No. 13-16052

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

IVY CAPITAL, INC.,
Defendant,

and

BENJAMIN HOSKINS, DREAM FINANCIAL,
LEANNE HOSKINS AND OXFORD FINANCIAL, LLC
Defendants-Appellants.

On Appeal from the United States District Court
For the District of Nevada
Hon. James C. Mahan
No. 2:11-cv-00283-JCM-GWF

BRIEF OF THE FEDERAL TRADE COMMISSION

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PRELIMINARY STATEMENT

This appeal concerns a deceptive – and highly profitable – scheme that ultimately defrauded consumers of over $130 million. Defendants, who operated as a common enterprise, bombarded consumers with sales calls promoting a costly business coaching scheme and related services. They represented that their program would enable consumers to establish profitable Internet-based businesses and to recover their investments quickly.

The Federal Trade Commission's motion for summary judgment presented overwhelming evidence that defendants' promotion was marred by false and deceptive representations and blatant violations of the FTC's Telemarketing Sales Rule ("TSR"). This evidence included, among other items, sworn declarations of consumers and investigators, an expert report, discovery responses, and excerpts of depositions of the defendants themselves and other senior managers. The FTC's motion painstakingly employed this evidence to provide a detailed and fully-supported description of the defendants' enterprise and Benjamin Hoskins's ("Hoskins") important role in it.

As the FTC showed below, defendants had no substantiation for

their extravagant claims, yet they touted their purchasers' success. Indeed, the entire theme of defendants' promotion – that it provided consumers access to "experts" who would coach them step-by-step – was a sham, involving no real experts. And a promised three-day refund policy was largely illusory.

In challenging the district court's grant of summary judgment, appellant Hoskins seeks to recast himself as a "silent partner" who merely accepted his profits (of more than $1.5 million), while leaving day-to-day operations and consumer sales to others. As the district court concluded, however, undisputed facts established he was not "silent" at all. Indeed, Hoskins concedes that after providing an initial infusion of resources, he was active in a number of areas, including, most notably, the critical task of securing relationships with "lead generators" – firms that could supply lists of consumers likely to respond to a pitch for defendants' coaching scheme. Furthermore, regardless of Hoskins's presence at the office, undisputed facts establish that he knew consumers were complaining and even advised the enterprise on ways to avoid sanctions for excessive payment card chargebacks.

It was therefore not an abuse of discretion for the district court to hold Hoskins jointly and severally liable with all the other defendants (most of whom settled with the Commission or defaulted) for the losses that consumers incurred. The district court was also correct in determining that two relief defendants, Oxford Financial, LLC ("Oxford") and Leanne Hoskins (Hoskins's spouse) had received funds derived from the defendants' unlawful conduct that must be disgorged. Because defendants can point to no genuine issue of material fact or erroneous legal conclusion underpinning these determinations, this Court should affirm.

STATEMENT OF JURISDICTION

The FTC brought this action pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b. The district court's jurisdiction derived from 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 53(b), 57b, 6102(c) and 6105(b).

Following entry of stipulated or default final judgments against all other defendants, the district court granted the Commission's motion for summary judgment against the remaining defendants, Hoskins and Dream Financial, and three relief defendants – Leanne Hoskins, Oxford

Financial, LLC ("Oxford"), and Mowab. ER 73-100. On July 5, 2013, following denial of their motion for reconsideration (Doc. 406), the court entered final judgment against all of these defendants. ER 134-53. An amended notice of appeal was timely filed on July 10, 2013, pursuant to Fed. R. App. P. 4(a)(1)(B).[1] ER 154-237.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly held that the FTC was entitled to summary judgment on the question of whether defendants, violated Section 5(a) of the FTC Act and the TSR by making false, deceptive, and unsubstantiated earnings claims in marketing products and services to consumers.

2. Whether the district court abused its discretion in holding Hoskins jointly and severally liable with all the other defendants for monetary equitable relief given his participation in and control over the unlawful marketing practices of a common enterprise and his

[1] Relief defendant Mowab has not appealed. Although Dream Financial filed a notice of appeal, it has not perfected it by arguing "specifically and distinctly" in its brief any arguments it wishes to raise. *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010).

knowledge that the enterprise made deceptive representations to consumers.

3. Whether the district court abused its discretion in requiring the relief defendants, Leanne Hoskins and Oxford, to disgorge proceeds of the unlawful scheme.

STATEMENT OF THE CASE

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

This appeal arises from an action by the FTC pursuant to Sections 5 and 13(b) of the FTC Act, 15 U.S.C. §§ 45 and 53(b), and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-08, seeking relief against false and unsubstantiated claims for a business coaching program and related services, and violations of the TSR, 16 C.F.R. Part 310. The Commission named eight individuals, including appellant Hoskins, and 22 separate corporate entities that formed a common enterprise (hereafter "Ivy Capital" or "the enterprise"). The Commission also named 10 relief defendants, including appellants Leanne Hoskins and Oxford, who received proceeds from the unlawful scheme. In addition to injunctive relief, the Commission requested monetary equitable relief to

recompense financially-strapped consumers, who had lost as much as $20,000 each, (*e.g.*, SER0203-04), in reliance on defendants' deceptive claims. ER 6-30.

On March 26, 2013, after most of the defendants had settled with the Commission or defaulted, the district court granted the Commission's motion for summary judgment against Hoskins and the remaining corporate defendant, Dream Financial, with respect to nine counts of the Commission's complaint. The court also granted summary judgment against the three remaining relief defendants, Oxford, Leanne Hoskins, and Mowab, with respect to the allegations of Count 10 – namely, that they had received proceeds of the scheme without having a legitimate claim to them. ER 114-30. On July 5, 2013, the court entered a permanent injunction which, *inter alia*, enjoined Hoskins and Dream Financial from participating in the promotion or sale of any business coaching program. ER 138.

In this appeal, appellant Hoskins challenges a judgment holding him jointly and severally liable with all the other defendants to pay $130 million in monetary equitable relief plus pre-judgment interest. ER 141. Hoskins does not dispute the existence of a common

enterprise, but contends he was not part of it; he claims he was a "silent partner" and therefore is not personally liable for the consumer harm that the enterprise caused. Leanne Hoskins and Oxford, having received proceeds of the scheme, seek to shield those monies from collection.

B. Facts and Proceedings Below

1. The Ivy Capital Enterprise and Sales Method

Between 2003 and February 2011, defendants, through an interconnected web of 22 companies, marketed business coaching and related services to consumers throughout the United States. Hoskins established the business with three partners – Kyle Kirschbaum, John Harrison, and Steven Lyman – and named it Ivy Capital, Inc. His three partners were each granted a 20% stake in the business, while Hoskins was granted a 40% share, reflecting his investment, his contacts, and his ability to secure "lead relationships" – *i.e.*, contractual relationships that would enable the partners to market their coaching product. ER 299, 331; SER1013-14, 1249, 1274, 1298, 1319, 1455-56. This remained a major responsibility for Hoskins as the business grew and expanded. ER 331.

Starting from Ivy Capital, Inc., the enterprise grew to include a group of Las Vegas-based entities owned, directly or indirectly, by Hoskins and his three partners, as well as operations in California and Utah. ER 90-92; Doc. 67 (Report of Temporary Receiver); SER0229-32. They shared resources and personnel, collaborated on key aspects of their operations, and presented themselves to consumers with unified branding and advertising. They collaborated closely – each one providing services necessary to the success of the entire scheme, and treating each other as divisions or departments, rather than as separate corporate entities. [2]

From the outset, Hoskins's key contribution was his ability to establish contacts with "lead generators" – in this instance, companies that advertised and sold inexpensive work-at-home programs. *See*, *e.g.*, SER0862. Consumers who purchased those programs also provided their contact information. Armed with information about likely purchasers and their contact information, defendants blasted them with

[2] For this reason, the district court concluded that the operation qualified as a common enterprise sufficient to create joint and several liability for all of the participating entities. ER 90-92. No appellant has challenged this conclusion.

repeated sales calls. *Id*; SER0001, 0011, 0031, 0131-32, 0167-68, 0402-05, 1311; *see also* SER1034-37, 1057.

Most of these calls came from Enrich Wealth Group ("EWG"), a company within the enterprise based in California. Ivy Capital created EWG to be its "sales floor," providing start-up funds, signing its lease, and formulating its management policies. SER0775.017-.018; 1667-69, 1671, 1673-74, 1686-87, 1693. EWG personnel were instructed to identify themselves as Ivy Capital employees – further reflecting the tightly integrated nature of the common enterprise. *See, e.g.*, SER1863-64.

Ivy Capital's telemarketers told consumers that, by trading up from the inexpensive products they had previously purchased, they would be able to establish Internet businesses that would generate substantial income and recoup their initial investment in mere months. *See, e.g.,* SER0001, 0012, 0147-48, 0197-98, 0636-41, 1373, 1535-37, 1545. They spun extravagant tales of clients who had made thousands of dollars quickly. *See, e.g.*, SER0012 ($3,000 per month within three months and $10,000 per month within 12 months was "very reasonable"); SER0132 ("extra $1,000 per month"); SER0147-48 ("expect

earnings from $8,000-$10,000 per month"); SER0639 ("[W]e've had people that, within their first month, have done that $3,000."). They told consumers they could achieve that much, working five to ten hours per week. SER0012-13, 0651, 0803, 1460, 1535. These express and implied earnings claims were captured in recorded calls that the FTC recovered from defendants' premises. After listening to recorded calls and applying generally accepted statistical methods, the Commission's expert opined that, in 90 percent of the calls he reviewed, defendants' telemarketers represented, expressly or by implication, that consumers could expect to earn thousands per month by using their business coaching program. SER0775.011.

Defendants told consumers that the program was exclusive and lucrative. Then, claiming they needed to verify which consumers would qualify for the program, telemarketers asked them for financial information, including, notably, the size of the unused line of credit on their credit cards. SER0011, 0013, 0131-32, 0146-47, 0203-04, 0642-44, 0728-29.[3]

[3] Defendants actually used this information to steer consumers to coaching packages prices roughly according to the amount of available credit on consumers' credit cards. *See, e.g.,* SER0002 ($6,880);

Telemarketers pitched the program as a low-risk, short-term investment. SER0728-29. They assured consumers that the company was simply looking for "success stories" to promote the company. SER0146-47, 0408, 0634, 0782. They told consumers they could "leverage" their investments by using their credit cards for the brief period of time it would take for their fledgling businesses to produce enough income to pay off the charge. *See, e.g.*, SER0001, 0132, 0148, 0197-98, 0728-29, 0784. They promised them that an "expert" personal coach would guide them "every step of the way." SER0031-32, 0197-98, 0628-29. And, to provide further assurances that their investments were safe, telemarketers told consumers that recovery of the initial investment within six months was backed by a company "guarantee" or "warranty." SER1462; *see also* SER0103, 0147. Defendants marketed this scheme by calling more than 10,000 consumers throughout the

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SER0031-32 ($7,880); SER0065-67 ($17,310); SER0103-04 ($13,880); SER0115-16 ($6,630); SER0133 ($5,015); SER0148 ($3,110); SER0167-68 ($4,060). As a former employee explained, defendants instructed their telemarketers to first ascertain the consumer's credit limit, and then pick a figure somewhat below that in order to leave money for future purchases of defendants' "upsells." SER0203-04; *see also* SER0411-12, 0728 (after telling the caller her credit limit was $7,000, customer is told the price is $5,015).

United States, not once making an effort to determine whether the targeted consumers were listed in the National Do Not Call Registry ("DNC Registry"). *See, e.g.*, SER1028, 1155, 1483-84. Nor did defendants pay the TSR-required fee for accessing that list. SER0381-82, 1028, 1483.

Consumers who succumbed to this pitch by making a purchase were quickly bombarded by calls from telemarketers who offered a variety of additional products – known as "upsells" – that they claimed would help consumers establish their businesses and generate income quickly. *See, e.g.,* SER1037. An automated "Lead TimeLine" system ensured that purchasers of business coaching would receive these calls starting five days after their purchase of a coaching program and continuing for at least 30 days. SER1034-37, 1057.

The proceeds of this scheme were distributed to the partners and to a number of relief defendants, including Leanne Hoskins and Oxford Financial, a limited liability corporation owned jointly by Benjamin and Leanne Hoskins. *See, e.g.*, SER2541-48. From its inception until February 2011, when the district court entered a temporary restraining

order, effectively shutting it down, Ivy Capital generated more than $130 million in sales. *See* Doc. 67 at 37 (Report of Temporary Receiver).

2. The Reality of the Ivy Capital Scheme

Defendants' entire promotion consisted of empty promises. Their coaches were not "experts." They were unreliable, inexperienced, and oftentimes inaccessible. In fact, there were no actual experts on staff and the "coaches [were actually] just regular employees working off a template." SER0197-98; SER0810-11 (coaches not required to have their own business, experience running an online business, or even a college degree); SER0858 (coach describing his own training).

Furthermore, consumers did not receive the "expert" advice as promised; instead, they received fewer or shorter coaching sessions, with unhelpful and even "useless" guidance. *See, e.g.,* SER0014, 0035, 0048, 0104, 0134, 0148-49, 0171. Also, in many cases consumers who attempted to use the online resources were stymied by technical difficulties. Passwords and log-in credentials did not work, webinars did not open and run, and online videos failed to play. *See, e.g.*, SER0002, 0014, 0118, 0149. Ultimately, defendants essentially abandoned consumers before the end of the coaching program. They did

not answer emails or phone calls in a timely fashion – sometimes not at all – or even create a working voicemail box. *See, e.g.*, SER0048, 0106, 0117-18, 0148-49, 1116-17, 1122-23.

Defendants did not deliver on their "upsells" either. Telemarketers told consumers that those products and services would enable them to develop successful Internet businesses, but those products and services did not exist, did not live up to defendants' promises, or were so difficult to access that they were virtually unusable. For example, while defendants promised the services of a "legal department," there was no legal department and no lawyers on staff. SER0015-16, 0199, 0202, 1474.

The promised tax expertise was also a sham. Defendants did not employ anyone with tax expertise from inception until at least 2010, yet during that period they sold that service. SER0206, 1469, 1474-75. The promised "corporate credit coaches," for whom consumers paid an extra $2,490 to $6,990, were difficult to reach and ultimately stopped working with consumers without making the promised arrangements. SER0201, 0216; *see also* SER1117 ($5,990 for corporate credit and other services). In fact, these promised lines of corporate credit were

essentially unobtainable. Two of Hoskins's partners admitted they were not aware of any support for the claim that consumers could obtain such credit. SER1084-85, 1100-01, 1490-92; *see also* SER0203 ("In my experience, none of my customers ever received any corporate credit."), 1998, 2003, 2056.

Most important, even consumers who worked substantially more than the part-time hours quoted in defendants' sales calls did not offset their initial purchase costs, let alone the substantial earnings defendants had promised. *See, e.g.*, SER0033-34 (consumer worked 50 hours per week for five months without a single sale).

3. Ivy Capital's Refund Practices

Disappointed consumers learned quickly that the potential for a refund was yet another ruse. Although defendants had a three-day refund policy for all of their products[4] – a policy they strictly enforced, *see, e.g.,* SER0207, 0868 – in numerous instances they did not disclose this limitation until it was too late. SER0003-04, 0104, 0775.013

[4] *See* SER1327, 1479, 2015, 2030, 2035.

(refund policies disclosed in seven of 40 calls, or 17.5%).[5] This omission was not an oversight. SER0207, 1407-08, 1451, 1858, 1981. While some consumers received an electronic contract that disclosed the three-day refund limitation, defendants encouraged telemarketers to pressure consumers to sign the contract before they could read it.[6]

Other consumers learned about the refund policy in a recorded call. SER0207. But anyone seeking a refund, even within three days, encountered numerous obstacles. *See, e.g.*, SER0380-81. Consumers reported that it was almost impossible to reach a live person. SER0034, 0105-06, 0117-18, 0149, 0207-08, 0381. Even when consumers were able to record a message, defendants oftentimes ignored them. This was not inadvertence. SER0207-08; *see also* SER1407-08, 1451 (stating that defendants did not disclose the refund policy because they did not want customers to use it); SER1858, 1981 (same).

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[5] This was often because coaches did not meet the consumers until after the three-day period had run. SER2015. In other instances, defendants simply failed to disclose the policy. SER2090. Indeed, sales scripts provided by a former employee contained no reference to a three-day refund policy. *See* SER0213-27.

[6] An email from an Ivy Capital partner instructs: "If they can not sign it, schedule a time the next day and don't send it [electronically] until that specified time. This will avoid them reading it and thinking about it for 24 hours." SER1381; *see also* SER1358-60, 1379-80.

Only the most persistent consumers reached a "Resolution Specialist." They learned quickly that "Resolution Specialists" were not there to resolve anything. SER0016-17, 0107-08, 0117-18, 0153.[7] As one consumer reported, a resolution specialist told him they "had never given a refund and [that they] probably never would." SER0117-18. Rather, their goal was to "save" a sale – typically, with offers of free coaching sessions and additional "upsell" products. *See* SER0789, 0820-21, 0849, 0863, 0868, 1390-91; *see also, e.g.*, SER0016, 0106. Resolution specialists sometimes used threats or intimidation that ranged from scolding consumers to implied threats that the consumer had breached an agreement. SER0153, 0172, 0207-08.

The refunds that defendants did make went to silence their most persistent and savvy consumers – generally, those who filed complaints with government agencies.[8] But consumers paid a price when they accepted those offers. For about one year leading up to the Commission's complaint, defendants required consumers to certify "they

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[7] The duties of a "resolution specialist" included "help[ing] hold[ing] people accountable for the decisions that they[ ] made to do [the business coaching] program, to help them to follow through with their commitments * * *." SER1384.

[8] *See* SER0789, 0874, 1387.

[would] not provide information, make any statement orally or in writing, or take any action, directly or indirectly, that would cause * * * embarrassment or humiliation or that could reasonably be interpreted to be disparaging of [the Ivy Capital enterprise]." SER0189; *see also* SER0068, 1351, 1480, 2036-37. The agreements included provisions for payment of liquidated damages for a breach of confidentiality. SER0189. This was no empty threat. In January 2011, lawyers for Ivy Capital sent "cease and desist" letters about purportedly "defamatory postings" on websites and alleged "contact with third parties." *See* SER0775.002-.006.

4. Hoskins's Central Role

Hoskins was directly and centrally involved in the Ivy Capital enterprise. As discussed in greater detail below, Hoskins was instrumental in establishing the enterprise. In fact, as depositions of his three partners showed, he founded the firm with them, after they approached him due to his greater business experience, his expertise in working with lead generators (which were vital to the new start-up), his familiarity with establishing merchant accounts in the payment card system, and his ability to provide critical start-up resources and

equipment. Hoskins denies none of this. SER1013-15, 1133-34, 1138, 1318-20, 1455-56.

Nor was Hoskins's role limited to establishing the Ivy Capital enterprise. Though defendants assert that Hoskins did not handle day-to-day operations or sales (*e.g.*, Br. 23-32), the evidence shows instead that he was directly involved in multiple aspects of the business and strategic planning. For instance, corporate financial statements and the receiver's analysis showed that he owned and was identified as an officer on several of the entities that constituted the common enterprise. *See, e.g.*, Doc. 67; SER0229-32, 2222-2483. Deposition testimony and emails reflect that Hoskins was notified of and attended senior management meetings, including 80% of all management meetings for the Business Development Division. SER1043, 1045, 1159-62, 1992, 2491-99. Hoskins's documents and testimony also established that he negotiated the purchase of one corporate entity, NSA Technologies, and he helped to set up Ivy Capital's call center based in the Philippines. SER1148, 1259-61, 1276-83.

In addition, the evidence proved Hoskins had authority over financial, legal, and tax issues. Testimony and documents showed that

Hoskins could – and did – sign contracts on behalf of the enterprise. SER1324, 1326, 1331, 1276-83. They also established that Hoskins was a signatory on bank and merchant accounts. *See*, *e.g.*, SER1138, 1168-1173, 1260, 1264-66, 1268, 1284-86. Moreover, as recently as December 2010, with the business well underway, Hoskins's own e-mails show him directing payments, seeking legal assistance in finalizing agreements, being consulted for tax planning advice, and providing detailed, step-by-step instructions on shaping the enterprise's corporate structure. *See*, *e.g.*, SER2534-35, 2538-40.

Most critically, Hoskins's emails show that he directed and advised Ivy Capital in its ongoing efforts to reduce its chargeback ratio. Chargebacks are credit card transactions disputed by consumers. A sufficiently high rate can be a red flag to payment card companies such as Visa and MasterCard of questionable merchant conduct that can lead to sanctions, including being cut off from the payment card system. SER3285-89. *See generally FTC v. Grant Connect, LLC,* 827 F. Supp. 2d 1199, 1221-22 (D. Nev. 2011) (high chargeback rates are red flags for deception). Hoskins provided advice to Ivy Capital on ways the

enterprise could avoid such sanctions that led one email recipient to thank him: "Btw, ben you da' man." SER2524; *see also* SER2500.

And, in exchange for all of these services to the Ivy Capital enterprise, payment records of funds sent to the LLC Hoskins owned jointly with his wife – *i.e.*, Oxford Financial – reflected payments of more than $1.5 million in compensation – a sum which reflects the importance of his contribution to the enterprise. SER2541-48. Indeed, Hoskins received compensation from the enterprise until the district court ordered the asset freeze in February 2011, meaning that Hoskins was involved from the very beginning of Ivy Capital until its demise. *Id.* (reflecting payments in January 2011); Doc. 12.

5. Proceedings Below

The district court granted summary judgment in favor of the FTC on all counts. It held that uncontroverted evidence established that Hoskins and his partners, acting through a "web of interrelated companies" that included Dream Financial: (1) made false and unsubstantiated representations that purchasers could make a lot of money and earn back their investments quickly (Count 1); (2) falsely represented the potential for their coaching program and related

products to help purchasers run profitable online businesses (Count 2); (3) deceptively failed to disclose that consumers must make refund requests within three days of purchase and sign non-disparagement agreements (Count 3); (4) falsely represented they would refund the purchase price of the program even to those who managed to cancel within three days (Count 4). ER 83-87

The district court also held that uncontroverted evidence established that Hoskins and the other defendants violated the TSR by: (1) committing the misrepresentations and failures to disclose described above, which also constitute TSR violations (Counts 5 through 7); and (2) telephoning numbers listed on the DNC Registry, continuing to make those calls even after consumers asked them to stop, and failing to pay for access to the Registry (Counts 8 and 9). ER 87-90.

The district court concluded that the "overall sum of evidence" demonstrated "unequivocally" that there was no "meaningful distinction" among the entities that constituted Ivy Capital. Those entities collaborated on all aspects of the scheme – generating and purchasing leads and distributing them to telemarketers, promoting their bogus coaching program, and marketing related products and

services. ER 90-92. The district court also concluded that there was no genuine dispute that the enterprise engaged in the acts alleged in Counts 1 through 9 of the complaint. And it concluded that, because Hoskins "directly participated in and had the authority to control" the enterprise, he was jointly and severally liable with the other members of the enterprise, including the last remaining corporate defendant, Dream Financial, for injunctive relief and for "full restitution by virtue of his knowledge of the Ivy Capital enterprise scam." ER 90-97.

The court next considered the allegations of Count 10 of the complaint. It concluded that the three remaining relief defendants had received funds from the enterprise without any legitimate claim to them. ER 97-99. In particular, because Oxford, a limited liability corporation owned jointly by Leanne (51%) and Benjamin Hoskins (49%), was used to funnel funds from Ivy Capital through to the Hoskins family, the court ruled that it was required to disgorge the entire $1.5 million it had received. ER 87-98.

The court turned next to the $1.1 million that Oxford had disbursed directly to Leanne Hoskins or to pay the expenses of the Hoskins household. The court found no evidence that Ms. Hoskins did

anything in consideration for those payments. She simply tracked incoming funds, prepared tax forms, and made disbursements to pay her personal expenses and the expenses of the Hoskins household – *i.e.*, she managed the piggy bank. SER1132, 1293, 1295. Citing the three-part test prescribed by Nevada law, the court concluded that the corporation was the alter ego of Hoskins and Leanne Hoskins, and that allowing Ms. Hoskins to retain the funds she received would sanction fraud and promote injustice. ER 98-99.

On July 5, 2013, the court entered a permanent injunction that prohibited Hoskins and Dream Financial from engaging in the practices alleged in the complaint and from otherwise participating in business coaching. ER 138-40. The court entered a final judgment for monetary relief against Hoskins and Dream Financial, jointly and severally with the defendants that had previously settled, for the entire amount of consumer harm – *i.e.,* $130 million. ER 141. The court also entered judgment against the remaining relief defendants for disgorgement of their ill-gotten gains. *Id*.

STANDARD OF REVIEW

This Court reviews an order granting summary judgment de novo, "to determine whether, viewing the evidence in the light most favorable to the non-moving party, any genuine issue of material fact exists and whether the district court correctly applied the relevant substantive law." *FTC v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001). "Once the FTC has made a prima facie case for summary judgment, the defendant cannot rely on general denials but must demonstrate with evidence that is 'significantly probative' or more than 'merely colorable' that a genuine issue of material fact exists for trial." *Id*. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). A non-movant's bald assertion or a mere scintilla of evidence in his favor is not sufficient to withstand summary judgment. *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009).

This Court "review[s] the district court's grant of equitable monetary relief for an abuse of discretion." *Stefanchik*, 559 F.3d at 931 (citing *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001)); *National Wildlife Fed. v. National Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008).

SUMMARY OF ARGUMENT

1. This is a routine case of deception in telemarketing sales. In support of its motion for summary judgment, the FTC submitted detailed and overwhelming evidence, including expert analysis of a statistical sample drawn from one million recorded sales calls. That evidence showed that defendants represented to consumers that, by using defendants' business coaching program and related products, they would make thousands per month and recover their investments within six months. In actuality, defendants had no reasonable basis for their extravagant claims, but continued to tout their meaningless success stories even as consumers complained. Defendants' response to the Commission's submission did not identify any consumers who, using defendants' coaching program, made thousands per month or recouped their investments, and relied chiefly on inconclusive portions of a single consumer's deposition testimony. The district court correctly concluded that this was not sufficient to create a triable issue as to the deceptive nature of defendants' telemarketing.

2. The district court did not abuse its discretion in holding Hoskins personally liable for the full amount that consumers paid.

Contrary to Hoskins's brief, personal liability for corporate conduct does not rest on a distinction between active and "silent" partners. Nor does the relevant standard require a showing that Hoskins was involved in direct sales or day-to-day affairs. Rather, under controlling Circuit precedent he is liable, jointly and severally with his co-defendants, for the full amount of the harm that was caused if he knowingly participated in, or controlled, the corporate affairs.

In fact, Hoskins was not a "silent partner." The Commission's submission amply documented Hoskins's active participation in the business from inception and continuing to at least December 2010, as reflected in his own email correspondence. Hoskins admits that he funded the enterprise and established the initial sources of leads for the telemarketing promotion. But he then continued to engage actively in a broad range of critical business matters – for example, negotiating purchase of a new lead source and advising the enterprise on strategies for reducing payment card chargeback rates. Hoskins's ongoing participation, coupled with ongoing communications with his partners and senior management, also demonstrate that he knew, or at least should have known, that consumers were being misled. Indeed, he

knew that the business was responding to inquiries from state attorneys general and that it feared complaints to the FTC.

3. The Court also did not abuse its discretion in holding the relief defendants, Oxford Financial and Leanne Hoskins, liable to disgorge for funds derived from the unlawful practices of the enterprise. Although Oxford may have predated Ivy Capital, bank records establish that Oxford received the entirety of Hoskins's more than $1.5 million share of the profits of the enterprise. Because Oxford provided no services for Ivy Capital, the district court was correct in concluding that Oxford was not entitled to retain the funds. Leanne Hoskins did nothing for Oxford, except to track those incoming distributions and then use them for her personal expenses and the expenses of the Hoskins household. The district court concluded correctly that merely funneling those monies through to the Hoskins family did not establish a bona fide claim to them. The district court also properly rejected the contention that the FTC must sustain the burden of tracing the monies received, dollar-for-dollar, back to Ivy Capital's unlawful practices. Rather, to support the judgment it was enough for the FTC to show that the relief defendants obtained monies they did not have previously.

ARGUMENT

I. The District Court Properly Determined That There Were No Genuine Issues of Material Fact for Trial

A. Defendants Did Not Controvert the Commission's Showing that Defendants Made False and Deceptive Claims

To establish that an act or practice is deceptive under Section 5 of the FTC Act, the FTC must establish that the representation, omission, or practice likely would mislead consumers, acting reasonably under the circumstances, concerning a matter material to the consumer's purchasing decision. *See, e.g., FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199-1200 (9th Cir. 2006); *Gill*, 265 F.3d at 950; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994). Unsubstantiated earnings claims are deceptive even in the absence of specific numbers. *See FTC v. Tashman*, 318 F.3d 1273, 1277-78 (11th Cir. 2003). Moreover, deception may be by implication rather than by outright false statements. *See FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993). Thus, under Section 5, the tendency of a particular representation to deceive is determined by the net impression that it is likely to make, not its constituent parts. *See, e.g., Stefanchik*, 559 F.3d at 928; *Cyberspace.com*, 453 F.3d at 1200.

1. The Commission Adduced Extensive Evidence of Defendants' False and Deceptive Representations

At the outset, defendants contend they were prejudiced by an assumption that business coaching is inherently illegal. Br. 15, 22. Neither the Commission nor the district court made this assumption. Rather, the Commission alleged that defendants made false and deceptive representations to induce consumers to purchase their business coaching program and related products. The district court agreed. It considered an evidentiary submission comprising hundreds of consumer complaints, sales scripts, transcripts of undercover calls, expert analysis of a statistical sample drawn from more than one million recorded calls, consumer declarations, contemporaneous emails, and the deposition testimony of all four individual defendants and multiple senior managers and employees. The court then concluded that the evidence supported the conclusion that defendants' representations were false and deceptive. ER 83-88.

Defendants told consumers they would make substantial amounts of money and recoup their investment quickly. *See, e.g.*, SER0784-85 (program will get consumer to earning goal); SER0785 (specific income

goals were discussed); *id.* (if consumers do what coaches said, they would make money); SER0786 (representatives set goals for where consumer wanted to be financially).[9] Defendants further promised that consumers could make those amounts working part-time. *See, e.g.*, SER1070, 1460, 1487-88, 1494.[10] To bolster those claims, defendants described the experiences of purchasers who purportedly had earned thousands each month within a few weeks. *See, e.g.*, SER0639-40. And even where defendants did not promise a specific dollar figure, they prompted consumers to shoot for a high figure, and then confirmed that those goals were easily reached. *See, e.g.*, SER0011-12, 0031-32, 0132, 0147, 1111.

Although formal company policy ostensibly discouraged telemarketers from making such claims, that policy that was largely ignored – as shown by scripts claiming an "89 percent success rate" and the prevalence of that figure in defendants' recorded sales calls.[11]

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[9] *See also* SER0012, 0103-04, 0132, 0147-48, 0167, 1069, 1072, 1076-77, 1373-77, 1845-50, 1853-54.

[10] *See also* SER0012-13, 0031-32, 0651, 0803, 1373, 1535.

[11] SER0775.014 (representatives claimed 89 percent success rate in 39 percent of calls), 1851, 2057-58 & 2076 (script claims success rate close to 90 percent); *see also* SER1077 (explaining how "89 percent success

Indeed, after listening to a statistical sample drawn from one million recorded calls, the Commission's expert concluded that representations regarding earnings and income were prevalent.[12] Most of those calls quoted average earnings of thousands of dollars per month.[13] They also claimed, directly or by implication, that consumers could recoup the cost of the business coaching program within six months.[14]

Defendants had no substantiation for these claims. They did not survey prior purchasers to assess their success.[15] And their "success stories" were meaningless. They made them up or solicited them within days of a consumer's purchase, sometimes with the "guidance" of a coach who was paid for earnings reports.[16] The bar for a "success story" was particularly low – some included anyone who sold something on

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rate" evolved from the claim that 89 percent of consumers graduated from the coaching program).

[12] *See* SER0775.009, 0775.011, 0775.015.

[13] SER775.011-.013.

[14] SER0775.012.

[15] SER1068, 1073-74, 1369. Though some witnesses speculated that such information was collected by Fortune Learning Systems (Ivy Capital's Utah coaching center), this was not true. SER 0803-04, 0895, 0942, 1073-74, 1335-37, 1463, 1502-05, 1522, 1854.

[16] SER0775.019, 0859.

eBay for any amount. *See, e.g.*, SER0799-800; *see also* SER0859, 0870-71.

In the end, defendants could not identify even one consumer who, using the coaching program, earned back his investment quickly and made thousands within a few months, as they had promised.[17] And many of the consumers who initially gave positive testimonials ultimately complained or cancelled, yet defendants kept plugging their "success stories." SER0819-20, 0927-38, 0943-1005.

2. Defendants Did Not Sustain Their Burden to Controvert Material Facts

As the district court concluded, the Commission satisfied its initial burden to demonstrate that unlawful practices were widespread. The burden of going forward then switched to defendants to show that a genuine issue of material fact remained for trial. *See Anderson*, 477 U.S. at 250. But to avoid summary judgment, defendants were required to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[M]ere disagreement or the bald

[17] *See* SER0805, 0925-26, 1073-74, 1159, 1373, 1394, 1463; *see also, e.g.*, SER2485-86 (defendants' interrogatory responses); SER2488 (same).

assertion that a genuine issue of material fact exists no longer precludes the use of summary judgment." *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989) (citing *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987)). Rather, an opposing party must come forward with "specific facts showing a genuine issue for trial." *Matsushita*, 475 U.S. at 587 (quoting FED. R. CIV. P. 56(e)). Thus, "[o]nce the FTC has made a prima facie case for summary judgment, the defendant cannot rely on general denials but must demonstrate with evidence that is 'significantly probative' or more than 'merely colorable' that a genuine issue of material fact exists for trial." *Gill*, 265 F.3d at 954 (quoting *Anderson,* 477 U.S. at 249-50); *see also FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) ("conclusory, self-serving affidavit, lacking detailed facts, and any supporting evidence, is insufficient to create genuine issue of material fact.")

Defendants did not counter the Commission's factual showing with a factual showing of their own – *e.g.*, by showing there were consumers who actually achieved the promised high earnings and financial independence by using the coaching program. Indeed, their

admittedly "nominal" opposition to the enterprise's liability for running the deceptive scheme (Br. 14) consisted primarily of excerpts from the deposition testimony of a single consumer, Mr. Dennis Hawks. *See* Br. 19. Defendants' reliance on that testimony is unavailing. Mr. Hawks was not the FTC's sole basis for its summary judgment motion.[18] *Id.* Rather, the FTC presented overwhelming and comprehensive evidence that "defendants' representations about the amount that a purchaser could earn, and how quickly a purchaser would earn a profit, [were] false and misleading." ER 84. Indeed, the district court concluded that the FTC's submission was a veritable "mountain of evidence."

Defendants attempt to turn this phrase against the FTC, criticizing it for supposedly failing to provide sufficient guidance as to the particular evidence it relied upon. Br. 35-37 & n.4. But even a cursory review of the FTC's motion for summary judgment shows that it provided a painstaking and extensive analysis of defendants' liability, with each supporting statement sourced to at least one, and more often,

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[18] Defendants mislead the Court in stating that the FTC canceled the other consumer depositions after Mr. Hawks testified. Br. 19. In fact, the FTC noticed the deposition of only one consumer and it took that deposition. The FTC did not notice any consumer depositions prior to Mr. Hawks's, so there was nothing to cancel.

several, pieces of evidence. *See* ER 563-709. Indeed, the motion includes two separate sections with detailed discussions of Hoskins's liability, including a discussion of why facts developed in Hoskins's own motion do not create genuine issues of material fact. ER 606-13, 677-700. All in all, these sections include 126 footnotes supporting his liability. *Id.* To assist the court and defendants, the FTC also included a table of exhibits that explained each evidentiary source. ER 575-578. As this table shows, the FTC relied on multiple types of evidence, including consumer declarations, investigator declarations, deposition testimony from defendants and their employees, asset depositions, financial statements, discovery responses, and emails. *Id.* And, to further assist the court and defendants, the FTC grouped emails into exhibits by topics, which themselves were clearly indicated in the table. ER 577-78. Thus, it is simply false for defendants to complain that the FTC dumped "[u]ncited '[m]ountains of [e]vidence'" on them. Br. 35.

By contrast, defendants' evidence did not come close to demonstrating a triable issue on any of the points at issue. It plainly was not sufficient for defendants to point to the experience of a single consumer. Br. 16-20; *Anderson,* 477 U.S. at 252 ("The mere existence of

a scintilla of evidence in support of the plaintiff's position [is] insufficient."). In any event, Mr. Hawks's testimony did not create a disputed issue of material fact because it was entirely consistent with the Commission's evidence regarding sales calls in which telemarketers prompted and encouraged consumers to establish specific income goals, and then assured them that a business coaching program would enable them to achieve those goals.[19] *Compare* SER1109, 1111 *with* SER0011-12, 0031, 0147-48, 0407. Prompting a consumer to articulate a specific earnings goal and then persuading him that his goal is attainable is the functional equivalent of an express earnings claim. *See, e.g., Figgie*, 994 F.2d at 604 (no "loophole" for implied claims).

Defendants contend that Mr. Hawks received everything he was promised. Br. 17-18. But the most important things that defendants promised consumers were a substantial income, financial independence, and recovery of their investments within six months. Defendants plainly failed to deliver on those promises. After following the program

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[19] Defendants err in stating that Mr. Hawks admitted that Ivy did not guarantee him any specific results. Br. 17. Mr. Hawks could not have been clearer that he was relying on the promises made by representatives over the phone and that he viewed them as material representations. ER 1406 at 141.

for nine months, and working substantially longer hours than defendants stated were required to achieve the promised success, Mr. Hawks had not sold a single product, let alone recouped his investment.[20] Thus, the dispute of material fact that defendants seek to create simply does not exist. *See* Br. 16-20.

Finally, Hoskins complains that – because the rest of the primary defendants settled earlier in the proceedings – he was restricted "in his ability to address the specific allegations against Ivy." Br. 14. That is not so. He was free to take discovery and to mount whatever defense he could have made even if his co-defendants had not decided to settle. Thus, Hoskins's suggestion that the decision of his co-defendants to settle forced him to assume an unfair burden is baseless.

B. There Was No Genuine Issue of Material Fact Regarding Hoskins's Personal Liability

1. Standards for Personal Liability

The district court correctly applied this Court's standard for holding Hoskins personally liable for the full amount of consumer harm. An individual is personally liable for corporate violations of the FTC Act

[20] Though defendants portray Mr. Hawks's choice of business as ill-advised, he testified that he selected this business based on research and advice from his Ivy Capital "coach." ER 1408-09 at 152-53.

if he (a) participated in the challenged practices, *or* (b) had authority to control them. *Stefanchik*, 559 F.3d at 931; *FTC v. Affordable Media, LLC,* 179 F.3d 1228, 1234 (9th Cir. 1999); *Publ'g Clearing House*, 104 F.3d at 1170. An individual is also liable for monetary equitable relief if, in addition, he knew that the corporate defendant was engaged in deceptive practices, was recklessly indifferent to the truth or falsity of the corporate defendant's representations, or was aware of a high probability of deception and intentionally avoided the truth. *Stefanchik*, 559 F.3d at 931; *Cyberspace.com*, 453 F.3d at 1202; *Pantron I Corp.,* 33 F.3d at 1103. Undisputed facts demonstrate that these standards were satisfied here.

2. Undisputed Facts Document Hoskins's Participation in and Control of the Scheme

Hoskins falters at the outset in contending that the district court improperly weighed the evidence regarding his role. Br. 23-24. In particular, he asserts that the district court erred in concluding that his evidence was "unpersuasive." Br. 23. In fact, the district court stated that his *arguments* (that he was merely a "silent partner") were "unpersuasive." ER 93. Moreover, contrary to his contention, nothing in *Lippi v. City Bank*, 955 F.2d 599 (9th Cir. 1992) suggests that a

district court improperly "weighs" evidence merely by considering its persuasive qualities. In that case, summary judgment was improper because the district court had listed evidence in its decision that would support a contrary conclusion by a reasonable trier of fact. *Id*. at 613.

By contrast, undisputed facts in the present appeal support only one conclusion – that Hoskins had a central role in the Ivy Capital scheme. As the district court concluded, he "was integral to starting the enterprise." ER 94. His three partners granted him an initial ownership stake of 40% in Ivy Capital, Inc. – twice their individual shares. SER1013-14, 1249, 1318-20, 1454-56.[21] And though he now disavows these titles (Br. 7), he was listed as an officer or managing member of several of the Ivy Capital entities. SER0229-32.

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[21] Hoskins also had significant ownership interests in several of the other Las Vegas-based entities – 25% in Vianet, Inc. ICI Development, Inc., Oxford Debt Holdings, LLC, Sell It Vizions, Ivy Capital, LLC, Virtual Profit, LLC, and Revsynergy, LLC. SER2224, 2243, 2262, 2328, 2347; Doc. 67 at 24, 26 (Report of Temporary Receiver). Hoskins also owned a piece of 3 Day MBA, LLC and Global Financial Group. Doc. 67 at 22, 32. As of 2011, he was the sole owner of Dream Financial. SER2100. Through his personal LLC, Oxford Financial, Hoskins owned 20% of Zyzac Commerce Solutions. SER1258, 1273, 2366; Doc. 67 at 18, 24. Finally, Hoskins had an indirect ownership interest in Fortune Learning, LLC, in Utah because it was a joint venture owned 50% by Ivy Capital. SER2172.

Critically for the fledgling enterprise, Hoskins delivered unwitting customers; he established the initial lead sources and provided advice and contacts for other lead generators. SER1013, 1017, 1319, 1323. These contacts were the lifeblood of a telemarketing scheme whose success was highly dependent on targeting consumers who were likely to purchase defendants' coaching scheme. Further, Hoskins introduced his partners to other key contacts for a new business – *e.g.*, merchant processing consultants and investment bankers. *See, e.g.*, SER1141-47.[22] In short, Ivy Capital could not have launched without Hoskins.

As the district court concluded (ER 94), Hoskins continued to play an important role in "significant decisions for the enterprise with the other partners." For example, Hoskins had the authority to sign contracts for Ivy Capital, *see* SER1324, 1326, 1331, and was the signatory on several bank and merchant accounts. *See*, *e.g.*, SER1138, 1252-53, 1260, 1264-66, 1268. Hoskins participated in significant business decisions, such as the decision to close Ivy Capital's Utah office and open a call center in the Philippines. SER1457-58. And in 2007 or

[22] Hoskins also arranged for a business credit card for various managers. SER1140-41, 1353. He even arranged for the installation of telephone and IT equipment. SER1249.

2008 – years after Ivy Capital launched – he travelled to the Philippines to help set that center up. SER1148, 1249. Hoskins negotiated a deal for Ivy Capital, through its related Global Finance group, to acquire one of its prime sources of leads. SER1259-60, 1276-83. Hoskins's business card gave the Ivy Capital office as his address, and, regardless of his level of participation in day-to-day affairs, he came to the office and participated in senior management level decision making. ER 94 ("participated in partnership meetings and telephone conferences"); SER1135, 2489. In consideration for his "extensive involvement," Hoskins "received significant distributions and a salary." ER 94.

Hoskins was not a mere passive recipient of communications. *See* Br. 38-39. Office correspondence and emails reflect Hoskins's ongoing participation and show him communicating with and directing the enterprise, whether or not he was on site.[23] For example, he was

[23] Defendants challenge the probative value of emails that Hoskins did not originate. Br. 39. But the fact that Hoskins received more messages than he sent is not probative, particularly where the messages show that it was his apparent practice to minimize his written interactions. Even still, the amount of email, the range of subjects, and the fact that these communications generally included his co-defendants and other members of senior management confirms Hoskins's central role. *See* SER2491-99, 2500-2533, 2533.001-.157, 2533.158-.204, 2534-40.

included on correspondence regarding senior management meetings and he attended many of these, including 80% of the monthly meetings for the Business Development Division. SER1043, 1045, 1159-62, 1992.

Hoskins was also one of a select group of officers to receive *daily* sales and financial updates by email. SER2875-3284. Some of those emails relate to managing chargebacks. A chargeback rate of 1% can be an indicator of deceptive marketing practices and can induce Visa to sanction a merchant. *See* SER3286-87 (Chen Decl.).[24] The emails show that Hoskins counseled his partners on a strategy for reducing chargeback rates – namely, by using pre-paid cards and balancing chargebacks across multiple merchant accounts:

> If what Ben sent earlier is correct and MasterCard focuses on # of transactions while Visa focuses [on] ratio on chargedback [sic] dollars, we would be able to handle # of transactions by pre-paid cards, but would need to run approx. $3M through [merchant identifiers] for Visa to drive ratio down to 0.65%.

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[24] There was no error in the district court's admission of the Chen declaration. Br. 39-41. Chen was not an expert witness; he was designated by Visa to describe the company's policies and procedures relating to chargebacks. Moreover, Chen's declaration was not "previously undisclosed" (Br. 39) because, as conceded below, the FTC had listed Visa as a potential witness. Doc. 366 at 2. The district court was correct in concluding that this disclosure was sufficient. ER 73 n.2.

SER2500. Other emails confirm the enterprise used pre-paid cards as Hoskins advised. *See, e.g.,* SER2529. In one, after discussing various ways to obtain pre-paid cards, the author, Vincent Fisher, writes, ""Ben or [K]yle bring your team up to speed on idea and lets [sic] develop more o [sic] Monday." SER2524. Fisher concludes by expressing his appreciation to Hoskins: "Btw, ben you da' man." *Id.* This exchange not only confirms Hoskins's involvement, but shows his input was followed and valued.

Emails further reveal that Hoskins was an active participant involved with the enterprise on a full range of management issues, including taxes, finance, and legal issues. *See generally* SER2534-40. For example, in an email relating to a potential default by Ivy Capital, he wrote:

> thanks for license. also can you send me the tax id numbers and company names that we ran check processing through with the [N]evada bank that added me to check systems. . . . I need the specific company names and tax id numbers to get report from check systems and challenge it, then we file legally.

SER2534. *See also* SER2535 ("Tax Meeting") (conveying employee request for a tax planning meeting with Hoskins).

With respect to financial issues, in an email titled "dream financial," Hoskins wrote:

> Jeremy, I am meeting with another bank about dream financial tomorrow…. Can you put together the last 3 months of bank statements and and [sic] Articles of Incorportaion [sic], etc…. So i can give them a file on it? . . . I have been pushing these guys off for some time now, and don't want to totally lose them.

SER2538. In another series of emails ("Wire Info"), Hoskins approves an employee's request for permission to wire funds and specifies the amount: "$2,000." SER2539. Having obtained Hoskins's approval, the employee relayed Hoskins's instructions to another, thus demonstrating that employees regarded him as someone with authority over financial matters. *Id.; see also* SER2537. The record also contains an email that Hoskins wrote to corporate counsel directing him to prepare a "final agreement," showing that Hoskins's control extended to transactions and related legal issues. SER2490.

Finally, Hoskins's response to an email from a partner regarding the problem of changing the corporate employer identification number further documents the breadth of his control. Hoskins answered at length, giving a step-by-step series of directions to undertake this

change, including creating a new corporate entity with accompanying merchant and bank accounts. SER2540.

In short, the district court correctly concluded that Hoskins participated in the Ivy Capital scheme, and accordingly was personally liable for injunctive relief. Defendants attempt to rebut this, claiming that the court ignored the bulk of Hoskins's evidence that showed he was, at best, a "silent partner." Br. 24. They point in particular to multiple depositions and declarations from his co-defendants and from senior employees to establish that Hoskins was not involved in day-to-day operations of the enterprise or in the sales process itself. Br. 24-32, 34.

But even if all of this were true, it still would not create a triable issue. Personal liability is not limited to those who are involved in sales or day-to-day operations, as Hoskins seems to assume. Br. 24-32, 34. Nor is the question – as Hoskins also contends – whether the individual's involvement is "pervasive and direct." Br. 44. Such a standard would enable savvy wrongdoers to freely reap the profits of deceptive schemes, without fear of liability, by delegating day-to-day responsibilities to lower level employees. Courts have understood this

point by insisting that those who actively participate in and direct the affairs of a corporation must remain responsible for its misconduct, whether or not they engage directly in the deception alleged. *See, e.g., FTC v. Publishers Bus. Servs., Inc.*, 2013 U.S. App. LEXIS 19336 at *8-9 (9th Cir. May 15, 2013) (defendants were "familiar with the business operations, policies, and procedures"); *FTC v. World Media Brokers*, 415 F.3d 758, 765-66 (7th Cir. 2005) (defendant served as a corporate officer and performed a "number of tasks that evince active participation in the corporate affairs"); *Publ'g Clearing House*, 104 F.3d at 1171 (authority and control demonstrated by authority to sign documents on company's behalf and role as corporate officer). Hoskins does not dispute, nor could he, that he played an important role in building the enterprise and that he participated in strategic decision making on its behalf until the district court shut it down. It was not error for the district court to hold him jointly and severally liable for the consumer injury that the enterprise caused.

3. Undisputed Facts Document Hoskins's Knowledge of the Scheme

The facts underpinning Hoskins's participation also establish his knowledge, because an individual's "degree of participation in business affairs is probative of knowledge." *Affordable Media*, 179 F.3d at 1235. But even apart from this presumption, the record independently establishes that Hoskins "had knowledge of the representations, was recklessly indifferent to [their] truth or falsity * * *, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Stefanchik*, 559 F.3d at 931.

For one, Hoskins knew that the enterprise was concerned about high chargeback rates that could create a risk of losing access to the credit card payment system. SER2500; *see also* SER1146-47, 1164, 1263. Hoskins attempts to evade this by claiming that the enterprise never exceeded the critical 1% threshold, and therefore that he could not have known "the company was a fraud." Br. 41. But, as the record shows, Hoskins knew the company had chargeback problems. In fact, in an email entitled "Summary of power pay call and course of action," his partner told him:

> Currently we are over 1% and the trends show us to continue that violation with Visa. If we do go over that 1% we will be retroactively fined 100 bucks a charge for all of June's charge backs and if we do not close the acct at the end of June we would run the risk of continued fines and TMF for July.

SER2532. His partner then stated that the solution was to "continue to apply all of our initiatives to lower charge backs and be under 1% for the month of June" and that to do this, the company will use pre-paid cards. *Id.* Thus, contrary to Hoskins's assertion, the "actual evidence" (Br. 41) shows that he was knowingly involved in helping the enterprise avoid the consequences of excessive chargebacks.

Hoskins also knew about other aspects of the business. For instance, he knew about Ivy Capital's sales process because one of his partners emailed details of that process to him:

> Ben, Attached are all of the packages, a review of the coaching resources, the compliance, instructions on what they need to do after making a sale, important contacts. Please let me know if you have any questions.

SER2536.[25] Hoskins was notified about consumer complaints because his partner emailed information about that issue, too, expressing

[25] Hoskins claimed he never read the information he received, or any Ivy Capital sales script. SER1136, 1157. However, considering the other facts establishing his knowledge, it is immaterial whether he

concern that aggrieved consumers would go to the FTC. SER1090, 1106, 1253, 1256, 1275. Hoskins was aware that the company was taking steps to respond to inquiries from state attorneys general. SER1167, 1246, 1254. Hoskins testified that he knew Ivy Capital was selling coaching packages that ranged from $2,000-$10,000, and that the company promised the coaches would work with consumers until they earned back these investments. SER1158-59. Hoskins also knew that Ivy Capital was generating millions of dollars in revenue. *See*, *e.g.*, *id.*, SER1164, 1237-43. Finally, Hoskins also admitted that he never saw a report confirming that consumers were making back their investments. SER1159. These "myriad red flags" establish that Hoskins had knowledge sufficient to support the district court's award of equitable monetary relief. *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010).

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actually read the materials he received. *See Stefanchik*, 559 F.3d at 931 (awareness of a high probability of fraud coupled with an "intentional avoidance of the truth" supports personal liability for monetary equitable relief).

4. The Court Properly Applied Equitable Principles in Determining Hoskins's Liability

This Court's precedents also foreclose Hoskins's argument that monetary relief under Section 13(b) should be limited to his ill-gotten gains. Br. 43-45. The proper measure of restitution is consumer loss, even "where the loss suffered is greater than the defendant's unjust enrichment." *Stefanchik*, 559 F.3d at 931; *see also Publishers Bus. Servs.*, 2013 U.S. App. LEXIS at *3-4; *FTC v. Inc21.com Corp.*, 2012 U.S. App. LEXIS 6466 at **9-10 (9th Cir. March 30, 2012); *Figgie*, 994 F.2d at 606-07.[26] In *Stefanchik*, this Court affirmed an award of $17 million against an individual defendant despite evidence that he had received only a fraction of that amount as a royalty. *Stefanchik*, 559 F.3d at 931. Hoskins attempts to distinguish his role at Ivy Capital from that of Stefanchik (Br. 44), but the undisputed record establishes that Hoskins played a key role in creating the scheme and keeping it going. In fact, were it not for Hoskins, Ivy Capital would not exist.

[26] Although the Commission brought *Figgie* under Section 19 of the FTC Act, this Court applied the same equitable principles that guide its authority to grant equitable monetary relief under Section 13(b) of the FTC Act. *Figgie*, 994 F.2d at 606-07.

Thus, the discrepancy between consumer injury and the profits that Hoskins reaped was not "manifestly unjust." Br. 43. As this Court and others have recognized, "[a]s between the innocent purchaser and the wrongdoer * * * equity requires the wrongdoer to restore the victim to the status quo." *Figgie*, 994 F.2d at 607. *Accord FTC v. Direct Mktg. Concepts*, 624 F.3d 1, 14-15 (1st Cir. 2010) ("consumer loss * * * would appear to be an appropriate measure of damages"); *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.").

Hoskins's reliance on the Second Circuit's decision in *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67-68 (2d Cir. 2006) is unavailing. Br. 43. *Verity* held only that the proper amount of monetary equitable relief can be less than consumer loss where a blameless intermediary keeps a portion of the payments from consumers before those payments reach the wrongdoers. But that proposition does not apply here, where there was no innocent intermediary and the money spent by consumers is equal to the money unlawfully obtained by wrongdoers acting in

concert, who are thus jointly and severally liable for the injuries they caused.[27]

Thus, the only remaining question is whether the existence of multiple wrongdoers is a reason to limit Hoskins's liability to the amount that he personally received. It does not. This Court has rejected emphatically the proposition that "personal financial benefit is a precondition for joint and several liability." *SEC v. Platforms Wireless Int'l*, 617 F.3d 1072, 1098 (9th Cir. 2010). *See also Publishers Bus. Servs.*, 2013 U.S. App. LEXIS 19336 at *7-8 (standard for individual liability); *Stefanchik*, 559 F.3d at 931 (same). Consistent with these principles, this Court and other courts of appeals have long applied joint and several liability where multiple collaborating defendants have violated Section 5, without regard to the proceeds received personally by any one of the joint collaborators. *See, e.g., World Media Brokers,*

[27] As the Second Circuit further explained in *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 374 (2d Cir. 2011), "[t]he only limitation that Verity placed on the district court's remedial authority was the requirement that any monetary award be limited to funds that actually were paid to the defendants, as opposed to money that was paid by the consumer but withheld by a middleman."

415 F.3d at 766; *Gill*, 265 F.3d at 959. *See also SEC v. Whittemore*, 659 F.3d 1, 9 (D.C. Cir. 2011) (collecting cases).

II. The District Court Did Not Abuse Its Discretion in Ordering Relief Defendants to Disgorge Ill-Gotten Gains

Once the equity jurisdiction of the district court has been properly invoked, it may order all the equitable relief that is necessary under the circumstances. *See, e.g., FTC v. EDebitPay, LLC*, 695 F.3d 938, 945 (9th Cir. 2012); *Stefanchik*, 559 F.3d at 931. The power to shape equitable remedies to accomplish complete justice is not limited to those who are accused of wrongdoing. It may extend to those who remain innocent of wrongdoing where they: (1) have received ill-gotten funds; and (2) do not have a legitimate claim to them. This allows the court to "effect full relief in the marshalling of assets that are the fruits of the underlying fraud." *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998).

A. Oxford Financial Had No Legitimate Claim to the Funds It Received

Undisputed evidence establishes that, from May 2007 to January 2011, Oxford Financial received more than $1.5 million in funds derived from the "scams and fraudulent activity perpetrated by Ivy on the

public." ER 97; *see* SER2541-48.[28] Oxford was essentially a piggy bank for Hoskins's share of the profits of the common enterprise. It held the funds until Mr. and Ms. Hoskins disbursed them – either to Ms. Hoskins directly, or to pay the expenses of the Hoskins household. SER1127-28, 1292, 1300, 1303-06.

Nothing in the record supports the assertion (Br. 53) that the funds were derived from consulting – or any other service. There are no consulting contracts, time sheets, invoices relating to work performed, records indicating that the funds received were related to consulting, or anything else describing the nature of any services performed. Indeed, Ms. Hoskins conceded that the funds that Oxford received from Ivy Capital were all attributable to Hoskins's ownership interest. She did not claim that these funds resulted from any employment or service of her own. SER1292, 1300.

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[28] The record of disbursements shows that Oxford Financial received funds from several of the entities in the Ivy Capital enterprise, including Ivy Capital itself, Zyzac Commerce Solutions, and Nevada Corporate Division Inc. SER2541-48. These entities were part of the common enterprise, a point that defendants did not contest below. Thus all the funds were derived from the unlawful practices of the enterprise.

The district court properly directed Oxford to disgorge its ill-gotten gains. Federal courts have broad equitable powers "to recover ill-gotten gains for the benefit [of] the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong." *Colello*, 139 F.3d at 676. The creditor plaintiff need only show that a relief defendant "has received ill gotten funds and that he does not have a legitimate claim to those funds." *Colello*, 139 F.3d at 677; *accord SEC v. Cavanagh*, 155 F.3d 129, 136-37 (2d Cir. 1998). If such a showing is made, the remedy is an order of disgorgement – *i.e.*, an equitable obligation to return a sum equal to the amount wrongfully obtained, not a requirement to replevy a specific asset. *See SEC v. Rosenthal,* 2011 U.S. App. LEXIS 11732 at **3-4 (2d Cir. June 9, 2011); *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000).

The district court applied these principles correctly. There was no dispute that Oxford had received more than $1.5 million from Ivy Capital, and that those funds were attributable to Hoskins's stake in that enterprise. Therefore, the court did not abuse its discretion or otherwise err in directing Oxford to disgorge funds "derived from the fraudulent activities of the Ivy Capital enterprise." ER 97.

B. The District Court Properly Ordered Leanne Hoskins to Disgorge the $1.1 Million She Received

The district court was also correct in holding Ms. Hoskins liable for the $1.1 million she received from Oxford. The undisputed record shows that Ms. Hoskins "used Oxford Financial to funnel money from the Ivy Capital enterprise into the [Hoskinses'] personal accounts." ER 98. Ms. Hoskins personally received payments totaling more than $1 million from Oxford's account, although the only services she rendered involved tracking the funds flowing into and out of Oxford**.** Oxford also paid another $110,000 for household expenses – *e.g.*, a new car, school tuition, credit card bills, and IRS fees. SER2874. Defendants' contention (Br. 48) that Ms. Hoskins derived no benefit from those direct payments defies all reason. Had Oxford not made these payments, Ms. Hoskins (or her spouse) would have used their own resources to pay these bills. By relieving her of those obligations, Oxford provided Ms. Hoskins an obvious benefit.

It is similarly clear that Ms. Hoskins had no independent claim to these funds. First, as discussed above, her role in Oxford was limited to documenting and distributing the proceeds of fraud. Defendants cite various cases in which relief defendants were relieved of responsibility

for disgorging ill-gotten gains. Br. 51-56. In those cases, however, the named relief defendants established either that they had provided bona fide services in consideration for the payments they received, or that the funds did not derive from wrongdoing. By contrast, Leanne Hoskins administered money for a limited liability corporation in which she is the majority owner, and whose sole purpose was to pay her personal and household expenses. In other words, all of the "services" Ms. Hoskins provided to Oxford Financial ultimately redounded to her own benefit. That does not create a legitimate claim to receive and retain the fruits of the fraud.

Second, as the district court held (ER 98-99), the undisputed record established that all three of the requirements for alter ego liability under Nevada law were satisfied.[29] *See Polaris Indus. Corp. v. Kaplan*, 747 P.2d 884, 886 (Nev. 1987) (per curiam). The district court

[29] In accordance with Circuit precedent, the district court applied the law of the forum state in identifying the relevant test for alter ego liability (ER 98-99), which, in Nevada, also applies to limited liability corporations. *See SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003); *Towe Antique Ford Found. v. IRS*, 999 F.2d 1387, 1391 (9th Cir. 1993); *AE Rest. Assocs., LLC v. Giampietro (In re Giampietro)*, 317 B.R. 841, 846-48 (Bankr. D. Nev. 2004); *see also Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175, 1180-83 (D. Nev. 2008).

did not even need to reach this point, however. State alter ego law does not necessarily limit a district court's equitable authority to determine the permitted scope of remedial orders under federal regulatory statutes. *Hickey*, 322 F.3d at 1131-32. Thus, whether state alter ego standards are satisfied is not dispositive of the question whether Ms. Hoskins is liable for disgorgement of the ill-gotten gains she received. This Court may affirm on either basis, regardless of the way in which it was resolved by the district court. *See, e.g.*, *Applied Info. Sciences Corp. v. eBay, Inc.*, 511 F.3d 966, 973 (9th Cir. 2007).

Nonetheless, the district court applied state law correctly. Leanne Hoskins was Oxford's majority owner. She kept the company's books and, in that capacity, used over $1 million in Oxford funds for personal and household expenses. ER 98. Given Oxford's role as a funnel for Hoskins's earnings (SER1292, 1300, 1304), it follows that Leanne Hoskins, in managing those distributions, both "influenced and governed" the corporation.[30] *Polaris*, 747 P.2d at 886. Furthermore, as

[30] Given that Oxford's purpose with respect to Ivy Capital was to funnel the proceeds of unlawful practices to the Hoskins family (ER 99), there is no inconsistency in arguing both that: (a) Ms. Hoskins established "influence and governance" over Oxford; and (b) she provided no services giving rise to a legitimate claim to the funds. *See* Br. 59.

sole owners, Benjamin and Leanne Hoskins and Oxford shared an obvious "unity of interest and ownership."[31] *Id.* The third element – whether adherence to the corporate form would "sanction fraud or promote injustice" – is satisfied easily. *Id.* As the district court explained, "[t]he sole purpose of Oxford Financial *with respect to the Ivy Capital enterprise* was to funnel ill-gotten gains from a massive scam to one of the owners of that enterprise and his spouse." ER 99 (emphasis added). Contrary to defendants' contention (Br. 49), it is irrelevant that Oxford may have received funds from sources other than Ivy Capital. The district court's order is limited to the amount of money that Oxford channeled from Ivy Capital. Shielding those gains from collection, "so

[31] Thus defendants err in suggesting that the district court, in finding a "unity of interest," incorrectly limited itself to an analysis of Oxford's ownership structure. *See* Br. 59-60. Nor did the court err in failing to address all the criteria mentioned in *Polaris*. *Polaris* does not prescribe a "litmus test" for determining when the corporate fiction will be disregarded. *Polaris,* 747 P.2d at 887. In fact, it lists a number of factors that are present here – notably, the commingling of funds and the failure to observe corporate formalities. *Id.* Finally, while the court may have failed to note that Oxford predated Ivy Capital (see Br. 49), that does not detract from the primary (and undisputed) fact that Mr. and Ms. Hoskins were Oxford's sole owners, employees, and beneficiaries.

that [they] may be potentially returned to the duped consumers, would sanction an injustice." ER 99.

In sum, the district court acted well within the scope of its remedial discretion in determining that Oxford was an alter ego of Benjamin and Leanne Hoskins and in ruling that Leanne was liable for the funds she pulled out of it.[32] A federal court may disregard corporate form "in the interests of public convenience, fairness, and equity * * *." *SEC v. Elmas Trading Corp.*, 620 F. Supp. 231, 234 (D. Nev. 1984), *aff'd mem.*, 805 F.2d 1039 (9th Cir. 1986). Such an approach is particularly appropriate here, where the Commission proceeds "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the * * * laws." *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975).[33]

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[32] Contrary to defendants' contention (Br. 57-59), it is immaterial that the Commission did not specifically allege alter ego liability in its complaint. Alter ego liability is an equitable, remedial doctrine. *St. Paul Fire & Marine Ins. Co. v. Pepsico, Inc.*, 884 F.2d 688, 698 (2d Cir. 1989). Thus, a federal court is not constrained by the specific terms of a litigant's prayer for relief. *See* FED. R. CIV. P. 54(c) (judgments, except default judgments, should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings).

[33] Defendants contend that it is inequitable to require Ms. Hoskins to disgorge more money on top of an even larger award against her

C. There is No Requirement to Trace the Specific Assets to be Disgorged

Contrary to defendants' contention (Br. 50), the Commission is not obliged to trace specific funds from Ivy Capital, through Oxford, and thence to its ultimate recipient, Leanne Hoskins. *See Bronson Partners*, 654 F.3d at 373 (equitable tracing rules do not require the court to identify specific funds that are subject to return); *Banner Fund Int'l*, 211 F.3d at 617 (disgorgement is equitable obligation to return a sum equal to the amount wrongfully obtained, not a requirement to replevy a specific asset); *see also SEC v. Bowin*, 2003 U.S. App. LEXIS 4548 at **3-4 (9th Cir. March 10, 2003) (not a defense to disgorgement that ill-gotten gains have been spent). In fact, as the Second Circuit noted in *Bronson Partners*, no court has required a public agency to undertake such efforts. Such a requirement would impede public law enforcement and is inconsistent with the purpose of disgorgement – to prevent unjust enrichment. It would have the perverse effect of allowing a

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husband. Br. at 62-63. Such an argument rests, however, on the highly speculative premise that Hoskins will indeed pay the entire $130 million judgment. In that event, the parties are free to make further arguments against any possible double-counting during collection proceedings.

defendant to escape disgorgement merely by spending down illicit gains while protecting legitimately obtained assets. *See, e.g.*, *Bronson Partners,* 654 F.3d at 373; *Banner Fund Int'l*, 211 F.3d at 617. Thus, defendants' assertion that the FTC has not established that it can trace specific dollar amounts from Ivy Capital, to Oxford Financial, and thence to Leanne Hoskins's current possession is legally irrelevant. Defendants do not dispute that Leanne Hoskins received $1.1 million that she did not have previously as a result of money transferred from Ivy Capital to Oxford Financial. That is enough to support the judgment. *See Bronson Partners*, 654 F.3d at 374.

D. Nevada Community Property Law Does Not Shield Funds in the Hands of Relief Defendants

Defendants also err in supposing that state community property doctrine protects any part of the funds that Ms. Hoskins received. Br. 62. Ms. Hoskins seems to contend that there is no community property left to pay a judgment – either because she spent it, or because she transformed it into her separate property by virtue of a separation agreement. *See* Br. 62; Doc. 320 at 14. But the permitted scope of remedial orders under federal regulatory statutes is not necessarily controlled by state law. *See, e.g.*, *Hickey*, 322 F.2d at 1131. For

example, if assets nominally titled in Ms. Hoskins's name were jointly controlled by Hoskins, then equity may require disgorgement without further inquiry. *See, e.g.*, *SEC v. Heden*, 51 F. Supp. 2d 296, 299-300 (S.D.N.Y. 1999); *see also FTC v. Strano*, 2013 U.S. App. LEXIS 12640 at **8-9 (2d Cir. June 20, 2013). Furthermore, even under state law Ms. Hoskins may have no recourse if the funds she received were impressed with a constructive trust – a "remedial device by which the holder of legal title to property is deemed to be a trustee of that property for the benefit of another who in good conscience is entitled to it." *Namow Corp. v. Egger*, 668 P.2d 265, 267 (Nev. 1983). Under Nevada law, the obligation to hold the property in trust for the rightful owner is not limited to the initial wrongdoer. It may extend to innocent third parties as well. *Id.*

In any event, Ms. Hoskins's appeal to state community property doctrine is entirely premature. The only issue before this Court is whether the district court erred in entering a judgment against Ms. Hoskins in the amount of $1.1 million. Whether Ms. Hoskins has assets to pay that judgment – or whether her remaining assets are exempt from levy – are questions that are properly addressed in a supplemental

proceeding brought under the Federal Debt Collection Procedures Act in the district court, not here. *See* 28 U.S.C. §§ 3001 *et seq*. In that proceeding, the Commission may petition for execution, installment payment order, or garnishment if, after an opportunity to develop the record, it believes that Ms. Hoskins has a substantial nonexempt interest in her remaining assets. *See* 28 U.S.C. §§ 3015, 3203, 3204, and 3205. Ms. Hoskins, if she believes that her property is exempt from collection (*e.g.*, pursuant to "an interest in a community estate"), may present her claim during the course of those proceedings at that time. *See* 28 U.S.C. §§ 3014(a)(2)(B) (referencing community property interests), 3202(d), 3205(c)(5).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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February 21, 2014

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiff-Appellee, Federal Trade Commission, states that it is unaware of any related case.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B), in that it contains 12,766 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Century Schoolbook 14-point font.

s/Leslie Rice Melman
LESLIE RICE MELMAN

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2014 I filed and served the foregoing with the Court's appellate CM-ECF system. I further certify that all participants in the case are registered CM-ECF users.

s/Leslie Rice Melman
LESLIE RICE MELMAN

CERTIFICATE FOR BRIEF IN PAPER FORMAT

No. 13-16052

I, Leslie Rice Melman, certify that this brief is identical to the version submitted electronically on February 21, 2014.

Dated: February 26, 2014

s/Leslie Rice Melman
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