IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

10-10715 and 10-12901 (Consolidated)

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

RICHARD A. BISHOP,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA (Case 8:09-cv-02309-SDM-TBM)

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION'S CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rules 26.1 and 28-1(b), this is to certify that the following is a complete list of individuals and entities known to have an interest in the above-captioned appeal:

Bishop, Richard A.

Bishop, Teresa A.

Bishop, Claire Rose

Bishop, Kaley Marie

Bishop, Sarah Jane

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Daly, John F. – FTC Deputy General Counsel for Litigation

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McDaniel, J. Brent

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Milgrom, Michael – FTC Attorney

Optimum Business Solutions, LLC, d/b/a Attorney Finance Services

Palmer, Patsy – Attorney

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Rose, Michael B. – FTC Attorney

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White, Marlow V. – Attorney

Yanes, Katherine Earle – Attorney

STATEMENT OF ORAL ARGUMENT

The Federal Trade Commission believes that oral argument will assist the Court in resolving issues presented in this appeal.

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STATEMENT OF ISSUES PRESENTED

1. Whether the district court abused its discretion in preliminarily enjoining the appellant-defendant's conduct when it determined that the Federal Trade Commission would likely succeed on the merits of its claim that he was liable for his extensive participation in deceptive practices.

2. Whether the district court abused its discretion in ordering a preliminary injunction, including a freeze of appellant-defendant's assets, where his likely monetary liability exceeded the assets' value.

3. Whether the district court had jurisdiction to grant the substantial alteration of an asset freeze order sought by appellant-defendant during the pendency of his appeal from that order.

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

This appeal arises from an action by the Federal Trade Commission (FTC or Commission), pursuant to Sections 5, 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45, 53(b), and 57b, and the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310 (2009), seeking temporary, preliminary and permanent injunctive relief, as well as equitable monetary relief, for the Defendants' deceptive marketing and sale of

mortgage loan modification and foreclosure relief services. D.1.[1] After granting a temporary restraining order (TRO) and asset freeze, D.19, the District Court on December 14, 2009, granted the FTC's request for a preliminary injunction, including continuation of the asset freeze. D.67. The District Court concluded that the FTC had met its burden of demonstrating "a substantial likelihood of success on the merits" and "that the equities weigh in favor of issuing a preliminary injunction." D.60 at 14, 17; D.67.[2]

The District Court subsequently rejected the motions of Defendant Richard A. Bishop (D.148), Appellant herein, and his wife (D.147) to modify the asset freeze. D.168 at 5, 7. The District Court concluded that it did not have jurisdiction to modify the asset freeze, because Bishop's pending appeal in this Court divested it of jurisdiction, D.168 at 5, and that, in any event, neither motion had shown new facts, circumstances or authority for modifying the preliminary injunction. D.168 at 5, 7. The District Court, however, authorized release of $9,500 per month from frozen assets for the Bishops to use for living expenses. D.168 at 8.

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[1] "D.#" refers to the document number and "D.# at #" refers to the document number plus page number from the District Court's record.

[2] The District Court's December 14, 2009, Order (D.67) "adopted" the Magistrate's Report and Recommendation (D.60). Accordingly, this brief attributes the Report and Recommendation's findings and conclusions to the District Court itself.

The present interlocutory, consolidated appeals arise before the close of discovery and challenge the District Court's entry of the preliminary injunction and rejection of Bishop's request for modification of the asset freeze. In No. 10-10715, Bishop principally claims that the District Court should have held a hearing on whether a nexus existed between the frozen assets and the deceptive activity. In No. 10-12901, he challenges the District Court's determination that it had no jurisdiction to consider his motion to modify the asset freeze due to the pendency of this appeal.

B. Statement of Facts

This case involves Defendants' mortgage loan modification and foreclosure relief business, which operated through deception and misrepresentations. Until the District Court ordered it shuttered, the business bilked consumers of more than $4 million. After describing the business, the FTC will set forth Defendant Bishop's pivotal roles in the business's formation, operation and direction.

1. The Deceptive Loan Modification Scheme

Defendant Washington Data Resources (WDR) purported to offer mortgage loan modification and foreclosure relief services, using a network of attorneys.

D.32-2 at 2-4; D.32-3 at 1; D.116 at 3.[3] Working closely with Nationwide Mortgage Services, Inc. (Nationwide), a company owned by Defendant Bishop that provided marketing, promotion and mailing services, D.31-3 at 26; D.43-1, WDR sent postcards to consumers that informed recipients that they may qualify for "the new government bailout to refinance your current mortgage and reduce your interest rate." D.5-2 at 2.

The postcards were an element of the deceptive scheme. On one side, they bore a "Date of Record," "Document Number," "Case Number," and the homeowner's county, D.5-2 at 2; D.117 at 4, although the information apparently did not relate to official governmental records. D.8 at 2-3. The postcards also referred to government programs, D.165 at 51, such as "Fresh Start" (D.5-2 at 2), "New Start" (D.117 at 4-5), and "Hope4Homeowners" (D.5-2 at 3). The postcards' message expressed urgency, telling homeowners to "call immediately" because "this may be your final notice." D.5-2 at 3; D.117 at 4.

The reverse side of the postcards was encouraging about prospects for mortgage relief. It identified the homeowner as "pre-qualified." D.5-2 at 3; D.117 at 5. One postcard stated that the "Hope4Homeowners program *will enable* you to

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[3] As explained below in Part 2 of the Statement of Facts, WDR was both a registered corporation and a name used by another entity, Jackson Crowder & Associates (JCA), which itself later became Defendant Crowder Law Group.

either refinance your existing loan or restructure your loan to reduce your interest rate and lower your mortgage payment." D.5-2 at 3 (emphasis added). Another stated that "[y]ou have been selected to receive this offer to help relieve you from the burden of overdue mortgage payments, past medical and credit card debt." D.117 at 5. The postcards referred to relief programs as "Government" (D.5-2 at 3) or "federal" (D.117 at 5), and bore the signature of individuals identified as attorneys. D.5-2 at 3; D.117 at 5. In the eyes of desperate homeowners facing possible foreclosure, the attorneys' signatures likely lent legitimacy and an aura of truthfulness to those representations. Homeowners receiving the postcards believed the offers involved government programs. D.12 at 2; D.14 at 2.

The postcards' misrepresentations were reinforced by WDR's sales agents when homeowners called the toll-free number on the card. D.5-2 at 2-3; D.117 at 4-5.[4] The sales agents described the loan modification program as "similar to the Obama program," D.8 at 17, and told them that WDR would get them into a government program. D.15 at 2. Although, when asked directly, one sales agent denied that WDR was affiliated with the government, D.6 at 23, other sales agents did not seek to disabuse callers of the impression of government affiliation. D.7 at

[4] Although the sales agents had titles such as "legal assistant" and "paralegal," D.6 at 23, they had no legal experience or formal legal training. D.115 at 3.

6-40; D.8 at 7-20. Indeed, homeowners thought that they were talking to the government, D.14 at 2, or that WDR was "federally backed," D.116 at 37.

WDR's sales agents promised results, stating (similarly to the postcards) that WDR would "reduce the interest rates … reduce the principal balances … reduce their monthly mortgage payments." D.8 at 10; *see also* D.6 at 19-20, 23, 25; D.115 at 31. They gave examples of allegedly successful interest rate and mortgage payment reductions. D.8 at 18-19; D.11 at 1-2; D.15 at 2; D.16 at 2. They promised results within 60-90 days, if not sooner. D.6 at 21; D.11 at 1; D.12 at 2-3; D.16 at 2. Although they offered no guarantees, the sales agents were encouraging:

> Nothing's guaranteed (inaudible) except for, you know, taxes and you – or, you know, death for that matter. I mean, we do pretty much have a very good turnaround. (D.6 at 25.)
>
> So, I can't say that I can guarantee anything, but, you know, if you're in the situation you are right now and you're being pretty truthful with me and you have not received any kind of sale date from your lender, I don't see any why they wouldn't be able to get you current on this. (D.6 at 26.)
>
> We've been working with lenders nationwide helping hundreds and thousands of homeowners just like you to get their finances back on track. (D.7 at 27-28.)

WDR required homeowners desiring its services to sign an "Application for Legal Services" (Application), D.11 at 31, D.14 at 8, D.117 at 6, and to pay

$2,000, D.6 at 30; D.7 at 28. Although the Application stated that there was "no guarantee that Law Firm can accomplish this goal [prevention of foreclosure] for Client," D.116 at 52, no statement in the Application modified the postcards' and sales agents' pitch. In response to homeowner requests to review the Application prior to purchase, WDR sales agents would refuse to send it unless the homeowners had provided sales agents with a credit card number or payment, stating, for example:

> Those are legal, sacred documents. They're not going to release it, you know, without you – without some type of commitment from you. … You know, because that's releasing our attorney's information, their contact information, your payments, what we can do for you and so forth.

D.6 at 31; *see also* D.12 at 2; D.15 at 2-3; D.16 at 2.

The Application purported to retain an attorney on behalf of the homeowner in the homeowner's state, D.14 at 3, 5-6, 8, and to become effective when the attorney accepted the representation. D.14 at 8. In reality, the attorney identified in the Application had no role in providing the loan modification service, apart from an initial acceptance phone call. D.116 at 3. Sales agents instructed homeowners to send financial information and communicate with WDR directly. D.11 at 3. WDR, not the attorneys named in the Application, contacted the mortgage companies. D.12 at 6.

WDR referred to the attorneys named in the Application and on the postcards as "Outside Attorneys," D.32-2 at 3, 5, and entered into "Outsourcing Agreements" with them. D.116 at 3, 17-20. Although these agreements purported to put the attorneys in control of all matters, including advertising and refunds, in reality WDR called the shots. D.116 at 4-6; D.12 at 5-6. For example, contrary to the Outsourcing Agreement, WDR made advertising, cancellation and refund decisions. D.116 at 4-6. The Outsourcing Agreement provided that Outside Attorneys would receive up to $200 of the $2,000 homeowners paid, D.116 at 31, a small amount reflecting their minimal role in the loan modification services.

WDR instructed homeowners to stop making mortgage payments while WDR purportedly negotiated the loan modification. D.12 at 3. When homeowners contacted WDR about the status of their loan modifications, however, WDR either did not return their calls or would provide little information. D.11 at 3-5; D.15 at 3; D.117 at 2. WDR's unresponsiveness left homeowners in the dark, thus forestalling their discovery of WDR's deceptive conduct. D.117 at 2-3. Its directive that homeowners stop making mortgage payments put homeowners further in arrears, often hastening foreclosure actions. D.11 at 6-7; D.12 at 2, 6; D.15 at 2, 4. WDR's failure to provide the promised loan modification is demonstrated by the several hundred thousand dollars in refunds WDR claims to

have made. D.32-3 at 2; D.56-2 at 4. Often, however, WDR refused to make refunds, D.11 at 6, or made only partial refunds, D.12 at 5; D.15 at 4.

Money flow for WDR was handled by Defendant Optimum Business Services, LLC, a Nevada limited liability company doing business as Attorney Finance Services (AFS). D.8 at 23-24, 31-32; D.32-2 at 3. AFS functioned as a central payment center. *Id.* AFS entered into contracts with Outside Attorneys to collect money from homeowners who had agreed to purchase WDR's services and to distribute those funds to the other Defendants, Nationwide, Outside Attorneys, or third parties. D.31-2 at 4-5; D.116 at 29-35; D.124 at 78-79. During the time of WDR's loan modification operation, consumers paid Defendants more then $4.4 million for supposed loan modification services. D.56-2 at 1.[5] Of that amount, it appears that less than $200,000 was returned to consumers as refunds. D.56-2 at 4.[6]

[5] Bishop estimated that WDR/Crowder Law Group had 2,336 clients. D.56-2 at 1, each of whom would have paid $2,000 for the services.

[6] Bishop maintains that JCA provided bankruptcy and not loan modification services (Brief (Br.) 3, 12), which would reduce refunds by WDR, via AFS, to less than $200,000. D.56-2 at 4.

2. Bishop and the Other Defendants

The WDR loan modification enterprise comprised a number of inter-dependent entities, all with ties to Bishop and for which he functioned as architect, source of capital (including intellectual, human and monetary), banker and decision-maker. Bishop was experienced in providing loan modification services through deceptive means. From 2005 to 2008, he had run Mortgage Assistance Solutions (MAS), a loan modification telemarketing operation (D.31-3 at 1; D.36-2 at 2), from offices in Clearwater, Florida. D.31-3 at 53. MAS functioned in a manner remarkably similar to WDR's. It sent advertisements to homeowners bearing the same document numbers – 1234-2784566-01 – and program name – "Fresh Start" – as later used on the WDR postcards. D.14 at 5; D.31-3 at 2, 8.[7] Bishop shut MAS down in March 2008, after several state attorneys general accused it of offering deceptive loan modification services. D.31-3 at 4-5, 7; D.36-2 at 2-3.[8]

At about the same time he was shutting down MAS, Bishop began working

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[7] It also appears that marketing under the program names "New Start" and "Fresh Start" was Bishop's brainchild. Florida Department of State records indicate that Bishop was the managing member of "New Start Program LLC" and "Fresh Start Program LLC." D.31-3 at 15, 19.

[8] MAS settled the cases, agreeing either to cease operations or pay money. Docs. 31-3 at 7; 36-2 at 2-3.

with Defendant Douglas Crowder to set up a law firm that would provide bankruptcy services through a network of attorneys in a number of states. D.8 at 69-70; D.36-2 at 3; D.115 at 1-3. Like MAS, it had its headquarters in Clearwater, even though Crowder was based in California. D.8 at 37-70; D.115 at 3. The firm, which was initially called Jackson Crowder & Associates (JCA) and would later change its name to Crowder Law Group (D.8 at 49-51), also operated using the "Washington Data Resources" name. D.116 at 12.[9] Bishop "set up the administrative, hiring, marketing, and insurance lines along with providing the furniture, equipment and software." D.32-5 at 1. Bishop estimated the software's value at "over $300,000." D.36-2 at 3. Bishop also contributed MAS's job procedure manual to the firm. D.115 at 21, 23; D.36-2 at 3. According to Bishop: "We did it with all my money, all my equipment, and I worked for free for four or five months." D.124 at 55-56.

Defendants Brent McDaniel, Tyna Caldwell, and Kathleen Lewis worked at JCA/WDR as senior managers. D.115 at 2. McDaniel served as its Director of Sales, Caldwell as its Senior Vice President, and Lewis, as its accountant/Finance

[9] Although WDR was not incorporated until late 2008, D.8 at 74-75, it did not operate independently of JCA. D.74 at 2; D.116 at 12. Because JCA also operated as "Crowder Law Group," this brief will refer to the WDR enterprise using one or a combination of the names, depending upon the context.

Manager. D.115 at 2; D.152-9 at 1. McDaniel, Caldwell and Lewis, however, were not employed by JCA/WDR. Rather, they were employed by another of Bishop's firms, RABC Services, Inc., which "leased" them to JCA/WDR. D.86, PX-24 at 2, D.124 at 86, 114.

In an attempt to remain behind the scenes,[10] Bishop did not become a principal of JCA/WDR. Instead he took money out of the firm via a Marketing Agreement with his own company, Nationwide. D.124 at 56-58; D.43-1. According to Bishop, "my scheme of being rewarded for doing that was to have a brokering – you know, to not – to broker the marketing piece and make my profit that way." D.124 at 56-57. He also received income and health benefits for himself and his family through RABC. D.84, DX-17 at 12 (Statement 1, Form 1040, Wage Schedule); D.124 at 59, 114; D.152-6.

After setting up JCA/WDR's operations, Bishop claims to have vacated the offices, D.36-2 at 3, but he remained a presence, visiting at least twice a month between June and December 2008 to discuss "the marketing and general business matters." D.32-2 at 2. His integral role was evident to an attorney working at JCA/WDR:

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[10] Because it was unaware of Nationwide's and RABC's existence when it filed the complaint in this action, the FTC did not name Bishop's firms as defendants.

> A non-attorney, who I knew only as Rick B., seemed to have a lot of authority and influence, though I understood this role to be that of a business consultant. Rick B. had his own office in a corner of the suite and when he moved out, shortly after I joined the firm, Douglas Crowder took over his office.

D.115 at 2.

Bishop could remain involved in the business without being physically on the premises, however, because of his employment of senior managers and longstanding relationships with them. Through RABC, he employed McDaniel, Caldwell and Lewis. D.86, PX-24 at 2; D.115 at 2; D.124 at 86, 114. Bishop described McDaniel, WDR's President (D.8 at 71-75), as his "nearest living friend." D.84, DX-19 at 3. Lewis "he had known for years." D.32-5 at 2. She worked for JCA, WDR, AFS, Nationwide and RABC. D.5-3 at 9; D.31-2 at 23, 26; D.115 at 2; D.152-6; D.152-9. She signed checks for AFS and Nationwide. D.31-2 at 23, 24-26. Indeed, Bishop's close working relationships with Lewis and McDaniel pre-dated the JCA/WDR activities; they had also worked for MAS. D.71-2 at 9; D.152-6 at 1.

Bishop claims (now) that he thought it was a bad idea for JCA to begin loan modifications as WDR. D.36-2 at 4; D.165 at 30.[11] At the time, however, Bishop

[11] The move into loan modifications was the apparent motivation for incorporating WDR as it own entity, D.32-3 at 1, even if its operations remained fully integrated with JCA, D.74 at 2; D.116 at 3, 12.

continued "leasing" McDaniel, Caldwell and Lewis to the enterprise, D.124 at 114, receiving both income and benefits in return. D.152-6 at 1-4; D.84, DX-17 at 12 (Statement 1, Form 1040 Wage Schedule). Bishop also entered into a new Marketing Agreement with WDR directly to promote and market WDR's loan modification activities. D.32-5 at 2; D.43-1. WDR compensated Bishop at a per-postcard rate for these services, as well as for office equipment, furniture, and his software and database. D.43-1 at 1. The software and database were particularly important to the enterprise's ability to track clients. D.124 at 18, 26-27.

The Marketing Agreement defined Bishop's and Nationwide's responsibility for the advertising used to promote the WDR loan modification services. In the Article entitled, "Services Provided by Nationwide," Bishop agreed that:

> Any advertising used by Nationwide to obtain new clients will be reviewed by the attorney named on the advertising before being used. All advertising will be truthful and not misleading, and will comply with such legal and ethical guidelines as WDR or any law firm it services may inform Nationwide of. Nationwide will keep a copy of all advertising used, together with the dates, media and locations of its use, for a two year period from the date of its last use.

D.43-1, Art. 2.b. Despite Bishop's contractual obligation to ensure that "[a]ll advertising will be truthful and not misleading," *id.*, and despite his experiences with MAS, which gave him knowledge that WDR's postcards were likely deceptive, Bishop did not review them for content. D.165 at 33-34.

Bishop also had control and knowledge of WDR's business activities through AFS. Bishop acquired AFS shortly after it began handling money for WDR. D.5-3 at 6; D.32-2 at 3, 5. From March to July 2009, during which time Bishop was AFS's owner, AFS collected over $1.2 million from consumers for the deceptive loan modification activities. D.5-3 at 6; D.32-5 at 2; D.152-7; D.152-11 at 2.

All of these businesses, whether or not owned by Bishop, functioned as a common enterprise. D.74 at 2. JCA, WDR, AFS, Nationwide and RABC all operated from 28870 U.S. Highway 19 North in Clearwater, Florida. D.8 at 23-24, 33-34, 69-72; D.31-2 at 23; D.124 at 101-02; D.152-6 at 1; D.152-7 at 1.[12] They shared telephone numbers. D.7 at 6 (Crowder Law Group/866-404-4921), D.31-2 at 23 (Nationwide/866-404-4921); D.116 at 28 (WDR/866-404-4921); D.14 at 7 (JCA/866-565-8545), D.152-8 at 1 (AFS/866-565-8545), D.152-10 (WDR/866-565-8545). They transferred money among one another. D.31-2 at 23-24 (Nationwide to AFS and vice versa); D.84, DX-14 at 6, 13, and 15 (Nationwide to

[12] In the loan modification scheme's earlier incarnation, MAS and Nationwide operated from offices less than 2 miles down the street at 26810 U.S. Highway 19 North. D.31-3 at 24, 45, 54.

TCBA).[13] Employees for the common enterprise answered telephones using a number of interchangeable names, including "Legal Support Services" (D.6 at 6; D.7 at 7; D.8 at 9), "law offices" (D.12 at 2), "Crowder Law Group" (D.7 at 14), "Washington Data Resources" (D.12 at 5), or "Attorney Financial Services" (D.12 at 5). "Washington Data Resources" was also represented to Outside Attorneys as simply another name for "Jackson Crowder & Associates." D.116 at 3, 12. McDaniel himself did not distinguish among the companies, listing his employer as "WDR-Crowder Law Group," D.71-2 at 8.

By mid-2009,[14] Bishop appeared to be trying to distance himself further from WDR's loan modification activities. Although the timing remains uncertain, at least by mid-May 2009, RABC had become TCBA, for which Lewis appears to have worked. D.152-6; D.124 at 114. TCBA continued paying the salaries of WDR's senior personnel. D.115 at 2; D.71-2 at 3; D.124 at 114. Bishop even removed himself as a TCBA employee, but TCBA then employed his wife, which allowed Bishop and his family to continue to receive health benefits. D.152-6.

In July 2009, Bishop sold AFS to Lewis for a nominal sum. D.32-5 at 2;

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[13] As discussed below, RABC became TCBA sometime in mid-2009. D.124 at 114.

[14] In the same time frame, Crowder sold his JCA/Crowder Law Group interest to Defendant Bruce Meltzer. D.8 at 35-39.

D.152-7. Although Nationwide had apparently stopped providing services to WDR, D.86, PX-24 at 2, Lewis still informed Bishop when she paid invoices for mailings performed for WDR. D.152-8.

Over time, it became undeniable that Bishop was directly responsible for WDR's affairs. On July 24, 2009, Lewis informed Attorney Marlow White that Bishop had instructed that a new retainer agreement should be in WDR's name. D.152-9. On July 27, 2009, Attorney White wrote Lewis about the retainer agreement, stating:

> After the retainer is exhausted, WDR will replenish the retainer at an amount agreed upon by Rick Bishop and myself as a subsequent minimum retainer; after that is exhausted, WDR will replenish again as Rick Bishop and I agree, and so forth.

D.152-10.

C. Proceedings Below

1. Entry of Preliminary Injunction and Asset Freeze

On November 13, 2009, the District Court granted, in part, the FTC's motion for a TRO with asset freeze. D.19. On November 18, 2009, the District Court entered stipulated preliminary injunctions with asset freezes as to Defendants Meltzer, Caldwell, Lewis, AFS and Crowder Law Group, D.29, followed by one as to Defendant McDaniel on December 4, 2009, D.54.

On December 7, 2009, Magistrate Judge McCoun issued his Report and Recommendation regarding a preliminary injunction as to Bishop. D.60. He recommended entry of the preliminary injunction to restrain Bishop's "participation, either directly or indirectly, in the conduct or affairs of any loan modification or foreclosure relief business pending final resolution of this suit." D.60 at 17. Among other things, he also recommended continuation of the "asset freeze related to Bishop's property as of the date of the TRO." *Id.*

Magistrate Judge McCoun found that "[e]vidence and proffered exhibits substantially support the FTC's allegations that the Defendants, acting in concert, operated a loan modification and foreclosure relief business which relies upon deceptive and misleading direct mail solicitation and telemarketing activities in violation of the FTC Act and the TSR." D.60 at 9. Further, he concluded that the FTC was "substantially likely to prevail on its claims as against each of the Defendants." *Id.* He also concluded that the FTC had "met its burden of demonstrating that the equities weigh in favor of issuing a preliminary injunction as against Bishop," because the "principal equity" – the "public interest in protecting consumers from such mortgage foreclosure relief scams" – is "undoubtedly" a "significant interest worthy of protection." *Id.* at 17.

Addressing Bishop's claim that WDR's activities were legitimate,

Magistrate Judge McCoun stated that "even in those cases where the Defendants achieved a loan modification for a client, such was accomplished through a scheme employing a deceptive business model and reliant on deceptive and misleading mass mailings and telemarketing activities to generate clients and profits." *Id.* at 10 (footnotes omitted). In addition to finding the postcards deceptive, he concluded that the sales agents' "pitch clearly suggested an expertise which would help the consumer save his/her home," even if there was no guarantee of results. *Id.* at 11 n.8.

Magistrate Judge McCoun rejected Bishop's denial of involvement in the deceptive activity. He noted Bishop's significant contributions in setting up the enterprise and his continued involvement after WDR began the loan modification scheme, including disbursing significant sums of money to WDR while managing AFS and brokering mailings for WDR. *Id.* at 13-14. Regarding Bishop's knowledge of WDR's deception, Magistrate Judge McCoun observed that, given Bishop's experiences with MAS, Bishop "surely could appreciate on his own the deceptive and misleading nature of the message being sent consumers." *Id.* at 14. He concluded: "On the evidence presented, the FTC has met its burden of demonstrating a substantial likelihood of success on the merits as against [Bishop]." *Id.*

Magistrate Judge McCoun also recommended that the preliminary injunction be issued to restrain Bishop's future telemarketing activities. Although he characterized it as a "close issue,"[15] he found "it reasonable to conclude that [Bishop] will again employ his talents in another mass marketing activity which merits the court's attention until resolution of this suit." *Id.* at 16-17. Magistrate Judge McCoun cited (1) Bishop's prior participation in MAS's activities, which were found to be deceptive; (2) Bishop's becoming involved in WDR's similar activities, despite his recognition that there were "too many bad actors" in that business, (3) Bishop's experience as a "back office" operator and telemarketer, and (4) Bishop's having recently formed new corporate entities in Florida. *Id.* at 16-17.

The District Court adopted *in toto* the Report and Recommendation, D.67 at 2, and ordered entry of the preliminary injunction, *id.* at 15. The preliminary injunction only restrained Bishop's misrepresentations and deceptive practices in "the advertising, marketing, promotion, offering for sale or sale of any mortgage loan modification or foreclosure relief service." *Id.* at 2. It froze assets owned, controlled or held for the benefit of Bishop, but only to the extent those assets

[15] His characterization applied only to whether to restrain Bishop from future telemarketing activities and not to his recommendation that the asset freeze continue as to Bishop.

existed as of November 13, 2009 or, if acquired after that date, are "derived from the activities which are the subject of this action or from activities prohibited by this order." *Id.* at 8. Bishop, however, was (and is) not prohibited from accessing lawful income or earnings obtained after entry of the order. *Id.* at 8.

On February 12, 2010, Bishop filed a notice of appeal of the preliminary injunction order, D.103, which is docketed as No. 10-10715.

2. Motions to Modify Asset Freeze

A week before the District Court entered the preliminary injunction and continued the asset freeze as to him, Bishop moved to modify or dissolve the TRO's asset freeze. D.59. In its December 14, 2009, order, the District Court referred the matter to Magistrate Judge McCoun. D.67 at 2. Following an evidentiary hearing, D.124, Magistrate Judge McCoun issued an "Order" on January 15, 2010, which rejected Bishop's request to modify the freeze but permitted him $9,500 per month for living expenses for January, February and March 2010. D.91 at 5.

Bishop appealed Magistrate Judge McCoun's Order, D.104, which this Court docketed as No. 10-10716. On April 8, 2010, this Court dismissed No. 10-10716 *sua sponte* for lack of jurisdiction, because Magistrate Judge McCoun's Order, which had not been adopted by the District Court, was not a final,

appealable order. D.139. On April 15, 2010, Bishop requested the District Court to "review and rule on the magistrate's order," but the District Court rejected the request as an "untimely objection." D.141.

On April 30, 2010, Bishop filed a motion asking that the asset freeze be modified and reduced to just $128,910. Docs. 147, 148. The District Court denied his motion on June 15, 2010. D.168. It concluded that the issues identified by Bishop in his motion were also pending on appeal, and therefore that it did not have jurisdiction to modify the injunction as requested by Bishop. *Id.* at 5. The District Court further stated that "even if this court retained jurisdiction, Bishop shows no new fact, circumstance or authority warranting a departure from the December 14, 2009, order." *Id.* The District Court, however, renewed the $9,500 living allowance for the duration of the appeal. *Id.* at 8.

On June 22, 2010, Bishop filed a notice of appeal of the District Court's June 15, 2010 order, D.170, which is docketed as No. 10-12910.

SUMMARY OF ARGUMENT

The Commission presented evidence that Defendant Bishop had a pervasive role in WDR's loan modification scheme, which relied upon deceptive and misleading advertising and sales pitches to lure distressed homeowners to pay $2,000 each for promised reductions in interest rates and mortgage payments.

Because of WDR's misrepresentations, homeowners believed that they would be assisted through government-affiliated programs, but in many instances, WDR, which had no governmental affiliation, did not provide the promised relief. WDR's scheme mirrored prior deceptive loan modification activities that Bishop had run, and he was pivotal in engineering, promoting, and acting on behalf of the WDR enterprise. Given his participation and control in the enterprise, his demonstrated tendency towards deceptive telemarketing, and the public equities strongly favoring the FTC, the District Court did not err in concluding that the FTC would likely succeed on the merits regarding Bishop's personal liability for WDR's deceptive activities and, thus, that he should be enjoined.

The District Court's asset freeze was an eminently reasonable exercise of its equitable jurisdiction at the preliminary injunction stage to ensure its ability to provide ultimate, complete relief. The District Court correctly refrained from addressing Bishop's claim that the freeze should be limited to just the funds he claims to have received from his co-Defendants. This Court should similarly refrain from adjudicating the scope of the asset freeze, so that the District Court may resolve the many outstanding issues that bear on the question.

If it does reach the issue, the Court should reject Bishop's claim that his liability is limited to just a fraction of the amount that consumers lost to the WDR

scheme. The cases on which he relies involved wholly dissimilar factual situations and most were under different statutory schemes. In those cases, some or all of the funds sought as "restitution" had been paid to or from third parties who were strangers to the litigation. By contrast, here all of the funds in question were paid directly by consumers to the Defendants, who acted in concert and are jointly and severally liable for the resulting consumer injury.

The Court should dismiss appeal No. 10-12901 as moot. Even if the Court were to find that the District Court had jurisdiction to modify the asset freeze that was on appellate review, its decision in No. 10-10715 will make any remand in No. 10-12910 unnecessary. Assuming it reaches the question of the District Court's jurisdiction, this Court should hold that the District Court lacked jurisdiction. Under Federal Rule of Civil Procedure 62(c), a district court may modify an injunction, pending appellate review, only in order to maintain the *status quo*. Bishop sought to alter the *status quo* by significantly reducing the assets subject to the freeze. His requested relief would have required the District Court to decide the same issues pending in No. 10-10715.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENJOINED BISHOP'S UNLAWFUL CONDUCT AND FROZE HIS ASSETS PENDING AN ADJUDICATION ON THE MERITS

A. Standard of Review

The scope of review of an order granting preliminary injunctive relief, including an asset freeze, is particularly narrow. *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 425 F.3d 964, 968 (11th Cir. 2005). An order granting preliminary relief can be overturned only upon a showing of an abuse of discretion. *See, e.g.*, *United States v. Endotec, Inc.*, 563 F.3d 1187, 1194 (11th Cir. 2009)*; SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999). While the district court's conclusions of law are subject to *de novo* review, underlying factual findings are reviewed for clear error. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 731 (11th Cir. 2005); *Unique Fin. Concepts, Inc.*, 196 F.3d at 1198.

B. The District Court Did Not Abuse Its Discretion in Enjoining Bishop From Participating in Loan Modification and Foreclosure Relief Services

The order at issue in this appeal is in aid of an action for a permanent prohibitory injunction and monetary equitable relief under Section 13(b) of the FTC Act, which states 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). In an action such as this one, the district court has authority to impose the full range of equitable remedies, including monetary equitable remedies such as restitution and rescission. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984); *accord*, *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9th Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111-13 (9th Cir. 1982). Because the district court is empowered to order a permanent injunction and monetary equitable relief, it is similarly authorized to order related preliminary and ancillary relief, including such preliminary relief (*e.g.*, asset freezes and equitable receiverships) as may be necessary to ensure the availability of permanent relief. *Gem Merch.*, 87 F.3d at 469; *U.S. Oil & Gas*, 748 F.2d at 1433-34.

Where, as here, a federal statute expressly authorizes injunctive relief, the FTC need not meet traditional private litigant criteria for injunctive relief but only the requirements in the statute. *United States v. Szoka*, 260 F.3d 516, 523-24 (6th Cir. 2001); *Gov't of the Virgin Islands, Dep't of Conservation & Cultural Affairs v.*

Virgin Islands Paving, Inc. 714 F.2d 283, 286 (3d Cir. 1983). Under Section 13(b), a court may issue an injunction "upon a proper showing that, weighing the equities and considering the FTC's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). Harm to the public is presumed. *World Wide Factors*, 882 F.2d at 346.

1. The Commission is Likely to Succeed in Showing that WDR's Loan Modification Scheme Was Deceptive

Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices. 15 U.S.C. § 45(a). An act or practice is deceptive if (1) there is a representation; (2) the representation is likely to mislead consumers acting reasonably under the circumstances; and (3) the representation is material. *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *In re Cliffdale Assocs.*, 103 F.T.C. 110, 164-65 (1984), *appeal dismissed sub nom. Koven v. FTC*, No 84-5337 (11th Cir. 1984). A representation may be express or implied; liability attaches for "misleading consumers by innuendo as well as by outright false statements." *In re Kraft, Inc.*, 114 F.T.C. 40, 121, 1991 FTC LEXIS 38, 12 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992); *see also* FTC Policy Statement on Deception, appended to *Cliffdale*, 103 F.T.C. at 175-77. A representation need not be made with an intent to deceive. *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *In re Nat'l Credit*

Mgmt., 21 F. Supp. 2d 424, 441 (D.N.J. 1998).

Defending the WDR enterprise, Bishop accuses the FTC and the District Court of failing to examine the "entire transaction" involving the loan modification services. Br. 38. In fact, the FTC's and the District Court's analyses were consistent with FTC Act law concerning deception, focusing on the "net impression" of WDR's representations. "The determination is not restricted to a consideration of what impression an expert or careful reader would draw from the advertisements, but rather involves viewing the advertisement as it would be seen by the public generally which includes the ignorant, the unthinking and incredulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions. …" *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1010 (N.D. Ind. 2000) (internal citations omitted), *aff'd*, 312 F.3d 259 (7th Cir. 2002). Representations targeted to an identifiable group of consumers, such as homeowners in financial distress, should be evaluated from the vantage point of that group. *In re Telebrands Corp.*, 140 F.T.C. 278, 291 (2005), *aff'd*, *Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006); *Cliffdale*, 103 F.T.C. at 179.

Bishop asserts that the FTC and the District Court focused on selected phrases on the postcards or on statements made during the sales pitch, while

ignoring other statements, such as in the Application. Br. 38-40. In fact, the FTC placed all of the evidence that Bishop claims was ignored before the District Court. For example, the Application was attached to a number of the consumer declarations, along with the postcards. D.5-2 at 2-3; D.13 at 4-11; D.14 at 5-15; D.116 at 50-58. Despite these materials – indeed, because of them – consumers remained under the impression that WDR would lower their interest rates and reduce their mortgage payments via government programs. D.12 at 2; D.14 at 2; D.115 at 5.

Bishop similarly claims that the sales agents made clear that WDR was not associated with the government and that they made no guarantees. Br. 40. The FTC submitted multiple consumer declarations describing homeowners' impressions that WDR was government-affiliated and would likely provide the promised relief. D.12 at 2; D.14 at 2; D.115 at 5. If sales agents denied any connection to the government, it appears they did so only if asked. D.6 at 23; D.7 at 6-40; D.8 at 7-20. As for mentions that results were not guaranteed, those isolated statements could not overcome the impression left by the sales agents' otherwise encouraging pitch.

Even if individual phrases on the postcard, in the Application, or during the

sales pitch were literally true,[16] Br. 38-41, such phrases do not remove the deceptive nature of Defendants' conduct. *FTC v. Peoples Credit First, LLC*, 2006-1 Trade Cas. (CCH) ¶ 75,192, 2005 U.S. Dist. LEXIS 38545, at *21-*22 (M.D. Fla. Dec. 18, 2005), *aff'd*, 244 Fed. Appx. 942, 2007 U.S. App. LEXIS 17429, at **5 (11th Cir. Jul. 19, 2007) ("technically or literally true" words in mail piece not persuasive in light of material implication of entire mail piece); *see also Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989). The District Court was clearly aware of the statements that Bishop claims were literally true. D.60 at 10-11 & especially n.8. It did not abuse its discretion, however, in concluding that the FTC was likely to succeed on the merits given the consumer declarations that they were deceived, D.11 at 6; D.12 at 2; D.14 at 2, or testimony from the Defendants themselves that names like "New Start" or "Fresh Start" referred to federal programs. D.165 at 51.

Bishop next claims that the District Court's acknowledgment that WDR apparently completed some loan modifications and made some refunds renders the entry of the preliminary injunction erroneous. Br. 44. As a matter of law,

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[16] Bishop also argues on appeal that the postcards' red, black and yellow color scheme "is not characteristic of government notices." Br. 39. Bishop cites no evidence for this novel claim. The FTC anticipates that a survey of government agencies' notices would reveal a wide range of color choices.

however, some success is not a defense to an FTC Act violation. *Amy Travel*, 875 F.2d at 572. Similarly, the payment of refunds does not sanitize a defendant's unlawful practices or preclude the Commission from seeking equitable relief. *See, e.g.*, *FTC v. Cyberspace, LLC*, 453 F.3d 1196, 1201-02 (9th Cir. 2006); *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002).

Bishop further contends that, because news articles reported that loan modifications are difficult to obtain, even through government programs, WDR's scheme should be deemed legitimate. Br. 44-45. First, even if programs to offer loan modification assistance for a fee are legitimate, defendants can still violate the FTC Act if such programs are offered in a deceptive manner, which the District Court concluded was likely the case here. *See, e.g.*, *Tashman*, 318 F.3d at 1277; *FTC v. Minuteman Press,* 53 F. Supp. 2d 248 (E.D.N.Y. 1998). Second, defendants are routinely found to have engaged in deception when they promote a product or service by misrepresenting the ease with which results can be achieved. *See Think Achievement*, 144 F. Supp. 2d at 1012; *FTC v. Trudeau*, 579 F.3d 754, 764-66 (7th Cir. 2009). Bishop's claim that "success in mortgage loan modification depends largely on the good faith of lending institutions" (Br. 45) contrasts sharply with WDR's encouraging postcards and the claims of success made by WDR's sales agents. On this record, it was not erroneous for the District

Court to conclude that the FTC would likely prevail in showing that the WDR enterprise was deceptive.

2. The Commission is Likely to Succeed in Showing that Bishop Is Responsible for and Should Be Enjoined from Deceptive Activities

The District Court concluded that Bishop "played a significant role in the development and operations of JCA" and that "[h]e continued to make significant contributions after the formation of WDR and AFS." D.60 at 14. It also enjoined Bishop from engaging in further deceptive activities pending the resolution of the case. *Id.* at 16-17. As shown below, the District Court's decisions were not an abuse of discretion.

a. Bishop participated in and had control over WDR's deceptive conduct

An individual may be held liable for injunctive relief for a corporation's violations of the FTC Act, if a court finds that the individual (1) participated in the deceptive practices or (2) had authority to control them. *FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997); *Amy Travel*, 875 F.2d at 573. Bishop claims that he had only a peripheral role in the WDR enterprise and that he did not control, operate or manage its loan modification activities. Br. 43, 47. He says that his roles were limited to helping set up JCA, brokering a mailing contract for

WDR, and owning and operating AFS for some months in 2009. Br. 46-47. The evidence shows that Bishop was far more active than he admits.

Without Bishop, there would not have been a WDR loan modification scheme. Bishop provided valuable start-up capital to JCA/WDR. He "set up the administrative, hiring, marketing, and insurance lines along with providing the furniture, equipment and software." Doc 32-5 at 1. By his own admission, they "did it with all my money, all my equipment. …" D.124 at 55-56. The software and database were particularly valuable to the enterprise's ability to track clients, and Bishop estimated the software's value at "over $300,000." D.36-2 at 3; D.124 at 18, 26-27. Bishop also employed JCA/WDR's senior staff (McDaniel, Caldwell and Lewis) and "leased" them to JCA/WDR. D.86, PX-24 at 2; D.115 at 2; D.124 at 86, 114.

When JCA/WDR moved into loan modifications, it continued using equipment, software, and a database Bishop had developed for MAS's deceptive marketing. D.32-2 at 2-4; D.32-5 at 1. Rather than simply receive payment for his contribution, Bishop agreed to promote WDR under the Marketing Agreement that paid him for his services as well as use of his assets. D.32-5 at 2; D.43-1. Through the Agreement's specification of "Services Provided by Nationwide," Bishop also agreed to ensure that "[a]ll advertising will be truthful and not misleading." D.43-

1, Art. 2.b. Because of this provision, Bishop was in a position to refuse advertising that was not truthful or that was misleading. He might also have forbade WDR's use of his valuable computer equipment, software, and database. He had the means to monitor and exercise control over WDR's marketing efforts and its operations more generally.

Bishop also maintained a noticeable presence in the WDR operation. Even after he supposedly started to work from home, Bishop continued to visit the WDR offices at least twice a month to discuss "the marketing and general business matters," D.32-2 at 2, and a JCA/WDR employee observed that Bishop "seemed to have a lot of authority and influence." D.115 at 2. Bishop deepened his involvement when he assumed ownership of AFS, which was the banking arm of the WDR enterprise. As owner, he signed the checks that distributed the money AFS had collected from homeowners who had signed up for WDR's loan modification program. D.5-3 at 6; D.31-2 at 1-2, 22; D.32-5 at 2. This role gave him the ability to monitor WDR's income and expenses.

Although by mid-2009 Bishop purported to end his involvement with WDR, at least on paper, by moving RABC's employees to TCBA and selling AFS to Lewis, D.124 at 114; D.152-6; D.152-7, he continued to participate in and control WDR's activities. Lewis kept Bishop apprised of WDR's marketing activities by

informing him when WDR paid for mailing services. D.152-8. Perhaps most significant of all, Bishop had the authority to make decisions about WDR's legal representation. D.152-9; D.152-10.

Given the record of Bishop's participation in and control over WDR's deceptive activities, it is likely that the FTC will succeed in showing that Bishop was personally liable for WDR's conduct. The District Court did not err in so finding.

b. Bishop is responsible for the conduct of a common enterprise

Bishop also seeks to avoid liability by comparing the companies that he admits to owning, Nationwide and AFS, to a utility and a bank providing services to WDR at arm's length. Br. 46-47. Defendant McDaniel, however, conceded that the various entities operated as a common enterprise. D.74 at 15. The evidence shows that Nationwide and AFS not only participated directly in WDR's deceptive conduct, their operations were tightly entwined with those of WDR, JCA, and RABC. Although a finding of common enterprise is not necessary to impose individual liability on Bishop, the close links among these entities – with Bishop as the common denominator – further support the District Court's ruling as to his

liability.[17]

Under the FTC Act, "[w]here one or more corporate entities operate in a common enterprise, each may be held liable for the deceptive acts and practices of the others." *Think Achievement*, 144 F. Supp. 2d at 1011 (citing *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973) (upholding conduct prohibition applied to members of a common enterprise and their principal); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746-47 (2d Cir. 1964)). To determine a common enterprise, courts consider a variety of factors, including common control, sharing office space and officers, whether business is conducted through a web of inter-related companies, the commingling of corporate funds and failure to maintain separation of companies, unified advertising, and evidence that reveals no real distinction among the corporate entities. *FTC v. Wolf*, 1997-1 Trade Cas. (CCH) ¶ 71,713, 1996 U.S. Dist. LEXIS 1760, at *23-*24,(S.D. Fla. Jan. 30, 1996) (internal quotes and citations omitted); *see also Think Achievement*, 144 F. Supp. 2d at 1011.

The criteria for common enterprise liability are readily satisfied here.

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[17] Although the District Court did not pass expressly on the FTC's common enterprise allegations, it noted that Defendants "act[ed] in concert" (D.60 at 9) and described the inter-related roles of JCA, WDR and AFS in the "loan modification business" (*id.* at 14). In any event, this Court could still affirm on such a basis. *See Ochran v. United States*, 273 F.3d 1315, 1318 (11th Cir. 2001).

Bishop had control over and participated in the activities of Nationwide, RABC, JCA, AFS and WDR, several of which entities either employed or were owned by McDaniel, Caldwell and Lewis at one time or another. *See* pages 10-17, *supra*. The entities thus shared officers, not to mention offices, D.8 at 23-24, 33-34, 69-72; D.31-2 at 23; D.124 at 101-02; D.152-6 at 1; D.152-7 at 1. They operated as units of a single entity: Bishop engineered the start-up and provided the information technology, D.32-5 at 1; D.36-2 at 3; D.115 at 21, 23; D.124 at 55-56; AFS served as the accounts receivable/payable department, D.8 at 23-24, 31-32; D.32-2 at 3; RABC was the senior management, D.115 at 2; D.124 at 114; and Nationwide was the marketing department, D.43-1. There was also no real separation in the enterprise's public face or internal operations. D.71-2 at 8; D.116 at 3, 12. Sales agents used names such as Crowder Law Group, WDR and AFS interchangeably, D.6 at 6; D.7 at 7, 14; D.8 at 9, D.12 at 2, 5; D.116 at 3, 12. The entities transferred funds among themselves. D.31-2 at 23-25; D.84, DX-14 at 6, 13, and 15.

Given the common ownership, control and operation of the entities making up WDR, Bishop cannot shield himself from liability by claiming Nationwide and AFS were independent. They were part of a common enterprise that engaged in deceptive practices for which Bishop should be held liable.

c. Bishop likely would engage in deceptive marketing activities in the future

In light of these showings that WDR engaged in widespread deception and that Bishop shared responsibility for that deception, the District Court did not abuse its discretion in enjoining him from engaging in deceptive loan modification activities. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132, 89 S. Ct. 1562, 1581 (1969) ("'federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past'") (quoting *NLRB v. Express Publ'g Co.*, 312 U.S. 426, 435, 61 S. Ct. 693, 699 (1941)). Past unlawful conduct is "highly suggestive of the likelihood of future violations." *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (quoting *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975)). "In deciding whether to issue an injunction in light of past violations, courts should consider factors such as the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future

violations." *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259.

Bishop's conduct showed a readiness to resume deceptive loan modification activities. At the same time that he was shutting down MAS because of state law enforcement actions against it, Bishop began to set up JCA/WDR. D.31-3 at 4-5, 7; D.32-5 at 1. He "again became directly involved in the same type of business," D.60 at 16, including by promoting WDR's loan modification services, owning and operating AFS, and acting on behalf of WDR. He had set up corporations bearing names like "Fresh Start," D.31-3 at 19, "New Start," D.31-3 at 15, and "Legal Administrative Services, Inc.," D.31-3 at 41-42, all of which resembled names used to market the WDR loan modification services. D.5-2 at 2-3; D.6 at 6; D.7 at 7; D.8 at 9; D.117 at 4-5. And despite his being subject to prior enforcement actions involving very similar loan modification activities, he continues to deny that such activities are deceptive. Br. 38-46. Taken together, these facts clearly show that Bishop had the means and ability to repeat the sort of deception he engaged in with WDR, and suggested a real prospect of such repetition. Although the District Court characterized its injunction decision as a "close issue," D.60 at 16, it was in fact amply justified.

C. The District Court Did Not Abuse Its Discretion in Freezing Bishop's Assets

The District Court properly froze Bishop's assets at the preliminary injunction stage to ensure its ability to provide final relief, and it correctly refrained from addressing Bishop's claim that the freeze should be limited just to funds he received through Nationwide. This Court should similarly refrain from adjudicating the scope of the asset freeze, so that the District Court may resolve the many outstanding issues that bear on the question. If it does reach the issue, the Court should reject Bishop's claim that his liability is limited to just a fraction of the amount that consumers lost to the WDR scheme he orchestrated. The cases on which he relies have no bearing on FTC Act liability for a deceptive scheme in which consumer funds were first paid directly to Defendants acting in concert and then shared among them.

1. The Asset Freeze Was Amply Justified Under Established Standards

Bishop claims that, prior to freezing his assets, the District Court should have held a "nexus hearing" concerning the relationship between those assets and the Defendants' deceptive conduct. Br. 25, 28. No such hearing was required, because the FTC fully justified the asset freeze under established legal standards, which require only that the Commission show: (1) that it is likely to prevail in

imposing monetary equitable relief on Bishop; and (2) that the asset freeze it seeks is "a reasonable measure to preserve the *status quo* in aid of the ultimate equitable relief claimed." *United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 497 (4th Cir. 1999).

In *U.S. Oil & Gas Corp.*, the Court recognized the authority of the district court under Section 13(b) "to issue a preliminary injunction, including a freeze of assets, during the pendency of an action for permanent injunctive relief." 748 F.2d at 1434. An interim freeze prevents dissipation of funds that may be needed to satisfy a final judgment for equitable monetary relief. *See United States v. First Nat'l City Bank*, 379 U.S. 378, 385, 85 S. Ct. 528, 532 (1965). Moreover, "when interim equitable relief is authorized *and the public interest is involved*, the doctrine applies that 'courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Rahman*, 198 F.3d at 497 (quoting *First Nat'l City Bank*, 379 U.S. at 383, 85 S. Ct. at 531)).

All the prerequisites for such relief are present here. As shown above, the FTC made a strong showing that it was likely to prevail in its claims that Defendants violated the FTC Act, and that the deceptive marketing of WDR's loan modification services netted Defendants over $4 million in fees. Section 13(b)

provides the district court with express authority to grant equitable relief with respect to that consumer injury. *See U.S. Oil & Gas*, 748 F.2d at 1432. "A corporation is liable for monetary relief under section 13(b) if the F.T.C. shows that the corporation engaged in misrepresentations or omissions of a kind usually relied on by reasonably prudent persons and that consumer injury resulted." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994).

Once corporate liability is established, Bishop can be held jointly and severally liable for the equitable monetary relief ordered, if he has knowledge of WDR's deceptive activities. *Gem Merch*., 87 F.3d at 470; *Publ'g Clearing House*, 104 F.3d at 1171. Such knowledge can be established by showing "actual knowledge of material representations, 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." *Amy Travel*, 875 F.2d at 574 (quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985)); *see also Publ'g Clearing House*, 104 F.3d at 1171; *FTC v. Transnet Wireless Corp*., 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007).

Bishop's knowledge suffices to make him personally liable for WDR's deceptive conduct. D.60 at 14. The District Court found that Bishop "was aware of [the states of Illinois's and Idaho's] concerns with the deceptive nature of the

solicitations," and that "[t]here is a great deal of similarity between the MAS mail solicitations and the mail pieces later used by Defendants. *Compare* Pl. Exs. 1 and 9 *with* Pl. Ex. 19 at 8." D.60 at 14 n.12. Bishop would have noticed the similarities and recognized the postcards' deceptive content, when he examined the postcards pursuant to his responsibilities under the Marketing Agreement. Thus, he knew, or should have known, that the WDR postcards were deceptive. Bishop also had knowledge of the enterprise's activities, because he ran AFS for a significant portion of the time that the WDR loan modification enterprise operated and disbursed significant sums of money. D.5-3 at 6; D.31-2; D.32-5 at 2; D.152-7.

Moreover, Bishop can be liable if he had reckless indifference to the truth or falsity of the misrepresentations. *Publ'g Clearing House*, 104 F.3d at 1171. He testified that he did not examine the postcards for content, D.165 at 33-34, despite having agreed to ensure that the advertising Nationwide used would be "truthful and not misleading." D.43-1, Art. 2b. Under the FTC Act, his apparent and reckless failure to examine the cards makes him liable for monetary relief.[18]

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[18] Bishop is not shielded from liability by the Marketing Agreement's requirement that the advertising be "reviewed by the attorney named on the advertising before being used." D.43-1, Art. 2.b. "Obtaining the advice of counsel [does] not change the fact that the business [is] engaged in deceptive practices" and is "not a valid defense on the question of knowledge." *Amy Travel*, 875 F.2d at

Thus, the FTC has shown that it is likely to obtain equitable monetary relief against Bishop, under a statute aimed at protecting consumers from unlawful conduct. In such circumstances, this Court has held that an enforcement agency bears only a "light" burden in justifying the amount of assets subject to the freeze, based on "'a reasonable approximation'" of liability. *See ETS Payphones*, 408 F.3d. at 735 (quoting *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004)). Here, the amount frozen actually falls short of such a reasonable approximation of Bishop's liability. Although discovery continues, preliminarily it appears that WDR/Crowder had at least 2,336 loan modification clients in 2009, D.56-2 at 2, who were each charged $2,000, D.6 at 30; D.7 at 28. Accordingly, the WDR enterprise would have collected $4,672,000 from homeowners, of which less than $200,000 appears to have been refunded. D.56-2 at 4.[19] The reasonable approximation, therefore, of Bishop's liability is $4,472,000.

By contrast, the amount of Bishop's assets frozen is approximately $1 million. D.78 at 5. In *ETS*, this Court concluded that a freeze of the defendant's

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575.

[19] D.56-2 at 4 also reports on refunds made by JCA, but Bishop states that JCA handled only bankruptcy filings, not loan modifications (Br. 3, 12). Refunds it supposedly made should not be considered in determining WDR's revenues from the loan modifications.

$7 million of assets was necessary given the SEC's reasonable approximation that defendants' liability amounted to $19 million. 408 F.3d at 736. It follows that the District Court's freezing approximately $1 million of Bishop's assets to satisfy his potential liability in excess of $4 million was not an abuse of discretion.[20]

Finally, Bishop has not supported his claim that there are equities in his favor that could justify denying or limiting the freeze. See Br. 37, 56-57. When weighing the equities between the public interest in protecting consumers from loan modification scams and Bishop's private interest, the public equities are accorded much heavier weight. *World Wide Factors*, 882 F.2d at 347. The District Court authorized Bishop to receive from the frozen assets $9,500.00 per month through the pendency of this appeal. D.168 at 8. The Bishops are also free to earn income in countless lawful endeavors. D.67 at 8. Such employment income, combined with the $9,500 per month they receive from the frozen assets, should produce considerable revenues to support their household while the freeze is in place. In light of the income and revenues Bishop is receiving and the substantial injury Defendants caused, the District Court did not err in finding that

[20] Even if the Court were to conclude that Bishop is personally liable only for the revenues the enterprise earned from consumers while Bishop owned AFS, which amounted to more than $1.2 million (D.152-11 at 2), the assets subject to the freeze would still be of lesser value.

the FTC had met its burden that the equities favored preliminary injunctive relief, including a freeze. D.60 at 17.

2. Bishop's Arguments for Further Limiting the Asset Freeze are Premature and Incorrect

As shown in the preceding section, the Commission amply established the "nexus between the assets sought to be frozen … and the ultimate relief requested," *Rahman*, 198 F.3d at 496-97, in accordance with the flexible standard recognized by this Court in *ETS Payphone*. Bishop nevertheless argues that the District Court should have further limited the extent of the freeze, on the basis of his contention that his liability would ultimately be limited to disgorgement of funds that he personally received from his co-Defendants. As shown below, his substantive argument is incorrect. As a threshold matter, however, the District Court correctly refrained from adjudicating that issue at this early stage of the litigation, and this Court should similarly affirm the freeze order without passing on it.

a. The asset freeze should remain in place until the District Court has addressed the merits of Bishop's liability

This Court has repeatedly observed that "'[e]xactitude is not a requirement'" in the imposition of asset freezes in aid of claims for equitable monetary relief. *ETS Payphones*, 408 F.3d at 735 (quoting *Calvo*, 378 F.3d at 1217). Indeed, the

Court has expressly recognized that contested issues regarding the scope of potential liability need not be resolved, early in the litigation, in order to impose and affirm a freeze. For example, in *CFTC v. Levy*, 541 F.3d 1102 (11th Cir. 2008), after declaring that the district court could freeze a defendant's assets to ensure the adequacy of equitable relief, the Court stated: "At this point, we cannot be sure whether the district court will order a disgorgement remedy – and, if it does, in what amount." *Id.* at 1114. It thus refused to address the scope of the asset freeze. *Id.*

Bishop's appeal comes to the Court in precisely the same posture as in *Levy*. The Commission has made a strong preliminary showing that Bishop is likely to be liable for relief based on the full extent of the WDR deceptive scheme; Bishop has advanced novel arguments for limiting that liability. That contested issue of law is among the many matters to be resolved by the District Court, subject to this Court's review, in the course of merits proceedings. Bishop will have ample opportunity to contest the amount of his liability, if and when the District Court holds him liable. Meanwhile, this Court should "decline to set aside the asset freeze at this time." *Levy*, 541 F.3d at 1114.

b. Bishop's liability for WDR's deception is not limited to the share of funds he received

This Court and other circuits have repeatedly recognized a defendant's liability for the full amount of consumer losses to remedy violations of the FTC Act. *Gem Merch.*, 87 F.3d at 467-70 (affirming award based on consumers' losses and additional order of disgorgement); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) ("Courts have regularly awarded, as equitable ancillary relief, the full amount lost by consumers."); *FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) ("the fraud in the selling, not the value of the thing sold, is what entitles consumers … to full refunds"). *See* Parts I.B.2.a., I.B.2.b. and I.C.1, *supra*.

Bishop, however, argues that the proper measure of restitution is "monies received *from* the offending enterprise." Br. 30 (emphasis added). Bishop bases this argument on an improper extension of principles discussed in cases addressing wholly dissimilar factual situations, mostly under entirely different statutory schemes. All of those cases dealt with situations in which some or all of the amounts sought as "restitution" were never in the hands of any defendant in the action, or had come from third parties. Even assuming the correctness of those decisions,[21] they have no bearing where, as here, all of the funds at issue were paid

[21] *But see* note 22, *infra*.

by consumers to Defendants who, acting in concert, then shared these ill-gotten gains through the web of entities they had created.

Bishop starts by quoting at length from *Great-West Life & Annuity Co. v. Knudsen*, 534 U.S. 204, 122 S. Ct. 708 (2002), while failing to offer any cogent explanation of its applicability here. Br. 30-31. In fact, *Great-West* involved an action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(3), in which a retirement plan sought to enforce a contractual provision against a plan participant, under which it was claimed that she was obligated to turn over to the plan funds she had received from a third party. 534 U.S. at 208, 122 S. Ct. at 711-712. The Supreme Court ruled that the relief sought in such an action would be legal in nature, and not equitable restitution – and, therefore, not authorized by the ERISA provision. *Id.* at 210, 221, 122 S. Ct. at 712-13, 718-19.

The Second Circuit subsequently ruled that the principles discussed in *Great-West* should be extended to impose limits on monetary liability under the FTC Act, at least in the very unusual situation presented there. *FTC v. Verity International, Ltd.*, 443 F.3d 48 (2d Cir. 2006), involved unfair and deceptive practices in the telephonic sale of adult entertainment content. The Second Circuit held that, for those transactions in which the consumers paid monies to third-party

telecommunications carriers, which had paid only a portion of those monies to defendants and were not themselves defendants in the action, recovery under the FTC Act was limited to disgorgement of the funds actually received by the defendants. *Id.* at 68.

Bishop does not rely significantly on *Verity*, and understandably so. In this case, no middleman interceded between consumers and the Defendants; rather, WDR, through AFS, received payments of $2,000 directly from each consumer for loan modification services. The Defendants then shared the more than $4 million in proceeds through the entities they had created, which, as discussed above, amounted to a common enterprise. *See* Part I.B.2.b., *supra.* Even assuming that *Verity* was correctly decided on its own facts, it offers no support to Bishop's arguments here.[22]

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[22] In fact, the Commission submits that *Verity* was incorrectly decided, and that the Second Circuit erred in applying the *Great-West* holding to a wholly dissimilar legal context. *Great-West* concerned ERISA, "a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's *private* employee benefit system." 534 U.S. at 209, 122 S. Ct. at 712 (citations and internal quotation markets omitted; emphasis added). The *Great-West* Court further emphasized its reluctance to interfere with "ERISA's carefully crafted and detailed enforcement scheme." *Id.* at 209, 122 S. Ct. at 712. In contrast, Section 13(b) of the FTC Act seeks to further the broad *public* goals of that Act, and does so principally by relying on the courts' expansive equitable powers. *See FTC v. Sw. Sunsites*, 665 F.2d 711, 718 (5th Cir. 1982) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 397, 66 S. Ct. 1086, 1089 (1946)); *cf. Porter*, 328 U.S. at 397-98, 66 S. Ct. at 1089 ("equitable jurisdiction is not to be denied or limited in the

In *CFTC v. Wilshire*, 531 F.3d 1339 (11th Cir. 2008), also relied upon by Bishop (Br. 31-33), this Court addressed the issue of monetary equitable relief under another statute, but in a context that also involved third-party transactions. There, the Commodity Futures Trading Commission (CFTC) sought monetary relief for the benefit of investors, based on violations of the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq*. The consumer losses for which the CFTC sought redress were not limited to payments made to the defendants for their services. Rather, the consumer losses occurred in open-market transactions, into which the investors were fraudulently induced to enter. In other words, while the defendants received fees for their unlawful services, the recipients of much of the money lost by consumers were other investors in anonymous commodity trades who were not defendants in the action. In those circumstances, this Court – citing *Verity*, although not *Great-West* – ruled that equitable monetary relief must be limited to

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absence of a clear and valid legislative command"). Application of the reasoning of *Great-West* to the FTC Act not only fails to account for major differences between the statutory schemes, but would also invite subterfuges by which entities engaged in unfair and deceptive acts would structure their activities in an effort to limit the liability of various defendants. Such a result would imperil the Commission's statutory mission to protect the public interest by invoking "the historic power of equity to provide *complete* relief in the light of statutory purposes." *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92, 80 S. Ct. 332, 334-35 (1960) (*quoted in Sw. Sunsites*, 665 F.2d at 718 (emphasis added)).

disgorgement of the funds received by defendants. 531 F.3d at 1345.[23]

Since its decision in *Wilshire*, this Court has properly declined the opportunity to limit restitution under the FTC Act to the defendant's unjust gain. In *FTC v. National Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), the district court concluded:

> Restitution is intended to return the injured party to the *status quo* and is measured by the amount of loss suffered by the victim. *Transnet Wireless Corp.*, 506 F. Supp. 2d at 1217. Requiring the defendants to return the profits that they received rather than the costs incurred by the injured consumer would be the equivalent of making the consumer bear the defendants' expenses. The court will not make the victimized consumers shoulder such a burden.

645 F. Supp. 2d at 1212-13. On appeal, this Court affirmed, on the basis of the "well-reasoned decision and the judgment of the district court … ." *FTC v. Nat'l Urological Group, Inc.*, 356 Fed. Appx. 358; 2009 U.S. App. LEXIS 27388 (11th Cir. Dec. 15, 2009); *see also Peoples Credit First, LLC*, 244 Fed. Appx. at 943; 2007 U.S. App. LEXIS 17429, at **2 (affirming without discussion the district court's measuring restitution as consumer loss less any refunds, *Peoples Credit First, LLC*, 2005 U.S. Dist. LEXIS 38545, at *29 n. 18 (citing, *inter alia*, *Gem*

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[23] The Court also relied on *Waldrop v. Southern Company Services, Inc.*, 24 F.3d 152 (11th Cir. 1994). That case is even further afield from the present one, dealing with the treatment of backpay. As this Court noted, "it has long been the general rule that back wages are legal relief in the nature of compensatory damages." *Id.* at 158.

Merch., 87 F.3d at 467)). The Court should continue to limit *Wilshire* to the context of investor losses on open market transactions, and not extend it to consumer injury remedied under the FTC Act.

Moreover, even if there were other circumstances in which *Wilshire* might limit FTC Act remedies, it is wholly inapplicable here. Nothing in that case can be read to undermine the principle that an individual may, under the standards set forth above, be held liable for the deceptive conduct of entities he had the ability to control, in which he participated, and of which he had knowledge. *See Gem Merch.*, 87 F.3d at 470; Parts I.B.2.a., I.B.2.b. and I.C.1*, supra*. Indeed, to impose on the Commission the difficult and sometimes insurmountable burden of linking the assets of individual defendants to an unlawful scheme they conceived and implemented through a business entity they control or in which they participated would impede its efforts to protect the public by rewarding those who, by clever manipulation or other means, can deny receiving any pecuniary benefit as a consequence of their unlawful practices.

In *Wilshire*, individual defendant Wilshire was arguably in a position analogous to Bishop's in that his personal liability was based, in part, on his status as a "controlling person" under the CEA provision imposing liability for CEA violations by a "controlled person." *CFTC v. Wilshire Inv. Mgmt. Corp.*, 407 F.

Supp. 2d 1304, 1312 (S.D. Fla. 2005). In remanding the case for re-determination of monetary relief based upon defendants' unjust gain, this Court did not require that Wilshire's personal liability be limited to whatever income he might have received from the company he controlled. *Wilshire*, 531 F.3d at 1345. Bishop here argues for that very result.

Furthermore, as discussed above, the Commission is likely to prevail in its contention that all of the Defendants here constituted a common enterprise. *See* Part I.B.2.b., *supra.* Nothing in *Wilshire* or *Great-West* addresses that issue, or even suggests that joint and several liability should be denied in these circumstances.

II. THE DISTRICT COURT DID NOT HAVE JURISDICTION TO MODIFY THE ASSET FREEZE

A. Standard of Review

In the second appeal, No. 10-12901, Bishop claims that the District Court had subject matter jurisdiction to significantly modify the preliminary injunction, even though his appeal from that injunction was already pending before this Court. Br. 47-48. This Court reviews the district court's determination that it lacked subject matter jurisdiction *de novo*. *Anderson v. United States*, 317 F.3d 1235, 1237 (11th Cir. 2003).

B. The Court's Decision in 10-10715 Will Moot the Relief Sought in 10-12901

This Court should dismiss Bishop's second appeal as moot. "A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (internal quotations and citations omitted); *see also Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1172 (11th Cir. 2004) (decision in one consolidated appeal controlled relief available in the second, thus mooting the second). Here, the Court's decision in the first appeal regarding the asset freeze, No. 10-10715, will obviate any meaningful relief in the second, No. 10-12901.

In the second appeal, Bishop asks the Court to reverse the District Court's conclusion that it lacked jurisdiction to hear Bishop's motion to modify the asset freeze. If the Court were to agree, it would presumably remand the case so the District Court could rule on the merits of the motion. This Court's decision in the first appeal, however, would make any such remand unnecessary.

If the Court were to conclude in the first appeal that the District Court did not abuse its discretion in freezing Bishop's assets, that decision would control the District Court's consideration of the motion to modify; there would be no grounds for modification, and a remand in the second appeal would be superfluous. If the

Court were to conclude that the District Court did abuse its discretion in freezing Bishop's assets, it would presumably remand the case to the District Court for re-determination of the asset freeze. In the latter case, Bishop would receive the very relief he is seeking in the second appeal. Accordingly, because in the second appeal the Court will be unable to give meaningful relief, it should be dismissed as moot.

C. The District Court Did Not Have Jurisdiction to Grant the Requested Relief

If it does not dismiss the second appeal as moot, the Court should affirm the District Court's conclusion that it lacked jurisdiction over Bishop's motion, because Bishop did not seek to maintain the *status quo*. Rather, he sought to dramatically alter it.

Bishop claims that the District Court had jurisdiction to rule on his motion to modify the asset freeze, entered as part of the December 14, 2009, preliminary injunction (D.67), during the pendency of his appeal of the same order. Br. 47. But "the filing of a timely and sufficient notice of appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of the appeal." *Schewchun v. United States*, 797 F.2d 941, 942 (11th Cir. 1986). The Supreme Court has explained:

> [A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and it divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982).

In limited circumstances district courts can modify injunctions that are subject to interlocutory appeal. Federal Rule of Civil Procedure 62(c) provides, in relevant part: "While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). That rule, in conjunction with Federal Rule of Appellate Procedure 8, Fed. R. App. P. 8, is primarily aimed at preserving the *status quo* "pending appeal," as the rule's title provides. Accordingly, under the rule, "the district court may not alter the injunction once an appeal has been filed except to maintain the *status quo* of the parties pending appeal." *The Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 819 (5th Cir. 1989); *accord*, *Natural Res. Defense Council v. Sw. Marine, Inc.*, 242 F.3d 1163, 1165 (9th Cir. 2001); *Lewis v. Tobacco Workers' Int'l Union*, 577 F.2d 1135 (4th Cir. 1978); *Ideal Toy Corp. v. Sayco Doll Corp*. 302 F.2d 623 (2d Cir. 1962);

Sammons v. Polk Cnty. School Bd., 2006 U.S. Dist. LEXIS 2538, at *6 (M.D. Fla. Jan. 12, 2006).

The District Court entered the preliminary injunction freezing Bishop's assets to preserve its ability to provide relief following adjudication of his liability. Without the asset freeze, Bishop could dissipate assets needed to provide equitable monetary relief for the injury to consumers caused by Defendants' deceptive loan modification scheme. The District Court's action protects Bishop's assets from dissipation.

The District Court could modify the asset freeze only in support of the *status quo*, *i.e.*, the existing asset freeze. *See Sw. Marine*, 242 F.3d at 1166-68; *SEC v. Kirkland*, 2006 U.S. Dist. LEXIS 65145, at *1-*2 (M.D. Fla. Sept. 12, 2006). Bishop, however, did not seek preservation of the existing asset freeze. Rather, he sought to reduce by a significant amount the assets subject to the freeze to include only those assets from "the limited time period during which Bishop was brokering the postcard mailings." Br. 55. Such a modification bears no resemblance to the more precise definition of "surface water" approved in support of the *status quo* in *Sw. Marine*, 242 F.3d at 1168, or the identification of real property purchased with funds subject to a receivership approved in *Kirkland,* 2006 U.S. Dist. LEXIS 65145, at *1-*2. Instead, Bishop's modification would gut, not preserve, the *status*

quo.

Contrary to Bishop's claim (Br. 56), his motion also would have mooted issues pending in this appeal, thus interfering with the Court's jurisdiction. To have granted the relief Bishop sought, the District Court would have had to accept Bishop's claims that (1) he played only a limited role in the WDR enterprise, which conducted a legitimate business, and had only limited profits from it, *see* D.148 at 2, 6-11, and (2) that restitution under the FTC Act must be measured by the defendant's unjust gain, *see* D.148 at 4-5. The FTC's arguments set forth above and Bishop's arguments in his own brief (see Br. 28-47) demonstrate conclusively that these issues are the ones pending in this appeal. The District Court's ruling on them would have "materially alter[ed] the status of the case on appeal." *Sw. Marine*, 242 F.3d at 1166 (internal quotation marks and citation omitted). It therefore had no jurisdiction to rule on Bishop's motion.

Finally, Bishop states that the "District Court has authority to modify the asset freeze on the basis of new and revised factual information which alters the *status quo.*" Br. 49. But "[a] district court cannot generally accept new evidence or arguments on the injunction while the validity of the injunction is on appeal." *Coastal Corp.*, 869 F.2d at 820 (citing *State of New York v. NRC*, 550 F.2d 745, 758 (2d Cir. 1977)). Accordingly, Bishop's "new" facts were not relevant to the

District Court's jurisdiction.

CONCLUSION

For the foregoing reasons, the District Court's decisions should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). It is proportionally spaced and contains 13,990 words, as counted by the WordPerfect word processing program.

September 27, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2010, I electronically filed the foregoing Brief for Plaintiff-Appellee Federal Trade Commission at the ECF website for the United States Court of Appeals for the Eleventh Circuit. On the same day, I also sent an original and six paper copies of the foregoing Brief by overnight delivery to the Court and, using the same manner of service,[1] two paper copies to counsel listed below. I also sent counsel a PDF of the Brief via email:

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