No. 20-10790

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

BURTON KATZ, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida
1:19-cv-25046-RNS (Hon. Robert N. Scola, Jr.)

Opposition of the Federal Trade Commission to Appellants' Motion for Stay Pending Appeal

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ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

BRADLEY DAX GROSSMAN
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
bgrossman@ftc.gov
202-326-2994

Of Counsel:
SARAH WALDROP
SANA CHAUDHRY
Attorneys

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Pursuant to Eleventh Circuit R. 26.1-1, Plaintiff-Appellee, the Federal Trade Commission, certifies that in addition to the names listed in Appellants' Certificate of Interested Persons dated March 30, 2020, the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this appeal.

Abbott, Alden F. – FTC General Counsel

Chaudhry, Sana – FTC Attorney

Damian, Melanie – Court-Appointed Receiver

Damian & Valori LLP – Law Firm for Receiver/Counsel for Receiver

DiFalco, Fernandez & Kaplan – Counsel for Defendants Arlene Mahon and Waltham Technologies LLC

Genet, Solomon Brauner – Counsel for Defendant-Appellant Elisha Rothman

Grossman, Bradley – FTC Attorney

Kaplan, Justin B. – Counsel for Defendants Arlene Mahon and Waltham Technologies, LLC

Marcus, Joel – FTC Attorney

McArdle, Pérez & Franco, P.L. – Counsel for Defendants Arlene Mahon and Waltham Technologies LLC

Meland Russin & Budwick, P.A. – Counsel for Defendant-Appellant Elisha Rothman

Murena, Kenneth Dante – Counsel for Court-Appointed Receiver

Waldrop, Sarah – FTC Attorney

Wolfe, Douglas – FTC Attorney

The Federal Trade Commission further states that, to the best of its knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Appellants operated scores of websites pretending to render government services on consumers' behalf. Using domain names like DMV.com and food-stamps.org, appellants tricked consumers into providing money or sensitive personal information on the belief that the sites would renew their driver's licenses or determine their eligibility for public benefits. But appellants did not provide those services. At most, they provided consumers with PDF documents containing generic, publicly available information and then sold their personal data to other scammers. They reaped more than $80 million.

The district court determined that the FTC was likely to show that appellants' websites were "patently misleading" in violation of the FTC Act and entered a preliminary injunction appointing a receiver and freezing appellants' assets to ensure monetary relief to victims after final judgment. Four appellants (collectively, Movants) now seek to stay the asset freeze pending appeal.

Movants fail to establish a likelihood of success on appeal. They do not challenge the district court's determination that their websites likely violated the law. Rather, they contend that (1) the FTC Act does not permit asset freezes, or (2) any freeze must be limited to net profits directly traceable to the wrongdoing. Those claims have no chance of success because they contradict this Court's repeated holdings to the contrary, including just two months ago. The speculative

possibility that this Court will hear the case en banc and abrogate 30 years of precedent does not amount to a likelihood of success.

Nor will Movants likely prevail on their claim that the asset freeze exceeds a "reasonable approximation" of ill-gotten gains. Mot.2. The voluminous record in this case, including the receiver's report and testimony, shows that appellants' unjust gains were at least twice the value of the frozen assets.

The asset freeze is not causing irreparable harm to Movants. They admit that the receiver is allowing "many" of their businesses to operate "profitabl[y]." Mot.18. Their generalized, unsworn assertions of financial difficulty provide no reason to unfreeze over $40 million in assets that likely belong to the victims.

By contrast, unfreezing the assets now could permanently deprive consumers of the restitution to which they will likely be entitled upon entry of a final judgment.

BACKGROUND

A. The On Point Global Website Scam

Appellants are five individuals and 53 corporate entities who collectively did business under the banner On Point Global. Movants are four of the individuals.

1. The Licensing Sites. Appellants controlled at least 57 websites containing bogus offers to provide motor-vehicle or other state-licensing services for a fee. FTC Exh.A (Dkt.108) at 5 (Receiver's Report); Dkt.132-1 at 83-143

(screenshots from deceptive sites). For example, license-driver.com held itself out as a "comprehensive source for all you [sic] driver license-related services." Dkt.132-1 at 207. The site's landing page displayed the large, bold headline "**Renew Drivers License In Your State**." *Id.*

The site prompted consumers to enter their credit card information and "SELECT A SERVICE," with checkbox options to "Renew Driver's License," "Replace Driver's License," and "Reinstate Suspended License." *Id.* at 208. If a consumer selected "Renew Driver's License," the site requested her birth date, information that would only be relevant if the site were *actually* renewing her license. *Id.* But once the transaction was complete, consumers would at most receive a PDF "guide" containing general information about state vehicle services; some received nothing at all. *Id.* at 9-10, 12-13, 16, 225-60.

Appellants tried to escape culpability by burying confusing disclaimers in small print. Hard-to-read text at the top of each page stated that the site is "in no way or fashion affiliated with any federal or local government agency or offices." *Id.* at 207. But even if a consumer *had* noticed that disclaimer, it would not dispel the impression that appellants' sites—whether affiliated with the government or not —would renew consumers' licenses for a fee.

2. The Government Benefit Sites. Appellants also operated at least 45 sites targeting indigent, sick, and elderly people with offers to determine whether they

are eligible for housing assistance, food stamps, Medicaid, or unemployment benefits. Dkt.132-3 at 85-86. After consumers disclosed intimate personal details, they learned that appellants' offers were a sham.

For example, Section-8-housing.org featured a bold headline inviting consumers to "**Find Out If You Are Eligible for the Section 8 Program**." Dkt.132-1 at 288. If a consumer clicked "Continue," the site then asked for name, address, phone number, birth date, gender, employment status, health insurance coverage status, medical diagnoses (*e.g.*, cancer, diabetes), disability status, debts, and information about the need for low-income medical assistance. *Id.* at 289-305. Again, consumers who provided that information received only a "guide" containing publicly available information that was not tailored to the sensitive data provided. *Id.* at 18-19, 318-34.

The government benefit sites stated in miniscule print at the top of the page that "[t]he site is privately owned and is neither affiliated with, nor endorsed by, nor operated by any government agency." *Id.* at 288. But the site gave the firm impression that appellants—whether affiliated with the government or not—were collecting consumers' personal information to determine eligibility for benefits. Appellants made millions selling that information to third parties, including fraudsters subject to federal-court injunctions. *Id.* at 65-70, 77-78; Dkt.132-6 at 5.

B. Proceedings Below

1. The Complaint and Request for TRO. The FTC alleges that appellants' websites are deceptive and violate Section 5(a) of the FTC Act. 15 U.S.C. § 45(a). The complaint charges that appellants are jointly and severally liable because the corporate defendants acted as a common enterprise and because the individual defendants (including Movants) participated in, controlled, and knew of the deceptive practices. Dkt.1 ¶¶ 61-107.

The FTC moved *ex parte* for a TRO with an asset freeze, temporary receivership, and order to show cause why a preliminary injunction should not issue. The court granted that relief. Dkt.17.

2. The Preliminary Injunction Hearing. At a two-day preliminary injunction hearing, the FTC presented documents, expert testimony, surveys, and consumer complaints demonstrating that appellants' sites deceived consumers into believing they would receive government services in return for money or personal information.

The court also heard significant evidence regarding the asset freeze. The receiver's report and testimony demonstrated that the frozen assets were collectively worth about $40 million, which amounted to half or less of a potential monetary judgment. The frozen assets consisted of approximately $5.5 million in individual accounts, FTC Exh.B (Transcript, 1/13/2020) at 122:9-122:11; $3

million in corporate accounts; $1.5 million held by credit card processors; domain names valued at $30 million; $1.2 million in tangible assets including artwork and luxury cars; and other assets whose value was currently "unknown," FTC Exh.A at 33.

On the other side of the ledger, the receiver concluded that appellants' deceptive websites had generated over $80 million in just the last two years.[1] Between January 2018 and November 2019, appellants made $63.2 million (after refunds) from selling "guides" "under the appearance of offering a service such as renewing driver's licenses." *Id.* at 20-21. In 2019, appellants made $17.3 million from selling or using personal information harvested from the benefits eligibility sites. *Id.* at 22-23.

The receiver described steps she had taken to protect consumers and preserve business assets. She "took offline" 57 sites that deceptively charged consumers "for government services." *Id.* at 5, 21. She concluded that the benefit-eligibility sites might be run profitably "if … converted to a nondeceptive format." *Id.* at 35-37. She noted that appellants' businesses unrelated to the FTC's action—such as the buying and selling of domain names—will "[c]ontinue to operate" during the receivership. *Id.* at 6, 21-27.

[1] This figure likely understates the ill-gotten gains, since the unlawful conduct began in 2011. *See infra* p. 18.

3. The Preliminary Injunction. At the close of the hearing, the district court announced that it would grant a preliminary injunction. The court found that the FTC had met its burden to show that the corporate entities acted as a "common enterprise" and that the individuals possessed sufficient "knowledge and control" to be held jointly and severally liable. FTC Exh.B at 314:8-314:18.

The court entered a preliminary injunction the following day. Movants' Exh.A. The court found "good cause" to believe that appellants had violated the FTC Act "by misrepresenting the services they offer, thus inducing consumers to pay money or divulge personal information under false pretenses." *Id.* at 2. The preliminary injunction bars appellants from making those misrepresentations or selling the consumer data they had obtained through deception. *Id.* at 4-5.

The court also found "good cause" to continue the asset freeze and receivership. *Id.* at 2-3, 5-6, 11-17. It found that the freeze was needed to prevent "immediate and irreparable damage to the Court's ability to grant effective final relief for consumers" through "monetary restitution." *Id.* at 2.

4. The Stay Motion. Movants sought a stay of the asset freeze (but not other facets of the preliminary injunction) pending appeal, which the district court denied. Movants' Exh.B.

The court ruled that Movants had failed to show a "strong likelihood of success on the merits" or even a "substantial case" challenging the asset freeze. *Id.*

at 1. It explained that this Court has "repeatedly reaffirmed" district courts' authority to impose asset freezes under the FTC Act, including "as recently as last month." *Id.* at 1-2 (discussing, *e.g. FTC v. Simple Health Plans, LLC*, No. 19-11932, 2020 WL 570811, at *2 (11th Cir. Feb. 5, 2020)). The court also rebuffed Movants' claim that the freeze was "overbroad." *Id.* at 2. Under Eleventh Circuit law, frozen assets "do not need to be derived from the alleged fraud," and the amount frozen need only reflect a "reasonable approximation" of ill-gotten gains. *Id.* (discussing *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005)). "[T]he Defendants' likely liability for their deceptive activities exceeds the total amount of frozen assets." Movants' Exh.B at 2.

Finally, the court held that the "balance of the equities favors the consumers" because maintaining the asset freeze will "preserve assets to redress the consumers that the Defendants harmed." *Id.*

ARGUMENT

To merit a stay, Movants must make a strong showing that (1) they are likely to succeed on the merits; (2) they will be irreparably injured absent a stay; (3) issuance of the stay will not substantially injure other parties; and (4) the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Although Movants argue that they need only show that their case is "substantial" (rather than likely to succeed), Mot.7, that standard applies only when the remaining factors

"weigh[] heavily in favor of granting the stay." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (quotation omitted).

Movants have shown neither a likelihood of success nor a substantial case. Their legal arguments defy binding precedent, which establishes that asset freezes are proper to preserve ultimate monetary relief under the FTC Act. The speculative possibility that the Court will jettison decades of precedent does not meet Movants' burden. Their factual arguments rest on misstatements of the record, which demonstrates that the possible recovery greatly exceeds the frozen assets.

The equities also disfavor a stay. Stay is appropriate only when it "maintain[s] the status quo pending a final determination on the merits." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Jun. 26, 1981).[2] The freeze itself maintains the status quo by ensuring that funds are available for restitution after judgment. Lifting the freeze would disrupt the status quo by allowing appellants to dissipate the money, irreparably harming consumers.

[2] Decisions of the former Fifth Circuit issued before September 30, 1981, are binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

I. MOVANTS ARE UNLIKELY TO SUCCEED ON THE MERITS

Movants' main argument is that a district court may not freeze assets to preserve them for monetary relief under the FTC Act. They concede they will lose on this issue before a panel because binding precedent holds the opposite. Mot.9. Their fallback argument is that assets may be frozen only if they are directly traceable to profits derived from illegal conduct. This argument, too, contravenes binding precedent. Movants' final contention is that the frozen assets exceed a reasonable approximation of ill-gotten gains. They ignore the receiver's report, which shows that the frozen assets are worth half or less of the amount subject to restitution.

A. The FTC Act Authorizes Monetary Relief, Including Asset Freezes

Movants are highly unlikely to persuade this Court that the FTC Act precludes monetary relief. *See* Mot.8-11. The motions panel is bound by precedent holding that the FTC Act does confer such authority; reversal of that precedent by the full Court is speculative at best.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers the FTC to seek and the district court to grant "a permanent injunction." As this Court has explained, "the unqualified grant of statutory authority to issue an injunction under section 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits." *FTC v.*

Gem Merch. Corp., 87 F.3d 466, 468-70 (11th Cir. 1996);[3] *accord FTC v. WV Univ. Mgmt., LLC*, 877 F.3d 1234, 1239 (11th Cir. 2017); *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013). Moreover, when a court has entered a preliminary injunction in an action under Section 13(b), "[a]n asset freeze is within the district court's equitable powers." *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1234 (11th Cir. 2014); *accord FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984).

Movants claim this Court's precedent is "outmoded" (Mot.8-9), but the Court rejected that same contention just two months ago. The Court stressed that "subsequent panels are bound to follow a prior panel's decision on an issue unless and until the first panel's holding 'is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc.'" *Simple Health*, 2020 WL 570811, at *2 (quoting *EEOC v. Exel, Inc.*, 884 F.3d 1326, 1332 (11th Cir. 2018)). Because this Court's Section 13(b) precedent remains good law, the

[3] This Court has decided that similar language in other agencies' organic acts authorizes equitable monetary relief. *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1344 (11th Cir. 2008); *ETS Payphones*, 408 F.3d at 734-35.

Court held, "the district court abused no discretion in granting the FTC's motion for a preliminary injunction, an asset freeze, and receivership." *Id.* at *2.[4]

Movants speculate that the Supreme Court will eventually "curtail" the FTC's authority under Section 13(b). Mot.11. But "[u]ntil the Supreme Court issues a decision that actually changes the law," this Court is "duty-bound to apply this Court's precedent and to use it and any existing decisions of the Supreme Court to measure the likelihood of a plaintiff's success on the merits." *Gissendaner v. Comm'r, Georgia Dep't of Corrections*, 779 F.3d 1275, 1284 (11th Cir. 2015). It is therefore immaterial that the Seventh Circuit recently held that Section 13(b) forecloses monetary relief, breaking with eight courts of appeals, including this one.[5] *See* Mot.9. Nor does it matter that the Supreme Court recently

[4] *Owner-Operator Independent Drivers Ass'n v. Landstar System, Inc.*, 622 F.3d 1307 (11th Cir. 2010), has no bearing here, as it addressed private class-action remedies. The Supreme Court has repeatedly upheld disgorgement in government cases, since "equitable authority to grant remedies is at its apex when public rights and obligations are … implicated." *Kansas v. Nebraska*, 574 U.S. 445, 472 (2015) (discussing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

[5] *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598-99 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890-91 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Magazine Sols.*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-14 (8th Cir. 1991).

heard argument concerning disgorgement under the securities laws.[6] *See id.* at 10. Under existing law, Movants' chances of succeeding before a panel are zero.

As Movants admit, their appeal rests on a sliver of hope that this Court will take the case en banc and overturn 30 years of precedent. *See* Mot.11. En banc review is extraordinarily rare: of thousands of cases, the Court reheard only seven en banc in 2019 and four in 2018. *See* http://www.ca11.uscourts.gov/enbanc-poll-orders. The remote prospect of en banc reversal does not establish a likelihood or even a significant possibility of success on the merits.

B. The FTC Met Its Burden To Show That The Asset Freeze Reflected A Reasonable Approximation Of Ill-Gotten Gains

Next, Movants claim they are likely to prevail because even if Section 13(b) permits asset freezes, the freeze here was "overbroad and not based on a reasonable approximation of restitution." Mot.12-15. Their arguments contravene binding precedent and misconstrue the record.

To obtain an asset freeze, "the FTC's burden of proof … is relatively light." *IAB*, 746 F.3d at 1234. The Commission need only provide a "reasonable

[6] Movants argue that the Solicitor General conceded that "the governing framework applied in this Circuit is outdated." Mot.10. That is false. The Solicitor General *defended* this Court's holding that "the Commission may seek disgorgement in civil actions, as an equitable adjunct to an injunction." Brief of Respondent, *Liu v. SEC*, No. 18-1501, at 12 (Jan. 15, 2020) (discussing *Calvo v. SEC*, 378 F.3d 1211, 1217 (11th Cir. 2004)).

approximation of a defendant's ill-gotten gains"; "[e]xactitude is not a requirement." *Id.* (quoting *ETS Payphones*, 408 F.3d at 735). In *IAB*, this Court affirmed an asset freeze where the receiver determined that the defendants' "gross income" from the challenged practices dwarfed the value of the frozen assets. *Id.*

This case presents the same scenario as *IAB*. As discussed, the receiver determined that appellants' net revenue from the deception exceeded $80 million in just the last two years, while the frozen assets were worth roughly $40 million. *Supra* pp. 5-6. The district court froze all the assets because appellants' "likely liability … exceeds the total amount of frozen assets." Movants' Exh.B, at 2. Under *IAB*, that decision is unlikely to be reversed.

Movants' counterarguments are all obfuscation.

1. ***The court appropriately valued the frozen assets.*** Movants proclaim that the district court erred because "the corporate entities alone are valued at over $150 million." Mot.12. The district court was entitled to credit the receiver's $40 million valuation over appellants' unsubstantiated, self-serving assertions.

In their merits brief, Movants wrongly claim that the receiver "endorsed" a $154 million valuation. Br.9. She did not. In a court filing *two months after* the preliminary injunction, she explained that appellants had valued their businesses at $154 million "[i]n early 2019," prior to the TRO. Dkt.169 at 2 n.2. She never claimed this was the actual current value of the businesses. Even if appellants'

self-valuation was once accurate, it was premised on illegal practices that generated tens of millions in revenue per year. It is highly implausible that the businesses would have anywhere near that value if operated lawfully. Indeed, the receiver's report concluded that the current value of appellants' illiquid business assets is "unknown." FTC Exh.A at 33-34. Faced with this uncertainty, the district court properly took a cautious approach since the assets' known value was far lower than a prospective restitution award.

2. Movants may not deduct their expenses. Movants misstate this Circuit's law when insisting that the $80 million unjust-gains figure is wrong because monetary relief is limited to "profits." Mot.12-13. *IAB* held that an asset freeze must reflect a "reasonable approximation of … ill-gotten gains," without deduction for the expense of deceiving consumers. *IAB*, 746 F.3d at 1234 (citation omitted). Even at the final judgment stage, "net revenue (gross receipts minus refunds), rather than the amount of profit (net revenue minus expenses), is the correct measure of unjust gains under Section 13(b)." *Wash. Data*, 704 F.3d at 1327.

Movants claim that in a recent oral argument before the Supreme Court in a securities case, the Deputy Solicitor General conceded this issue. Far from it, he stressed that defendants should *not* be permitted to deduct from a disgorgement award the "money [they] spent to perpetuate the fraud." Oral Argument Tr., *Liu v. SEC*, 50:3-50:7; *see also id.* at 32:2-32:4, 51:10-51:15 (Mar. 3, 2020).

3. ***The frozen assets need not be traceable to the wrongdoing.*** Movants are equally wrong when asserting that the district court could only freeze assets directly flowing from their transgressions. Mot.6, 12. This Court has established that limiting monetary relief to "the actual assets unjustly received would lead to absurd results" because "a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of disgorgement." *FTC v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013) (cleaned up). The district court properly froze assets not directly tied to the violations since they could eventually be used for a restitution award.

4. ***Liability may be joint and several.*** Multiple defendants may be held jointly and severally liable when corporate defendants act as a common enterprise and when individual defendants have knowledge and control of the scheme. *WV Univ.*, 877 F.3d at 1239-40, 1242-43; *IAB*, 746 F.3d at 1233. Movants accuse the district court of failing to "make findings of fact" to "rop[e] all Defendants' diversified enterprises and even personal assets together." Mot.14. Yet they admit three pages later that the court *did* make those very findings. *See id.* at 17 n.7. At the close of the hearing, the court announced, "I find that there has been a showing that there was a common enterprise based upon shared control[], shared offices, shared payroll, commingled funds, that the individuals, the government has shown each of them had sufficient control and knowledge to make them responsible."

FTC Exh.B at 314:8-314:18. That factual determination satisfies the test for liability, and since Movants do not dispute those facts here, they have not shown a likelihood of reversal.

5. ***The frozen assets reflect only ill-gotten gains.*** Movants assert that the $80 million restitution figure covers all websites appellants maintained, rather than just "the six websites the FTC has identified in its complaint." Mot.13. That claim misstates the facts.

The FTC's complaint charges that "more than 200" websites contained deceptive claims. Compl. ¶ 112. The receiver explained that she shut down 57 deceptive websites that generated revenues of $63.2 million since January 2018 alone.[7] FTC Exh.A at 5, 21. She separately determined that appellants obtained $17.3 million in 2019 by selling or using personal data secured through deception. *Id.* at 22-23. The receiver's report thus establishes at least $80.5 million as a conservative estimate of ill-gotten gains. This figure does *not* include $17.1 million in additional revenue flowing from appellants' separate websites that purportedly provided services to consumers. *Id.* at 21. The FTC has not sought disgorgement of those proceeds.

[7] While the receiver focused on taking down the most heavily trafficked sites, the FTC believes that a far greater number will be proven deceptive at trial.

6. ***The order's temporal scope was correct.*** Movants declare that the ill-gotten gains estimate "was calculated back to the beginning of 2016." Mot.14. But as the receiver clearly explained in her report, the $80 million estimate covers only the span of "January 2018 through November 2019." FTC Exh.A at 20-23. And those gains may be just the tip of the iceberg, as the FTC's evidence showed that appellants intentionally designed their websites *in 2011* to trick consumers into believing they were renewing their driver's licenses. Dkt.132-3 at 58-59. The record also revealed that consumers started complaining to the FTC about the websites in 2013,[8] and that credit-card processors started terminating appellants' accounts in 2015 due to excessive chargebacks for disputed transactions.[9]

7. ***Precise arithmetic was not required.*** Finally, Movants fault the district court for failing to specify a "figure" in its order reflecting an "approximation of disgorgement." Mot.14-15. In *IAB*, this Court rejected that exact argument. Because the receiver's report was sufficient evidence of ill-gotten gains, the court was not required to itself "calculat[e] the amount of [defendant's] ill-gotten gains before freezing any assets." *IAB*, 746 F.3d at 1234. Movants rely on *FTC v. Bishop*, 425 F. App'x 796, 798 (11th Cir. 2011), but the Court's published decision

[8] Dkt. 132-1 at 74-78; Dkt. 132-7 at 57-60.

[9] Dkt. 132-14 at 9, 14.

in *IAB* expressly disavowed the reasoning of that "two-page, unpublished disposition." 746 F.3d at 1234.

II. MOVANTS HAVE FAILED TO SHOW IRREPARABLE HARM

Movants claim both that their businesses and they as individuals will suffer irreparable harm from the asset freeze. Their claims fail because they boil down to generic assertions of harm, unsupported by evidence or affidavits.

Business harms. Movants complain that the asset freeze has "significantly limited [their] businesses" and "shut down portions of them." Mot.15. But they concede that (1) the receiver is recommending that "many profitable enterprises … remain in business" during the freeze, and (2) those businesses will still be "profitable" at the end of the case. Mot.18. Thus, to the degree there is even harm to the legitimate businesses (which is itself unlikely), it is not irreparable.

Movants have no basis to complain about lost "customers," "employees," or "goodwill" from the receiver's decision to shut down the illegitimate websites. *See id.* at 15. The district court found that those websites are "patently misleading" and likely violated the FTC Act, Movants' Exh.A at 2, a finding Movants do not contest. Prohibiting the operation of a deceptive business is not irreparable injury; Movants "have no vested interest in a business activity found to be illegal." *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972).

It is not enough that "[t]he order demands a comprehensive reorganization of Defendants' businesses … in contravention of years of business planning." Mot.16. That claim is odd, since Movants "do[] not challenge th[e] appointment" of the receiver, Mot. 18, which is the source of the business reorganization. To the degree Movants' business plans relied on deceiving consumers, they cannot complain that those plans were disrupted. *Diapulse*, 457 F.2d at 29. And they have not shown that any disruption will be irreparable should they ultimately prevail. If that were enough, then the Court would have to stay every asset freeze and receivership, since all involve disruption to business plans.

Personal harms. Movants claim the asset freeze prevents them from "obtaining" money. Mot.17. It's hard to see why, since the preliminary injunction expressly excludes assets obtained after entry of the TRO that are unrelated to the allegations. Movants' Exh.A at 6. Movants are free to obtain other income sources. Movants also complain that the freeze is preventing them from "spending money" they obtained before the TRO (Mot.17), but that is precisely the point of an asset freeze.

Movants note that due to the coronavirus pandemic, "governments at every level are affording relief of all types to persons of all types." Mot.17. If the current situation presents special challenges, Movants may ask the district court to exercise its discretion to release certain frozen assets to cover reasonable living

expenses. In fact, the court has *already* released funds to certain Movants pursuant to the parties' agreement. For any additional release, Movants would need to provide affidavits and comprehensive financial disclosures demonstrating that they lack other resources. As things stand, bare assertions about the pandemic provide no reason to release all $40+ million preserved for victim compensation.

III. STAYING THE ASSET FREEZE WOULD IRREPARABLY HARM CONSUMERS AND THE PUBLIC INTEREST

The real risk of irreparable harm is not to Movants but to the victims who could go without relief if the asset freeze is lifted. As the district court found, staying the freeze would allow appellants to "spend their ill-gotten gains," depleting the assets available for restitution. Movants' Exh.B, at 2. Once spent, those assets could disappear from the court's reach forever, permanently altering the existing landscape.

Movants see no problem with this, claiming that a "prohibitive injunction" against *future* deception is enough to protect consumers. Mot.18-19. It goes without saying that the victims have an interest in being repaid the money that appellants took from them under false pretenses.

Movants try to assure the Court that they will not dissipate assets because "[t]he corporate entities are now being run by a receiver," who "can stop any dissipation." Mot.18. But the receiver cannot stop appellants from dissipating *personal* assets, which are outside her control. Besides, Movants admit that they

are seeking to dissipate corporate assets, explaining that they "rely on the corporate entities for their financial sustenance." Mot.17 n.7.

Movants also posit that an asset freeze is unnecessary because they have "many profitable enterprises" that are still operating and can be used to satisfy a judgment. Mot.18. But there is no guarantee that will be the case at the time of final judgment. Moreover, the receiver has valued the frozen assets at only $40 million, far less than appellants' potential liability. The freeze ensures that at least some money will be available for redress after final judgment. Movants deny that they have an "incentive to dissipate anything" (Mot.18), but "[d]issipation does not necessarily mean that assets will be spirited away in secret; rather, it means that less money will be available for consumer redress." *FTC v. Simple Health Plans LLC*, 379 F. Supp. 3d 1346, 1365 (S.D. Fla. 2019), *aff'd*, 2020 WL 570811.

Movants also claim that an appeal bond would be a "more tailored alternative" than an asset freeze (Mot.18), but tailoring alone does not show that the district court abused its discretion. Indeed, Movants did not offer to post security before the asset freeze, raising the idea only belatedly in their stay motion. Even if they had properly preserved the issue, Movants have shown no ability to post security worth over $80 million, the floor of monetary relief in this case. Without more, Movants' protestations about posting security are an empty gesture.

Shifting gears, Movants argue that lifting the asset freeze would serve the "public interest" *even if* it deprives consumers of lawfully-due restitution (Mot.19-20), but their contentions make no sense. Movants posit that their unemployment websites "have helped millions of consumers in just the last two weeks." Mot.20. But since Movants concede that the sites are operational despite the asset freeze, they have failed to show that staying the freeze would further the public interest.

Even less persuasive is Movants' claim that there is a "public interest" in staying the freeze because the Seventh Circuit recently decided the question of monetary relief under the FTC Act differently from this Court and other circuits. Mot.19-20. Staying the asset freeze would not provide "resolution of this asymmetry" (*id.*); it would simply allow appellants to dissipate assets to which consumers will be entitled under Eleventh Circuit law. While that might advance Movants' private interests, the public's interest is in remedying consumer injury.

CONCLUSION

This Court should deny the motion for a stay pending appeal.

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

April 9, 2020

/s/ Bradley Grossman
BRADLEY DAX GROSSMAN
Attorney

FEDERAL TRADE COMMISSION
Office of the General Counsel
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2994
bgrossman@ftc.gov

Of Counsel:
SARAH WALDROP
SANA CHAUDHRY
Attorneys

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the foregoing response complies with the volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 5,196 words, as created by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 32(f).

April 9, 2020

/s/ Bradley Grossman

Bradley Dax Grossman
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

CERTIFICATE OF SERVICE

I certify that on April 9, 2020, I filed the foregoing with the Court's appellate CM-ECF system, and that I caused the foregoing to be served through the CM-ECF system on counsel of record for defendants-appellants, who are registered ECF users.

Dated: April 9, 2020

/s/ Bradley Grossman
Bradley Dax Grossman
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
(202) 326-2994 (telephone)
(202) 326-2477 (facsimile)
bgrossman@ftc.gov