No. 11-18023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Federal Trade Commission,
Plaintiff-Appellee,

v.

Grant Connect, LLC, *et al.*,
Defendants,

and

Kyle R. Kimoto,
Defendant-Appellant.

On Appeal from the United States District Court
For the District of Nevada
Hon. Philip M. Pro
No. 2:09-cv-01349-PMP-RJJ

Brief of the Federal Trade Commission

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Jurisdictional Statement

The FTC agrees with Appellant's Jurisdictional Statement.

Issues Presented

1. Whether the mastermind of a multifaceted scheme to defraud consumers through false and misleading Internet marketing and unauthorized charges to their credit cards—who conceived of the scheme, recruited the participants, created and controlled the company responsible for the deceptive marketing, and participated in the deceptive marketing—may escape liability for injunctive or monetary relief under the FTC Act because the scheme continued (and some components came to fruition) after he was convicted and sent to jail for similar conduct.

2. Whether the district court's injunction is impermissibly vague or overbroad.

Statement of the Case

Appellant Kyle Kimoto made his career from defrauding consumers, convincing them under false pretenses to give up their credit card or bank account numbers, and then extracting from those accounts monthly fees for dubious "memberships" in programs the

consumers never asked for, did not know they had enrolled in, and did not use—and that were notoriously hard to cancel.

After the FTC and the courts shut down two of his companies and banned him from telemarketing, Kimoto placed his wife as the owner of a new venture, Vertek Group LLC, to provide the deceptive marketing needed to move his fraudulent business model to the Internet. He then brought together his coconspirators from prior scams to handle two other components of the scheme: the dubious products to be marketed and a system for tracking the money.

In a nutshell, Kimoto and his coconspirators lured consumers on the Internet with offers of easy credit, free government grants, get-rich-from-home schemes, and similar enticements. Kimoto's company created deceptive ads and websites selling the schemes with false promises, and appearing to require only a low enrollment fee. Consumers signed up by the thousands, not realizing that the promises were empty. They were also unaware that they would incur recurring monthly fees for the program they enrolled in and—worse—to similar recurring charges for additional unrelated programs, which they did not know about at all. Kimoto and his cohorts would later claim that

consumers had "agreed" to such enrollments based on fine print buried in "terms and conditions" pages on the Internet.

Kimoto ran Vertek while it developed several iterations of the scam, right up until April 2008, when he was convicted of conspiracy and fraud for one of his prior schemes and taken to prison. But his coconspirators kept this scheme running for another year, supporting Kimoto's wife and family—and piling up consumer complaints—until the FTC requested that the district court shut them down, which it did. Now, like the proverbial parricide seeking mercy as an orphan, Kimoto argues that his imprisonment relieves him of liability. It does not.

A. Kyle Kimoto's Prior Involvement In Deceptive Marketing Schemes.

Kimoto's scams first came to the FTC's attention in 2002, when his company, Zentel Enterprises, Inc., marketed so-called "upsells"—purportedly "free trials" for services that resulted in recurring monthly charges—in connection with a deceptive advance-fee credit card scam. S.E.R. 37-38, 60-61.[1] The following year, the FTC sued Kimoto and another of his companies, Assail, Inc., for a series of similar scams in which consumers were told they would receive a preapproved

[1] S.E.R. refers to the FTC's supplemental excerpts of record.

Mastercard for a fee and were again offered "free trials" of various services without being told that the trials "would result in recurring monthly charges" that were "extremely difficult" to cancel. *FTC v. Assail, Inc.*, 410 F.3d 256, 259 n.1 (5th Cir. 2005). The *Assail* scam generated about 100,000 consumer complaints during a seven-month period. *United States v. Kimoto*, 588 F.3d 464, 469 (7th Cir. 2009). The Fifth Circuit commented that Kimoto "committed multiple, egregious violations of the [FTC Act]" in that case. *Assail*, 410 F.3d at 264. Kimoto was permanently enjoined from telemarketing and ordered to pay $106 million in equitable monetary relief.[2] S.E.R. 34. In April 2008, he was convicted of conspiracy, mail fraud, and twelve counts of wire fraud for his role in *Assail*; he was sentenced to 350 months' imprisonment. *Kimoto*, 588 F.3d at 468, 475.

B. Kimoto's Next Scheme.

In 2004, between the initial and the final injunctions in the *Assail* case, but before he was indicted, Kimoto moved to Las Vegas and set up a new corporation, which eventually became defendant Vertek Group,

[2] Most of the monetary award was initially stayed, but the court later lifted the stay after the FTC discovered Kimoto was transferring assets that he had not disclosed. S.E.R. 33.

LLC.[3] E.R. 434; S.E.R. 204-205. To skirt the FTC's scrutiny, and to provide income to his family in case he became imprisoned, Kimoto structured the company to be ultimately owned by his then-wife, defendant Juliette Kimoto. E.R. 1052; S.E.R. 144, 204-205. For a time the company bought and sold real estate, but by the end of 2006 it became the linchpin of Kimoto's new consumer scam, centered this time on Internet marketing rather than telemarketing. S.E.R. 128-129.

From the beginning, Kimoto was in control of Vertek. S.E.R. 114, 115, 133, 147, 199. He hired his childhood friend, defendant Michael Henriksen (Kimoto's accountant and codefendant in *Assail*) as Vertek's accountant. S.E.R. 122-124, 126. And he hired defendant Tasha Jn Paul, who had worked her way up to manager while working for him at Assail, as his "right hand man." S.E.R. 143-144, 145, 195.

He also lined up Steven Henriksen (Michael's brother) and his business Global Gold, Inc., to be the first "product provider" for the

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[3] Vertek was initially called Keystone Financial, but changed its name when it moved from real estate into Internet marketing. S.E.R. 128 ("Vertek and Keystone are the exact same company."). The company also operated as Vantex Group, LLC, beginning in about April 2008. Though Vantex was a separate legal entity, upon its creation it seamlessly supplanted Vertek and continued the business without interruption. For simplicity, this brief refers to the companies collectively as "Vertek."

scheme.[4] S.E.R. 131, 146. Global Gold's "product" consisted of a line of credit that, unbeknownst to consumers, could only be used to purchase products in Global Gold's online store. S.E.R. 132. Kimoto, the Henriksens, and Jn Paul initially ran both Vertek and Global Gold from Steven Henriksen's house. S.E.R. 140-141.

As the final piece of the puzzle, Kimoto brought codefendants Randy O'Connell and James Gray (also business associates from Assail), and their company O'Connell Gray, LLP (collectively, "O'Connell Gray") on board. E.R. 509-510, 513-514, 672. O'Connell Gray provided the technical back-end to the operation, using their database system to help "with the logistics of accepting transactions on the [I]nternet . . . and by making recommendations for payment gateways and merchant banks." E.R. 510, 514. Kimoto personally negotiated with O'Connell Gray on the respective responsibilities and profit shares of O'Connell Gray and Vertek on the Global Gold and Grant Connect

[4] Steven Henriksen was not a named defendant in *Assail*, though his company was in the process of becoming Assail's telemarketing "control center" when the FTC brought the case. *Assail*, 410 F.3d at 260-261. He was also held in contempt and temporarily jailed in connection with the case for helping Kimoto and Michael Henriksen dissipate $500,000 in assets. Docket No. 179 & 193, *FTC v. Assail, Inc.*, No. 6:03-cv-00007 (W.D. Tex. Oct. 9 & 20, 2003); *Assail*, 410 F.3d at 261.

scams, which were initially described as the "Catalogue Venture" and the "Government Grant Venture." E.R. 511, 515, 672-673, 678-682; S.E.R. 118-119.

C. How The Scheme Worked.

1. The line of credit version of the scheme.

With the pieces in place, Vertek, under Kimoto's control, coordinated closely with O'Connell Gray to develop Global Gold into the first version of the scheme to launch, a line of credit scam. Vertek developed deceptive Internet advertisements and emails, known as "creatives," and also the deceptive web sites where consumers would sign up, known as "landing pages." *E.g.*, S.E.R. 83, 151-153.

Vertek marketed the credit schemes under numerous brands, such as Global Gold, First Plus Platinum, First National Gold, and many others, but they were all the same scheme. S.E.R. 1, 152, 155-157. The ads touted a "$7,500 Unsecured Credit Line," with promises such as "No credit checks! No Employment verifications! No Security Deposits! Bankruptcy? No problem! APPROVAL GUARANTEED!" *E.g.*, S.E.R. 71-76. The ads also stated the consumer would be charged "0% interest for 12 months and 7.9% thereafter." *Id.* The ads did *not* mention,

however, that consumers would be unable to use this "line of credit" for anything other than items in Global Gold's online store.

Consumers who clicked on the ads were taken to a Vertek-designed "landing page." S.E.R. 101-102; E.R. 116-118. That page featured a large "$7,500 Unsecured Line of Credit" headline, sometimes accompanied by smaller type stating, "toward thousands of our merchandise items," and again promised guaranteed approval, no credit check, and 0% interest for 12 months. *Id.* The page included quotes from major news outlets about the importance of credit, and often included images of what appeared to be a traditional credit card. *E.g.*, S.E.R. 101-102; E.R. 116-118. Consumers were invited to enter personal information and check a box agreeing with the privacy policy. *Id.*

Consumers who did so were taken to a second page, where they were again assured they were about to receive a $7,500 credit line, that they could receive a $1,500 unsecured cash advance for signing up today, and that they would pay only a small $2.78 activation fee. S.E.R. 8-9. The page solicited the consumers' credit or debit card information, date of birth, and Social Security number. It also required that they check boxes indicating they agreed to the terms and conditions and

privacy policy, which were clickable links, and "the offer details below," which appeared in small print further down the page from the submit button. S.E.R. 8-10. Consumers were often told that the line of credit was a "limited time offer," and the page sometimes included a countdown timer with only a short time remaining to fill out their information. S.E.R. 11, 13. The web sites did not invite or permit the consumer to view the online store before signing up. S.E.R. 167, 182.

The "offer details" stated inconspicuously that the line of credit "is for use towards thousands of our merchandise items only," that consumers would be charged a $39.95 monthly fee if they did not cancel, and that they would also be signed up for additional programs, each with its own negative-option "free trial" period and recurring monthly charges if the consumer did not cancel. S.E.R. 8-10. Although defendants referred to these programs as "upsells," there was no way to opt out of them. S.E.R. 173-175.

The terms and conditions—also drafted by Vertek under Kimoto's control, S.E.R. 77-78—used terms like "Global Gold *Card Holder*" and "First Plus Platinum *Cards*" but stated in fine print that the line of credit was not a traditional credit card, and could only be used "to

purchase merchandise in the Global Gold Credit Services [or one of the other brands] website." E.R. 120-121, S.E.R. 92-93, 103-104. More than twenty paragraphs into the fine print, the terms stated that the consumer "accepted enrollment for up to 2 additional promotional product offers using the relevant data I provided"—that is, the consumer's credit or debit card. E.R. 122; S.E.R. 94, 105. The terms and conditions often did not tell the consumer what the additional promotions cost, and provided only links to the various offers' websites for further details. *Id.*

The other offers included, at various times, Grant Connect (government grants), Vcomm300 and VCommUnlimited (long distance), SmartHealth Gold ("medical and lifestyle benefits"), Premier Plus Member (email and text messaging), and Identity Sweep 360 (identity theft protection). E.R. 447; S.E.R. 94. Each of these services had a ten-, fourteen-, or fifteen-day trial, with monthly recurring charges of between $12.95 and $19.95 thereafter. E.R. 445-446. Although every consumer who signed up for the line of credit was enrolled in two of these services, very few ever used them. S.E.R. 179-180, 188.

Consumers who signed up for the line of credit offers often believed they were signing up for a credit card, and complained that they were charged for services they never agreed to. *E.g.*, E.R. 315-316, 326, 331, 333, 342, 345, 348, 351, 356, 363. In addition, they learned only after signing up that, despite the supposed "line of credit," most items in the online store could be purchased only if they provided a down payment first. S.E.R. 209-210, 304, 363. When consumers tried to cancel, Global Gold's customer service operation (also set up by Vertek, S.E.R. 77-79, 82) tried to convince them to delay cancellation or keep the service they received (rather than the one they believed they had signed up for), or offered them a lower membership price. *E.g.*, E.R. 265, 274, 315-316. They also directed consumers to separate websites or phone numbers to cancel the various negative-option services, even though all of the calls were handled from the same call center. E.R. 11.

In addition to designing the advertisements and landing pages, drafting the terms and conditions, and setting up customer service for the line of credit scheme, Vertek also arranged merchant accounts for Global Gold, which allowed them to make charges on consumers' debit or credit cards. S.E.R. 77-79, 82-89. The line of credit scams launched

around June 2007 and eventually brought in $18.7 million from consumers, after accounting for $2.7 million in refunds. E.R. 477. By the time the FTC shut it down, 94% of all Global Gold customers had cancelled their memberships. *Id.*

2. The Grant Connect version of the scheme.

While the line-of-credit scheme was in development, Kimoto and his coconspirators also began developing Grant Connect, a version of the scheme that touted an online system for finding free government grants rather than easy credit.[5] After Kimoto introduced O'Connell Gray to the idea in 2006, James Gray sent Kimoto login details for several grant search products, suggesting that Kimoto have Tasha Jn Paul create a "highly detailed roadmap of how all the sites and offers interrelate." E.R. 687. They also discussed available domain names, with Vertek settling on www.grantconnect.com in early December 2006. E.R. 689. In March 2007, with Kimoto's trial still a year away, Vertek and O'Connell Gray exchanged emails regarding the "Delivery Timeline" for Grant Connect, including "landing pages and creatives." S.E.R. 77. Vertek also created a first draft of the terms and conditions

[5] The scheme was also marketed as Grant Source America. S.E.R. 3.

for Grant Connect, and worked on designing a logo for the product. S.E.R. 77, 80-81. In mid-February 2008, Kimoto was sent "program specifics (and testimonials) for Grant Connect." E.R. 522.

Grant Connect followed the same model as the line of credit scams. Its Vertek-designed landing pages featured pictures of President Obama and Vice President Biden or pictures of a woman holding cash. S.E.R. 165-166; E.R. 101, 104, 112. They claimed that billions of dollars of government grants were available to individuals, and included quotes from news sources like Fox, NBC, and CBS. E.R. 112-114. They offered an "easy to use program" to "instantly find the grant that's right for you," and claimed consumers could find grants "to help you with your financial situation," for needs such as purchasing a home, child care, debt consolidation, small businesses, medical expenses, and personal grants. *E.g.*, E.R. 113; S.E.R. 1-2. The sites also included phony testimonials from individuals claiming they had received hundreds of thousands of dollars in government grants, though none of the individuals ever used Grant Connect. *E.g.*, E.R. 104, 114, 516.

As with the line-of-credit offer, consumers completed a two-step process, entering first their contact information and, on a separate

page, their credit or debit card information. E.R. 101-102, 113-114. The second page required the consumer to check boxes indicating agreement with the privacy policy and terms and conditions, which were contained in a separate link, and the "offer details." Again, the inconspicuous offer details included a $2.78 processing fee, automatic recurring monthly charges of $39.95 after the 7-day trial, and additional offers with their own trial periods and negative-option monthly charges. E.R. 114. The additional offers included ID Pro Alert, MemberLegal Net, ID Sweep, and Smart Health Gold; their monthly charges ranged from $12.95 to $19.95 each. E.R. 446-447, 456.

Upon purchasing Grant Connect, consumers were directed to the Grant Connect website, where they could log in and search for grants. In online customer service chats on the Grant Connect site, Global Gold representatives told consumers they could find grants for things like expanding a business, college expenses, buying a home, home renovations, personal financial needs, medical costs, utilities bills, rent assistance, and paying off personal debts. E.R. 7. In fact, most government grants cannot be used for such personal purposes.

Moreover, the Grant Connect site was confusing, difficult to use, and contained outdated information. *Id.*

As with the line of credit offers, customers complained and cancelled Grant Connect in droves. Grant Connect enrolled more than 52,000 customers beginning in October 2008, of which 91% had cancelled by August 2009.[6] E.R. 477, 785. In total, the scheme brought in $2.2 million, after accounting for $500,000 in refunds. *Id.*

3. The work-from-home versions of the scheme.

A third iteration of Kimoto's scheme, which commenced development in 2007, involved programs that promised consumers could earn substantial income quickly and easily while working from home. One of the programs, marketed as Domain Processing and One Hour Wealth Builder, claimed users could "immediately begin earning hundreds of thousands of dollars a day, in just a few minutes of your spare time," by buying and selling expired Internet domain names. S.E.R. 26-28. The site, designed by Vertek, claimed users could make $174,000 per year working just four hours a day. S.E.R. 26-28, 153.

[6] Some of these consumers were unwittingly enrolled in Grant Connect as one of the "promotional offers" bundled in the line of credit scheme. *E.g.*, E.R. 239, 265, 291, 297.

Another iteration, My Search Cash, offered consumers a "free" trial kit for an "easy system" to make "big money" or "thousands" or up to "$50,000 or more a year" using EBay and Google. S.E.R. 70, 217.

These earnings claims were unsubstantiated. S.E.R. 190-191. In addition, like the line of credit and Grant Connect schemes, the work-from-home offers included phony testimonials attesting to how easy it was to make money using the systems. S.E.R. 26-28, 217.

Consumers followed the same two-step process to sign up for these offers and, as with the other iterations of the scam, were signed up for additional programs with negative-option recurring fees. E.R. 447, 457-458. The vast majority of consumers cancelled soon after. Of about 84,000 consumers who signed up between March 12, 2008 and July 30, 2009, 63% had cancelled by the latter date. S.E.R. 215. The work-from-home scheme brought in approximately $1.4 million from consumers, after accounting for $367,000 in refunds. E.R. 792.

4. The Acai Total Burn version of the scheme.

In yet another iteration of the scheme, developed after Kimoto's imprisonment, consumers were sold dietary supplements, including Acai Total Burn, with representations that the product would help them

build muscle, increase their metabolism, lose weight, gain energy, reduce fatigue, and slow down the aging process. S.E.R. 29-31. As with the work-from-home scheme, these claims were baseless. S.E.R. 184-187. Consumers who purchased Acai Total Burn were charged an initial $4.95 trial fee, and then $49.95 monthly thereafter. E.R. 455. As with the other scams, they were also signed up for additional negative-option programs with fees from $19.95 to $29.95 per month. E.R. 455.

In the short time the defendants sold Acai Total Burn (June 5 to July 30, 2009), they enrolled 670 consumers and brought in $8,333. Of those customers, 159 had already cancelled by the end of the period. S.E.R. 215.

D. Kimoto's Control Of Vertek And Participation In The Deceptive Schemes.

Vertek was instrumental in each version of Kimoto's scheme during the entire period of the scheme's operation. The company was responsible for marketing the scheme, and creating (or in some cases directing another company to create) websites for the ad campaigns, the deceptive advertisements that lured consumers in, and the deceptive landing pages that convinced consumers to purchase. S.E.R. 148-149, 151, 201; E.R. 511, 515 (Vertek was responsible for "creating and

designing all of the marketing for Grant Connect, including landing pages . . . where consumers would view the marketing and enter their credit card information.").

Vertek was also responsible for recruiting "affiliates" who would drive Internet users to the websites, and for creating custom "skins" so the affiliates could appear to be offering an exclusive product. S.E.R. 136, 155, 201; E.R. 511, 515. The company performed these functions for each iteration of the scheme. S.E.R. 152-160. The company also participated in other aspects of the operation, such as drafting the terms and conditions and setting up customer service for the line of credit scam, collaborating on the initial plan for Grant Connect, and implementing the additional negative-option "upsell" products. S.E.R. 77-90. In short, Vertek was an essential party to the operation's "success" in extracting money by deceiving consumers.

1. Kimoto's control of Vertek.

There is no dispute that, before his imprisonment, Kyle Kimoto was in charge of Vertek and controlled its day-to-day activities. *E.g.*, E.R. 435, 1053; S.E.R. 115, 147 ("[I]t was clear that Kyle Kimoto was the boss? A: Correct."; "Q. And he was the one involved in the day-to-

day business operations; correct? A: Up until the time he stopped working there."), 163, 199. Kimoto was "responsible for creating and organizing" both "Vertek and later Vantex." E.R. 1052. Although Juliette Kimoto was the owner, she had no role in running the company. E.R. 1052-1053; S.E.R. 126-127, 150, 200. Moreover, Kimoto negotiated on Vertek's behalf regarding the respective responsibilities and profit shares of Vertek and O'Connell Gray for Grant Connect. E.R. 511, 515.

Both Tasha Jn Paul, who ran much of Vertek's operations, and Michael Henriksen, who ran accounting, directly reported to Kimoto. E.R. 665; S.E.R. 133, 145, 147. After his indictment, Kimoto brought Johnnie Smith on to run Vertek because he wanted "someone I can trust because I'm concerned about my family." S.E.R. 195; *see also* S.E.R. 134, 193-195. But Smith did little real work for the company until February or March, 2008. *E.g.*, S.E.R. 112, 197-198. And Kimoto "clearly had more authority than Johnny Smith." S.E.R. 164.

Nearly all the iterations of Kimoto's scheme were developed, and most were launched, *before* Kimoto's criminal trial in April 2008—while he was in direct control of Vertek. Vertek was in active development of the line of credit, Grant Connect, and Domain Processing projects in

2007 and 2008. *See* pp. 7, 11-12, 15-16, *supra*. As Kimoto admits, the line of credit scheme began making sales in June 2007, and the Domain Processing work-from-home scheme was launched in March 2008. Appellant's Br. 13, 16; *see also* E.R. 477; S.E.R. 215.

2. Kimoto's participation in the schemes.

In addition to his overall control of Vertek, Kimoto was directly involved with almost every version of the scam at issue in this case.

Line of credit. Kimoto admitted in his deposition he was directly involved in the line-of-credit scams. S.E.R. 169. Among other things, Kimoto identified and recruited the affiliate networks that drove traffic to Vertek's deceptive web sites. S.E.R. 170.

Grant Connect. Kimoto also directly participated in Grant Connect. He was the impetus behind the project, initially introducing the idea to O'Connell Gray in 2006, and negotiating the mutual responsibilities and profit shares of Vertek and O'Connell Gray. E.R. 511, 515; S.E.R. 120. Soon thereafter, O'Connell Gray sent Kimoto their "[first] pass" draft letter of intent regarding the "Gov't Grant Venture" between O'Connell Gray and a contemplated "Kyle K[i]moto Entity," which became the Grant Connect scam. E.R. 674, 679-682; S.E.R. 117-

118. Vertek and O'Connell Gray then began to develop Grant Connect in late 2006. E.R. 511, 515. In December 2006, Gray sent Kimoto credentials to explore the grant product that O'Connell Gray eventually acquired, and which became Grant Connect. E.R. 687. Under Kimoto's control, Vertek selected the www.grantconnect.com web domain in early December 2006. E.R. 689. The project continued in 2007, and in mid-February 2008, Kimoto personally received "program specifics (and testimonials) for Grant Connect." E.R. 522, 477.

Work from home. Kimoto also personally participated in the work-from-home scams. In February 2008, Tasha Jn Paul sent an email listing responsibilities for the Domain Processing project. E.R. 806-807. The email shows that Kimoto led four of the 13 tasks, including a new design for the website, a new logo, and the text and design for the deceptive landing page and ads. E.R. 807. Consistent with those responsibilities, Kimoto received details of setting up the program, including initial costs, monthly fees, names for the various membership levels, and even the name that would show up on consumers' credit card statements. E.R. 532. He also was sent a document titled "Domain Processing: How it Works," which contained many of the false claims

that wound up on the landing pages, including that users could "make more money than you ever dreamed possible, only working as little as 60 minutes a day," promising "no limit to the amount of money you can make," and claiming users could earn $174,150 per year using the program. E.R. 697-701. The conspirators also anticipated that Kimoto would continue work on the work-from-home scams; in February 2008, Jim Gray emailed an affiliate, mentioning that he would "most likely be interfacing with Kyle Kimoto, who heads up product development and publisher relations." E.R. 523.

3. Kimoto's knowledge of the misrepresentations.

Kimoto's control of Vertek and participation in the various scams demonstrate that he had knowledge of the conspiracy's deceptive practices. For example, he was responsible for recruiting affiliates for the line-of-credit offers, which he could not have done without knowing the promises made in Vertek's advertisements and landing pages. As he testified, "it was important for me to understand and know this language [on the landing page], because that was my job to take [the line of credit product] out to the affiliate marketer." S.E.R. 172. He likewise received the program specifics and testimonials for Grant

Connect and thus knew about the deceptive advertising claims for that product. E.R. 522. Importantly, he received the testimonials before the product launched, when they obviously could not have been genuine. *Id.* Kimoto also had knowledge of the work-from-home scam, both through his responsibility for the design and text of the deceptive landing pages and through having received a draft containing many of the false claims that appeared on the web pages. E.R. 697-701, 807.

Kimoto also demonstrated that he thoroughly understood defendants' deceptive practice of including negative-option "upsells" without adequately disclosing the nature of the programs. S.E.R. 171, 173-175. He testified frankly that the additional products were "not really an upsell" at all, but part of take-it-or-leave-it package—though Vertek's landing pages never made that clear. S.E.R. 174-175. The conspirators' deceptive "upsell" practice was consistent across every version of the scam, both before and after Kimoto was imprisoned.

E. Kimoto's Trial And Imprisonment.

Kimoto's criminal trial began March 31, 2008 and lasted ten days. *United States v. Kimoto*, 588 F.3d 464, 471 (7th Cir. 2009). He was convicted on one count of conspiracy, one count of mail fraud, and

twelve counts of wire fraud, and was immediately taken into custody. *Id.* at 468. In September 2008 he was sentenced to 350 months' imprisonment. *Id.* at 495.

After the trial, Kimoto did not approach the authorities regarding the deceptive conduct of Vertek or his other coconspirators, nor did he take any action to disavow or withdraw his association with the scheme. To the contrary, despite his imprisonment, Kimoto continued to benefit from Vertek's deceptive conduct through the company's support of Julie Kimoto. *See* S.E.R. 137. Although she had no role in running the company, after the conviction Ms. Kimoto received between $50,000 and $60,000 *per month* from Vertek. S.E.R. 135. Vertek's income eventually began to drop, yet Ms. Kimoto continued to receive $15,000 or $20,000 per month up until the company was shut down by the receiver in this case. S.E.R. 138. Indeed, Mike Henriksen testified that he wanted to stay with Vertek because he "felt a lot of obligation to the Kimotos" and the company was "helping provide a living for my best friend's wife and his kids." *Id.*

F. Procedural History.

In July 2009, the FTC brought suit against several participants in the scheme, including Vertek, Global Gold, Steven Henriksen, and Juliette Kimoto, and sought a temporary restraining order, asset freeze, and appointment of a receiver to bring an immediate halt to the deceptive marketing of Grant Connect. E.R. 12, 80-127. The district court issued a temporary restraining order the following day. After further investigation the FTC amended its complaint to add allegations about the other versions of the scheme, and also to add as defendants Kimoto, Michael Henriksen, Tasha Jn Paul, Johnnie Smith, and numerous other participants in the scheme. E.R. 542-575.

The amended complaint charged the defendants with seven counts of violating Section 5 of the FTC Act, based on their deceptive marketing of the line of credit, Grant Connect, work from home, and Acai Total Burn schemes, and on their use of false testimonials and inadequate disclosure of negative-option continuity plans. *Id.* The complaint also alleged that defendants violated the Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693 *et seq.* and its Regulation E, 12

C.F.R. § 205.1, by placing unauthorized charges on consumers' credit cards. *Id.*

G. The District Court's Order.

Following discovery, the FTC, Kimoto, and Steven Henriksen and his corporate entities filed cross-motions for summary judgment.[7] E.R. 1. The district court granted the FTC's motion against all remaining defendants and denied each of the defendants' motions. E.R. 14, 17, 53. The court found no genuine issue of fact that the line of credit, Grant Connect, work from home, and Acai Total Burn schemes were deceptively marketed; that the negative-option upsells were inadequately disclosed; that the testimonials were phony; and that defendants debited consumers' accounts without written authorization in violation of EFTA. E.R. 25-47.

In addition, the court found no genuine issue that the defendants had operated a common enterprise because "[a]ll the various offers were run by the same individuals using different company names," the defendants "swapped and shared personnel" and work space, they

[7] The FTC had previously entered into stipulated permanent injunctions with Johnnie Smith, Vertek, Vantex, Juliette Kimoto, and two other entities she owned. E.R. 13.

"blurred the lines of corporate separateness in their activities," and they "engaged in concerted and coordinated action across campaigns, and made their profits interdependent." E.R. 21-23.

Accordingly, the court enjoined the defendants from engaging in negative-option marketing, continuity programs, preauthorized electronic fund transfers, and the use of testimonials; and from marketing or selling products related to grants, credit, business opportunities, diet supplements, or nutraceuticals. E.R. 48. The court noted that "[r]epeat offender Kyle Kimoto previously was involved in a similar credit card scheme in *Assail*," and that the defendants' "readiness to flout the law, the extensive nature of the activity, and the adaptability of [their] methods to other products counsel in favor of permanent injunctive relief." E.R. 48-49.

The court also found the FTC had presented evidence of consumer injury totaling $29,784,770.52. That total comprised approximately $18.9 million from the line-of-credit scheme, $1.5 million from the work-from-home schemes, $2.3 million from Grant Connect, $7.2 million from the VComm "upsells," and $8,333 from Acai Total Burn. E.R. 50-51. The

court ordered the defendants jointly and severally liable for the consumer injury amount. E.R. 79.

Kimoto, initially acting pro se, was the only defendant who appealed the district court's order.

Summary of the Argument

1. The district court's summary judgment order against Kimoto was correct. Kimoto does not dispute that Vertek violated the FTC Act by making false and misleading representations and omissions in its marketing of the line-of-credit, Grant Connect, work-from-home, and Acai Total Burn products. Nor does he dispute that Vertek operated as a common enterprise with other defendants toward the shared goal of marketing and selling the products to consumers.

Kimoto is liable for injunctive relief due to Vertek's FTC Act violations because he participated in the violations and had the authority to control them. There is no genuine dispute that Kimoto controlled Vertek from its creation until his criminal trial and incarceration in the *Assail* matter. In that period, Vertek developed and launched the line-of-credit and work-from-home versions of the scheme. The company also nearly completed the development of Grant Connect,

which launched soon after Kimoto's imprisonment. Although Acai Total Burn was developed after Kimoto's imprisonment, it employed the same deceptive practices developed while Kimoto headed Vertek.

In addition to his authority to control Vertek's deceptive practices, Kimoto also participated directly in the practices. Not only did Kimoto organize the defendants' common enterprise by connecting the various companies and individuals to make the scheme work, he directly participated in the line-of-credit, work-from-home, and Grant Connect versions of the scheme. Kimoto's arguments to the contrary do not create a triable issue of fact regarding his control of Vertek or his participation in the deceptive conduct.

Kimoto is liable for monetary relief as a result of Vertek's FTC Act violations because he had knowledge of the deceptive practices employed in each iteration of the scheme as well as the specific representations in all but the Acai Total Burn product. Kimoto's knowledge is evident from his role in organizing the defendants' activities, his business-development role for Vertek, and his personal participation in the line-of-credit, work-from-home, and Grant Connect projects. Kimoto attempts to deny knowledge by ignoring the record and

his own deposition testimony, but does not point to any affirmative evidence that creates a genuine fact issue.

2.a. The district court acted within its discretion when it permanently enjoined Kimoto from engaging in the specific practices and from marketing or selling the categories of products that he and his codefendants used to defraud consumers. The injunction was not overbroad because those restrictions are reasonably related to the unlawful practices, the violations were serious and deliberate, the scheme was easily transferrable to other products, and because Kimoto has shown himself to be a recidivist violator of the FTC Act.

Kimoto's arguments that the injunction is overbroad or vague are meritless. *First*, his attempt to avoid liability by focusing on the extent to which evidence shows he *personally* participated in particular parts of the scheme fails because his liability is based on *Vertek's* FTC Act violations; his personal activities are irrelevant to the scope of the injunction. *Second*, his argument that the injunction improperly extends to broad product categories and prohibits certain practices in the sale of any product or service is directly contrary to the relevant case law. *Third*, his argument that some conduct occurred after his

incarceration does not negate that the injunction is reasonably related to conduct that occurred before he was imprisoned.

b. The district court also properly held Kimoto liable for equitable monetary relief equal to the full amount of consumer harm from the scheme. As the person who organized the defendants, had knowledge of the deceptive practices, and controlled Vertek while it developed the line-of-credit, work-from-home, and Grant Connect schemes, Kimoto cannot escape liability merely by withdrawing from participation (through imprisonment) while his wife and family continued to collect hundreds of thousands of dollars from cheated consumers.

The district court's order is consistent with the broader principle that participants in a common enterprise or conspiracy are jointly and severally liable for the foreseeable harm they cause so long as they have not withdrawn from the scheme. As this Court has held, a conspirator like Kimoto cannot withdraw simply by ceasing active participation in the scheme—here by becoming imprisoned. Instead, he must have disavowed the unlawful objective of the scheme, affirmatively acted to defeat its purpose, or taken decisive steps to disassociate himself; Kimoto did none of those things. Kimoto thus remained liable for his

codefendants' continued marketing of the line-of-credit and work-from-home products, for their launch of Grant Connect, and for their extension of the scheme to Acai Total Burn, all of which were foreseeable.

3. Kimoto's argument (presented for the first time on appeal) that the Electronic Funds Transfer Act does not permit individual liability for corporate violations fails because violations of EFTA are deemed violations of the FTC Act. 15 U.S.C. § 1693o(c).

Standard of Review

1. Summary Judgment. The district court's entry of summary judgment is reviewed de novo. *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir. 2008). Summary judgment is appropriate if "there is no genuine issue as to any material fact," and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must identify materials that "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To avoid summary judgment, the nonmovant must show a genuine issue of material fact by presenting "affirmative evidence" from which a jury could find in his favor. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 257 (1986). "[B]ald assertions or a mere scintilla of evidence . . . are both insufficient to withstand summary judgment." *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009).

2. Permanent injunction. The district court's entry of a permanent injunction is reviewed "for an abuse of discretion or for application of an erroneous legal principle." *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 465 (9th Cir. 1985). "To prevail on appeal, the [appellant] must show that there was no reasonable basis for the district court's decision." *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1331 (9th Cir. 1987). The scope of the permanent injunction is reviewed for an abuse of discretion, and "factual findings supporting the decision to grant the injunction will be reviewed for clear error." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002).

3. Monetary relief. This Court "review[s] the district court's grant of equitable monetary relief for an abuse of discretion." *Stefanchik*, 559 F.3d at 931, quoting *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001).

Argument

I. The District Court Correctly Held Kimoto Liable For Vertek's Violations Of The FTC Act.

A. Legal Standard.

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1). An act or practice is deceptive if there is (1) a representation, omission, or practice, that is (2) material, and (3) likely to mislead consumers acting reasonably under the circumstances. *E.g.*, *Stefanchik*, 559 F.3d at 928. When a corporation violates the Act, an individual may be held personally liable for injunctive relief if he either "participated directly in the practices or acts or had authority to control them." *FTC v. Amy Travel*, 875 F.2d 564, 573 (7th Cir. 1989). "Either participation or control suffices." *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008). "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel*, 875 F.2d at 573.

To hold an individual liable for monetary relief, the FTC must also "demonstrate that the individual had some knowledge of the practices." *Id.* "The knowledge requirement may be fulfilled by showing that the

individual had 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Id.* at 574, quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985); *Stefanchik*, 559 F.3d at 930.

B. Vertek Violated The FTC Act.

Kimoto does not dispute the district court's holding that the line-of-credit, Grant Connect, work-from-home, and Acai Total Burn products were marketed using deceptive advertisements and landing pages—including phony testimonials and inadequate disclosures of the negative-option "upsells"—in violation of the FTC Act. Nor does he dispute that Vertek was responsible for numerous key aspects of those violations, including the design of the deceptive advertisements and landing pages for each version of the scheme. Kimoto likewise does not dispute Vertek's involvement in other aspects of the scheme, including signing up affiliates, arranging customer service, and drafting the terms and conditions that hid the nature of the negative-option upsells. He does not dispute that the recurring monthly charges violated the

EFTA. And he does not dispute that the defendant companies and individuals operated as a common enterprise.

C. Kimoto Controlled Vertek And Directly Participated In The Misrepresentations.

Kimoto also does not dispute that he controlled Vertek until his incarceration.[8] Kimoto's active involvement in Vertek's business affairs included personally setting the company up, finding new lines of business for the company, and acting on its behalf in negotiations with O'Connell Gray and others. He personally hired the top employees at the company and they directly reported to him. *See* pp. 18-19, *supra*. Those employees testified that Kimoto was "the boss" at Vertek, that he was "involved in the day-to-day business" of the company, and that he "clearly had more authority than Johnny Smith." S.E.R. 147. As the head of Vertek, he had the authority to control all of its operations, including the deceptive practices at issue. Kimoto is therefore liable for

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[8] Kimoto tellingly describes Vertek's shift from real estate to Internet marketing as "when *Mr. Kimoto*"—not the company; nor his wife, the putative business owner—"entered the Internet marketing world," and when "*Mr. Kimoto* turned his efforts toward Internet marketing." Appellant's Br. 9 (emphasis added). He also admits he was the one who "reached out to past colleagues Tasha Jn Paul and Michael Henriksen . . . to be the heads of day-to-day operations and accounting," and that in 2007 he "brought in Johnnie Smith . . . to assist with various company affairs." *Id.* at 9, 12.

injunctive relief based on Vertek's illegal practices for each of the deceptive campaigns. *See Stefanchik*, 559 F.3d at 931; *Amy Travel*, 875 F.2d at 574 (finding control where defendants "created the businesses, opened new ones, . . . hired personnel," and "oversaw the daily operations").

Although his control alone is sufficient to support his liability for injunctive relief, *QT,* 512 F.3d at 864, Kimoto also participated directly in Vertek's illegal practices. Kimoto was the driving force behind the entire scheme, which consistently employed the same deceptive practices he had engaged in before and that eventually landed him in prison. He created the organization that made all the versions of the scheme possible. As he admits, he personally connected Steven Henriksen, Global Gold, O'Connell Gray, and Vertek to their various roles in the scheme. Appellant's Br. 10. Moreover, he directly participated in several iterations of the scheme, including the line of credit (which he admits), Grant Connect, and work-from-home schemes.[9] *See* pp. 20-22, *supra*.

[9] Kimoto does not challenge the injunction so far as it applies to the line of credit scheme. *See* Appellant's Br. 32-33 (arguing only that he lacked knowledge of the illegal conduct related to line of credit).

In short, the FTC identified overwhelming evidence that Kimoto met not only one of the alternative predicates for liability—"participation" or "control"—but indeed both. In response, Kimoto cites no evidence that would raise a genuine issue of material fact regarding his participation or control. For example, he attempts to downplay materials he was "sent or copied on" related to the work-from-home scheme (Appellant's Br. 30), but those emails show he took the lead on the design of the deceptive website and on the text and design of the deceptive landing pages and advertisements, E.R. 807, and that he received materials containing the same false and misleading claims that were made on the website. E.R. 697-701. Nor does he refute evidence that his partners expected that he would continue to be involved in the project. E.R. 523. Instead, Kimoto complains that there was not *still further* evidence that he "responded or otherwise provided input" on the project. Appellant's Br. 30. But to avoid summary judgment, a defendant must come forward with "*affirmative evidence*" of his own "from which a jury might return a verdict in his favor." *Anderson*, 477 U.S. at 257 (emphasis added). Here, Kimoto presented no more than "bald assertions" (from his coconspirators), which are

insufficient to create a triable issue. *Stefanchik*, 559 F.3d at 929; *see* E.R. 1039-1045.

Kimoto's denial of participation in Grant Connect takes even greater liberties with the record. Kimoto claims that "nothing happened" on Grant Connect between late 2006 and February 2008 (Appellant's Br. 29), but that is simply wrong. *See* pp. 12-13, 20-21, *supra*. In fact, a lot happened. Kimoto ignores that (1) he negotiated with O'Connell Gray on a letter of intent for Grant Connect; (2) O'Connell Gray researched grant products to acquire; (3) O'Connell Gray sent login details to Kimoto to create a "roadmap of how all the sites and offers interrelate"; (4) O'Connell Gray and Vertek settled on the domain name www.grantconnect.com; and (5) they discussed delivery timelines and drafted terms and conditions for the program. E.R. 511, 515, 522, 687, 689, S.E.R. 77-80, 117-118, 120. All of this activity occurred while Kimoto controlled Vertek. Kimoto also personally received the "program specifics (and testimonials)" for the product in February 2008. E.R. 522.

D. Kimoto Had Knowledge Of The Deceptive Practices.

As noted, a showing of "some knowledge" (or reckless indifference or conscious avoidance) is necessary for an award of *monetary* equitable relief. *See Amy Travel*, 875 F.2d at 573; *Stefanchik*, 559 F.3d at 930. Here, Kimoto admits that he was responsible for "developing new business" for Vertek (Appellant's Br. 10), but the record demonstrates that Vertek did not have any business other than the deceptive marketing of dubious or outright fraudulent services. Further, Kimoto set the company up and enlisted Steven Henriksen, Global Gold, and O'Connell Gray precisely to provide the deceptive "Internet marketing services" that were the heart of the scheme. *Id.* Kimoto thus knew by virtue of his admitted role—and particularly in light of his prior experience with the FTC—that Vertek was engaged in deceptive practices. *Cf. Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 788 (9th Cir. 1996) ("[K]nowledge and intent follow from the inherently fraudulent nature of a pyramid scheme as a matter of law.").

Kimoto's participation in the individual iterations of the scheme also shows that he knew about the deceptive practices used to sell the various products. In his deposition, Kimoto demonstrated that he was

closely familiar with the line of credit landing pages, including their deceptive claims and the deceptive "upsell" practices—which were employed for *all* the products. S.E.R. 171-175. Kimoto had actual knowledge of the deceptive Grant Connect claims through having received program specifics and phony testimonials for the product. E.R. 522. And as the senior person responsible for redesigning and writing the Domain Processing website—and having received a draft of the deceptive claims—he had actual knowledge of the deceptive claims for that product. E.R. 522, 697-701, 807.

With regard to Grant Connect, Kimoto pretends the activity before February 2008 did not happen, and claims only that he was not "made aware of any aspect" of the product "following his incarceration." Appellant's Br. 29. As shown above, however, Kimoto had knowledge of the deceptive practices before his incarceration. Kimoto also claims he had no knowledge of the Domain Processing scheme, but again points to no affirmative evidence suggesting he did not see or receive the materials sent to him. He likewise identifies no affirmative evidence that he did not participate in the design and writing of the deceptive web pages, which the record shows were assigned to him.

Kimoto's denial of knowledge regarding the line of credit scheme likewise falls flat. Kimoto denies only "developing the product or adjusting it over time," relies on the absence of documents demonstrating that he personally saw the many complaints that came in while he controlled Vertek, and attempts to hide behind the purported approval of "a reputable law firm." Appellant's Br. 33. But he does not and cannot deny his intimate familiarity with the deceptive line of credit landing pages. As he testified, "it was important for me to understand and know this language [on the landing page], because that was my job to take [the line of credit product] out to the affiliate marketer." S.E.R. 172. Moreover, Kimoto's attempt to rely on a letter from counsel "[is] not a valid defense on the question of knowledge" required for individual liability. *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006), quoting *Amy Travel*, 875 F.2d at 575.

Kimoto also denies knowledge of the Acai Total Burn scheme, which was launched after he was imprisoned. But Acai Total Burn used the same deceptive practices as the schemes that launched or were in development before he was imprisoned, including the deceptive two-step ordering process and negative-option upsells with recurring monthly

charges. Kimoto had knowledge of those practices and, given the Vertek business model he developed, it was foreseeable that the company would apply that model to other products. Accordingly, Kimoto had "some knowledge" of the deceptive practices used to sell Acai Total Burn. *Amy Travel*, 875 F.2d at 573. In any event, as noted below, even if Kimoto were found to *lack* knowledge of the Acai Total Burn scheme, that conclusion would at most justify reducing his liability for monetary equitable relief by $8,333. *See* p. 55, *infra*.

II. The District Court's Injunction And Order Of Equitable Monetary Relief Were Within Its Discretion.

A. The Injunction Against Kimoto Is Not Vague Or Overbroad.

Section 13(b) of the FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). The Commission "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). And those "caught violating" the FTC Act "must expect some fencing in." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957). Accordingly, injunctive relief under the FTC Act may be framed "broadly enough to prevent respondents from engaging in similarly

illegal practices in future advertisements." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965). The injunction will be upheld so long as it bears a "reasonable relation to the unlawful practices found to exist." *Id.* at 394-395.

To determine if an injunction is overbroad, the court considers "(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations." *FTC v. John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1012 (C.D. Cal. 2012), quoting *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994); *see also Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370-371 (9th Cir. 1982) (listing factors as "whether the [defendants] acted in blatant and utter disregard of the law," "whether they had a history of engaging in unfair trade practices," and whether they engaged in "a technique of deception that easily could be transferred to . . . some other product"). "Injunctions are not set aside" for vagueness "unless they are so vague that they have no reasonably specific meaning." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992).

Here, the district court's injunction was reasonably related to the FTC Act violations. The marketing and payment activities that the court enjoined—negative option marketing, continuity programs, preauthorized electronic fund transfers, and the use of testimonials—were precisely the activities that Kimoto and the other defendants used to exploit consumers. *See* E.R. 48. The categories of products that the defendants were enjoined from marketing—grants, credit, business opportunities, and diet supplements or nutraceuticals—were the same categories in which defendants employed their illegal deceptive marketing practices. *See* E.R. 49.

Moreover, the violations were serious and deliberate. Kimoto and his coconspirators engaged in "extensive misconduct" and were "willing to flout the law to offer the deceptive grant product which no Defendant attempt[ed] to defend as a legitimate product." E.R. 49-50. In addition, the scheme here could be easily transferred—and was transferred—to other products. Moreover, Kimoto in particular had a history of violating the FTC Act. *Id.* Because the injunction was reasonably related to the misconduct, and because Kimoto would likely engage in further deceptive practices, the court's injunction was well within its

discretion. *See Litton*, 676 F.2d at 370-371; *Colgate-Palmolive*, 380 U.S. 394-395.

Kimoto's arguments that the injunction is overbroad or vague are not persuasive. He first argues that the injunction is not tailored to his individual conduct (Appellant's Br. 36-38, 41-43), but that ignores the basis for his liability. Kimoto is liable for Vertek's violations of the FTC Act by virtue of his control over the company and participation in the deceptive practices. Vertek participated in all of the campaigns and all of the deceptive practices. Accordingly, it is irrelevant whether there was evidence, for example, that Kimoto personally processed electronic funds transfers (Appellant's Br. 43).

Kimoto argues that, under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), injunctions must be rigidly tailored to each individual's conduct, but that argument is unpersuasive. In *Claiborne*, the Supreme Court overturned an order that had declared a civil rights boycott illegal and had imposed joint and several liability on the participants. The Court found that the nonviolent aspects of the boycott were protected by the First Amendment rights of speech, assembly, association, and petition. *Id.* at 908-909. Those concerns simply are not

present here, and no general proposition that injunctions must not "blur the distinction between each defendant's individual conduct" (Appellant's Br. 41) is properly wrenched from the case.

Kimoto next complains that the injunction is overbroad or vague because it bars him from marketing "broadly defined categories of products," engaging in "lawful conduct," and marketing "products unrelated to this lawsuit." Appellant's Br. 45-46. But the courts have regularly upheld injunctions "encompassing all products or all products in a broad category, based on violations involving only a single product or group of products." *E.g.*, *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976) (collecting cases). "Coverage of all products in a broad category is a means of 'fencing-in' one who has violated the statute," and serves "to 'close all roads to the prohibited goal,'" so that the injunction "'may not be by-passed with impunity.'" *Litton*, 676 F.2d at 370, quoting *Ruberoid*, 343 U.S. at 473. Kimoto's reliance on *E. & J. Gallo* for the contrary proposition is mistaken. In that case, the court rejected an injunction that reached other products, but its ruling was

limited to "the highly fact-specific area of trademark law." 967 F.2d at 1298. Kimoto cites no FTC Act case applying such limitations.[10]

Kimoto also argues that the injunction is overbroad for prohibiting the use of testimonials "in connection with the advertising, marketing, promoting, offering for sale, or selling of *any product or service*." Appellant's Br. 47, quoting E.R. 65 (emphasis supplied by Kimoto). He relies on *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, but in that case the Sixth Circuit *upheld* an injunction prohibiting use of "the name, likeness and image of Elvis Presley for . . . *any goods or services*." 936 F.2d 889, 897 (6th Cir. 1991) (emphasis added). The Sixth Circuit found that, unlike the prohibition for such "commercial use," the injunction's extension to "any purpose whatsoever" was overbroad. *Id.* The district court's injunction here contains no provision comparable to "any purpose whatsoever."

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[10] Kimoto's argument that the injunction is vague (Appellant's Br. 46-47 & 38 n.18) fails to identify any aspect of the injunction that he contends has "no reasonably specific meaning." *E. & J. Gallo*, 967 F.2d at 1297. His argument that "assisting others" is overbroad (Appellant's Br. 37 n.17), is also without merit. An injunction is not overbroad for the "[m]ere inclusion" of general language that is sufficiently specific when "taken in the context of the entire order and record on which it was entered." *Streck, Inc. v. Research & Diagnostic Sys.*, 665 F.3d 1269, 1293 (Fed. Cir. 2012).

Lastly, Kimoto argues that the injunction should be overturned because "all unlawful conduct connected to Acai Total Burn, Grant Connect, and Domain Processing occurred *after* Mr. Kimoto was incarcerated." Appellant's Br. 39. As explained above, that is incorrect; much of the relevant conduct occurred before he was imprisoned. In any event, to the extent Kimoto challenges the enjoined *practices*, there is no dispute that each of the practices was employed for Global Gold while Kimoto was in control of Vertek.

To the extent he challenges the *product categories* he was enjoined from marketing, there is no dispute that Grant Connect and Domain Processing were in active development (and the latter launched) before Kimoto's trial. Kimoto thus cannot seriously argue that the injunction's bar on marketing similar products is not "reasonably related" to the illegal conduct that occurred while he controlled the company. Although Acai Total Burn was marketed after Kimoto's imprisonment, it differed from the other versions of the scheme only in the front-end product. In light of the rationale for a permanent injunction—to prevent future violations like those the defendants were shown to have committed—it was within the district court's discretion to also prohibit Kimoto from

marketing in the one category of products to which his scheme had already been extended. *See Litton*, 676 F.2d at 370-371.

In sum, the district court found that Kimoto was a recidivist violator of the FTC Act who was more than willing to continue flouting the law in order to sell dubious or indefensible products. He has provided "no basis for disturbing the district court's prudent assessment that giving [him] another chance might prove to be unwise." *FTC v. Gill*, 265 F.3d 944, 957 (9th Cir. 2001).

B. The Amount of Monetary Relief Was Within The District Court's Discretion.

The FTC Act "gives the federal courts broad authority to fashion appropriate remedies for violations of the Act," including the power to order equitable monetary relief. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Stefanchik*, 559 F.3d at 931. The amount of consumer loss is an appropriate measure of equitable monetary relief under the Act. *Gill*, 265 F.3d at 958. And the court "may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment." *Stefanchik*, 559 F.3d at 931.

A defendant is liable for monetary relief as a result of corporate violations of the FTC Act if the defendant (1) satisfies the requirements for injunctive relief through participation in the violations or having the authority to control them; and (2) has "some knowledge" of the practices. *Amy Travel*, 875 F.2d at 574.

As shown above, there is no genuine issue of material fact that Kimoto was instrumental in developing the deceptive practices Vertek used to market all of the products, and knew about the specific application of those practices in the line of credit, Grant Connect, and work-from-home versions of the scheme. Kimoto argues that he should not be liable for the conspiracy's activity that occurred after he was incarcerated. But the mastermind of a fraudulent scheme cannot escape liability by withdrawing from active participation and passively sitting by while the scams he designed continue and the proceeds continue to fill his (or his wife's) bank accounts. "[O]ne may not enjoy the benefits of fraudulent activity and then insulate one's self from liability by contending that one did not participate directly in the fraudulent practices." *Amy Travel*, 875 F.2d at 574 (citation omitted).

To be sure, Kimoto ceased his *active* participation in the scheme, albeit involuntarily, when he was incarcerated. But Kimoto's efforts—in the business structure he created and the deceptive practices he oversaw—enabled the deceptive scheme to keep defrauding consumers after he was imprisoned. And prison did nothing to diminish Kimoto's knowledge of the practices. The scheme also continued to benefit Kimoto by supporting his wife and children—precisely as he intended it would. *See* E.R. 1052. It is undisputed that Juliette Kimoto had no role in running Vertek, yet she kept receiving large amounts of money from the company—$50,000 to $60,000 per month—even after Kimoto was in prison. S.E.R. 135.

Holding Kimoto liable under the FTC Act for the foreseeable consequences of activities he set in motion is fully consistent with broader principles recognized under the Act, as well as in other areas of the law. Under the FTC Act, "[d]efendants found to be a common enterprise are held jointly and severally liable for the injury caused by their violations of the FTC Act." *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000). Thus, where individuals operate "an integrated business through a maze of interrelated companies . . . 'the

pattern and frame-work of the whole enterprise must be taken into consideration.'" *Delaware Watch Co. v. FTC*, 332 F.2d 745 (2d Cir. 1964).[11] And, as this Court has recognized in a related context, where defendants were "beneficiaries of and participants in a shared business scheme, . . . the common revenue generated in the course of that scheme [is] the proper subject of the court's equitable powers under the FTC Act."). *See FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1143 (9th Cir. 2010).[12]

More broadly, both civil and criminal conspiracy law recognize that "[a]ll conspirators are jointly liable for the acts of their co-conspirators." *Beltz Travel Serv. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980). To be liable for the acts of the common venture, an individual need not have participated in every detail of the conspiracy. *See id.* Rather, conspirators are "liable for reasonably foreseeable overt acts committed by others in furtherance of the

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[11] *See also Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973) (finding no abuse of discretion in FTC order "running against all" petitioners that "operate[d] as a single economic entity").

[12] Although *Network Services Depot* involved the imposition of a constructive trust over funds held by corporate entities found to constitute a common enterprise, its underlying principle is equally pertinent here.

conspiracy they have joined." *United States v. Grasso*, 724 F.3d 1077, 1089 (9th Cir. 2013), quoting *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008); *see also United States v. Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012) ("a conspirator is liable only for the conspiracy's illegal proceeds that were reasonably foreseeable to him").

Here, Kimoto does not contest the district court's finding that the defendants operated a common enterprise or that the businesses committed multiple, egregious violations of the FTC Act. It was certainly foreseeable that, after Kimoto was imprisoned, Vertek would continue to market the line-of-credit scams using the same deceptive practices they had been employing for nearly a year before his imprisonment. Although the work-from-home scams launched only shortly before his criminal trial and Grant Connect launched several months later, both products were in active development while Kimoto was in control of Vertek, and he had actual knowledge of the misrepresentations they contained. It was thus foreseeable that Kimoto's coconspirators would continue to market the work-from-home schemes and that they would soon launch Grant Connect on the public.

In light of Vertek's practice of launching successive iterations of the scam with the same deceptive advertising and sales practices, it was also foreseeable that they would continue to launch iterations with other products like Acai Total Burn. In any event, although Kimoto's brief focuses heavily on Acai Total Burn, that scam accounts for only a small percentage of the monetary equitable relief ordered against him. In particular, even if his knowledge of the practices used to market Acai Total Burn were insufficient to justify monetary liability, the district court's monetary award against him for all of these schemes should still be upheld, less the $8,333 in sales attributed to Acai Total Burn.

Finally, Kimoto cannot argue that he withdrew from the enterprise—and thus cut off his liability—by becoming imprisoned. A participant can withdraw from a conspiracy only by "(1) disavowing the unlawful goal of the conspiracy; (2) affirmatively acting to defeat the purpose of the conspiracy; or (3) taking definite, decisive, and positive steps to disassociate himself from the conspiracy." *United States v. Kilby*, 443 F.3d 1135, 1139 (9th Cir. 2006), quoting *United States v. Fox*, 189 F.3d 1115, 1118 (9th Cir. 1999). "[M]ere cessation of conspiratorial activity is not enough to effect a withdrawal." *United States v. Shaw*,

106 F. Supp. 2d 103, 123 (D. Mass. 2000). Here, upon his imprisonment Kimoto did not "disavow[] the unlawful goal of the conspiracy," nor did he act "to defeat the purpose of the conspiracy," or take any steps "to disassociate himself from the conspiracy." *Fox*, 189 F.3d at 1118-1119. In fact, he continued to benefit from the illegal activity because it supported his wife and children. By being imprisoned Kimoto "did not withdraw from the conspiracy, he just completed his role in it." *Id.* Kimoto therefore continued to be liable for the foreseeable acts of his coconspirators until the practices were discovered and shut down by the FTC.

III. Kimoto Was Correctly Held Liable For Vertek's Violations Of The EFTA.

Kimoto does not deny that his coconspirators, including Vertek, violated the EFTA by automatically debiting consumers for recurring monthly charges for negative-option "upsells" without obtaining the required written authorization. *See* 15 U.S.C. § 1693e(a); 12 C.F.R. § 205.10(b) (requiring that the consumer be given a copy of the authorization). Instead, he asserts, for the first time,[13] that an

[13] The Court ordinarily does not consider arguments first made on appeal absent "exceptional circumstances." *El Paso v. America West*

individual may not be held liable for corporate violations of the Act. Appellant's Br. 34.

This argument fails because the EFTA assigns enforcement of its requirements to the FTC, and states that "a violation of any requirement imposed under [the EFTA] shall be deemed a violation [of the FTC Act]." 15 U.S. § 1693o(c). An individual therefore may be held liable for corporate EFTA violations so long as the standard for individual liability for corporate violations of the FTC Act is met. Here, there is no genuine dispute as to Kimoto's control of Vertek, nor his participation in its creation of the web pages implementing the negative-option upsells, nor his knowledge that recurring charges were in fact posted to consumers' credit and debit cards. Accordingly, Kimoto was correctly held personally liable for injunctive and monetary relief for Vertek's EFTA violations.

Airlines, Inc., 217 F.3d 1161, 1165 (9th Cir. 2000). Kimoto has not attempted to show that the exceptional circumstances this Court has approved—"to prevent a miscarriage of justice," "when a change in law raises a new issue while an appeal is pending," or "when the issue is purely one of law"—exists here. *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987). In any case, as demonstrated in the text, the argument is baseless.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

December 6, 2013

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Ninth Circuit Rule 28-2.6 Statement

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the FTC states that there are no known related cases pending in this Court.

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I certify that the foregoing was filed using the Court's Appellate CM-ECF System on December 6, 2013. All counsel of record are registered CM-ECF users, and service will be accomplished by the CM-ECF system.

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Certificate of Compliance

I, Theodore (Jack) Metzler, certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) in that it contains 11,258 words.

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I, Theodore (Jack) Metzler , certify that this brief is identical to the version submitted electronically on [date] Dec 6, 2013 .

Date Dec 10, 2013

Signature s/Theodore (Jack) Metzler

(either manual signature or "s/" plus typed name is acceptable)