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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

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| FEDERAL TRADE COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>CONSUMER DEFENSE, LLC, et al.,<br><br>Defendants. | No. 2:18-cv-00030<br><br>**RESPONSE TO FTC MOTION FOR ENTRY OF MONETARY JUDGMENT**<br><br>**ORAL ARGUMENT IS REQUESTED** |

This Court should deny the Federal Trade Commission's (FTC) renewed motion for entry of monetary judgment against Jonathan and Sandra Henley. ECF No. 391. The FTC's request is substantively unsound. Instead, this Court should direct the FTC to return funds already paid.

The authority relied upon by the FTC, Section 19 of the FTC Act, does not permit punitive awards. Instead, under binding Ninth Circuit precedent, Section 19 allows only direct restitution to harmed customers, once identified by the FTC, in an amount that compensates proven losses. The FTC does not request that limited relief, however, and its sweeping demand to be paid all gross receipts of the relevant businesses, minus consumer refunds, flies in the face of the legal standard. This Court must reject it.

## FACTS AND PROCEDURAL HISTORY

The FTC sued the Hanleys and their businesses in 2018, alleging various violations of the FTC Act and Dodd-Frank Act. On January 10, 2018, this Court entered an *ex parte* restraining order and asset freeze against all of the defendants. From that point on, the relevant businesses and assets have been out of the Hanleys' control, and have long since ceased operation. Indeed, the receiver terminated the relevant businesses' operations immediately following his appointment on January 10, 2018. *See* ECF No. 26 at 22–23 (receiver's initial report).

The FTC moved for summary judgment more than a year later. It argued that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), allowed awards of "equitable monetary relief" in the "full amount lost by consumers rather than limiting damages to a defendant's profits." ECF No. 255 at 43. It asked this Court to calculate a disgorgement award "based on the amount consumers paid for the product or service minus refunds and chargebacks." *Id.* (citation omitted). The FTC also asserted it need only provide a "reasonable approximation" of "consumer losses," with "the burden [on] Defendants to demonstrate the inaccuracy of the FTC's figures." *Id.* at 44 (citations omitted). It insisted that the award also not be "reduced by any value received by consumers." *Id.*

Based on these arguments, the FTC sought $18,428,370. *Id.* To support its calculation, the FTC said, "Between January 8, 2013, and January 8, 2018, Defendants had gross revenues of $19,154,115 and $564,090 in chargebacks or returns. (SJX20 at 29 ¶ 60.)." *Id.* at 22 (Statement of

Material Fact No. 75). "Defendants refunded an additional $161,655. Thus, the net consumer injury caused by their deceptive marketing practices amounts to $18,428,370." *Id.* (citations omitted).

In its order granting summary judgment for the FTC, this Court entered a judgment as requested by the FTC "as equitable monetary relief" under Section 13(b). ECF No. 320 at 20, ¶ VI.A. This Court also ordered that the award be paid to the FTC for distribution as the agency saw fit, with the remainder to be forfeited as "disgorgement," saying:

> All money paid to the FTC pursuant to this Order may be deposited into a fund administered by the FTC or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the FTC decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the FTC may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement.

*Id.* at 23–29, ¶ VI.G.

The Hanleys timely appealed that decision. ECF No. 328.

While the appeal was ongoing, the receiver issued its final report concerning its efforts to pay the outstanding award. *See* ECF No. 364. The receiver reported aggregate receipts from all of the defendants of $1,570,141.57, which came from liquidation of their assets, including the Hanleys' home and personal vehicles. *Id.* at 10–11. The receiver's fees from those receipts were $138,016.38, and were to be deducted from that net cash. ECF No. 364-2 at 3. The receiver's final report also requested additional fees of $137,948.15, and a $10,000 reserve for final costs. ECF No. 364 at 12. Discounting for all of the defendants' expenses not attributable to receiver costs, the receiver proposed an "immediate transfer to the FTC [of] $968,068.42." ECF No. 364 at 12.

This Court approved the request, directing immediate payment of $968,068.42, plus any remaining amount of the reserved $10,000, to the FTC. ECF No. 368 at 2.

On April 22, 2021, the Supreme Court unanimously held that Section 13(b) did not "authorize[] the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1344 (2021).

On January 20, 2022, the Ninth Circuit reversed and remanded this case in an unpublished memorandum opinion. *See* ECF No. 370 (docketed opinion). The Court said, "AMG, decided during the pendency of this appeal, held that the FTC may not obtain equitable monetary relief under section 13(b) of the Federal Trade Commission Act. We must therefore vacate the district court's grant of monetary relief under section 13(b), 15 U.S.C. § 53(b)." *Id.* at 3 (citations omitted). The sole issue on remand was for this Court "to consider in the first instance whether an award is appropriate here under section 19 of the FTC Act." *Id.* at 5. The decretal paragraph of the memorandum provided, "[a]ccordingly, we VACATE the district court's monetary judgment and REMAND for further proceedings." *Id.*

Only seven days after the Ninth Circuit's opinion, and before the Ninth Circuit's mandate had issued, the FTC filed a motion asking for reimposition of the original award, limited only in duration. The FTC demanded an award of $11,906,792, which, like the judgment, represented the gross receipts of all of the defendant businesses for a three-year period. ECF No. 371 at 6–7. Notably, the FTC's motion omitted any reference to the Ninth Circuit's leading decision on the scope of Section 19, *FTC v. Figgie Int'l*, 994 F.2d 595 (9th Cir. 1993).

The Hanleys, proceeding *pro se*, learned of the FTC's motion on February 10, 2022, which was the response date for the motion. In an email to the FTC's counsel, Gregory A. Ashe, the Hanleys objected that the Ninth Circuit's decision was still subject to revision, the time to file a petition for rehearing had not yet expired, and this Court lacked jurisdiction pending a mandate from the Ninth Circuit. Mr. Ashe responded, "Based on our reading of the appellate court's opinion ([Ninth Circuit Docket Number] 53-1), we do not see anything that 'directs that a formal mandate issue.' Further, we believe the entire docket entry 53 (53-1 and 53-2) meets the requirements of FRAP 41(a) for the mandate. Accordingly, we believe that when the appellate judgment was docketed in the District Court (as ECF No. 370), the district court retained jurisdiction over the case." The FTC, therefore, refused to withdraw the motion, and consented only to a 14-day extension for the time to respond, which this Court granted.

Undersigned counsel thereafter filed a counseled response to the FTC's motion, arguing, in part, that the motion was premature because the mandate had yet to issue. *See* ECF No. 374.

Two days later the FTC withdrew its motion. *See* ECF No. 377.

The Ninth Circuit's mandate was docketed with this Court on March 17, 2022. ECF No. 389.

On March 22, 2022, the FTC essentially re-filed its original request for a judgment of $11,906,792 pursuant to Section 19. *See* ECF No. 391. Yet again, the FTC's demand is based on its calculation of all of the gross receipts for all of the defendant businesses between January 8, 2015, and January 8, 2018. *Id.* at 8. Now, however, the agency at least acknowledged the *existence* of the Ninth Circuit's binding precedent in *Figgie*. *See id.* at 6.

The Hanleys now file this response. They also request oral argument on this important matter.

**THE FTC'S DEMAND IS UNLAWFUL**

The FTC's demand that it, instead of customers, be paid a judgment representing all of the defendants' gross receipts for the relevant period is in open defiance of controlling Ninth Circuit precedent and plainly inconsistent with the relevant statutory text. Amazingly, the FTC demands it be paid this judgment in reliance on now-vacated case law addressing the scope of Section 13. *See* ECF No. 391 at 7 ("Thus, '[c]onsumer loss is calculated by the amount of money paid by customers, less refunds made.' [*FTC v.*] *OMICS Grp.*, 374 F. Supp. 3d [994 (D. Nev. 2019)]; [*FTC v.*] *Com. Planet, Inc.*, 815 F.3d [593 (9th Cir. 2016)]."). And its only passing reference to the Ninth Circuit's decision in *Figgie*, 994 F.2d 595, is the misleading, and largely irrelevant, observation that the "FTC does not need to show proof of individual reliance by each purchasing customer to obtain a monetary judgment." *See* ECF No. 391 at 6. But *Figgie* is *the* seminal case on the scope of Section 19, and unmistakably held that even presuming reliance from identifiable customers, the FTC may not demand payments made to the agency instead of consumers, and any award must not exceed actual "redress" to a harmed consumer, which must be based only on requests from customers. *See Figgie*, 994 F.2d at 607. Nonetheless, the FTC asks for *everything*—gross receipts separated from refunds to consumers—which does not meet the relevant limits.

**A. The Ninth Circuit Has Concluded That Section 19 Does Not Authorize the FTC's Demanded Award**

Section 19 is not an open-ended grant of authority for the FTC to seek whatever judgments it wants. And it is not a substitute for the broad disgorgement power the agency previously relied upon. It provides:

> The court . . . shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers . . . Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

15 U.S.C. § 57b(b).

This includes two key limits. First, the statute authorizes only relief that will "redress injury to consumers." *Id.* What is "redress?" The text sheds light on that question: the "refund of money" or "return of property" or "payment of damages." *Id.* Remedies, in other words, that make *consumers* whole.

What's more, Section 19 prohibits any "exemplary or punitive damages." 15 U.S.C. § 57b(b). That fits Section 19's general purpose—to make consumers whole, not punish wrongdoers. So a Section 19 award can't serve as general punishment or deterrence.

No wonder, then, the Ninth Circuit has already held that Section 19 does not authorize "disgorgement" awards. Under Section 19, "there may be no redress without proof of injury caused" by a defendant's practices. *Figgie*, 994 F.2d at 605. Through Section 19, Congress sought "only to authorize redress to *consumers* and others for 'injury resulting' from the trade practice." *Id.* at 607 (emphasis added). The FTC could not use "[u]nclaimed money from the redress fund" for "'indirect redress' in the form of . . . donations to non-profit" organizations, because there is "no basis for allowing the Commission to keep money in excess of what it reasonably spends to find purchasers of the [product], advertise to them the availability of the money . . . and process their claims and reimburse them." *Id.* at 607. There, as here, the FTC argued that it should be permitted "to keep the money because it is in the nature of disgorgement." *Id.* And there, as here,

the argument ran afoul of Section 19 because "requiring Figgie to pay the Commission the excess would . . . not mak[e] redress to the consumers who bought" the product. *Id.*

When the FTC demands a payment "that [] goes beyond redressing injury to consumers and provides a potential windfall to consumers," it violates Figgie's directives. *Fed. Trade Comm'n v. Noland*, No. 20-cv-00047, 2021 WL 5493443, at *4 (D. Ariz. Nov. 23, 2021). Indeed, if the FTC demands an award for a consumer who "was satisfied with the products upon receipt and immediately consumed them," that consumer cannot be said to then be entitled to redress under Section 19, because "there is simply no 'proof of injury' in that scenario." *Id.* (citing *Figgie*, 994 F.2d at 605). A district court errs when it orders "full refunds" when customers received "some value." *Figgie*, 994 F.2d at 606.

Further, because Section 19 requires *redress*—and not punishment—refunds should be given only "to those buyers who make a valid claim for such redress." *Figgie*, 994 F.2d at 606 (internal quotation marks omitted). Customers, ultimately, can decide whether they want a refund for products, or whether they felt they paid for what they got. *See id.* ("consumers who decide, after advertising which corrects the deceptions by which Figgie sold them the heat detectors, that nevertheless the heat detectors serve their needs, may then make the informed choice to keep their heat detectors instead of returning them for refunds."). The FTC thus bears the burden of proof on consumer loss, and any doubts "must be resolved against the FTC." *Noland*, 2021 WL 5493443, at *4. "[F]or each consumer on whose behalf a damage award is sought, the FTC must prove why that consumer was harmed and identify the amount of money that is 'necessary to redress' that consumer's injury." *Id.* at *5. Just pointing to gross revenue won't cut it. *See id.*

*Figgie* decides this case. Payments to anyone other than consumers or others who experienced injury amount to "extraordinary provision[s]" that "cannot be characterized as 'redress'" because the "word connotes *making amends to someone who has been wronged*." *Figgie*, 994 F.2d at 607 (emphasis added). If the Commission keeps the money, or the cash goes to the Treasury, no redress occurs—just as *Figgie* explains. Simply "[c]alling a fine 'indirect redress' does not make it redress" because that would "exceed the statutory limitation on the remedy." *Id.*

No doubt, pre-*AMG*, case law allowed precisely what the FTC attempts here: keep as much of the award as it wants, without limits, and without any obligation to return anything. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) (explaining, in Section 13 case, that the FTC may "as a matter of grace, attempt to return as much of the disgorgement proceeds as possible," but "the remedy is not, strictly speaking restitutionary at all, in that the award runs in favor of the Treasury, not the victims."). In those cases, the FTC could—if it wanted—give the money to consumers, but it didn't have to do so. *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997).

But Section 19 doesn't give the FTC a choice. It requires redress. *See Figgie*, 994 F.2d at 606–07. And other courts echo *Figgie*'s core insight: if the FTC seeks "disgorgement under Section 19(b), the Court might have found . . . defendants' objections to disgorgement to be persuasive." *FTC v. Silueta Distributors, Inc.*, 1995 WL 215313, at *6 (N.D. Cal. Feb. 24, 1995); *see also FTC v. Washington Data Resources*, 856 F. Supp. 2d 1247, 1280 (M.D. Fla. 2012) ("Concerned solely with the plaintiff's injury, Section 19(b) confers no authority to award monetary relief that exceeds redress to consumers."); *id.* at 1281 ("Section 19(b) prohibits disgorgement in excess of consumer redress."); *FTC v. Cap. Choice Consumer Credit, Inc.*, 2004 WL 5149998, at *45 (S.D. Fla. Feb. 20, 2004) ("under Section 19(b), a court may not order disgorgement in excess of redress.").

No wonder then, two of the four sitting Commissioners have recognized that Section 19 is not a substitute for Section 13. *See Resident Home, LLC; Analysis of Proposed Consent Order To Aid Public Comment*, 86 Fed. Reg. 58,279, 58,283 (Oct. 21, 2021) (Dissenting Statement of Commissioners Phillips and Wilson) (citing *Figgie*, 994 F.2d at 606-07, and saying, "Soon after the Supreme Court unanimously rebuked the Federal Trade Commission for seeking monetary remedies not permitted by Section 13(b) of the FTC Act—remedies that, in fairness to the agency, were blessed by appellate courts for decades—the Commission now votes to accept monetary remedies not permitted by Section 19."). And they predicted that if it "continue[s] to flout the limits of [its] authority, the Commission should fully expect additional rebukes from the courts." *Id.* They were surely right on that score.

**B. The FTC Has Failed To Carry Its Burden of Proof**

The FTC stubbornly ignores all of this and demands, yet again, that it, instead of any harmed customers, be paid every cent of the defendant businesses' gross receipts for the relevant period. *See* ECF No. 391 at 7–8.[1] But no possible reading of *Figgie* could support such an unreasonable and unlawful demand.

The FTC has not identified specific harm to identifiable consumers, it has not identified which, if any, customers were deprived of what they paid for instead of being satisfied customers, and it has not even suggested that the relevant businesses' gross receipts were somehow comprised entirely of lost funds from harmed consumers. Indeed, for the FTC's calculations to be correct, *not a single customer* could have received what he or she paid for, and the businesses could not have received *a single dollar* from any source other than a harmed and defrauded customer. In fact, we very likely know how much consumer redress there actually was, because the FTC has already *subtracted* that amount from its request. *See* ECF No. 391 at 7–8 (citing ECF No. 255-21 at 30 ¶ 60 (listing the defendants' "gross deposits" minus only "chargebacks/returns," "reversals," and "refunds")). In other words, the FTC is asking for everything *but* direct redress—but such awards are explicitly prohibited by Section 19. *See Figgie*, 994 F.2d at 605.[2]

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[1] The FTC curiously calls its demanded judgment "the Hanleys' net revenues," but it is no such thing. *See* ECF No. 391 at 7. As college students learn on the first day of their very first course on business, net revenues are profits after costs. *See In re Las Vegas Monorail Co.*, 429 B.R. 317, 337 (Bankr. D. Nev. 2010) (net revenue is "the net amount left after certain operating expenses are deducted from gross revenues"). But the FTC is referencing "the amount of money paid by consumers, less refunds made." *See* ECF No. 391 at 7. That constitutes gross receipts, as the FTC already determined. *See* ECF No. 255-21 at 30 ¶ 60 (listing the defendants' "gross deposits" minus only "chargebacks/returns," "reversals," and "refunds")).

[2] The Commission has also forfeited any opportunity to introduce additional evidence that might be directed to a demand for some judgment less than all of the defendant businesses' gross receipts. Discovery closed almost three years ago. *See* ECF No. 260 (order concerning discovery). But the FTC has not made any request to re-open discovery, most likely because such a motion should properly be denied. *See City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017) (discussing standard for re-opening discovery). Thus, if it were to respond with new evidence or argument in its reply, it would be unfair for this Court to consider it. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (Litigants may not "submit 'new' evidence in their reply without affording plaintiffs an opportunity to respond. Such a result would be unfair."); *Herrera v. Asuncion*, 17-cv-8276, 2018 WL 1768272, at *9 (C.D. Cal. Mar. 7, 2018), *report and recommendation adopted by* 2018 WL 1773112 (C.D. Cal. Apr. 10, 2018) ("Generally, a petitioner may not raise new grounds for relief in a reply or traverse that were not raised in the petition, since doing so deprives the respondent of an opportunity to address those new grounds.").

Worse, the FTC insists *it* should receive a windfall, instead of harmed consumers. After all, it has already been paid nearly $1 million, which has not been returned and wants nearly $11 million more. *See* ECF No. 368 at 2; ECF No. 391 at 7–8. That money doesn't belong to the agency though, and "indirect redress" payable to the Commission is also specifically prohibited. *See Figgie*, 994 F.2d at 607.[3]

The Commission's contrary argument that it is entitled to "the amount of money paid by consumers, less refunds made," is supported by a misleading set of arguments founded on overruled precedent. *See* ECF No. 391 at 7 (citing *OMICS Grp.*, 374 F. Supp. 3d at 1014–15; *Commerce Planet*, 815 F.3d at 603). In fact, the FTC only makes passing reference to *Figgie*, but rather than acknowledge *any* of the limits already discussed, it insists that the agency "does not need to show proof of individual reliance by each purchasing customer to obtain a monetary judgment." *Id.* at 6. It also asserts, quite wrongly, that "the court need not take into account any purported value of Defendants' services[.]" *Id.* at 7.

Start with the FTC's argument that it is entitled to gross receipts. To be sure, the two cases the agency cites, *Commerce Planet*, 815 F.3d at 603, and *OMICS Grp.*, 374 F. Supp. 3d at 1014–15, do support that proposition. However, both were cases discussing *only* Section 13. *See id.* And both were unequivocally overruled by the Supreme Court in *AMG Capital*, 141 S. Ct. at 1344. When the Ninth Circuit remanded *this case* in light of *AMG*, it obviously also recognized what the Commission seems not to—Section 13(b) is not a source of monetary penalties.

The Commission's discussion of *Figgie* is equally problematic. The Commission is correct that *Figgie* concluded that the FTC lacked the obligation to prove that each identified customer have actually been induced by misrepresentations before they are entitled to refunds. *See Figgie*, 994 F.2d at 605–06. But that doesn't answer the question facing this Court. Assuming that every *identified* customer is presumed to have paid the defendant businesses for services based on unlawful representations, the *Figgie* court also required Section 19 relief to be limited to the amount

[3] The FTC could conceivably respond that it also intends to pay customers out of this award, in a manner and amount the agency deems appropriate down the road. But the FTC tried that argument already, and the Ninth Circuit rejected it. Under Section 19, any redress must go directly to consumers, *not* the agency. *See Figgie*, 994 F.2d at 607.

actually paid by unsatisfied customers who requested refunds, made payable to *the customers* themselves. *See id.* The Commission conveniently forgets these other limitations.

Finally, the FTC's suggestion that it has *no* burden of proof concerning redress, and, instead, the Hanleys must disprove the presumption that all of their gross receipts are fair game, turns basic law on its head. *See* ECF No. 391 at 6. As one court recently concluded, "there is no merit to the FTC's contention that the Individual Defendants 'must bear the burden of proving which [products] were sent.'" *Noland*, 2021 WL 5493443, at *4. It is "one of the most basic propositions of law … that the plaintiff bears the burden of proving his case, including the amount of damages." *Faria v. M/V Louise*, 945 F.2d 1142, 1143 (9th Cir. 1991); *see also Tourgeman v. Collins Fin. Servs., Inc.*, 197 F. Supp. 3d 1222, 1225 (S.D. Cal. 2016) ("[I]t is one of the most basic propositions of law that the plaintiff bears the burden of proving his case, including the amount of damages."), *aff'd sub nom. Tourgeman v. Nelson & Kennard*, 900 F.3d 1105 (9th Cir. 2018). And where, as here, "[t]he FTC is the plaintiff in th[e] action and has chosen to affirmatively move for summary judgment on the issue of damages," it "'must affirmatively put forth evidence that would satisfy its proof burden at trial. If the moving party fails to identify and document facts that would support a finding for that party at trial, then the motion must fail.'" *Noland*, 2021 WL 5493443, at *4 (quoting 2 Gensler, Federal Rules of Civil Procedure, *Rules and Commentary*, Rule 56, at 162 (2021)). "[A]ny uncertainty over" facts supporting "the FTC's damages calculation" "must be resolved against the FTC." *Id.* That was why, of course, the court in *Figgie* did not order damages for every product sold, but allowed only a *claim* for a refund for all products, since "[n]ot all the receipts …need be the result of deceptive practices, because [the products] had value, might reasonably have been purchased by some consumers, and [] some of the claims made for them in the promotional materials were true." 994 F.2d at 605.

"The FTC's burden-flipping approach is also problematic because a receiver was appointed at the outset of this case, at the FTC's request, to assume control over [the defendant businesses] and related entities. Thus, the Individual Defendants no longer have first-hand access to [the companies'] records." *Noland*, 2021 WL 5493443, at *4 n.1. All of the evidence that goes to the FTC's claim that the various customers suffered some losses has been in its own or the receiver's

possession this whole time. But the receivership is now over, and the records have not been returned to the Hanleys. *See* Attachment A, Decl. of Jonathan Hanley. Moreover, as Mr. Hanley has attested in an attached declaration, many of the relevant records appear to be lost based on the receiver's error in preserving relevant business emails. *See id*. Summary judgment should not be issued for the Commission in the requested amount when *it* has deprived the Hanleys of any opportunity to present evidence to dispute the damage calculation. *See* Fed. R. Civ. P. 56(d) ("When Facts Are Unavailable to the Nonmovant").

This Court should not accept the FTC's invitation to defy binding precedent. Because the agency has made no effort to identify harmed consumers, and, worse, demands that *it* be paid *instead* of consumers, the Court should deny the agency's request entirely. Moreover, because the Hanleys have already paid nearly $1 million directly to the agency, and almost $280,000 in fees to the receiver, neither of which related to direct consumer redress, this Court should direct the parties to return those funds to the Hanleys immediately.

**C. The Text of Section 19 Compelled the Ninth Circuit's Holding in *Figgie***

Not that this Court needs to engage in this exercise, it is, in any event, obligated to follow *Figgie's* holding, but that decision was also undeniably correct concerning Section 19's text.

As in any case involving statutory interpretation, the text must guide the court. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). (the "cardinal canon before all others" is the plain text). Statutory language must be read "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski v. United States*, 573 U.S. 169, 178 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)).

And here, the text is clear: Courts have "jurisdiction" to enter relief only to "redress injury to consumers." 15 U.S.C. § 57b(b).

The term "redress" is well-known to the law. It has two forms, "penal" and "restitutionary," with the latter being defined as "[m]oney paid to one who has been injured, the amount being the pecuniary value of the benefit to the wrongdoer." Black's Law Dictionary, *Redress* (11th ed. 2019). *Penal* redress, on the other hand, requires "full compensation . . . for the full value of the loss (an amount that may far exceed the wrongdoer's benefit)" "as an instrument for *punishing* the

offender." *Id.* (emphasis added). Because Section 19 is limited to "redress" without "the imposition of any exemplary or punitive damages," it unmistakably permits only restitutionary redress "to make consumers whole." *Resident Home, LLC*, 86 Fed. Reg. at 58283 (Dissenting Statement of Commissioners Phillips and Wilson).

Full equitable jurisdiction would go beyond this purpose because certain equitable remedies do not focus on consumer redress. *See Bronson*, 654 F.3d at 373 (explaining that FTC need not return money to customers in Section 13 action pre-*AMG*). Had Congress intended for the FTC to have a full range of equitable tools, it "could just have said so." *Kloeckner v. Solis*, 568 U.S. 41, 52 (2012); *Liu v. SEC*, 140 S. Ct. 1936 (2020). Congress did not.

And so the statute limits the FTC's reach to something short of the outer bounds of equitable relief. A court may order things like "the refund of money," or the "return of property," or "the payment of damages." 15 U.S.C. § 57b(b). But whatever the remedy, it must "redress" the "injury to consumers."

The Supreme Court's recent treatment of statutes granting even broader equitable powers confirms the point. In *Liu*, the law allowed the SEC to obtain "any equitable relief that may be appropriate or necessary for the benefit of investors"—power far beyond Section 19's "redress" standard here. 140 S. Ct. at 1940. Yet even that language prohibited the SEC from going beyond ill-gotten gains. *Id.* at 1943. Nor did "equitable relief" justify SEC disgorgement practices. Courts had "test[ed]" the statute's reach by "ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims." *Id.* at 1946.

The same SEC statute required that relief be "for the benefit of investors." But the Supreme Court highlighted a problem: The SEC did "not always return the entirety of disgorgement proceeds to investors" and instead "deposit[ed] a portion of its collections in a fund in the Treasury." *Id.* at 1947. That was "in considerable tension with equity practices." *Id.* at 1946. Thus, the Court said the law "requires the SEC to *return a defendant's gains* to wronged investors," because "no analogous common-law remedy permitting a wrongdoer's profits to be withheld from a victim indefinitely without being distributed to known victims." *Id.* at 1948. Thus, not even full "equitable relief" could reach the scope of *penal* redress. *See* Black's Law Dictionary, *Redress* (11th ed. 2019).

Just so here. Or more so here. Section 19 imposes limits beyond those in Section 78u(d)(5). *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (noting that Section 19 "expressly limits a court's equitable jurisdiction."). Instead of giving full "equitable relief" that be "for the benefit of investors," the FTC Act says the relief must "redress injury to consumers." Full stop. So while the SEC Act might allow relief that "benefits" investors, even if it is not direct payment—such as using money to pay whistleblowers, *see Liu*, 140 S. Ct. at 1947—Section 19 does no such thing. It is clear: Only redress is permitted.

And redress "must mean something more than depriving a wrongdoer of his net profit," or it would be "meaningless." *Liu*, 140 S. Ct. at 1948.

Furthermore, the statute prohibits the award of "exemplary or punitive damages." *See* 15 U.S.C. § 57b(b).

The Supreme Court has already told us that similar disgorgement-type remedies amount to penalties. *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017). When the disgorgement goes beyond "return[ing] the defendant to the place he would have occupied had he not broken the law," then the fine has punitive features. *Id.* Indeed, "[d]enial of" a deduction of costs "by making the defendant liable in excess of net gains, results in a punitive sanction." *Id.* at 1644–45 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment h, at 216); *see Liu*, 140 S. Ct. at 1941 (disgorgement and equity "never 'lends its aid to enforce a forfeiture or penalty.'" (quoting *Marshall v. Vicksburg*, 15 Wal. 146, 149 (1873)).

Thus "to avoid transforming an equitable remedy into a punitive sanction, courts" historically "restricted the remedy to an individual wrongdoer's net profits to be awarded for victims." *Liu*, 140 S. Ct. at 1942. Anything beyond that would run afoul of the rule that the "wrongdoer should not be punished." *Id.* at 1943.

FTC's request here goes far beyond the statutory limits. It far exceeds net profit and veers into exemplary or punitive territory. It also seeks to keep the funds, instead of giving them directly to harmed consumers. The FTC seeks simply to take everything the defendants earned during the relevant periods, and without pointing to any direct losses from consumers. *See* ECF No. 391 at 7–8.

The FTC's request is thus a repeat of both the inequitable practices in *Liu* and the punitive disgorgement in *Kokesh*. As there, the relief would be "imposed by the courts as a consequence for violating . . . public laws." *Kokesh*, 137 S. Ct. at 1643. It would be "ordered without consideration of a defendant's expenses that reduced the amount of illegal profit," which means it "does not simply restore the state quo [but] leaves the defendant worse off." *Id.* at 1644–45. And it is "not compensatory" since "funds are dispersed to the United States Treasury." *Id.* at 1644; *see also Liu*, 140 S. Ct. at 1949–50 (disgorgement cannot exceed the gains made by a business "when both the receipts and payments are taken into account." (internal quote omitted)). That is, as the *Kokesh* court explained, punitive. And Section 19 doesn't allow it.

The FTC's demand is, indeed, the very definition of "penal." *See* Black's Law Dictionary, *Penal Redress* ("full compensation of the injured person as an instrument for punishing the offender," and the amount "may far exceed the wrongdoer's benefit."). And because Section 19 prohibits "exemplary or punitive damages," this Court must reject the FTC's demand.

## CONCLUSION

Between defying binding precedent, and failing to engage with statutory limits on its power, the FTC apparently believes in this case that it can do whatever it wants. That is not so. Rules apply to the FTC just as they do to any other litigant. This Court should not permit such behavior. It should reject the FTC's demand for payment entirely, and instead direct the return of the funds already paid to the agency.

DATED: April 5, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEVADA**

| | |
|---|---|
| FEDERAL TRADE COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>CONSUMER DEFENSE, LLC, *et. al.,*<br><br>Defendants. | **CASE NO. 2:18-CV-00030-JCM-BNW**<br><br>**DECLARATION OF JONATHAN HANLEY** |

I, Jonathan Hanley, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am a defendant in this matter and have personal knowledge of the facts set out in this declaration.
2. Prior to January 10, 2018, I had an interest and/or control in the business entities subject to this litigation, *i.e.*, Consumer Defense LLC (Nevada), Consumer Link, Inc., Preferred Law, PLLC, American Home Loan Counselors, American Home Loans, LLC, Consumer Defense Group, LLC, Consumer Defense LLC (Utah), Brown Legal, Inc., AM Property Management, LLC, FMG Partners, LLC, and Zinly, LLC.
3. On January 10, 2018, this Court issued a temporary restraining order and appointed a receiver concerning those businesses.
4. Since that time, I have not had any direct access to the business records of those entities.
5. The records have instead been held by the receiver and/or the plaintiff, the Federal Trade Commission.
6. Also since January 10, 2018, the businesses have all ceased operation.
7. I learned in December 2018 that the receiver had failed to preserve relevant email records concerning the domains @americanhomeloans.com, @preferredlawteam.com, @consumerdefense.com, and @consumerlink.com, which related to several of the defendant businesses.
8. The receiver had access to these domains, and the email records of approximately 100 employees of the defendant businesses when it took over operation of the businesses.

9. However, I learned from the receiver's counsel that the email records associated with these businesses were not retained because the receiver failed to pay hosting fees during the receivership.

10. I was not able to recover those emails from either the receiver or the FTC during the discovery period.

11. Upon information and belief, the email records that were not preserved relate to customer records and records of which customers received services from the relevant businesses.

Dated: April 4, 2022

Jonathan Hanley

Jonathan Hanley