10-878

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff - Appellee,
v.

BRONSON PARTNERS, LLC, d/b/a NEW ENGLAND DIET CENTER;
MARTIN HOWARD; H&H MARKETING, LLC;
and SANDRA HOWARD
Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

FINAL BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DeMILLE-WAGMAN
Assistant General Counsel for Litigation
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2448

OF COUNSEL:
ROBIN E. EICHEN
NUR-UL-HAQ

Federal Trade Commission
New York, NY

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JURISDICTION

The Federal Trade Commission ("Commission" or "FTC"), an agency of the United States government, initiated this action in the United States District Court for the District of Connecticut seeking relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), for deceptive acts or practices that violated Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52. The district court's jurisdiction over this matter derived from 28 U.S.C. §§ 1331, 1337(a), and 1345; and from 15 U.S.C. § 53(b).

This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, to review the district court's Judgment, which is final and was entered on January 6, 2010.

The appellants filed their Notice of Appeal on March 5, 2010, and that notice was timely, pursuant to Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES PRESENTED

1) Whether, in an action brought by the Commission pursuant to Section 13(b) of the FTC Act, the district court has the authority to order a defendant that has engaged in unfair or deceptive acts or practices to pay monetary equitable relief.

2) Whether the district court correctly ordered appellants to pay $1,942,325 in monetary equitable relief, where that is the amount that appellants received as a result of their deceptive sales of two diet products.

STATEMENT OF THE CASE

A. Nature of the case, the course of proceedings, and the disposition below

In this appeal, defendants Bronson Partners, LLC, d/b/a New England Diet Center; Martin Howard; and H&H Marketing, LLC, (these defendants are henceforth referred to as "Bronson Partners") challenge the January 2010 Judgment that required them to pay $1,942,325 in restitution as a result of their deceptive marketing of two diet products.[1] The Commission initiated the underlying action in November 2004. In its Amended Complaint, the Commission alleged that Bronson Partners had violated Sections 5 and 12 of the FTC Act,[2] through its advertising and marketing of two diet products, Chinese Diet Tea, and the Bio-Slim Patch. D.52 (A.41).[3] According to the Amended Complaint, Bronson Partners' advertising claimed that the products would cause rapid and substantial weight loss without the need to diet or exercise. *Id.* (A.48, 50). The Amended Complaint alleged that these claims were false and unsubstantiated. *Id.* (A.49-51). The Commission sought both injunctive

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[1] Relief defendant Sandra Howard has also joined in the Notice of Appeal filed by Bronson Partners. However, the district court did not enter any relief against her. D.219 at 26-27.

[2] Section 5 of the FTC Act prohibits, *inter alia*, unfair or deceptive acts or practices, and Section 12 makes it unlawful to disseminate any false advertisement for any food, drug, device, service, or cosmetic.

[3] Items in the district court's docket are referred to as "D.xx." Items in the Appendix are referred to as "A.xx."

relief and monetary equitable relief.

On July 10, 2008, the district court granted the Commission's motion for summary judgment with respect to the merits of all four counts of its Amended Complaint, concluding that Bronson Partners' advertising for Chinese Diet Tea and the Bio-Slim Patch was false and deceptive. D.147 (A.59). On June 2, 2009, the court held a hearing with respect to relief, and it found that Bronson Partners' revenues from its sales of Chinese Diet Tea and the Bio-Slim Patch amounted to $1,942,325. On December 29, 2009, the court entered a Permanent Injunction, in which, *inter alia*, it enjoined Bronson Partners from making the sorts of claims challenged in the Commission's Amended Complaint, and from making any false or misleading claim in connection with the marketing of any weight-loss product. D.220 (A.166). On January 5, 2010, it entered a Judgment, in which it ordered Bronson Partners to pay $1,942,325 in monetary equitable relief to the Commission. D.221 (A.267).

In this appeal, Bronson Partners does not challenge the district court's conclusion that its advertising was deceptive, or that the advertising violated Sections 5 and 12 of the FTC Act. Nor does it challenge the injunctive relief entered by the court. Instead, it seeks review only of the court's legal authority to impose the monetary equitable relief that it included its Judgment.

B. Facts and proceedings below

1. Background

Defendant Bronson Partners, LLC, sells, *inter alia*, various dietary supplements. D.100 at 2. It is wholly owned by Defendant Martin Howard, and his wife, relief defendant Sandra Howard. *Id.* at 2, 5.[4] In 2003, Bronson Partners began to market two diet products -- Chinese Diet Tea ("Diet Tea"), and the Bio-Slim Patch. *Id.* at 6, 9, 23. Chinese Diet Tea is an herbal tea that contains green tea. *Id.* at 7. Bronson Partners marketed Diet Tea through advertisements that it placed in magazines with national circulation. *Id.* at 6. Bronson Partners' advertising for Diet Tea included, *inter alia*, the following claims:

> Let this powerful Chinese Green Diet Tea help you lose those unwanted pounds. Can you imagine losing weight by simply drinking a cup of refreshing tea? Well, that is all you now have to do to lose weight with one of the "easiest" and most effective diets ever discovered. * * * Clinical trials have shown by drinking a cup of Chinese Green Diet Tea your body will absorb less sugar and animal fats. Participants on Chinese Green Diet Tea clinical trials carried on eating a normal healthy measure of sugar and fats -- but they still lost weight. * * * Researchers found that those who drank Chinese Diet Green Tea burned an additional 500 calories per week, with no change in diet or physical activity!

Id. at 8. Consumers purchased Diet Tea directly from Bronson Partners either by mail or by calling a toll-free number. *Id.* at 7. A month's supply of Diet Tea cost

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[4] Defendant H&H Marketing was initially named as a relief defendant because it served as a receptacle for profits generated by Bronson Partners. D.100 at 5. The court subsequently granted the Commission's motion to name H&H as a full defendant. D.219 at 25 (A.160).

consumers $24.95 (plus shipping and handling), and in 2003 and 2004, Bronson Partners' gross revenue from the sale of Diet Tea amounted to $2,002,494.18. *Id.* at 7.

In 2003 and 2004, Bronson Partners also marketed a diet product called the Bio-Slim Patch ("Patch"). *Id.* at 10, 23. The Patch is a disposable adhesive patch that has been impregnated with three dietary supplements: fucus, garcinia, and guarana.[5] *Id.* at 9. Bronson Partners marketed the Patch through, *inter alia*, advertisements included in a catalog that it sent to its customers. *Id.* at 10. The advertisements advised users to "[s]imply wear the patch on your skin," and that "[w]ith this newly improved weight loss discovery * * * [y]ou may lose weight faster and easier than ever before!" The advertising further claimed that:

> Repulsive, excess ugly fatty tissue will disappear at a spectacular rate due to the combination and synergy of these three natural ingredients: Fucus, Garcinia and Guarana, working in combination with one another. * * * The Bio-Slim Patch is not a boring diet. It doesn't require back-breaking exercise. * * * And you continue to eat your favorite foods. There isn't an easier way to possibly lose weight. You carry on with your normal life style, eat a balanced diet, drink water and lose weight.

Id. at 10-11. Just like Diet Tea, consumers purchased the Patch directly from Bronson Partners by mail or by telephone. *Id.* at 10. Bronson Partners advised users to wear each Patch for one day, and a one-month supply of the Patch cost consumers $24.95 (plus shipping and handling). *Id.* In 2003 and 2004, Bronson Partners' revenue from

[5] Fucus is derived from seaweed, garcinia is extracted from starfruit, and guarana is derived from the fruit of a plant native to the Amazon jungle. *See* D.4, Exhibit 1, Declaration of Commission expert Edward Blonz at 15.

sales of the Patch totaled $69,762.90. *Id.* at 23.

2. Proceedings below

The Commission filed its complaint on November 4, 2004, and its Amended Complaint on June 13, 2005. The Amended Complaint had four counts. D.52 (A.41). Count 1 alleged that Bronson Partners' advertising falsely claimed that Diet Tea could cause rapid and substantial weight loss (up to six pounds per week for multiple weeks), that it was clinically proven to do so, and that it could do so even as users continued to eat their favorite foods. Count 2 alleged that Bronson Partners lacked a reasonable basis for its claims that Diet Tea could cause rapid and substantial weight loss, and could do so even as users continued to eat their favorite foods. Count 3 alleged that Bronson Partners had falsely claimed in its advertising that the Patch could cause rapid and substantial weight loss, and could do so without the need to restrict food intake or increase exercise. Count 4 alleged that Bronson Partners also lacked a reasonable basis with respect to the claims challenged in Count 3.

On July 10, 2008, the court (per Judge Stefan R. Underhill) granted in part the Commission's Motion for Summary Judgment. *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119 (D. Conn. 2008) (D.147, A.59). The court held that there was no genuine issue that, in its advertising, Bronson Partners had made the claims

challenged in the Commission's complaint.[6] *Id.* at 128-132 (A.71-78). The court then held that, based on the declaration of the Commission's expert, Edward Blonz, a Ph.D. in nutrition science, those claims were both false and unsupported.[7] *Id.* at 134-135 (A.82-83). The court also held that the claims challenged in the Commission's complaint were material. *Id.* at 135-136 (A.83-85).

The court next determined that defendant Martin Howard was personally liable for Bronson Partners' violations. *Id.* at 136 (A.85). In particular, the court held that, "[b]ecause Howard was responsible for the text and dissemination of the advertisements, and because he failed to engage in any meaningful investigation of such bold claims, he is personally liable for Bronson's false advertising." However, the court did not resolve the liability of the two relief defendants (H&H Marketing, and Sandra Howard), *id.* at 136-137 (A.86), and it did not address relief.

On June 2, 2009, the court conducted a hearing and received evidence with

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[6] In its Opposition to the Commission's Motion for Summary Judgment, Bronson Partners conceded liability with respect to the two counts of the Commission's Complaint that related to the Patch. *See FTC v. Bronson Partners*, 674 F. Supp. 2d at 378 n.1 (A.136). Accordingly, the court's ruling on the Commission's Motion for Summary Judgment addressed only the claims based on the Diet Tea advertising.

[7] In reaching this holding, the court carefully considered the declaration of Bronson Partners' expert, Hasan Mukhtar. 564 F. Supp. 2d at 132-134 (A.78-82). The court held that Dr. Mukhtar's declaration did not create a genuine issue of material fact because Dr. Mukhtar never addressed the advertising claims that were challenged in the Commission's complaint. *Id.* at 133 (A.80).

respect to the appropriate relief and the liability of the relief defendants. D.213-D.215. On December 4, 2009, the court issued its Ruling and Order addressing these remaining issues. *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373 (D. Conn. 2009) (D.219, (A.136). Citing this Court's decision in *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006), the district court held that "equitable restitution is the appropriate remedy when funds identified as belonging in good conscience to the consumer are traceable to funds in the defendants' possession," and that this was an appropriate remedy in this case. 674 F. Supp. 2d at 379 (A.138-39). The court then held that this remedy "is measured by a defendant's unjust gain." *Id.* at 380 (A.140). The court found that there was no evidence that any of Bronson Partners' gains from the sale of Chinese Diet Tea and the Bio-Slim Patch were lawful gains. *Id* (A.141).

The court next calculated the proper amount of restitution by applying the "two-step burden-shifting framework" described by this Court in *Verity*. First, the court found that the restitutionary baseline equaled $1,942,325. *Id.* at 380-382 (A.141-42). The court calculated this baseline by determining the amount received by Bronson Partners from sales of the Diet Tea and the Patch, and subtracting the amount of refunds that Bronson Partners had given to consumers who purchased those products. The court rejected Bronson Partners' contention that this amount should be reduced to compensate for bounced checks and credit card chargebacks because Bronson Partners could not provide any evidence tracing any of the bounced checks or

chargebacks to sales of Diet Tea or the Patch. *Id.* at 381-382 (A.142-44).

The court next performed the second step of the calculation: it considered whether there were any offsets that should reduce Bronson Partners' restitutionary obligation. *Id.* at 382-389 (A.144-57). Bronson Partners argued that any award of restitution should be reduced by its operating costs (including advertising, credit card fees, fulfillment, and taxes). The court rejected this argument because Bronson Partners was a direct seller -- it "received all of the consumer dollars spent on sales of Diet Tea and the Patch." *Id.* at 384-385 (A.149). Thus, costs incurred by Bronson in making those deceptive sales "'will not be passed on to the victims.'" *Id.* at 385, citing *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999) (A.150).

The court next held that H&H Marketing was the alter ego of Martin Howard. Thus, it granted the Commission's motion to designate H&H as a full defendant. *Id.* at 391 (A.160). The court then held that, because all three defendants (Martin Howard, Bronson Partners, and H&H) had collaborated in the deceptive marketing, it would hold them jointly and severally liable for restitution in the amount of $1,942,325. *Id.* at 392 (A.161). However, it held that Sandra Howard had a legitimate claim to the amounts that she had received from defendants ($88,500). Thus, the court refused to hold her liable as a relief defendant. *Id.* (A.162). Finally, the court held that injunctive relief was necessary because, even though Bronson Partners had ceased selling Diet Tea and the Patch, it had given no indication that it

would not resume similar practices in the future. *Id.* at 393 (A.164).

On December 29, 2009, the court entered its Permanent Injunction Order. D.220 (A.166). It enjoined Bronson Partners, *inter alia*, from making any misrepresentation in connection with the marketing of a weight loss product, including representing that such product could cause rapid or substantial weight loss without the need to reduce food intake or increase physical activity. The court also enjoined Bronson Partners from representing that Diet Tea, the Patch, or any ingredient in either product could cause any amount of weight loss.

The court entered its final judgment in this matter on January 5, 2010. D.221 (A.267).

STANDARD OF REVIEW

The only issues raised by Bronson Partners' appeal are issues of law: whether the district court lacked authority to award equitable restitution, and whether the court was required to limit any monetary award either to specific funds that could be traced, or to net profits. Such issues of law are reviewed by this Court *de novo*. *Miranda v. Bennett*, 322 F.3d 171, 175 (2d Cir. 2003).

SUMMARY OF ARGUMENT

In this appeal, Bronson Partners does not dispute that its advertisements for Diet Tea and the Patch were deceptive. Nor does it dispute that it caused more than $1.9 million of injury to consumers who purchased the two products in response to the

deceptive advertising. Instead, it urges this Court to hold, contrary to the decisions of six other circuits courts, that, when the Commission brings an action in district court to combat deceptive conduct, the court lacks authority to award monetary equitable relief on behalf of those injured consumers. In fact, however, that authority comes from Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), pursuant to which the Commission brought this action. Section 13(b) authorizes a court to award permanent injunctive relief. In *Porter v. Warner*, 328 U.S. 395 (1946), the Supreme Court explained that, once a district court's equitable jurisdiction has been invoked, the court may use the full range of its equitable powers to provide complete relief. The Court also explained that, when an action is brought in the public interest, those equitable powers should be broadly construed. Because the Commission has invoked the court's equitable jurisdiction under a statute affording remedies in the public interest, the district court has ample authority to award monetary equitable relief. Although Bronson Partners contends that Section 19 of the FTC Act, 15 U.S.C. § 57b, somehow limits the district court's authority in this case, in fact, that section enhances the Commission's authority to pursue those who violate its rules or who are subject to its cease and desist orders, but imposes no limit on actions brought pursuant to Section 13(b). (Part I, *infra*.)

Bronson Partners next tries to avoid monetary liability by arguing that, even if the court does have authority to award such relief, any such award must be limited

either to funds that can be traced, or net profits from sales of Diet Tea and the Patch. It claims that no funds can be traced, and that it had no net profits, resulting, not surprisingly, in what it contends is a maximum monetary liability of zero. Plainly, if the district court were so constrained, this would be directly at odds with *Porter v. Warner*, because the court would lack authority to provide complete relief. Nor does *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), a case that turned on the particular provisions of a statute that has no application here, impose any such limit. Although in *FTC v. Verity*, *supra*, this Court relied on *Great-West*, it did so only because of a fact pattern common to both of those cases (but not present here): in *Verity* and *Great-West*, the defendant's monetary liability was limited because the plaintiff was attempting to recover funds that the defendant had never received. Here, injured consumers made payments directly to Bronson Partners, *i.e.*, Bronson Partners did receive the amount that the district court required it to disgorge. Because the district court's award was based on Bronson Partners' unlawful gain, that award is fully justified. (Part II.A, *infra*.)

Nor do any of the cases cited by Bronson Partners mandate that a monetary award be limited to traced funds or net profits. With respect to tracing, Bronson Partners relies primarily on a bankruptcy case. But that case is irrelevant because this Court has made clear that, in the context of a bankruptcy, a court must exercise caution when imposing equitable remedies to avoid any conflict with the goals of the

Bankruptcy Code. No such conflict arises in this case. With respect to its net profits argument, Bronson Partners relies primarily on cases that arose in completely different contexts, including private contract litigation, and private actions challenging trademark infringement. Bronson Partners also cites several agency cases, but the cases it cites merely establish that, in an action such as this one, the court has discretion with respect to any award of monetary relief. Consumers paid $1.9 million for Diet Tea and the Patch in response to Bronson Partners's deceptive advertising, and those consumers paid that amount directly to Bronson Partners. Accordingly, the district court acted well within its statutory authority, and did not abuse its discretion, when it imposed $1.9 million in monetary equitable relief on Bronson Partners.

ARGUMENT

I. SECTION 13(b) OF THE FTC ACT PROVIDES THE DISTRICT COURT WITH AUTHORITY TO AWARD MONETARY EQUITABLE RELIEF

When, as here, the Commission brings an action pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and establishes that a defendant has violated the FTC Act (*i.e.*, has committed an unfair or deceptive act or practice), the court has authority to grant not just injunctive relief, but also monetary equitable relief. Indeed, the six courts of appeals that have addressed the issue have all agreed that Section 13(b) gives a district court this authority. *See*, *e.g.*, *FTC v. Direct Marketing Concepts, Inc.*, ___ F.3d ___, 2010 WL 4118643 (1st Cir. Oct. 21, 2010); *FTC v. Amy Travel Service,*

Inc., 875 F.2d 564, 571 (7th Cir. 1989); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Pantron I Corp*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468 (11th Cir. 1996). And district courts in all the other circuits have reached the same conclusion. *See*, *e.g.*, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 37 (D.D.C. 1999); *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 323-24 (S.D.N.Y. 2008); *In re Nat'l Credit Mgmt. Gp., LLC*, 21 F. Supp. 2d 424, 462 (D.N.J. 1998); *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008); *FTC v. Solar Michigan, Inc.*, 1988-2 Trade Cas. (CCH) ¶ 68,339, p. 59,915-16 (E.D. Mich. 1988). Further, we are unaware of any case that holds, as Bronson Partners would urge this Court to hold, that, in an action under Section 13(b), the Commission lacks the authority to obtain monetary equitable relief. Although this Court pretermitted this issue in *FTC v. Verity*, 443 F.3d at 66, it should now expressly recognize the availability of such relief.

Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." The Supreme Court has explained that, when a statute authorizes a court to enter a permanent injunction, Congress has thereby invoked the court's equitable jurisdiction. *Porter v. Warner Holding Co.*, 328 U.S. at 398. Moreover, once this equitable jurisdiction has been

invoked, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Id.* The Court also stressed that, when an agency has taken action in the public interest, "those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* Here, of course, the Commission is acting on behalf of the public, and the full range of the court's equitable powers are accordingly invoked.

Although courts that interpret Section 13(b) frequently rely on the Supreme Court's decision in *Porter v. Warner*, *see*, *e.g.*, *FTC v. Security Rare Coin*, *supra*; *FTC v. Gem Merchandising*, *supra*; *FTC v. Mylan*, *supra*; *FTC v. Ameridebt*, *supra*, Bronson Partners contends that they have all done so in error. *See* Brief for Defendants-Appellants ("Br.") at 19-20. In fact, it twice refers to those decisions as "largely unreasoned." Br. at 12, 21. But it is Bronson Partners, not the courts, whose argument lacks reason.

In *Porter v. Warner*, the Court interpreted the enforcement provision of the Emergency Price Control Act of 1942. The Price Control Act provided that the Administrator of the Office of Price Administration could take action against landlords who charged rent in excess of amounts permitted by the statute. In particular, the statute provided that, if the Administrator believed the law was being violated, he could initiate an action in court:

> for an order enjoining such acts or practices, or an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

328 U.S. at 397.

The Court held that the statute authorized the Administrator to obtain not just injunctive relief, but also an order requiring a landlord to disgorge overcharges that it had collected in violation of the statute. The Court provided two independent reasons for its conclusion. First, it held that an order requiring disgorgement of overcharges:

> may be considered an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. * * * [W]here, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law.

Id. at 399. That is, the authority to require disgorgement of overcharges is inherent in the grant of authority to enter an injunction prohibiting the collection of such charges.

Bronson Partners attempts to distinguish *Porter v. Warner* by misreading it. It notes that, unlike Section 13(b), the Price Control Act provided for the entry not only of injunctions, but also of "other orders." Thus, Bronson Partners suggests, absent the

authority to enter "other orders," the Court would not have held that the Administrator could obtain disgorgement. This argument ignores that the Court provided two independent reasons as to why the Price Control Act authorized monetary relief. Bronson Partners focuses only on the second reason -- that an award of monetary relief could be considered an order "appropriate and necessary to enforce compliance with the Act." But the first portion of the Court's discussion makes clear that monetary relief would be authorized even if the Price Control Act had not provided for entry of other orders. As the Court explained, monetary relief would be justified as an equitable adjunct to an injunction:

> The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes.

Id. at 400 (citation omitted).

Indeed, in *Mitchell v. Robert DeMario Jewelry,* Inc., 361 U.S. 288 (1960), the Supreme Court rejected the reading of *Porter v. Warner* on which Bronson Partners relies. In that case, the Court considered a provision of the Fair Labor Standards Act ("FLSA") that prohibited employers from discriminating against any employee who asserted rights under that Act. The court of appeals had held that, because the FLSA's enforcement provision provided only for injunctive relief, the district court lacked

authority to order back pay to employees who had been wrongfully discharged. The Supreme Court categorically rejected this interpretation. It first quoted those portions of its decision in *Porter v. Warner* in which it emphasized that, when a court is given the authority to enter injunctive relief, "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Id.* at 291, quoting *Porter v. Warner*, 328 U.S. at 398. The Court then rejected the argument on which Bronson Partners relies:

> The applicability of this principle is not to be denied, either because the Court there [*i.e.*, in *Porter v. Warner*] considered a wartime statute, *or because, having set forth the governing inquiry, it went on to find in the language of the statute affirmative confirmation of the power to order reimbursement*.

361 U.S. at 291 (emphasis added). Thus, the Court made absolutely clear that it would have reached the same result in *Porter v. Warner* even if the statute in that case had only provided for entry of injunctive relief.

Even though this Court has never held that Section 13(b) authorizes entry of monetary equitable relief, it has confronted the very same issue in the context of other similar statutes. For example, in *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971), this Court held that, even though the Securities Exchange Act of 1934 did not specifically authorize monetary relief, the court could grant such relief based upon the statutory provision that authorized entry of injunctions. In reaching this decision, this Court cited, *inter alia*, *Porter v. Warner*, and *Mitchell v. Robert*

DeMario Jewelry. Similarly, in *CFTC v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir. 1986), this Court held that the Commodity Exchange Act authorized monetary relief based solely upon a general grant of enforcement authority. *See also ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1184-85 (1st Cir. 1980) (even though the Motor Carrier Act only provided for injunctive relief, this was sufficient to authorize the ICC to seek monetary restitution on behalf of injured shippers). The situation here is no different. Section 13(b) provides for entry of permanent injunctive relief in law enforcement actions brought by the Commission in the public interest. Inherent in this is the authority, exercised in this case by the district court, to award monetary equitable relief.

There is no merit to Bronson Partners' contention that Congress somehow intended to deny courts the authority to award monetary equitable relief in actions brought by the Commission pursuant to Section 13(b). *See* Br. at 20-22. Bronson Partners bases this argument on a comparison of Section 13(b) with Section 19 of the FTC Act, 15 U.S.C. § 57b. *See* Br. at 17-18, 20-22. But, as the Supreme Court explained in *Porter v. Warner*, if a statute grants a court equitable jurisdiction, its authority to grant relief is only limited by "a clear and valid legislative command," 328 U.S. at 398, and Bronson Partners' argument fails to establish any such "clear" limitation.

In fact, Section 19 is irrelevant because it has nothing to do with actions that the

Commission initiates pursuant to Section 13(b). Instead, it applies in two different situations: first, to those who violate certain Commission rules, *see* 15 U.S.C. 57b(a)(1); and second, to the targets of Commission *administrative* litigation, 15 U.S.C. § 57b(a)(2). With respect to those who violate Commission rules,[8] Section 19(a)(1) enhances the Commission's enforcement authority beyond what it would be if the Commission were limited to its enforcement authority under Section 13(b) because it allows the Commission to seek not just injunctive relief and monetary equitable relief, but also damages. Plainly, Section 19 is neither "superfluous," *see* Br. at 18, 21, nor a "nullity," *see* Br. at 20.

With respect to the targets of the Commission's administrative litigation, Section 19 also enhances the Commission's enforcement authority. As explained above, pursuant to Section 13(b) of the FTC Act, the Commission may challenge law violations directly in court. But pursuant to Section 5 of the FTC Act, the

[8] Section 18(a)(1)(B) of the FTC Act, 15 U.S.C. § 57a(a)(1)(B), authorizes the Commission to promulgate rules that define with specificity acts which are unfair or deceptive. In addition, several other statutes authorize the Commission to promulgate substantive rules that may be enforced pursuant to Section 19. *See*, *e.g.*, 15 U.S.C. § 6102 (authorizing the Commission to promulgate rules implementing the Telemarketing Act, and providing that such rules may be enforced pursuant to Section 19); 15 U.S.C. § 6502 (authorizing the Commission to promulgate regulations implementing the Children's Online Privacy Protection Act, and providing for enforcement pursuant to Section 19).

Commission may also pursue law violations administratively.[9] In an administrative proceeding, the Commission issues an administrative complaint, leading to an administrative trial conducted pursuant to procedures set forth in Part 3 of the Commission's Rules of Practices. 16 C.F.R. Part 3. Cases such as *Porter v. Warner*, which hold that statutes such as Section 13(b) invoke a court's inherent equitable authority, are irrelevant to the Commission's administrative proceedings because, unlike federal courts, administrative agencies do not have inherent equitable authority. And, as Bronson Partners correctly notes, in *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974), the Ninth Circuit held that, when the Commission pursues an unlawful practice administratively, its cease and desist order may not require the wrongdoer to disgorge ill-gotten gains.

In response, within a year of the *Heater* decision, Congress added Section 19 to the FTC Act, so that, in certain situations, the Commission may obtain monetary relief with respect to conduct challenged in its administrative proceedings. In particular, Section 19(a)(2) provides that, after entering an administrative cease and desist order against a violator, the Commission may initiate an action in court, and if the Commission shows that the conduct that led to entry of the cease and desist order was also dishonest or fraudulent, the court may impose monetary equitable relief and

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[9] The Commission often chooses administrative enforcement when cases involve particularly complex factual situations, or raise issues of first impression involving any of the statutes enforced by the Commission.

damages.

Thus, Section 19 was enacted to enhance the Commission's authority against rule violators and targets of administrative proceedings. But there is no indication that Congress intended Section 19 to limit the pre-existing authority of the Commission -- and of the courts -- under Section 13(b). Indeed, Congress specified exactly the opposite, providing that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."[10] Section 19(e), 15 U.S.C. § 57b(e). Plainly,

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[10] Bronson Partners argues that the first sentence in Section 19(e) merely indicates that the remedies available to the Commission in an action brought pursuant to Section 19 are not limited to those specifically set forth in Section 19(b). *See* Br. at 21. But that interpretation of the sentence cannot be correct because Section 19(b) already provides that the remedies listed in that section are not the only ones available to the Commission. Thus, Bronson Partners' interpretation must be wrong because it renders the sentence surplusage. *See Mendis v. Filip*, 554 F.3d 335, 341 (2d Cir. 2009) ("it is 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant,'" quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). Bronson Partners argues that the second sentence merely addresses the Commission's authority, not the authority of a court. *See* Br. at 21. But this interpretation is nothing more than wordplay. Section 19 adds to the remedies that the Commission may obtain against rule violators, or against those who are the subject of litigated Commission cease and desist orders. This second sentence makes clear that, by adding Section 19 to the FTC Act, Congress did not intend to limit other remedies that the Commission could seek against such parties. It makes no sense to suggest, as Bronson Partners does, that Congress did not want to limit the Commission's ability to seek relief for a wrongdoer's conduct, but that, at the same time, Congress did want to limit a court's authority to grant such relief.

Section 19 provides no "clear and valid legislative command" limiting the authority of a court in an action brought pursuant to Section 13(b).

Finally, legislative history makes clear that, in an action brought pursuant to Section 13(b), Congress specifically intended to authorize monetary equitable relief. In 1994, Congress amended the FTC Act, and expanded the venue and service of process provisions of Section 13(b) so that the Commission could bring a single lawsuit against all defendants involved in an illegal transaction, even if they did not all live in the same district. Pub. L. No. 103-312, § 10 (1994). The Senate Report that accompanied the legislation recognized that, pursuant to Section 13(b), "[t]he FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. 103-130, at 15-16 (1993). If Congress had been dissatisfied with the Commission's use of Section 13(b) to obtain consumer redress, it would, presumably, have limited Section 13(b). Instead, it expanded the reach of the section. This provides a clear indication that it is Bronson Partners, not the federal courts, that has misinterpreted Section 13(b).

II. THE DISTRICT COURT CORRECTLY ORDERED BRONSON PARTNERS TO PAY $1.9 MILLION IN MONETARY EQUITABLE RELIEF

Bronson Partners argues that, even if the district court does have authority to award monetary equitable relief, that relief must be limited to specific funds that can be directly traced from injured consumers, or to net profits. According to Bronson

Partners, it has commingled all the money it received from the consumers it deceived, and, as a result, none of those funds can be traced. Also, it claims that its expenses exceeded its ill-gotten gains and that its net profits were zero. Thus, Bronson Partners contends that, in any event, it cannot be required to pay any monetary relief. In fact, the district court's authority is not as limited as Bronson Partners would have this Court believe. As explained above, in an action such as this one, a court may use all its equitable powers to provide complete relief. Bronson Partners suggests that, in *Great-West Life & Annuity Ins. Co. v. Knudson*, *supra*, the Supreme Court somehow confined the district court's authority. In fact, however, as illustrated by this Court's decision in *FTC v. Verity*, *Great-West* is relevant to actions brought by the Commission only in limited factual situations, which are not present in this case. Further, as *Verity* makes clear, a district court has ample authority to base its monetary award on a wrongdoer's unlawful gains, not just traced funds or net profits. Because Bronson Partners received $1.9 million directly from deceived consumers, the district court had ample authority for the monetary relief it awarded.

A. The district court's monetary award is consistent with principles set forth in underlying Supreme Court cases, and with this Court's decision in *FTC v. Verity*

As explained in Part I, *supra*, when the Commission brings an action, pursuant to Section 13(b), to combat deceptive trade practices, the following principles apply: 1) a statute authorizing injunctive relief invokes the court's equitable powers; 2)

because the public interest is involved, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake; and 3) once a court's equitable powers have been invoked in such a case, the court may award complete relief, even including relief that might have been available in a court of law. *Porter v. Warner*, 328 U.S. at 398-399; *Mitchell v. DeMario*, 361 U.S. at 291; *see United States v. Sasso*, 215 F.3d 283, 289 (2d Cir. 2000) (citing *Porter v. Warner*, and *Mitchell v. DeMario*, and holding that the principles in those cases apply when interpreting the remedial provisions of the Racketeer Influenced and Corrupt Organizations Act); *SEC v. Texas Gulf Sulphur*, 446 F.2d at 1307 (applying those principles to the interpretation of the remedial provisions of the Securities Exchange Act of 1934). Thus, the district court has inherent authority to "'give effect to the policy of the legislature,'" *Mitchell v. DeMario*, 361 U.S. at 292, quoting *Clark v. Smith*, 38 U.S. 195, 203 (1839).

Bronson Partners contends that the district court's remedial authority is limited by *Great-West Life*. *See* Br. at 22-24. But Bronson Partners misunderstands the relevance of that case. In *Great-West*, the plaintiff, an insurance company, sought to recover funds from the defendant, a quadriplegic automobile accident victim. Although those funds were held in trust on the defendant's behalf, they had never come into her possession. The plaintiff invoked the private enforcement provisions of the Employee Retirement Income Security Act ("ERISA"), under which

participants, beneficiaries, or fiduciaries of employee benefit plans may sue "(A) to enjoin any act or practice which violates * * * the terms of the plan, or (B) to obtain other appropriate equitable relief * * *." 29 U.S.C. § 1132(a)(3). The Court's interpretation of this provision was guided by its observation that "ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." 534 U.S. at 209 (internal quotation marks and citation omitted). The Court also observed that "ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* (emphasis in original; internal quotation marks and citations omitted).

Guided by these principles, the Court held that, because ERISA specifically permitted a party to seek "appropriate *equitable* relief" (emphasis added), plaintiffs were limited to seeking those forms of relief that would have been considered equitable at the time of the divided bench. The Court concluded that, because the funds that plaintiffs were seeking had never come into plaintiffs' possession, the type of restitution that the plaintiffs were seeking was legal, not equitable, and was not permitted by ERISA's limited grant of remedial authority. "Admittedly, our cases have not previously drawn this fine distinction between restitution at law and restitution in equity, but neither have they involved an issue to which the distinction was relevant." 534 U.S. at 214-15.

There are critical distinctions between the Commission's case against Bronson Partners and *Great-West*. The Commission brought its case against Bronson Partners in the public interest; *Great-West* involved a private action. The Court's analysis in *Great-West* is dependent upon specific statutory limits set forth in ERISA, *see* 534 U.S. at 209, limits that have no application to a case brought under the FTC Act.[11] Moreover, in *Great-West*, the Court explained that, in a private action under ERISA, courts are limited to remedies specifically set forth in that statute. *Id.* As explained above, in this case, the district court had the authority to award complete relief.

In *FTC v. Verity*, this Court relied on *Great-West*, but it did not deny the discretion available to courts in cases brought by the Commission (or by other agencies, such as the SEC); rather, it addressed a particular factual situation that was shared by those two cases, but which is not present here. In *Verity*, the defendants violated the FTC Act by billing consumers for online pornographic and other adult entertainment services that, in some instances, the consumers had never ordered or authorized. Defendants billed consumers by placing the charges directly on consumers' telephone bills. As a result, the payments were received not by defendants, but by the phone company. When the *Verity* defendants first began their

[11] Bronson Partners' reliance on *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004) (*see* Br. at 24), and on *Alexander v. Bosch Automotive Sys., Inc.*, 232 F. App'x 491 (6th Cir. 2007) (*see* Br. at 26 n.7, 27) is misplaced because those cases also involve private actions under ERISA.

operation, the payments made by consumers were received by AT&T. During this period, AT&T immediately deducted its own costs from the amounts paid by consumers, and then it paid the costs of other companies that played a role in connection with providing the entertainment services. Only after all these costs were deducted did AT&T pay anything to the defendants. Thus, during this AT&T period, a substantial portion of the payments made by consumers never reached defendants.[12] 443 F.3d at 68.

At some point, AT&T terminated its contract with defendants, and defendants entered into a contract with Sprint. During the Sprint period, the payment structure worked differently. Consumers made payments not to Sprint, but to a company known as eBillit. eBillit transferred all the funds it received directly to defendants. Defendants then made payments to all the companies that provided services, including Sprint and eBillit. Thus, during the Sprint period, all the money paid by consumers passed through defendants' pockets. *Id.*

This Court distinguished the AT&T period from the Sprint period. First, this Court held that, if the district court were to award restitution, such an award had to be limited to equitable restitution. 443 F.3d at 66. Next, it held that "[t]he appropriate measure for restitution is the benefit unjustly received by the defendants." *Id.* at 67.

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[12] AT&T is a common carrier, is outside the Commission's jurisdiction, and was not named as a defendant. *See* 15 U.S.C. § 45(a)(2).

This Court then noted that, although in many cases the measure of restitution will equal the amount of consumer loss, this will not be true "when some middleman not party to the lawsuit takes some of the consumer's money before it reaches a defendant's hands." *Id.* at 68; *see FTC v. Direct Marketing*, 2010 WL 4118643 at * 9 (quoting *Verity* and refusing to limit the monetary remedy to the appellants' net profits where consumers made payments to another defendant). Of course, that is what happened in *Verity* during the AT&T period: AT&T was the middleman, it was not a defendant, and it took some of the consumers' money so that those amounts never reached defendants. As a result, for the AT&T period, this Court held that "[o]nly the remaining fraction of total billings unjustly enriched the defendants-appellants and may be the basis for a disgorgement remedy." 443 F.3d at 68.

But this Court treated the Sprint period differently because there was no non-defendant middleman. This Court held that, during the Sprint period, defendants' liability could equal the entire amount it received through eBillit, "without deducting monies paid by the defendants-appellants to other parties." *Id.* This Court concluded that, "[f]or both periods, the focus of the district court's restitution calculation should be on the defendants-appellants' unjust gains." *Id.*

The situation during the AT&T period in *Verity* is similar to *Great-West*, because, with respect to the AT&T period, the Commission, like the insurance company in *Great-West*, was seeking to recover funds that had never come into the

defendant's possession. Accordingly, this Court, relying on *Great-West*, held that such an award would be outside the district court's equitable powers.[13] 443 F.3d at 67-68. But the situation in this case is similar to the Sprint period in *Verity*. Consumers made payments for Diet Tea and the Patch directly to Bronson Partners. No payments were extracted by a middleman. This Court made clear in *Verity* that, in such a situation, monetary relief may be based on the total amount received by defendants: "in many cases * * * the defendant's gain will be equal to the consumer's loss because the consumer buys goods or services directly from the defendant. Thus, in these cases it is not inaccurate to say that restitution is measured by the consumer's loss." *Id.* at 68. This is such a case, and the district court had ample authority to require Bronson Partners to pay to the Commission the amount it received from consumers.

B. There is no requirement that any award of monetary equitable relief be limited either to money paid by consumers that can be traced to funds currently in Bronson Partners' possession, or to Bronson Partners' net profits

The $1.9 million in monetary equitable relief awarded by the district court is consistent with this Court's decision in *Verity* and the principles discussed above.

[13] As we have continued to argue in courts within other Circuits, we respectfully disagree with the holding of *Verity*, even as to the "middleman" situation with which it dealt. In our view, the teachings of *Porter v. Warner* encompass full consumer redress even in such situations, and nothing in *Great-West* refutes *Porter* on this point. No such issues are raised here, however, as the district court carefully applied *Verity* to the matters presented.

Bronson Partners, however, contends that monetary relief must be denominated either equitable restitution or disgorgement; that if the court awards equitable restitution, this remedy may be imposed only on money paid by consumers that can be traced to specific funds in Bronson Partners' possession; and that if the court chooses to award disgorgement, that remedy is limited to net profits, *i.e.*, net receipts minus all expenses. Not surprisingly, Bronson Partners contends that, either way, its liability is zero: if the court chooses restitution, Bronson Partners claims that no funds can be traced, *see* Br. at 31-32, and if the court chooses disgorgement, it claims that its expenses associated with the sales of Diet Tea and the Patch exceed the revenues it received, *see* Br. at 9-11.

The district court correctly rejected the rigid approach urged by Bronson Partners. As it explained, relying on this Court's decision in *Verity*, "it does not matter whether a remedy is characterized as 'consumer redress' or 'disgorgement,' each remedy is restitutionary in nature and does not alter the core principle that restitution is measured by a defendant's unjust gain." 674 F. Supp. 2d at 380, citing *Verity*, 443 F.3d at 67 (A.140). Thus, the court based its award on Bronson Partners' unjust gains -- the amounts it received directly from injured consumers.[14]

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[14] The district court did not, as Bronson Partners mistakenly contends, state that there was no difference between restitution and disgorgement. *See* Br. at 30. It merely recognized, as discussed above, that in a case such as this one where injured consumers pay their money directly to a wrongdoer, it does not matter whether the relief is characterized as restitution or disgorgement. 674 F. Supp. 2d at 380 (A.140).

With respect to tracing, Bronson Partners relies primarily on *Sonnenschein v. Reliance Ins. Co.*, 353 F.2d 935 (2d Cir. 1965). *See* Br. at 28-30. But that case is completely irrelevant. It involved an attempt by a creditor to establish an equitable lien on the trust property held by a bankrupt. This Court's decision in *Sonnenschein* was governed by "trust doctrine as applied in bankruptcy," *id.* at 936, and involved competing claims to the bankrupt's assets. As this Court explained in a case that, like *Sonnenschein*, involved a bankruptcy, equitable remedies must be applied "very cautiously to minimize conflict with the goals of the Bankruptcy Code." *In re First Central Financial Corp.*, 377 F.3d 209, 217 (2d Cir. 2004) (internal quotation marks and citation omitted). Thus, *Sonnenschein* is governed by a different set of principles than are at work here. Similarly, neither *Great-West* nor *Alexander v. Bosch Automotive*, *supra*, *see* Br. at 27, advances Bronson Partners' cause. As explained above, although *Verity* a factual similarity with *Great-West*, the present case does not. Moreover, both *Great-West* and *Alexander v. Bosch* involved private actions under

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Nor did the court ever state that, in calculating monetary equitable relief, "its goal was to restore consumers to their position before the sale." *See* Br. at 30. In fact, the court actually stated that the relief it imposed "is measured by a defendant's unjust gains," citing *Verity*. 674 F. Supp. 2d at 380 (A.140). The court referred to restoring funds to consumers in response to Bronson Partners' argument that any monetary award imposed on it should be reduced by amounts it had paid in postage and taxes, because in its view, it had already paid these amounts to the government. *Id.* at 383 (A.146). As the court explained, it is irrelevant that these amounts were paid to the government (or to the postal service, a quasi-government agency), because, in its Order, the court indicated that its goal was to restore these funds to consumers, not to compensate the government. *See* D.220 (A.166).

ERISA, and as explained above, the relief awarded in such cases is, just like *Sonnenschein*, governed by very different principles than apply here.

Nor is Bronson Partners' tracing argument helped by *FTC v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202 (D. Mass. 2009), *aff'd*, ___ F.3d ___, 2010 WL 4118643 (1st Cir. Oct. 21, 2010). *See* Br. at 25-26, 27. As Bronson Partners notes, in that case, the district court discussed the distinction between equitable and legal restitution, and concluded that the remedy the Commission was seeking (a refund of the money that consumers paid to the defendants) could not be considered equitable restitution because the Commission was not pursuing particular identifiable funds, *i.e.*, funds that could be traced. *See id.* at 218. What Bronson Partners ignores, however, is that, after discussing the limits on equitable restitution, the court nonetheless awarded the Commission the very relief that it sought, without requiring any tracing. In particular, the court held that an award of the proceeds of deceptive sales could be considered disgorgement. As the court explained, disgorgement "is, in effect, a rescissionary measure that is just both as a remedy and as a deterrent." *Id.* at 219. The holding in *Direct Marketing* is completely congruent with the district court's conclusion in this case that restitution is measured by a defendant's unjust gain." 674 F. Supp. 2d at 380 (A.140).[15]

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[15] In *Verity*, this Court observed that, if a court were to impose "equitable restitution," it might be required to trace the money paid by injured consumers "into their product in the defendant's possession." 443 F.3d at 67 n.10. But this Court

No case supports Bronson Partners' contention that, in calculating monetary equitable relief, the district court was required to deduct fixed costs and expenses from the amount paid by injured consumers. *See* Br. at 35. As this Court made clear in *Verity*, the defendants-appellants in that case could be required to pay back all amounts that they actually received from consumers "without deducting monies paid by the defendants-appellants to other parties." 443 F.3d at 68. *See FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (rejecting argument that monetary equitable relief must be limited to net profits); *FTC v. Direct Marketing*, 2010 WL 4118643 at *9 (same). Thus, it is simply irrelevant that, according to Bronson Partners, its expenses in connection with its sales of Diet Tea and the Patch exceeded its revenues.

Most of the cases cited by Bronson Partners in support of its net profits argument are irrelevant because they arise in different contexts and are governed by principles that have no application in the present case. *See* Br. at 32, citing *Forster Poultry Farms, Inc. v. Suntrust Bank*, 2008 WL 1970823 (E.D. Cal. May 5, 2008) (calculating damages in private action for breach of contract); Br. at 34-35, citing *The Daisy Gp., Ltd. v. Newport News, Inc.*, 1998 WL 796473 (S.D. N.Y. Nov. 17, 1998)

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emphasized that, even such equitable restitution "is not limited to an award of the very funds that unjustly enriched the defendant and are still in the defendant's possession." *Id.* In any event, this Court did not limit the monetary equitable relief that the Commission could obtain to traced assets, presumably because the Commission is not limited to obtaining strictly defined equitable restitution. Instead, this Court held that the Commission could obtain monetary relief measured by "the benefit unjustly received by the defendants." *Id*. at 67.

(discussing calculation of profits in private action under Lanham Act for trademark infringement), and *Ptak Bros. Jewelry, Inc. v. Ptak*, 2009 WL 1514469 (S.D.N.Y. June 1, 2009) (same);[16] Br. at 36, citing *Sheldon v. Metro-Goldwyn Pics. Corp.*, 106 F.2d 45 (2d Cir. 1939), *aff'd* 309 U.S. 390 (1940) (calculating the wrongfully obtained profits in a private trademark infringement action). Indeed, as this Court recognized in *SEC v. Cavanagh*, 445 F.3d 105, 118 n.29 (2d Cir. 2006), if a case implicates a broader public interest, a federal court has additional latitude in awarding equitable remedies above and beyond what it would possess in a case where only private interests are at stake. The cases cited by Bronson Partners do not implicate such a public interest.

Bronson Partners also relies on *FTC v. QT Inc.*, 472 F. Supp. 2d 990 (N.D. Ill. 2007), *aff'd*, 512 F.3d 858 (7th Cir. 2008). It claims that, in that case, the Commission conceded that net profits was the appropriate measure of relief under the

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[16] Bronson Partners claims that, in cases brought by the Commission under the FTC Act, courts often look for guidance to cases brought under the Lanham Act. *See* Br. at 33 n.12. However, as the cases cited by Bronson Partners demonstrate, those courts rely on Lanham Act cases only with respect to issues of advertising interpretation, not with respect to the appropriate relief. *See FTC v. Brown & Williamson Tobacco Co.*, 778 F.2d 35, 40 (D.C. Cir. 1985) (discussing how courts in Lanham Act cases interpret ambiguous language in advertising); *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) (discussing the use of extrinsic evidence for advertising interpretation in Lanham Act cases). Relief in cases brought under the Lanham Act is governed by 15 U.S.C. § 1117, which allows, *inter alia*, for damages. We are unaware of any FTC Act case in which, in connection with the determination of appropriate relief, the court relied on cases under the Lanham Act.

FTC Act. *See* Br. at 33-34. However, Bronson Partners misrepresents what happened in *QT*. In fact, in that case, the Commission sought, and the court initially awarded, monetary equitable relief in the full amount of the defendants' wrongful sales, a sum that exceeded $87 million. *See* Plaintiff's Post-Trial Brief in *FTC v. QT*, No. 03-cv-3578 ((N.D. Ill. July 21, 2006) at 42 ("The proper measure of restitution is the amount of net consumer sales for [defendants' product] from 2000 through June 2003 -- $87 million"); *see also*, *FTC v. QT*, *id.*, Final Order and Judgment (Nov. 13, 2006) at 9. In its Post-Trial Brief, the Commission also recognized that the court could, in its discretion, limit its award to the defendants' net profits, which in that case, exceeded $24 million. After entry of the Final Order, the court granted in part, over the Commission's objection, defendants' motion for reconsideration. *See* 472 F. Supp. 2d at 998. As a result, defendants' liability was reduced to their net profits. Thus, although the Commission recognized that the court could, in its discretion, limit its award to defendants' profits, the Commission never agreed that the court was somehow required to limit its award to that amount.[17]

Finally, the SEC cases cited by Bronson Partners do not support its cause. For

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[17] Bronson Partners also invokes the district court's decision in *FTC v. Direct Marketing*, *supra*, in support of its net profits argument. *See* Br. at 32, 34, 35. Although, in *Direct Marketing*, the court did state that disgorgement is measured by "profits causally connected to the violation," 648 F. Supp. 2d at 214 (citation omitted), the court ultimately based its award on "sales revenue, as opposed to profits," *id.* at 219. As the court explained, such an award is both "appropriate" and "just" because it permits the Commission to make refunds to injured consumers.

example, in *SEC v. Cavanagh*, as Bronson Partners notes, this Court observed that the primary purpose of disgorgement is to "forc[e] a defendant to give up the amount by which he was unjustly enriched." *See* Br. at 34, quoting *SEC v. Cavanagh*, 445 F.3d at 117. Bronson Partners somehow assumes that this Court was thus limiting disgorgement awards to net profits. *Id.* In fact, however, the award that this Court affirmed in *Cavanagh* was an award of the proceeds that the defendants received from their fraudulent sales of securities. As the district court held, "[d]isgorgement of proceeds as opposed to profits is appropriate here. *Defendants are not entitled to deduct costs associated with committing their illegal acts.*" *SEC v. Cavanagh*, 2004 WL 1594818, *30 (S.D.N.Y. July 16, 2004) (emphasis added), *aff'd*, *SEC v. Cavanagh*, *supra*.

Bronson Partners also contends that any award against it must be limited to net profits because, in *Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006), this Court stated that "district courts may require wrongdoers to disgorge fraudulently obtained profits." Br. at 32. But Bronson Partners has taken that quote out of context. Prior to making the statement quoted by Bronson Partners, this Court held that "[d]istrict courts possess broad equitable discretion to craft remedies for violations of the [Securities] Exchange Act [of 1934]." 467 F.3d at 81. Thus, this Court then stated that, "*Within this discretion,* district courts may require wrongdoers to disgorge fraudulently obtained profits." *Id.*

(emphasis added). That is, although a court may choose, in its discretion, to limit an award of monetary equitable relief to net profits, it is not required to do so. *See also SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 564 (S.D.N.Y. 2009) (disgorgement award should not be reduced by the defendant's business expenses).

In this case, it was no abuse of discretion for the district court to award monetary equitable relief in the amount of gross sales minus refunds, and to reject Bronson Partners' suggestion that the relief be limited to its net profits.[18] Indeed, there is little wonder that the district court rejected Bronson Partners' suggestion. Unlike *FTC v. QT*, where the defendants had received more than $24 million in net profits and the court required them to disgorge that amount, in this case, according to Bronson Partners, its net profit was zero. Moreover, in calculating this figure, Bronson Partners deducts from its revenues all of its expenses connected to its deceptive sales, and by far the largest of those costs was the cost of its deceptive

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[18] Bronson Partners complains that, in connection with its calculation of monetary relief, the district court should not have cited *FTC v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004), because that case involved a compensatory civil contempt sanction for violating a court order, not a direct violation of the FTC Act. *See* Br. at 31. However, in *Kuykendall*, the court explained that it based its calculation of the civil contempt compensatory sanction on the methodology applied by courts in cases arising directly under the FTC Act. *Id.* at 766 n.11. In any event, although the district court cited *Kuykendall*, it relied primarily on this Court's decision in *Verity*, "[t]he lesson from *Verity* * * * is that where no middleman takes a portion of the consumer dollars, the full amount of those proceeds, even if they are equivalent to the consumers' losses, may be the subject of an award of equitable relief." 674 F. Supp. 3d at 384, citing *Verity*, 443 F.3d at 67-68 (A.149).

advertising. *See* Br. at 9-11. Plainly, it was no abuse of discretion for the district court, when calculating monetary equitable relief, to refuse to give Bronson Partners a credit for the advertising that formed the basis for this case.[19] Indeed, to do otherwise would effectively reward Bronson Partners for its deceptive advertising.

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[19] Bronson Partners complains that, in calculating the monetary award, the district court did not deduct the amount of bounced checks and credit card chargebacks. However, as the district court found, Bronson Partners was unable to provide any evidence as to the amount of such checks and chargebacks attributable to customers who bought Diet Tea and the Patch. Instead, it simply made a guess as to what those amounts were. *See* Br. at 9. The district court did not err when it refused to accept that guess as adequate evidence of those charges. *See* 674 F. Supp. 2d at 381 (A.143) ("[d]efendants offer no evidence tracing a single chargeback or bounced check to sales of Diet Tea or the Patch").

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's Judgment.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

s/ Lawrence DeMille-Wagman
LAWRENCE DeMILLE-WAGMAN
Assistant General Counsel for Litigation
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2448
lwagman@ftc.gov

OF COUNSEL:
ROBIN E. EICHEN
NUR-UL-HAQ

Federal Trade Commission
New York, NY

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2010, I sent six copies of the final brief of Appellee Federal Trade Commission to the Clerk of the Court of the United States Court of Appeals for the Second Circuit by express overnight delivery. I also electronically filed that brief with the Clerk by using the appellate CM/ECF system. I certify that counsel for appellants, who are named below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Steven P. Caley
Damon W. Suden
Kelley Drye & Warren LLP
101 Park Avenue
New York, NY 10178

Lewis M. Rose
Daniel S. Blynn
Kelley Drye & Warren LLP
3050 K Street, N.W.
Washington, D.C. 20007

s/ Lawrence DeMille-Wagman

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,702 words, as counted by the WordPerfect word processing program.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Times New Roman 14 point typeface.

s/ Lawrence DeMille-Wagman