power and used it to
4 seek broader and broader monetary relief until today
13:13:13 5 it seeks monetary relief jointly and severally
6 against companies and individuals based on gross
7 sales. This is a tremendous and unwarranted
8 expansion of the authority that congress provided to
9 the FTC, and it is counter to the statutory scheme
13:13:41 10 that Congress provided for the FTC.

11 Two years after congress enacted Section
12 13(b), it enacted Section 19. Section 19 does
13 provide for consumer redress and a mechanism for it
14 to be obtained by the Federal Trade Commission. It
15 provides it in instances where the FTC is alleging a
13:14:14 16 rule violation or certain statutory violations which
17 are treated as rule violations, and for violations of
18 Section 5 of the FTC Act, of course, statute and the
19 statute that is at issue in this case it provides
13:14:38 20 that the FTC can go through administrative proceeding
21 and at the end of that administrative proceeding if
22 the FTC believes that the conduct was such that a
23 reasonable man knew that it was dishonest or
24 fraudulent, the FTC can go to Court to seek redress.

13:15:06 25 That ability to seek redress is subject to a

1 three-year statute of limitations. Beginning in the
2 late 1970s and early 1980s, the Commission began to
3 make expansive use of its 13(b) authority and began
4 seeking asset freezes and began seeking monetary
13:15:29 5 relief based on the grant to it of the ability to get
6 an injunction. And as the Commission began to shift
7 its consumer protection focus to actions in federal
8 court, abandoning in large part the administrative
9 proceedings, it abandoned entirely Section 19 which
13:15:56 10 begs the question if Section 13 carried with it
11 initially this broad grant of authority to obtain
12 monetarily, why did the FTC wait eight years to do it
13 and why did congress add Section 19 two years later
14 to provide a specific mechanism by which the FTC
13:16:17 15 could obtain redress.

16 So when you step back and you look at the
17 statutory scheme as a whole, which is what we should
18 do in trying to determine what the words in the
19 statute mean, Section 13(b) provides a mechanism for
13:16:32 20 stopping, enjoining conduct. Section 19 provides a
21 mechanism for remedying past.

22 The Supreme Court in the *Great West* case
23 talked about what the words injunction means. It
24 said, to read an injunction to include court orders
13:16:58 25 to pay a monetary judgment means that quote, "A

1 statutory limitation to injunctive relief would be
2 meaningless, since any claim for legal relief can,
3 with lawyerly inventiveness, be phrased in terms of
4 an injunction." And there it denied the finding that
13:17:21 5 a grant of an injunction or equitable relief provided
6 for monetary relief. And in *Great-West*, the grant
7 was broader than that here. It authorized
8 appropriate equitable relief, a broader grant of
9 authority than simply an injunction which is what
13:17:37 10 Section 13(b) of the FTC Act provides.

11 In the *Meghrig* case, the Court discussed that
12 express terms, the displaced implied terms, the Court
13 said at 516 U.S. at 488, quote, "It is an elemental
14 canon of statutory construction that where a statute
13:18:04 15 expressly provides a particular remedy or remedies, a
16 court must be chary" that's C-H-A-R-Y "of reading
17 others into it" period, close quotes.

18 Here, congress had provided a specific
19 mechanism for backward looking monetary relief,
13:18:24 20 Section 19. And to read that remedy into Section
21 13(b) undercuts the structure of the statute and is
22 contrary, we believe, to binding Supreme Court
23 precedence.

24 Let me turn now to how the Tenth Circuit has
13:18:45 25 dealt with this issue. As I mentioned at the

1 beginning, the Tenth Circuit has, in a couple of
2 cases, accepted the FTC's overbroad interpretation of
3 what Section 13(b) allows it.

4 Tenth Circuit did not analyze it. The
13:19:05 5 Defendants in these cases did not raise the arguments
6 that we are raising here. Section 19 was not
7 presented to the Court -- the Court's matrix but
8 explained the context and the limits on the FTC's
9 authority. In the *Freecom* case, the discussion was
13:19:25 10 limited to a footnote. There, the issue was whether
11 attorney's fees should be awarded against the Federal
12 Trade Commission for frivolous litigation in a claim
13 brought under the Equal Access to Justice Act. The
14 Defendant in that case conceded that the FTC was
13:19:46 15 entitled in certain cases to monetary relief. The
16 Tenth Circuit merely recognized that concession.

17 In *LoanPointe*, which is an unpublished
18 decision, again the Defendant did not challenge the
19 FTC's ability to get equitable monetary relief. The
13:20:06 20 defendant, and ultimately the Court, simply accepted
21 the FTC's interpretation of its authority. There was
22 no adversarial briefing on the issue of whether
23 Section 13(b) properly provided for the FTC to obtain
24 equitable monetary relief.

13:20:27 25 In short, Your Honor, the argument we make

1 here has not been presented or considered by the
2 Tenth Circuit. And given the circuit's split, that
3 I'll get to in a minute, that makes this case
4 appropriate for interlocutory review because this is
5 the controlling question of law that should be
6 resolved on an interlocutory appeal.

7 In his ruling denying our motion to dismiss,
8 Judge Shelby relied on the Tenth Circuit's decision
9 in *RX Depot* from 2006 and he predicted that the Tenth
10 Circuit would not accept the argument that I've been
11 making here. *RX Depot* dealt with the availability of
12 monetary relief under a provision of the Food, Drug,
13 and Cosmetic Act that authorized the FDA to obtain an
14 injunction.

15 There are important differences, however,
16 between the Federal Trade Commission Act and the
17 Food, Drug, and Cosmetic Act. Section 19 of the FTC
18 Act provides for consumer redress through a court.
19 There is no similar provision in the Food, Drug, and
20 Cosmetic Act. It does provide for certain other
21 remedies, but it does not provide a mechanism for the
22 FDA to go to Court to obtain consumer redress.

23 We also note that Judge Shelby did not
24 consider the *Jantran* case, 2015, the *Elwell* case in
25 2012, or the *Livesay* case from 2010, all of which

1 discussed the notion that statutes must be strictly
2 construed and that courts should be weary of finding
3 general authorities where there is specific language
4 providing for remedies. The *Jantran* case I think is
5 most instructive and I think it is particularly
6 important there because in the *Jantran* case it was
7 the government that was the plaintiff. And at times
8 in this case and others, the FTC has argued that the
9 rules of statutory interpretation should not apply as
10 we look at Section 13(b) because the FTC is the
11 government and they're here to help, and the remedies
12 available to it should be broadly construed
13 regardless of what the actual words in the statute
14 say.

15 In *Jantran*, the Tenth Circuit utilized the
16 statutory construction of *expressio*,
17 *E-X-P-R-E-S-S-I-O*, *Unius*, *U-N-I-U-S* when assessing
18 the Government's alleged interpretation of its
19 statutory authority, recognizing that where a
20 Government is plaintiff, quote, "Courts ought to be
21 reluctant to find implied remedies where an act
22 expressly provides other remedies." That's at 782
23 F.3d 1183. The *Jantran* court so concluded based upon
24 the Supreme Court's ruling in *Karahalios*, that's
25 *K-A-R-A-H-A-L-I-O-S*, versus *The National Federation*

1 of *Federal Employees*. The Court held, "it is an
2 elemental canon of statutory construction that where
3 a statute expressly provides a remedy, courts must be
4 especially reluctant to provide additional remedies.
5 In such cases, in the absence of strong indicia of
6 contrary congressional intent, we are compelled to
7 conclude that congress provided precisely the
8 remedies it considered appropriate," close quotes.
9 That's at 1183 of the *Jantran* case.

10 In the *Elwell* case from 2012, now Justice
11 Gorsuch noted, in construing the statute at issue
12 there, quote, "After all, common sense, reflected in
13 the canon *expressio unius exclusio alterius*, suggests
14 that the specification of one provision implies the
15 exclusion of others," close quote. And that's at 693
16 F.3d 1312.

17 Plaintiffs have argued that the question of
18 whether Section 13(b) provides for monetary relief
19 but that is not a controlling question of law. Their
20 arguments there are misplaced. Questions regarding
21 the scope of relief can be controlling. We cited the
22 *Sokaogon, S-O-K-A-O-G-O-N, Gaming* case for that.
23 Cases regarding the scope of relief tend to be
24 controlling when they affect the further course of
25 litigation. That's certainly the case here.

1 If you look at the other cases that we have
2 cited in our papers, the *Newsome* case, the *Kostal*
3 *Life* case, in those the Court said a ruling which
4 substantially limits the damage that the plaintiff
5 may recover can be held to be a controlling question
6 of law. In *Mister v Illinois Central Gulf Railroad*
7 *Company*, the Court found that a controlling question
8 of law where the order disposed of a large part of
9 the damages that the plaintiff had hoped to recover.

10 In the *Brand Name Prescription Drug* lawsuit, the
11 Court found that orders disposing of a large
12 percentage of the plaintiffs recoverable damages was
13 a controlling question of law in naming that the
14 proper measure of damages is always a question of
15 law.

16 The cases cited by the plaintiffs do not show
17 otherwise. If you look at those cases, the outcomes
18 depend on the facts, the theories, and the import of
19 the decision. None of those cases held that the
20 question of whether the plaintiff was entitled to
21 half a billion dollars of monetary relief was not a
22 controlling question of law. In *Homeland versus*
23 *Resolution Trust Corporation*, the question was
24 whether the plaintiff could obtain injunctive relief
25 in addition to a monetary claim against the RTC. The

1 *Fujitsu* case cited by Plaintiffs the question that
2 was found not to be a controlling question of law was
3 the proper method for calculating lost profits.

4 In the *Jones v Norton* case, cited by the
13:27:30 5 Plaintiffs, the question was whether an order denying
6 plaintiffs the opportunity to plead in the
7 alternative was a controlling question of law and the
8 Court found that it was not. Cases relied on by
9 plaintiffs deal with questions of much less
13:27:45 10 significance and real import than those presented
11 here. There are substantial grounds for disagreement
12 which is another part of the inquiry as to whether
13 there is a controlling question of law that ought to
14 be certified for interlocutory review.

13:28:12 15 There is a circuit split. Last year, the
16 Seventh Circuit in the *Credit Bureau* case reversed
17 its prior precedent and found that the statutory
18 scheme of the Federal Trade Commission Act, when
19 examined as a whole, indicated that Congress did not
13:28:34 20 intend for Courts to imply monetary remedies into
21 Section 13(b)'s authorization of an injunction. As
22 the Plaintiffs point out, other circuits have found
23 the opposite.

24 And this issue has now found its way to the
13:28:52 25 Supreme Court in several different formats. In the

1 *Credit Bureau* case, the Federal Trade Commission had
2 sought a writ of certiorari that is still pending.
3 In the *AMG* case, a recent case out of the Ninth
4 Circuit that affirmed that Section 13(b), did provide
5 for monetary relief. That cert petition was filed
6 and is pending. But what is interesting in the *AMG*
7 case is that the Solicitor General of the United
8 States, acting on behalf of the Federal Trade
9 Commission, asked that the Supreme Court defer or
10 stay, considering the petition in *AMG* until the
11 Supreme Court had the opportunity to consider and
12 decide a case from the SEC, the Securities and
13 Exchange Commission, the *Liu* case, L-I-U.

14 There was a little argument held in the *Liu*
15 case in the first week of March, March 4th. The
16 question in *Liu* was whether disgorgement is an
17 equitable remedy. And the statute in *Liu* actually
18 provides an interesting point of contrast to the FTC
19 Act and, I think, further shows why finding equitable
20 monetary relief under Section 13(b) is not
21 appropriate. Section 21(d)(5) of the Securities and
22 Exchange Act authorizes the SEC to obtain, quote,
23 "Any equitable relief -- any equitable relief
24 necessary for the benefit of investors," close quote.
25 A much broader grant of equitable relief than simply

1 saying an injunction. And I note that in other
2 places in the Federal Trade Commission Act,
3 specifically Section 45(l) Congress provided the FTC
4 with the right to obtain an injunction and other
13:31:15 5 equitable relief. It did not do so in Section 13(b).

6 There was spirited argument at the *Liu* case.
7 The justices seemed to have serious questions about
8 how disgorgement might be calculated and, again, the
9 Solicitor General on behalf of the FTC, urged the
13:31:46 10 Court to defer hearing any new petitions until it had
11 sorted out the *Liu* matter.

12 Indeed, when the FTC sought certiorari in the
13 *Credit Bureau* case, it did so on its own behalf
14 rather than using the Office of the Solicitor General
13:32:05 15 as governmental agencies almost always do when they
16 appear before the Supreme Court. Indeed, it was
17 only, I believe, the fourth time that the FTC had
18 appeared in its -- on its own behalf in the Supreme
19 Court. All of this is to say, Your Honor, that this
13:32:27 20 is a matter hotly disputed and one that deserves
21 interlocutory review by the Tenth Circuit so that the
22 Tenth Circuit can actually consider these arguments
23 and provide guidance to the lower courts.

24 Further, Your Honor, interlocutory review
13:32:48 25 will materially advance the determination of this

1 litigation. The FTC seeks \$500,000,000. They base
2 that number on the Defendants' gross sales. If the
3 Tenth Circuit rules correctly, we believe that the
4 FTC is not entitled to that relief, it will change
5 the course of this litigation.

6 It certainly will include the ability to
7 potentially settle the case. Taking a half a billion
8 dollars off the table will undoubtedly make this case
9 easier to settle and advance the termination of the
10 litigation.

11 Moreover, whether the FTC is entitled to
12 equitable monetary relief will dictate whether or how
13 much of this case ultimately is tried to a jury. And
14 as we think about the motion for protective order,
15 and the motion for a stay, it's important to
16 remember, Your Honor, that the conduct at issue here
17 has stopped. The Defendants agreed to a stipulated
18 preliminary injunction that stops the conduct that is
19 challenged in the complaint. They are no longer
20 selling the real estate education services which are
21 the subject of the complaint. There is no need to
22 race this case to a conclusion based on some argument
23 that the Court needs to get to the end to stop the
24 alleged violative conduct. The conduct has stopped.
25 And we think that and the legal issues points towards

1 a statute.

2 Your Honor, I note that the question to be
3 certified and to advance the termination of
4 litigation does not have to end the entire case.

13:34:41

5 We're looking at *Molock*, M-O-L-O-C-K case, from the
6 District of Columbia. The plaintiffs argue that the
7 Federal Trade Commission in Count 4 of their

8 complaint and the Division of Consumer Protection
9 through their complaint, seek essentially the same

13:35:02

10 relief and therefore this question will not impact
11 the course or termination of this litigation. That
12 is not so.

13 Under Section 13(b) for Counts 1 through 3 of
14 the complaint, the Federal Trade Commission seeks
15 disgorgement, an equitable remedy in which the FTC
16 will base on the Defendants' gross sales which they
17 contend measure the supposed ill-gotten gain of the
18 Defendants which must be disgorged.

13:35:20

19 In Count 4, the FTC, and in Counts 5 through
20 8, the Utah Division of Consumer Protection, seek
21 restitution, damages, and fines. These are legal,
22 not equitable remedies, and thus entitle the

13:35:41

23 Defendants to a jury trial. Restitution and damages
24 are measured by consumer loss, not by the Defendants'
25 gain. Whether the relief in this case is thus

13:36:02

1 measured by disgorgement or restitution has a seismic
2 impact on how this case will proceed, whether it will
3 proceed to a jury, potential discovery that is
4 necessary, potential expert testimony that may be
13:36:26 5 necessary. Moreover, we think it will lead to, if
6 the Tenth Circuit were to go as it should with the
7 Defendants, will certainly facilitate settlement
8 because we believe the plaintiffs are going to have a
9 difficult time proving damages to consumers,
13:36:43 10 obviously much easier just to prove gross sales.

11 Your Honor, for these reasons we believe that
12 the denial of the partial motion to dismiss should be
13 certified for interlocutory review and whether under
14 our motion to stay or our motion for protective order
13:37:06 15 discovery ought to be stayed.

16 As I mentioned, the underlying alleged
17 conduct has stopped. Given the current situation no
18 one is going to be able to take depositions in the
19 near term or not meaningful depositions and certainly
13:37:22 20 not able to prepare clients properly for depositions.
21 So this seems an opportune time to get clarity on
22 this half a billion dollar question before the
23 parties waste considerable resources and the Court's
24 time with all of the discovery disputes that are
13:37:37 25 incumbent in a case of this nature.

1 And so, Your Honor, for those reasons we ask
2 that the Court certify or amend Judge Shelby's order
3 so as to certify it to the Tenth Circuit and stay
4 discovery while that interlocutory appeal is
5 considered by the Tenth Circuit.

13:37:52

6 Your Honor, that concludes my prepared
7 remarks, Your Honor. I'm happy to answer questions.

8 THE COURT: Thank you for that, Mr. Gordon.

9 Let's hear from the Plaintiffs and then I
10 will let both sides know whether I have any questions
11 for them.

13:38:05

12 Plaintiffs, the floor is yours.

13 MR. DIASCOSAVVAS: Thank you, Your Honor.

14 This is Savvas Diacosavvas from the Federal Trade

13:38:17

15 Commission and I'll be responding to the
16 certification motion that was just addressed by
17 Mr. Gordon. And if I may, Your Honor, I would like
18 to -- well, begin as follows.

19 So the Defendants' motion to certify an
20 interlocutory appeal requires them to show that
21 whether Section 13(b) of the FTC Act authorizes not
22 just an injunction, but also equitable monetary
23 relief, whether that question satisfies three
24 factors. Only then can the Court certify and can the
25 Court of Appeals hear an immediate appeal under

13:38:51

1 Section 1292(b).

2 We submit, Your Honor, that the Defendants
3 have failed to satisfy any of these three factors,
4 although the failure to satisfy any one precludes
13:39:08 5 certification. And so with that, if I may, Your
6 Honor, let's begin at the beginning with the first
7 factor which requires that the question be a
8 controlling one.

9 We disagree with Mr. Gordon's arguments
13:39:22 10 concerning the law. Certainly in this district and
11 under Tenth Circuit law, it is our view that a
12 question that is solely about remedies and that does
13 not implicate liability issues is not controlling
14 under Section 1292.

13:39:39 15 And the key case, we believe, is the *Homeland*
16 *Stores* case which we've discussed in our papers.
17 That case involved a breach of contract case against
18 the Resolution Trust Corporation which takes over
19 helping managing assets of failing banks. So the
13:40:02 20 Resolution Trust Corporation enters the plaza, the
21 Plaintiff was a tenant in that plaza, and they sued
22 the Resolution Trust Corporation for breach of
23 contract and they asked for two forms of remedies.
24 They asked for damages as well as an injunction. And
13:40:17 25 the District Court held that under the statutes

1 governing the RTC, the Court could order damages but
2 could not order an injunction. The Court certified
3 only the damages question for immediate appeal, not
4 the injunctive relief question.

13:40:33

5 But because both questions were part of the
6 same order, the Tenth Circuit said that it could and
7 indeed should consider both on appeal if they each
8 met the requirements of Section 1292(b). 1292(b) is
9 a jurisdictional statute for the Court and so each
10 question had to certify -- had to satisfy all three
11 factors.

13:40:51

12 Now, the Tenth Circuit declined to consider
13 the injunctive relief question, even though it was
14 part of the same order, because the Tenth Circuit
15 held that it was not controlling in light of the
16 availability of money damages. In other words, the
17 Tenth Circuit held that because one form of relief
18 was available for the Plaintiffs' breach of contract
19 claim, namely money, whether a second additional form
20 of relief, an injunction, was also available was not
21 a controlling question.

13:41:03

13:41:18

22 And if I may, Your Honor, I would like to
23 just quote a couple of sentences from the decision.
24 The Tenth Circuit explained its analysis this way.
25 Quote, "In this case, however, whether injunctive

13:41:31

1 relief is available against the RTC is not such an
2 alternate controlling question." And the Court went
3 on, "Because we hold in Section 3 below that
4 Homeland's complaint does state a claim and at
5 minimum relief would be available in the form of
6 damages at law, we need not decide on the
7 availability of any specific type of alternate relief
8 here. Thus, we do not address the question of the
9 availability of injunctive relief." This is the same
10 -- end quote. And this is at 17 F.3d at 1271 to
11 1272.

12 And Your Honor this is the same situation as
13 in our case. In both cases, the Plaintiffs are
14 seeking both monetary relief and an injunction. Two
15 different remedies for their claims. In both, there
16 is a motion to dismiss under 12(b)(6). In both, one
17 form of relief is either sustained or undisputed. In
18 *Homeland* it was damages, money damages. Here, it is
19 an injunction. And in both, the existence of one
20 type of remedy for the claim means that whether or
21 not an additional form of remedy is also available is
22 not the controlling question.

23 Our papers also discuss a case that Judge
24 Campbell decided, *Jones v Norton*, which reflected
25 similar logic. This was a wrongful death case in

1 which the Plaintiffs were the decedent's estate and
2 decedent's parents and they sued several police
3 officers under Section 1983 for civil rights
4 violations and they also claimed wrongful death under
5 Utah State Tort Law.

6 And because of certain definitions and
7 immunities involved, the Court required the
8 Plaintiffs to plead these claims in the alternative.

9 And now there were different types of damages
10 available under Section 1983 than under the state
11 tort claims. So by requiring these claims to be pled
12 in the alternative, Judge Campbell was forcing the
13 Plaintiffs to choose between the damages under
14 Section 1983, which were personal to the victim, and
15 then it was under state tort law which included loss
16 of consortium.

17 And Judge Campbell held that these questions
18 were not controlling under Section 1292 because they
19 only concern the available relief and not liability.

20 She explained, quote, "The legal question at issue
21 here is not a controlling question of law because the
22 Court's ruling does not prevent Plaintiffs from
23 presenting their case to a jury. The Court's order
24 merely limits the recovery that Plaintiffs may seek,"
25 close quote. This is at page 302.

1 So once again this is analogous to our
2 situation. Just like in the *Jones* case, the question
3 that the Defendants here want to appeal is simply
4 whether an additional form of relief, monetary
13:44:44 5 relief, is also authorized in addition to an
6 injunction. And just like in the *Jones* case, that
7 issue will not prevent the FTC from preventing its
8 claims to a trier of fact, it does not affect
9 liability. All the Defendants here are challenging
13:44:58 10 this application as whether one additional type of
11 relief is available and that's not controlling.

12 Now, none of the cases that the Defendants
13 cite in their papers involve solely a remedy issue.
14 They all involve liability issues as well, things
13:45:21 15 like sovereign immunity, fiduciary duties, breach of
16 contract law, standing, free speech, and the like.
17 Those may, of course, affect damages since damages
18 flow from liability, and sometimes the Court's
19 reference the amount of damages associated with the
13:45:36 20 claim to identify the size of that claim relative to
21 others in the case. Those are not remedies questions
22 solely. The only exception was the *Mister* case which
23 Mr. Gordon mentioned, but that case is
24 distinguishable because the litigation there has been
13:45:52 25 bifurcated. There was, first, a liability phase with

1 its own discovery, motion practice, and a bench trial
2 on liability, and then a second phase on damages
3 which involved motion practice, discovery, and a
4 hearing on damages.

13:46:10

5 And the Court issued a ruling on what
6 categories of damages were allowed under Title VII
7 and Section 1981 in that case, but it did so after
8 the liability phase concluded. So all this case
9 stands for is that after liability has settled and
10 when all that remains is to determine what remedies
11 are appropriate, a ruling about remedies can be
12 controlling. But that's not our situation.

13:46:27

13 Now, Your Honor, if I may just have a moment
14 I would like to turn to the second factor which is
15 the substantial grounds for difference of opinion.
16 There is no reasonable grounds for a difference of
17 opinion in this matter, Your Honor, because the Tenth
18 Circuit has already twice held that Section 13(b)
19 authorizes equitable monetary relief. The first was
20 in *Freecom* and then the second was in *LoanPointe*.

13:46:48

13:47:10

21 Now, as Judge Shelby recognized in the *Roberts* case,
22 and as Judge Waddoups recognized in the *Kell* case,
23 which we discussed in our papers, they explained what
24 substantial grounds for difference of opinion means.

13:47:32

25 Substantial grounds for difference of

1 opinions exists, quote, "Where the circuits are split
2 on the issue, and the Court of Appeals of the Circuit
3 have not spoken on the point. If complicated
4 questions arise in the forum law, or if not a
5 difficult question, a first impression are
6 presumptive," end quote. This is *Roberts* at Page 2
7 as well as *Kell* at Page 2.

8 So a circuit split alone is not sufficient
9 for substantial grounds for difference of opinion. A
10 circuit split would suffice if the Court of Appeals,
11 obviously the Tenth Circuit, had not spoken on the
12 point but it has spoken on the point. And so, if I
13 may, I would like to turn to the *Freecom* case and
14 discuss that in a little bit of detail so that I can
15 hopefully try to make that persuasive to the Court.

16 The issue in *Freecom* concerned an award of
17 cost and attorney's fees by the District Court
18 against the Federal Trade Commission in that case.
19 The district judge ruled in favor of the Defendant
20 but also ordered the FTC to pay costs and attorney's
21 fees under the Equal Access to Justice Act. The FTC
22 appealed and the Tenth Circuit reversed that award,
23 and in the process, the Tenth Circuit construed
24 Section 13(b) as authorizing equitable monetary
25 relief.

1 Now, the Defendants argue that this portion
2 of *Freecom* is essentially dicta because the *Freecom*
3 defendant did not contest whether or not Section
4 13(b) authorized equitable monetary relief. But that
13:49:24 5 doesn't change the binding nature of the Tenth
6 Circuit's holding because in order to review the fees
7 and costs award, the Tenth Circuit had to assess both
8 the legal authority for the equitable monetary relief
9 that the FTC was seeking, as well as the evidentiary
13:49:40 10 support. And here's why. Section 2412(b) of the
11 Equal Access to Justice Act creates a bad faith
12 exception to the usual American rule where each side
13 bears their own cost. In order to affect bad faith,
14 the Tenth Circuit has to determine whether the FTC's
13:49:59 15 claims were quote, "Entirely without color," end
16 quote. And to do that, the Tenth Circuit explained
17 it had to address both the legal basis for the FTC's
18 pursuit of monetary relief, as well as the
19 evidentiary support.

13:50:15 20 Here is how the Court explained its task.
21 Quote, "The question is whether viewed in light of
22 the record evidence and underlying substance of law
23 the losing parties claims lack any legal or factual
24 basis. A claim is entirely without color when it
13:50:31 25 lacks any legal or factual basis." Now, here is the

1 critical part. "Conversely, a claim is colorable
2 when it has some legal and factual support." And
3 then the Court went on. This is at 401 F.3d at 1201,
4 the *Freecom* case.

13:50:48 5 So in other words, if during the case below
6 the FTC fell short on either the legal grounds or the
7 factual grounds, then the award against the FTC was
8 justified, said the Tenth Circuit. But in order to
9 reverse the district court and find that the FTC's
13:51:05 10 claims were colorable, they had to have both the
11 legal and evidentiary basis. And that's exactly what
12 the Tenth Circuit did. They found that there was a
13 legal and an evidentiary basis for the FTC's claims
14 including redress from individual defendants and it
15 therefore reversed the award.

13:51:20 16 Now in order to find that the FTC's pursuit
17 of redress had a legal basis, it had to construe
18 Section 13(b) as authorizing equitable monetary
19 relief. And that's what it did in Footnote 6. And
13:51:33 20 Judge Shelby recognized this very logic at pages 11
21 to 12 of his order denying the Defendant's Motion to
22 Dismiss when he called the Tenth Circuit's discussion
23 of Section 13(b) authorizing redress, quote, "A
24 necessary antecedent to the Tenth Circuit's
13:51:49 25 discussion of the FTC's burden in proving liability

1 for consumer redress," end quote. That is at pages
2 11 to 12 of the Motion to Dismiss Order which is
3 Docket 93 in our docket.

4 And also, Your Honor, I would like to point
13:52:04 5 out that just within the last month Judge Kimball, in
6 a very similar case brought by the FTC and the
7 division against one of the Nudge Defendants
8 competitors reached the same conclusion and treated
9 *Freecom* as quote, "Controlling precedent," end quote.

13:52:20 10 That case is *FTC v Zurixx*, Z-U-R-I-X-X. The decision
11 is at 2020 WestLaw, 927531 at Page 6, District of
12 Utah, February 26th, 2020.

13 That is the decision where Judge Kimball
14 denied the motion to dismiss and rejected the same
15 contention that Section 13(b) did not authorize
13:52:39 16 monetary relief and the process relied on *Freecom* as
17 binding precedent.

18 Now, the Defendant claimed that the Tenth
19 Circuit did not thoroughly analyze Section 13(b) in
13:52:53 20 the *Freecom* case. We respectfully disagree, Your
21 Honor. I won't read the whole footnote, but it is a
22 shorter discussion than in some other cases but that
23 doesn't mean that the Tenth Circuit didn't properly
24 consider the matter. What the discussion shows is
13:53:11 25 that the Tenth Circuit conducted an analysis, the

1 Court identified Section 13(b) as the source of the
2 remedies for and it set the conduct, it refers to
3 what is and what is not in the text of Section 13(b).
4 It applies interpretive principles for equitable
13:53:29 5 relief for the statutory text, and it concludes that
6 equitable monetary relief is authorized, quote, "As
7 incidental to injunctive relief," end quote. And the
8 Tenth Circuit cites case law from other circuit
9 courts in support of its analysis.

13:53:44 10 Now, this discussion, we submit, clearly
11 shows that the Tenth Circuit had considered the
12 matter and concluded at Section 13(b) authorizes
13 equitable monetary relief. Now before I -- before I
14 discuss the *LoanPointe* case, I would like to address,
13:54:02 15 quickly, the Defendants' characterization that the
16 defendant -- that the defendant in the *Freecom* case
17 conceded that Section 13(b) authorized equitable
18 monetary relief.

13:54:29 19 The Defendants' argued in their motion to
20 dismiss briefing and in their moving brief here in
21 this motion that the Defendant in *Freecom*, quote,
22 "Did not contest," end quote, whether Section 13(b)
23 authorized equitable monetary relief. For example,
24 the Docket 97 at Page 5 uses that language which is
13:54:47 25 the moving brief for certification motion.

1 In the Defendants' reply brief in support of
2 the motion for certification, the Defendants changed
3 that characterization and said that the *Freecom*
4 defendant conceded that Section 13(b) authorized
5 equitable monetary relief. And as support, they cite
6 you a footnote from the *Freecom* Defendants' Appellate
7 brief and that case is in our docket at 106-1 and in
8 footnote 17 on Pages 36 and 37 in that brief. This
9 distinction between not contesting and conceding
10 should not matter, Your Honor, just to be clear from
11 our perspective. What matters is, as we've
12 discussed, what did the Tenth Circuit view the test
13 to be and how did it frame its analysis. But to the
14 extent that the Court may be considering whether to
15 credit that distinction, we respectfully submit that
16 the Court should not consider the issue of concession
17 for two reasons. First, the defendants raised this
18 argument about concession in *Freecom* for the first
19 time on reply, and so they waived it by waiting, but
20 second, the argument is also simply incorrect. The
21 Defendant were actually right the first time.
22 *Freecom* did not address whether Section 13(b)
23 authorized equitable monetary relief. Instead, the
24 *Freecom* defendant challenged the evidence presented
25 at trial arguing that the FTC failed to provide --

1 failed to prove that any consumers were actually
2 injured. And that's clear by looking at pages 36 to
3 37 of the brief in the discussion where that footnote
4 appears, the *Freecom* defendant is challenging the
13:56:16 5 evidence discussing the evidence that was presented
6 and how it fails to demonstrate any consumer injury
7 under any theory. And then in the footnote, all
8 they're arguing is that even if the Court were to
9 construe the evidence as demonstrating some type of
13:56:29 10 injury, the only type of injury that's being shown is
11 lost profit and lost profits are not a proper measure
12 of redress. They're not conceding that Section 13(b)
13 authorizes redress, the footnote doesn't even mention
14 13(b). So I just wanted to make that point
13:56:47 15 Plaintiff's want it to be discussing the *LoanPointe*
16 case.

17 Now, the *LoanPointe* case was a second
18 opportunity for the Tenth Circuit to address Section
19 13(b). In particular, there was a disputed issue on
13:57:02 20 appeal that as the Tenth Circuit itself acknowledged
21 required the Court to construe whether Section 13(b)
22 authorized the disgorgement of what at issue. And
23 that disputed issue was the standard of review. The
24 *LoanPointe* defendants argued that the usual *de novo*
13:57:19 25 standard of review applied because they took an

1 appeal from a grant of summary judgment.

2 On the other hand, the FTC argued that an
3 abuse of discretion standard should apply because the
4 *LoanPointe* defendants were only appealing the remedy,
5 the disgorgement award, and not liability.

6 And the Tenth Circuit explained that in order
7 to resolve this dispute, and determine the proper
8 standard of review, it had to examine the authority
9 for the disgorgement award at issue. So at 525
10 Federal Appendix at Page 698 to 699, the Tenth
11 Circuit explained, quote, "In order to determine
12 whether we review the district court's disgorgement
13 order de novo or for abuse of discretion, it is
14 necessary to examine the nature of the remedy of
15 disgorgement," end quote.

16 And then the Tenth Circuit discussed
17 disgorgement and in the process quoted *Freecom* as
18 well as other cases involving disgorgement
19 specifically and eventually concluded that because,
20 quote, "A district court's authority to award
21 disgorgement under Section 13(b) falls within its
22 general equitable jurisdiction," end quote, the same
23 standard of review applies to an appeal of an order
24 granting injunctive relief as to an appeal of an
25 order awarding equitable monetary relief. So it

1 applied on abuse of discretion standard. So given
2 *LoanPointe*, the Court still analyzed Section 13(b) as
3 authorizing the district -- the disgorgement award at
4 issue in that appeal.

13:58:53 5 May I just have one moment, Your Honor.

6 THE COURT: Certainly.

7 MR. DIACOSAVVAS: Thank you, Your Honor.

8 So the Tenth Circuit's analysis in *Freecom*
9 and in *LoanPointe* is based on the interpretive

13:59:15 10 principles for equitable jurisprudence set forth by
11 the Supreme Court in the *Porter* and the *Mitchell*

12 cases. And these cases held, in essence, that when
13 congress authorizes an injunction, it is conferring

14 sole equitable authority to award complete relief

13:59:30 15 unless there is a, quote, "Necessary and inescapable
16 inference," end quote, that congress intended

17 otherwise.

18 In fact, *Porter* explained, quote, "Nothing is
19 more clearly a part of the subject matter of a suit

13:59:43 20 for an injunction than the recovery of that which has
21 been illegally acquired, and which has given rise to
22 the necessity for injunctive relief," end quote.

23 This is 328 U.S. at 399.

24 The Defendants argue in their motion to

13:59:57 25 dismiss that *Porter* and *Mitchell* were abrogated by

1 the *Meghrig* decision and they asked Judge Shelby to
2 disregard *Porter* and *Mitchell* which underlie the
3 *Freecom* analysis and the *LoanPointe* analysis, and
4 instead to follow the Seventh Circuit's reading of
5 *Meghrig* in the *Credit Bureau* case.

6 Now, Your Honor, if I may just set the stage.
7 Section 13(b), as Mr. Gordon mentioned, was enacted
8 in 1973, and for decades countless district courts
9 around the country agreed that Section 13(b)
10 authorizes equitable monetary relief. And until last
11 summer, all eight Courts of Appeals, and in that
12 number I'm counting the Tenth Circuit in *Freecom*,
13 and, in fact, there are nine if you include a Third
14 Circuit decision that was unpublished. All of the
15 Court of Appeals that have addressed the matter also
16 agree that Section 13(b) authorizes equitable
17 monetary relief.

18 But last August, a panel of the Seventh
19 Circuit in *Credit Bureau* reversed its own precedence
20 following *Porter* and *Mitchell* and held that Section
21 13(b) does not authorize equitable monetary relief.
22 And it justified its departure from decades of
23 precedence including its own precedence based on the
24 *Meghrig* case from 1996.

25 Now, the problem with the Defendants'

1 argument in our view, Your Honor, is that the Tenth
2 Circuit disagreement with the Seventh Circuit's
3 reading of *Meghrig*. The Seventh Circuit panel
4 described *Meghrig* as quote, "Displaces the rational
14:01:41 5 of our precedent," end quote. This is at 937 F.3d at
6 781 from the *Credit Bureau* case.

7 The Tenth Circuit views the matter
8 differently. The Tenth Circuit has already rejected
9 the argument that *Meghrig* abrogated the *Porter* and
14:01:57 10 *Mitchell* analysis. Just to remember that *Porter* and
11 *Mitchell* presume all equitable remedies unless there
12 is a necessary and inexplicable inference to the
13 contrary. And in the Tenth Circuit's view, *Meghrig*
14 is consistent with *Porter* and *Mitchell*, it was just
14:02:11 15 an example of this sort of exception because monetary
16 relief under the *Meghrig* statute would have been
17 quote, "Irrational," as the Supreme Court concluded
18 in the *Meghrig* case. The Tenth Circuit explained
19 this construction of in *RX Depot* and --

14:02:43 20 MR. GORDON: Hello? We can't hear.

21 MR. DIACOSAVVAS: Sorry, I took a pause, that
22 was just me.

23 MR. GORDON: All right.

24 MR. DIACOSAVVAS: Also worth noting, Your
14:03:00 25 Honor, is that in denying the Nudge Defendants'

1 motion to dismiss in this case, Judge Shelby
2 recognized the divergence between the Tenth Circuit
3 and the Seventh Circuit. He noted that *Freecom* was
4 decided years after *Meghrig* and he noted that the
14:03:16 5 Tenth Circuit in *RX Depot* saw *Meghrig* as applying,
6 not changing, the *Porter* and *Mitchell* analysis. He
7 said, quote, "Accordingly, the *RX Depot* Court stated
8 the general rule announced in *Porter*, and followed by
9 *Mitchell* and *Meghrig*, guides our analysis before
14:03:35 10 holding equitable relief was available under the
11 Food, Drug, and Cosmetic Act." This was at the order
12 denying the Defendants' motion to dismiss, Docket
13 Number 3, at Page 13, note 75, in our case.

14 And also, the *Zurixx* case, the order that I
14:03:53 15 mentioned from Judge Kimball, saw it the same way.
16 Quote, "Particularly relevant here is that the Tenth
17 Circuit in *RX Depot* explicitly rejected the
18 contention that *Meghrig* changed the *Porter Mitchell*
19 analysis. Rather, the Tenth Circuit found that
14:04:17 20 *Meghrig* merely identified the statute that fit into
21 the exceptions recognized by *Porter* and *Mitchell*,"
22 end quote. This is at the *Zurixx* decision, 2020,
23 WestLaw, 927521 at Page 5.

24 Your Honor, if I may take a minute to discuss
14:04:42 25 the structure of the FTC Act which Mr. Gordon also

1 discussed a few minutes ago and to respond to the
2 assertion from the defense that the availability of
3 monetary relief from Section 19 demonstrates that
4 monetary relief under Section 13 is inappropriate.

14:05:02 5 That's my summary of their argument.

6 The one critical problem with that
7 characterization of the relationship between 13(b)
8 and 19 is that Section 19 which was passed two years
9 after Section 13(b) includes a savings clause that

14:05:22 10 says, all remedies in Section 19 are in addition to
11 and not instead of any other remedies. In addition,
12 Section 13(b) and 19 serve different purposes.

13 Congress gave the FTC different options for enforcing
14 substantive violations of Section 5 which prohibits

14:05:41 15 deceptive and unfair practices. One of them
16 administrative proceeding under Section 5(b) for a
17 cease and desist order followed by a truncated
18 judicial proceeding for monetary relief under Section
19 19. And the other is a purely judicial proceeding

14:05:55 20 for equitable relief including an injunction and
21 equitable monetary relief under Section 13(b).

22 The fact that each ACT provides an
23 opportunity for monetary recovery does not make them
24 redundant or unintended. Again, they serve different
14:06:12 25 purposes. So under the administrative options, under

1 the administrative option, involving Sections 5 and
2 19, when the FTC seeks to apply the FTC Act in a new
3 or novel setting, it can choose to proceed
4 administratively. As the defendant reports from
14:06:29 5 Section 1973 concerning Section 13(b) recognized, an
6 administrative action enables the FTC to quote, "To
7 further expand upon the prohibitions of the FTC Act,"
8 end quote. This is Senate Report Number 93-151 at
9 pages 30 to 31, 1973.

14:06:47 10 So in other words, the Administrative Law
11 Judge and the FTC's Commissioners can apply their
12 agency expertise in particular areas of trade in
13 novel situations and help set precedent. And the
14 Commission's findings received deference from the
14:07:00 15 Court of Appeals on review.

16 Following the administrative case, the FTC
17 can commence a district court action under Section 19
18 to recover redress. In that action, the Commission's
19 findings of fact are to be deemed conclusive but the
14:07:19 20 flip side to that deference is that monetary relief
21 was only allowed when a reasonable person would have
22 known that the conduct at issue was defamous or
23 fraudulent.

24 Under the district court only option, meaning
14:07:37 25 Section 13(b) second proviso that Mr. Gordon

1 identified, that second proviso streamlined this
2 process when cases are more routine. The FTC can
3 simply initiate a district court action for complete
4 relief both to enjoin the improper conduct and obtain
14:07:57 5 equitable monetary relief for consumers. Here, the
6 FTC receives less deference but is not subject to the
7 same knowledge requirement of Section 19.

8 The Senate Report from 1973 explains that
9 Section 13(b) enables the FTC to proceed in district
14:08:18 10 court, quote, "In those situations when it does not
11 desire to further expand upon the prohibitions of the
12 FTC Act to the issuance of a cease and desist order.
13 Commission resources will be better utilized in cases
14 tending to dispose of more efficiently," end quote.
14:08:35 15 That's the same Senate Report as before, Senate
16 Report 93-151 at pages 30 to 31, 1973.

17 Now, the remedies also differ. Relief under
18 Section 13(b) is limited to equitable remedies.
19 Section 19 authorizes equitable remedies as well as,
14:08:53 20 quote, "Payment of damages," end quote. So Section
21 19 has a higher knowledge requirement, but on the
22 other hand it provides for broader monetary relief.

23 So Sections 13(b) and 19 authorize the same
24 types of relief and alternate procedures for
14:09:11 25 obtaining them depending on the FTC's enforcement

1 goals. In addition, congress's intent that Section
2 13(b) authorized equitable monetary relief is
3 confirmed by subsequent amendments to Section 13(b).
4 In 1994, congress amended Section 13(b) to expand on
14:09:32 5 venue and service of process provisions. It made no
6 changes to the FTC's equity powers even though it
7 specifically recognized in the accompanying Senate
8 Report that Section 13(b) authorizes the FTC to,
9 quote, "Go into Court to obtain consumer redress,"
14:09:48 10 end quote. This is Senate Report Number 103-130 at
11 pages 15 to 16, 1993.

12 Then in 2006, congress enacted the U.S. Safe
13 Web Act of 2006. And congress added a new subsection
14 to Section 5 concerning foreign conduct with domestic
14:10:07 15 contacts and that addition said in part that, quote,
16 "All remedies available to the Commission," end
17 quote, would be available for these extra territorial
18 violations, quote, "Including restitution to domestic
19 or foreign victims," end quote.

14:10:21 20 So, again, congress would have known about
21 the consensus of appellate decisions quoting that
22 Section 13(b) authorizes equitable monetary relief
23 when it amended the FTC Act and spoke of quote, "All
24 remedies available to the commission," end quote.

14:10:35 25 And, in fact, in the *Zurixx* order I mentioned

1 involving the Nudge competitor, Judge Kimball denied
2 the motion to dismiss and held that Section 13(b)
3 authorized monetary relief both based on Freecom as
4 quote, "controlling precedent," end quote, and also,
14:10:53 5 by reviewing this very structure involving the victim
6 enforcement tax.

7 Your Honor, regarding the Solicitor General's
8 opposition in the *AMG* petition that Mr. Gordon
9 referenced, I'll just make a point or two. The
14:11:31 10 Solicitor General asked for a decision on that
11 petition to be decided after the appeal in *SEC v Liu*.
12 The FTC, by contrast, wants its petition from the
13 Seventh Circuit's decision in *Credit Bureau* to be
14 heard without delay. The FTC explained that it was
14:11:51 15 seeking Supreme Court review itself because of the,
16 quote, "Extraordinary importance," end quote of the
17 Section 13(b) issue and because the Seventh Circuit's
18 decision was wrong, and, quote, "Threatened the FTC's
19 ability to carry out its mission," end quote. And
14:12:06 20 I'm reading from the FTC's petition for certification
21 at Page 1, footnote 1, this is in our docket at
22 docket number 91-2.

23 And a couple more points, Your Honor, on
24 that. The only point of relief in dispute in *Liu* is
14:12:34 25 disgorgement. But equitable monetary relief under

1 Section 13(b) is not limited to disgorgement. In
2 fact, *Freecom* does not even mention disgorgement in
3 its non-exclusive list of examples of equitable
4 remedies. It mentions redress, restitution, refunds,
14:12:51 5 among others as examples among other things that
6 would be authorized. *LoanPointe* mentions
7 disgorgement, by the way.

8 So although *Liu* concerns disgorgement,
9 Section 13(b) authorizes equitable monetary relief
14:13:07 10 more generally. Second, even though the solicitor
11 general's response in the *AMG* petition asked the
12 Supreme Court to decide the *Liu* appeal first, he also
13 recognized that quote, "The relevant statutory
14 schemes are not identical and the FTC and the SEC's
14:13:26 15 authority to seek monetary relief will not
16 necessarily rise and fall together," end quote. This
17 is from the *AMG* brief from the respondent which is
18 our docket at number 91-1 at Page 6 to 7.

19 Could I have just one moment, Your Honor?

14:13:51 20 THE COURT: You may.

21 MR. DIACOSAVVAS: Thank you, Your Honor.

22 Just jumping back for a moment, Mr. Gordon
23 mentioned that the Food, Drug, and Cosmetic Act was
24 different from the FTC Act in the monetary relief
14:14:28 25 that it authorizes. I just want to mention one item

1 in response. The Food, Drug, and Cosmetic Act does,
2 in fact, authorize consumer refunds expressly through
3 an administrative process. Yet the Tenth Circuit in
4 *RX Depot* also held that equitable monetary relief was
5 also available as an equitable adjunct to the
6 injunctive relief authorized in Section 332(a) of the
7 Food, Drug, and Cosmetic Act.

8 Now with that, Your Honor, if I may turn
9 quickly to factor three under the certification
10 analysis. Our position, Your Honor, is that an
11 immediate appeal will not materially advance the
12 ultimate termination of this case for several reasons
13 even if the Defendants were to prevail on appeal.
14 And that is because such an outcome would have
15 literally no effect on the course of this litigation.
16 And that's because the issue of consumer injury and
17 the Defendants' revenues are not just relevant to
18 monetary relief under the FTC's Section 5 claims in
19 Count 3 of the complaint. Those same issues also
20 relate to the scope of injunctive relief. Because
21 the Defendants' conduct and the scope of injury that
22 they caused is a factor for the Court to consider
23 when determining the scope of a permanent injunction.

24 Also, those same issues, consumer injury and
25 the Defendants' revenues, would also be the proper

1 subject of discovery under the divisions claims under
2 Utah law. Just as an example, the Utah Consumer
3 Sales Practices Act identifies statutory
4 considerations for affecting fund including the
14:16:11 5 breadth of the Defendants' conduct and consumer
6 injury.

7 In addition, in Count 4 of the complaint,
8 Plaintiff's alleged violations of the Telemarketing
9 Sales Rule and Section 19 authorizes redress for
14:16:29 10 these violations. The Defendants' have not
11 challenged Section 19 or Count 4 and that recovery
12 under Count 4 alone would be significant.

13 In the Plaintiffs TRO application, Plaintiffs
14 presented a financial analysis of the Defendants'
14:16:45 15 revenues from just telemarketing sales over a
16 three-year period from 2014 to 2017, and those
17 telemarketing revenues totalled approximately
18 \$95,000,000. So either way, the Defendants, even if
19 they were to prevail on appeal regarding Counts 1, 2,
14:16:59 20 3, would still face a significant monetary judgment
21 here.

22 And also definitely not to be overlooked is
23 the fact that again this challenge has zero effect on
24 the scope of the proceeding concerning liability in
14:17:28 25 any of the 11 counts of the complaint.

1 And also, just to respond quickly, Mr. Gordon
2 mentioned that the FTC is only seeking disgorgement
3 under Counts 1 through 3. We are seeking equitable
4 monetary relief under Counts 1 through 3, we're not
14:17:46 5 limited to disgorgement. So just to jump back a
6 little bit, I apologize for jumping out of order, but
7 this goes back to the *Liu* argument and the idea of
8 the impact of *Liu* which was focused on disgorgement.

9 Your Honor, may I just have one moment? I
14:18:06 10 think I am -- I am wrapping up here.

11 THE COURT: You may.

12 MR. DIACOSAVVAS: Thank you, Your Honor.

13 So just to wrap up on factor three, given the
14 overlap, there would be no material effect on the
14:18:38 15 ultimate termination in this case. The ultimate
16 conclusion would not be hastened by an immediate
17 appeal, there would be no resources or time saved.
18 If anything, an immediate appeal would do just the
19 opposite. It would require the parties to allocate
14:18:51 20 time and resources on an appeal that would not
21 simplify the underlying litigation.

22 So for these reasons, Your Honor, we
23 respectfully request that the Court deny the
24 Defendants' motion to certify an immediate appeal.
14:19:05 25 Thank you.

1 THE COURT: Thank you.

2 Mr. Gordon, any reply?

3 MR. GORDON: Briefly, Your Honor. Thank you.

4 I'm cognizant of the amount of time that you have

14:19:15

5 devoted to us and we appreciate that.

6 Whether this presents a controlling question

7 of law, the *Homeland Stores* case did not set a rule

8 that forms of relief could never be a controlling

9 question of law. And if you look at the *Kostal* case

14:19:27

10 that we cited, and the cases cited therein, it did

11 find that questions of -- the types of damages that

12 were available to the plaintiff was a substantially

13 controlling question. It just didn't find it would

14 advance litigation in that case. But clearly the

14:19:42

15 Court has broad discretion and none of those cases

16 present the type of situation we have here where

17 there is a half a billion dollar difference in the

18 relief sought. And I think that does present a

19 controlling question of law and I think that the

14:19:57

20 differences between Mr. Diacosavvas's presentation

21 and mine sort of highlight the complexity of this

22 issue and why it is ripe for interlocutory review on

23 -- at least on the *LoanPointe* the Plaintiff -- the

24 Defendants there did not challenge the legal basis.

14:20:18

25 In the Equal Access to Justice petition, the

1 petitioner was challenging the fact. They were
2 claiming that the FTC ignored certain facts. It was
3 not plain that the FTC did not have that right. The
4 *Meghrig* decision was not discussed there. Section 19
5 was not discussed there. The arguments that we are
6 presenting here were not discussed there. This is an
7 issue of first impression, really, at the Tenth
8 Circuit.

9 As to the savings clause in Section 19, I
10 find the argument curious there. At the time that
11 Section 19 was enacted, two years after Section
12 13(b), the FTC had not taken its overly expansive
13 view of the relief provided under Section 13(b).
14 There was nothing to save for congress.

15 Regarding the argument that this statutory
16 scheme was meant to allow the Commission to use
17 administrative proceedings to deal with novel
18 situation, that doesn't really jive with the
19 requirement Section 19 that to get monetary relief
20 they have to show that the conduct involved was
21 something that the defendant knew was dishonest.
22 That's not a novel situation, Your Honor.

23 When congress granted the FTC the authority
24 to go directly to Court to get a permanent
25 injunction, that's what congress was authorizing the

1 FTC to do, to get a permanent injunction, to just do
2 so directly in Court without having to go through the
3 administrative proceeding. It was giving the FTC the
4 ability to essentially get a cease and desist order
14:22:07 5 from a Court rather than doing so administratively.
6 There is nothing that supports this monetary
7 component.

8 Counsel for the Plaintiffs mentioned a couple
9 of times that Section 13(b) encompasses a host of
14:22:24 10 different equitable remedies but they did not
11 disagree that in this case they are seeking
12 disgorgement in the amount of \$500,000,000.

13 And regarding Count 4, the distinction there
14 is important. In Count 4, the FTC seeks restitution
14:22:42 15 for damages. To do that, they can't base their
16 relief simply on gross revenue. Rather they have got
17 to show the Defendants' conduct caused injury to
18 consumers. And we don't think they're going to be
19 able to do that. And that highlights the important
14:23:00 20 distinction between disgorgement and the other types
21 of relief that the FTC is seeking and why
22 adjudicating that case -- that issue now at the Tenth
23 Circuit is so critically important and will advance
24 the termination of the litigation.

14:23:15 25 With that, Your Honor, I have nothing else

1 and we thank the Court for its time and attention
2 today. We're happy to answer any questions that the
3 court might have. Thank you.

14:23:26

4 THE COURT: No, I want to thank both counsel
5 for --

6 MR. WING: Your Honor, this is Robert Wing,
7 representing the Utah Division of Consumer
8 Protection.

14:23:34

9 THE COURT: I'm sorry, who wishes to be
10 heard?

11 MR. WING: Robert Wing representing the Utah
12 Division of Consumer Protection.

13 THE COURT: I'm happy to hear you. It does
14 sound like our connection with you may be bad.

14:23:45

15 Would you like to dial back in to the call or
16 try to move the phone or something like that?

17 MR. WING: Let me try one other thing, Your
18 Honor. Just a moment.

14:24:13

19 MR. DIACOSAVVAS: Your Honor, this is
20 Mr. Diacosavvas for the FTC.

21 May I make a very quick response to one of
22 the points that Mr. Gordon just raised?

23 THE COURT: You may.

14:24:20

24 MR. DIACOSAVVAS: Thank you, Your Honor.
25 This concerns the savings clause. Mr. Gordon argued

1 that the savings clause had no effect here because
2 there was nothing to save. We disagree, Your Honor.
3 In 1975, when congress added Section 19 to the FTC
4 Act and its savings clause, Section 13(b) was already
14:24:42 5 law. And Section 13(b) was added in 1973. And by
6 that time, there was several decisions reflecting
7 government agencies relying on references to an
8 injunction as authority to seek monetary relief. For
9 example, in the *Porter* case, decided by the Supreme
14:24:58 10 Court in 1946, that case involved the Administrator
11 of the Office of Price Administration suing under the
12 Emergency Price Control Act of 1942.

13 In the *Mitchell* case, decided by the Supreme
14 Court in 1960, that case was brought by the Secretary
14:25:15 15 of Labor under the Fair Labor Standards Act. And
16 there were also SEC, Security & Exchange Commission
17 cases from the late 1960s.

18 So, for example, *SEC v Texas Gulf Sulphur*
19 *Co.*, 446 F.2d 1301, discussion of that at 1307 from
14:25:35 20 the Second Circuit, 1971, that affirmed that
21 restitution of ill-gotten proceeds from insider
22 trading and that case was decided by the Second
23 Circuit in 1971. And the underlying enforcement
24 action was filed in 1965.

14:25:49 25 So the argument that congress didn't know

1 what it was doing when it passed the savings clause
2 in Section 19, two years after authorizing an
3 injunctive relief --

14:25:59

4 MR. WING: This is Robert Wing calling back
5 in, Your Honor. Can you hear me?

14:26:13

6 THE COURT: Yes. Thank you. Your connection
7 is better now. Let me just advise you that I have
8 granted Plaintiffs a surresponse after which I'm
9 going to allow the Defendants a surreply if they wish
10 it, and then I'll hear from you.

11 So back to our Plaintiffs.

12 MR. DIACOSAVVAS: Your Honor --

13 THE COURT: Go ahead.

14:26:25

14 MR. DIACOSAVVAS: To Mr. Diacosavvas or to
15 Mr. Wing?

16 THE COURT: To you.

17 MR. DIACOSAVVAS: Okay. Thank you, Your
18 Honor.

14:26:30

19 I will just finish this one sentence -- this
20 one point that I was going to make. So the argument
21 that congress didn't know what it was doing when it
22 passed the savings clause in Section 19, two years
23 after authorizing injunctive and by extension
24 equitable monetary relief, two years earlier in
25 Section 13(b), I think lacks merit.

14:26:43

1 And that's also especially true when you
2 consider the breadth of the language of the savings
3 clause which appears in Section 19(e). With that, I
4 thank the Court for its additional time.

14:26:58

5 MR. WING: Very, very briefly, Your Honor.

6 THE COURT: Yes, I do want to hear from you,
7 but right before I do, I want to offer to Mr. Gordon
8 a surreply on that point, if you wish it.

14:27:08

9 MR. GORDON: Thank you, Your Honor. This is
10 Mr. Gordon I appreciate it. What Mr. Diacosavvas
11 didn't say that was -- there is no evidence and it
12 didn't happen that between the enactment of Section
13 13(b) in 1973, and the enactment of the savings
14 clause as part of Section 19 in 1975, the FTC did not
15 seek equitable monetary relief using its authority
16 under Section 13(b) that it now trumpets. There was
17 nothing to see. What happened with other statutes in
18 other circumstances is irrelevant to what Section 19
19 savings clause saved. Thank you.

14:27:45

20 THE COURT: Thanks very much.

21 Mr. Wing, would you proceed?

22 MR. WING: Yes, Your Honor. This is Robert
23 Wing again for the Division of Consumer Protection.

14:27:58

24 Because of the nature of the claims of the
25 Division of Consumer Protection, neither the

1 interlocutory appeal nor a stay of the discovery
2 would shorten the course provided this litigation.
3 The claims of the division under the Consumer Sales
4 Practices Act, the Telephone Call Prevention Act, and
14:28:14 5 the Business Opportunity Disclosure Act will not be
6 affected by the decision in *Liu* and would not be
7 affected by the decision by the Tenth Circuit on
8 interlocutory appeal.

9 Now thinking about how this case would go
14:28:30 10 forward, the discovery on the Division's claims would
11 be overlapping completely with the discovery that the
12 FTC would be looking for on its disgorgement claims.
13 The Division would be entitled to discovery on all
14 aspects of liability. It would also be entitled to
14:28:51 15 discovery relating to damages, relating to the amount
16 that each consumer has been harmed, and the amount of
17 the assets and the receipts of the Defendants.

18 Particularly, Your Honor, that's because we
19 would also be seeking on behalf of the Division fines
14:29:13 20 under 13-11-17(6) which says that there are a number
21 of factors that have to be considered by the Court in
22 assessing fines, and those factors are extremely
23 broad. They have the Court must consider the
24 seriousness, nature, circumstances, extent and
14:29:35 25 persistence of the conduct constituting the

1 violation, the harm to other persons resulting even
2 likely or indirectly from the violation. And it goes
3 on to include additional items.

4 So that is so broad that it would include
14:29:53 5 anything that the FTC would be looking for by way of
6 its disclosure claim. So that -- so in discovery,
7 the -- the information sought by the Division and the
8 information sought by the FTC would have complete
9 overlap. When we get to trial, the FTC would put on
14:30:15 10 its evidence relating to disgorgement. The Division
11 would put on its evidence relating to restitution.

12 It is going to be essentially the same evidence
13 because restitution, when you sum the losses to the
14 consumers, the amounts that the consumers paid to the
14:30:33 15 Defendants should equal the amount that the
16 Defendants have received from the consumers.

17 And so then at trial, once the evidence is in
18 if there is any difference at all, it would merely be
19 in calculating whether there is any difference
14:30:48 20 between restitution and fines and disgorgement and
21 that is not a difference that would be so significant
22 that it would justify keeping this case on hold for
23 an interlocutory appeal.

24 That's all I have to say, Your Honor.

14:31:04 25 THE COURT: Thank you, Mr. Wing.

1 Mr. Gordon, do you wish to respond for
2 Defendants?

3 MR. GORDON: Briefly, Your Honor.

14:31:18

4 One of the issues that I think Mr. Wing's
5 remarks highlight is that if this case is certified
6 for an interlocutory review and the Tenth Circuit
7 does that correctly, it may be quite possible to
8 settle this case with the Federal Trade Commission
9 but perhaps not with Utah. But that would certainly
10 advance the termination of litigation and would
11 certainly save resources and certainly save federal
12 taxpayer money.

14:31:32

13 On the point that Mr. Wing made at the end, I
14 disagree with him on the proper measure of
15 restitution. You know, I think for the restitution
16 is going to require -- is not based on the total
17 price paid rather it's based on some measurement of
18 the amount that the consumer was harmed. Especially
19 if they're seeking damages which they've alleged in
20 the complaint. There is a causation element there,
21 there is a measurement of the value of what was
22 conveyed. A large amount of the sales in this case
23 are for real property. There is no dispute that
24 people got their real property. So the issues here
25 are much different if we're talking about restitution

14:32:02

14:32:14

1 versus disgorgement and those issues ought to be
2 sorted out at the front end by the Tenth Circuit
3 rather than trying to figure it out at trial.

4 Thank you, Your Honor.

14:32:24

5 THE COURT: Thank you, Mr. Gordon.

6 So with that, counsel, I think what I'll do
7 is put us in a brief recess. I believe I'll be able
8 to rule for you today from the bench. We will be in
9 brief recess here.

14:32:37

10 I would invite you to stay on the line and
11 also to mute your phones, all of them, while we take
12 this recess, and then we'll be back on in just a
13 little while. Thank you. We'll be in recess.

14 MR. GORDON: Thank you, Your Honor.

14:44:23

15 (Recess.)

16 THE CLERK: Counsel, the Court is ready to
17 resume. Is everyone on the line and ready to
18 proceed?

19 MR. GORDON: Yes for the Defendants.

14:44:39

20 THE CLERK: Plaintiffs?

21 MR. LUBETZKY: Yes, thank you.

22 THE CLERK: Court will now resume session.

23 THE COURT: So we're back on the record in
24 *FTC and Utah Division of Consumer Protection versus*
25 *Nudge*, case number 2:19-CV-867.

14:44:50

1 Counsel, I know both sides would appreciate a
2 decision on these motions as soon as possible, and I
3 will be able to rule from the bench for you today.

4 I'm going to start with the motion to stay.

14:45:05 5 Reviewing a motion to stay proceedings, Courts
6 generally consider factors including, one, whether
7 granting a stay would likely simplify the issues
8 before the Court; two, the stage of the litigation;
9 and three, a balancing of prejudice to the parties.

14:45:22 10 That is the *Menchacha-Estrada versus Synchrony Bank*
11 case, District of Utah, 2017.

12 If a requested stay presents, quote, "Even a
13 fair possibility" close quote, of damage to another
14 party, the Tenth Circuit requires the moving party
14:45:41 15 to, quote, "Show a clear case of hardship or
16 inequity," close quotes. That's the *Creative*
17 *Consumer Concepts* case, Tenth Circuit, 2009.

18 Now, the first of these factors,
19 simplification of the issues, counsels against a
14:45:59 20 stay. Defendants are requesting a stay until the
21 Supreme Court clarifies whether the FTC can seek and
22 obtain certain relief pursuant to Section 13(b) of
23 the FTC Act. They contend the clarity will come from
24 *Liu versus SEC*, and that's one of the arguments that
14:46:16 25 they have made here, and admittedly, the Supreme

1 Court does appear poised in *Liu* to resolve a
2 question. But the resolution of that question will
3 not decide the issues in this case but instead the
4 remedies available to a different agency under a
14:46:31 5 different statute. The FTC Act, Section 13(b) issue
6 in this case is not before the Supreme Court in *Liu*
7 and any impact here, while possible, is only
8 speculative.

9 Defendants also observe that the Section
14:46:46 10 13(b) question, whether the FTC Act authorizes
11 equitable monetary relief in permanent injunction
12 proceedings, appears in multiple cases in which cert
13 petitions are pending before the Supreme Court. But
14 the Court has not granted cert. So whether these
14:47:01 15 cases will even be addressed by the Court is
16 speculative. And, even if the Supreme Court takes
17 those cases, and even if the Supreme Court then
18 issues the decision Defendants hope for, Defendants
19 have not shown how a favorable decision there would
14:47:17 20 significantly simplify the issues here. The parties
21 began discovery only recently and, of course,
22 liability has not been determined. Regardless of the
23 outcome of the FTC Act cases, discovery will be
24 necessary to determine whether Defendants are liable
14:47:33 25 under the 11 counts pled by the FTC and the Division.

1 Discovery also will be necessary to determine the
2 applicability of other remedies. Even if equitable
3 monetary relief under Section 13(b) were to become
4 unavailable, this case involves several other
14:47:50 5 statutory provisions and remedies, including the
6 Telemarketing Consumer Fraud and Abuse Prevention Act
7 implemented by the Telemarketing Sales Rule. The TSR
8 authorizes injunction in addition to damages,
9 restitution, or other compensation, or such further
14:48:08 10 and other relief as the Court may deem appropriate.

11 The Utah Consumer Sales Practices Act is
12 another statute at issue. The US -- or UCSPA
13 authorizes declaratory judgment, injunctive relief,
14 recovery of damages, and fines in addition to an
14:48:28 15 award of attorney fees, court costs, and costs of
16 investigation.

17 The Business Opportunity Disclosure Act
18 authorizes, in addition to other relief granted by
19 the Court, an award of attorney fees, court costs,
14:48:40 20 and investigative fees.

21 And the Telephone Fraud Protection Act
22 authorizes imposition of a civil penalty of up to
23 \$2,500 against Defendants for each violative
24 transaction.

14:48:52 25 In addition to these other provisions,

1 discovery is necessary to determine the severity of
2 the alleged consumer injury. In fixing the scope of
3 any permanent injunction relative to the violations,
4 Courts may consider the seriousness of the harm the
5 injunctive is intended to remedy.

6 So for those reasons, Defendants have not
7 established that the pending SEC Supreme Court case,
8 or the FTC Act cases they hope the Supreme Court will
9 take, will resolve the claims in this case, nor have
10 Defendants shown a stay would likely simplify, in any
11 material way, the issues before the Court. Discovery
12 will still be necessary to determine the merits of
13 the Defendants' alleged violations and the severity
14 of the alleged harm.

15 This brings us to the second factor, the
16 stage of litigation factor, and that could,
17 conceptually, support a stay. The parties are in the
18 early stages of discovery of what is a relatively new
19 case. Both sides appear poised to continue with
20 discovery and the bulk of time and resources spent on
21 this litigation lies ahead. However, as I just
22 noted, substantial discovery in this case will still
23 need to occur no matter what the Supreme Court
24 decides. Consequently, neither the *Liu* case nor the
25 FTC Act cases truly jeopardize the impending

1 investment of time and resources in discovery, motion
2 practice, or trial.

3 The third factor, balance of prejudice,
4 weighs against staying the proceedings. Plaintiffs
14:50:19 5 assert that from 2012 forward Defendants engaged in
6 deception and misrepresentation to take over
7 \$400,000,000 from consumers across the country. A
8 stay risks diminution of the accuracy of witness
9 memories. And delay threatens a loss of funds
14:50:37 10 available to compensate alleged consumer victims
11 because the stipulated PI does not prevent Defendants
12 from spending certain funds during the pendency of
13 this case.

14 Now, Defendants broadly claim that continuing
14:50:48 15 these proceedings would place unnecessary burdens on
16 the parties, waste resources, and force them into
17 expensive litigation. But I have not seen in the
18 briefing or heard in the arguments today, compelling
19 examples or other facts which would support those
14:51:03 20 assertions. So considering the possibility of harm
21 to Plaintiffs from a stay in the proceedings, I find
22 that the Defendants have not shown a clear case of
23 hardship or inequity and that's the standard which
24 they're required to meet. So according to the
14:51:19 25 accounting for totality of the circumstances, a stay

1 is unwarranted.

2 I'll turn now to the motion to certify which
3 is where the litigants have spent the bulk of their
4 time in the hearing today. Defendants request the
14:51:33 5 Court certify for the interlocutory appeal that
6 portion of this Court's previous order holding that
7 the FTC may seek equitable monetary relief for
8 alleged violations of the FTC Act under Section
9 13(b).

14:51:46 10 An interlocutory order may be certified for
11 immediate appeal if, in the district court's opinion,
12 the order, quote, "Involves a controlling question of
13 law as to which substantial grounds for differences
14 of opinion exist, and that immediate appeal of the
14:52:03 15 order will materially advance termination of this
16 litigation," close quote. And I'll note that is 28
17 U.S.C. Section 1292(b).

18 Considering the purpose of certification, the
19 Tenth Circuit has instructed district courts that
14:52:19 20 interlocutory appeals should be limited to, quote,
21 "extraordinary cases in which extended and expensive
22 proceedings probably can be avoided by immediate
23 final decision of controlling questions encountered
24 early in the action," close quote. That is the *State*
14:52:37 25 *of Utah By & Through Utah State Department of Health*

1 versus *Kennecott*, Tenth Circuit, 1994. The provision
2 contains a, quote, "Rare exception," close quote, to
3 the final judgment rule that generally prohibits
4 piecemeal appeals. That's the *Koehler v Bank of*
14:52:54 5 *Bermuda -- Koehler versus Bank of Bermuda* case,
6 Second Circuit, 1996. With those standards in mind,
7 I'll turn now to considering the factors.

8 First, the matter for immediate appeal must
9 present a controlling question of law. Generally,
14:53:09 10 controlling questions of law include questions that
11 are, one, serious to the conduct of the litigation;
12 two, could affect the ability of the district court
13 to render a binding decision, or materially affect
14 the outcome of the litigation in the district court;
14:53:21 15 or three, might save time for the district court, and
16 time and expense for the litigants. And here I'm
17 citing the *Roberts versus CR England* case, District
18 of Utah, 2018.

19 So our first factor is whether the question
14:53:35 20 is serious to the conduct of litigation. The Section
21 13(b) question is not likely to seriously affect the
22 course of the litigation here. Whether monetary
23 restitution is available as an equitable remedy is an
24 issue but is not critical to the great majority of
14:53:53 25 discovery or to the overall conduct of litigation.

1 It's one of several potential remedies sought in the
2 event that the Defendants' liability is established.
3 Something which has not yet occurred or may ever
4 occur in this case. Even if restitution were
14:54:08 5 unavailable as an equitable remedy under Section
6 13(b), Plaintiffs are pursuing discovery related to
7 the amount of alleged ill-gotten gains to determine
8 revenues available under other statutes and to
9 determine the overall severity of the alleged
14:54:23 10 wrongdoing for the purpose of requesting a permanent
11 injunction.

12 The Tenth Circuit, considering a Section
13 1292(b) certification of an order involving a motion
14 to dismiss, and whether injunctive relief could issue
14:54:38 15 against a party, determined that, quote, "whether
16 injunctive relief is available," close quote, against
17 the party, did not control the disposition of the
18 certified order. That's the *Homeland Stores* case,
19 Tenth Circuit, 1994. Because relief would be
14:54:54 20 available in another form, the Court concluded,
21 quote, "It need not decide on the availability of any
22 specific type of alternate relief," close quote.
23 Citing the Tenth Circuit's *Homeland Stores* decision,
24 the Seventh Circuit has noted that a yet-to-be
14:55:09 25 applied hypothetical injunction did not present a

1 controlling question of law where a legal remedy
2 remained available. That's the *Dahlstrom versus*
3 *Sun-Times Media* case, Seventh Circuit, 2015. And the
4 Federal Circuit has held, in an unpublished decision,
14:55:26 5 that, quote, "A question regarding the theory on
6 which damages may be recovered cannot be controlling
7 where the issue of liability remains undecided,"
8 close quote. That's the *Fujitsu versus Tellabs* case,
9 Federal Circuit, 2013. These decisions align with
14:55:42 10 the circumstances here. A question regarding a
11 hypothetical remedy is not controlling where
12 liability has not been determined and where other
13 remedies remain available.

14 Now, I think it's worth briefly noting
14:55:57 15 Defendants' observation of three potentially
16 controlling types of questions of law. The
17 Defendants have argued that controlling questions of
18 law include those that if erroneously decided would
19 constitute reversible error on final appeal, those
14:56:10 20 that could have precedential value for a large number
21 of cases, and those involving questions of statutory
22 interpretation. I'll take them in order.

23 First, reversible-error cases tend to involve
24 intermediate appeals that may terminate an action, if
14:56:26 25 the decision is reversed, or involve a procedural

1 determination that may significantly impact the
2 action. That's the *APCC Services* case, District of
3 D.C., 2003. Neither of these possibilities are
4 present in this case.

14:56:43 5 Second, Defendants also observe the
6 controlling questions of law and may include those
7 that could have precedential value for a large number
8 of cases. But the record here does not explain to me
9 or suggest how immediate review of this Court's order
14:56:58 10 would impact a large number of other cases.

11 Three, lastly, Defendants contend controlling
12 questions of law include those involving questions of
13 statutory interpretation. And, of course, the proper
14 interpretation of a statute can be a question of law
14:57:16 15 untethered to particular facts of the case. But this
16 is not enough, in the Tenth Circuit, to justify
17 piecemeal appellate review. The question of law must
18 be controlling, the case must be extraordinary, and
19 extended and expensive proceedings must probably be
14:57:31 20 avoided.

21 That Tenth Circuit standard by which I am
22 bound is not met here. I'm not persuaded that this
23 Court turns on the interpretation of Section 13(b) or
24 the Defendants' proposal would head off protracted,
14:57:45 25 costly litigation.

1 The second factor is whether the Section
2 13(b) question could affect the ability of the
3 district court to render a binding order. There is
4 no issue with the Court rendering a binding decision
14:57:58 5 in the absence of an interlocutory appeal here. If
6 liability is established and relief ordered,
7 including restitution or disgorgement, that order
8 would be supported by existing precedent. In *FTC*
9 *versus Freecom*, the Tenth Circuit noted that the FTC
14:58:15 10 Act's Section 13(b) grant of authority to provide
11 injunctive relief carries with it the full range of
12 equitable remedies including the power to grant
13 consumer redress. It's the Tenth Circuit 1996 as the
14 parties well know. And the Tenth Circuit upheld this
14:58:29 15 position in an unpublished decision in 2013 which
16 both parties have discussed today and also in their
17 briefing, explicitly extending the range of
18 injunctive relief to include disgorgement of profits.
19 That's the *FTC versus LoanPointe* case, Tenth Circuit,
14:58:45 20 2013. Given that existing precedent, there is
21 currently no risk of issuing a non-binding decision
22 absent an immediate appeal.

23 The third factor is whether an immediate
24 appeal might save time for the district court and
14:58:58 25 time and expense for the litigants. As I have said

1 before, because the issue of liability must still be
2 litigated, including determining the severity of the
3 purported harm to consumers, an appellate delay would
4 not save substantial time or resources for the party
14:59:14 5 or for the Court. Regardless of the outcome of an
6 immediate appeal, the parties must still engage in
7 discovery on all 11 causes of action. What's at
8 issue here is a remedy, not the cause of action
9 itself.

14:59:26 10 Even if restitution or disgorgement turn out
11 not to be available to remedy the alleged harm, the
12 severity of that harm may be considered in fixing the
13 scope of a permanent injunction which would still be
14 part of the case. Under these circumstances, an
14:59:40 15 immediate appeal to determine whether Section 13(b)
16 authorizes equitable monetary relief would simply
17 delay the case.

18 For all of those reasons, an immediate appeal
19 is not necessary to address a controlling issue of
14:59:52 20 law.

21 In addition to identifying the controlling
22 question of law, Defendants must also establish
23 substantial grounds for differences of opinion with
24 respect to the question presented. Substantial
15:00:06 25 grounds for difference of opinion arise one, when the

1 question is one of first of impression or novel with
2 little or no circuit guidance; or two, a difference
3 of opinion exists within the circuit. And that's the
4 *DRFP versus Republica Bolivariana de Venezuela* case,
5 Southern District of Ohio, 2013.

6 Here the Section 13(b) question has been
7 answered by the Tenth Circuit in *FTC versus Freecom*
8 *Communications* and *FTC versus LoanPointe*. These
9 decisions sufficiently eliminate genuine doubt about
10 the scope of remedies currently available under
11 Section 13(b) in the Tenth Circuit. That another
12 appellate court has come to a different conclusion,
13 and that litigation is occurring in other courts, are
14 insufficient grounds to send this remedy issue back
15 to the Tenth Circuit prior to a final judgment where
16 the Tenth Circuit has already spoken.

17 As noted previously, the Tenth Circuit
18 teaches that such appeals are, quote, "A rare
19 exception reserved for extraordinary cases where the
20 movant shows that extended and expensive proceedings
21 probably can be avoided," close quote. That standard
22 is not met here.

23 The last factor is whether immediate appeal
24 will materially advance termination of this
25 litigation. Where the litigation will be conducted

1 in substantially the same matter, irrespective of the
2 decision on the appeal, quote, "The appeal cannot be
3 said to materially advance the ultimate termination
4 of the litigation," close quote. That's the *White*
5 *versus Nix* case, Eighth Circuit, 1994.

6 It appears from this record that regardless
7 of the decision on immediate appeal, the bulk of
8 discovery would not change. As noted previously,
9 liability must still be litigated including
10 determining Defendants' purported misrepresentations,
11 false claims, and the extent of any harm to
12 consumers. There has not been a showing sufficient
13 that an immediate appellate decision would eliminate
14 the need for extensive discovery. An appellate delay
15 would not save substantial time or resources for the
16 parties or the Court and would not materially advance
17 the ultimate termination of the litigation.

18 Accordingly, the requirements for
19 certification for immediate appeal of the Court's
20 order on the Motion to Dismiss are not met.

21 Finally, we have the Motion For Protective
22 Order. Rule 26(c)(1) of the Federal Rules of Civil
23 Procedure states, quote, "The Court may, for good
24 cause, issue an order to protect a party or persons
25 or person from annoyance, embarrassment, oppression,

1 or undue burden or expense," close quote. The
2 Defendants have moved for a protective order, quote,
3 "For the reasons set forth in Defendants' pending
4 stay and interlocutory certification motions," close
15:02:47 5 quote.

6 As I explained moments ago, those arguments
7 are insufficient to support a stay or an
8 interlocutory certification and so they can fare no
9 better for the requested protective order. I do want
15:03:02 10 to say, however, that in making this determination I
11 note that the Defendants are not precluded in the
12 future from making arguments about the appropriate
13 scope or possible staging of discovery as that
14 process proceeds.

15 Consistent with these determinations that I
16 have made today, Defendants' Motion to Stay, Motion
17 to Certify for an Interlocutory Appeal, and Motion
18 for a Protective Order are each denied.

19 Counsel, is there anything further that we
15:03:29 20 should take up in this hearing today?

21 MR. LUBETZKY: Not for the Plaintiffs, Your
22 Honor. This is Darren Lubetzky for the FTC.

23 MR. GORDON: Same for the defendants, Your
24 Honor. Thank you.

15:03:42 25 THE COURT: Thanks to both sides for their

1 extensive briefing and for their excellent advocacy
2 here today. Wish you all the best. We will be in
3 recess.

4 (Whereupon, the hearing concluded.)
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REPORTER'S CERTIFICATE

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name this 6th day of April, 2020.

Laura W. Robinson
Laura W. Robinson
RPR, FCRR, CSR, CP