NO. 20-55356

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

OTA FRANCHISE CORPORATION, *ET AL.*
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 8:20-cv-00287-JVS
Hon. James V. Selna, U.S. Distr. J.

ANSWERING BRIEF FOR THE FEDERAL TRADE COMMISSION

Of Counsel:

ANDREW SMITH
Director

THOMAS M. BIESTY
RHONDA PERKINS
ANDREW HUDSON
ROBERTO ANGUIZOLA
Attorneys

Bureau of Consumer Protection

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-3579

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

CASES (CONT'D) **PAGE**

CASES (CONT'D) **PAGE**

CASES (CONT'D) **PAGE**

CASES (CONT'D) **PAGE**

STATUTES & REGULATIONS

STATUTES & REGULATIONS (CONT'D) **PAGE**

INTRODUCTION

The Federal Trade Commission (FTC) brought this enforcement action to halt a deceptive scheme involving online financial trading. Defendants-appellants are three corporations and three individuals.[1] Operating as a common enterprise under the name "Online Trading Academy" (OTA), appellants prey on consumers, especially older individuals, with deceptive or unsubstantiated promises of substantial earnings by trading in the financial markets.

Appellants market a purported "strategy" to "time the market," and claim that any consumer—regardless of prior experience, training, or basic knowledge of how financial markets operate—can apply it as a step-by-step "recipe" to generate substantial profits. OTA's own customer surveys show, however, that the percentage of customers who generate income levels anywhere near what OTA advertises is no more

---

[1] Defendants-appellants are OTA Franchise Corp. (OTA Corp.); Newport Exchange Holdings, Inc. (NE Holdings); NEH Services, Inc. (NE Services); Eyal Shachar; Samuel R. Seiden; and Darren Kimoto.

On May 22, 2020, the FTC moved for leave to amend its complaint to add ELO Investments, Inc. (ELO) and Matrix Financial Technologies, Inc. (Matrix) as defendants, and Orit Shachar, the wife of Eyal, as a relief defendant. ELO, Matrix and Orit Shachar were not part of the preliminary injunction proceedings below, and are not appellants here.

than 3-4 percent. Independent, robust trading data, moreover, strongly indicates that most OTA customers do not make any money, and many cannot even recoup the fees they paid to OTA. OTA charges customers hundreds or thousands of dollars (as much as $50,000 for its most expensive program), and already has bilked consumers nationwide out of more than $360 million.

To shield its scheme from scrutiny, OTA has sought to gag dissatisfied customers by often conditioning refunds on those customers' agreeing to forgo publishing negative comments about OTA or its personnel or reporting wrongdoing even to law enforcement agencies.

The FTC sued to halt the scheme and secure redress for victims. The FTC moved for temporary relief, a preliminary injunction, an asset freeze, and the appointment of a temporary receiver. In support of that motion, the FTC proffered over 8,000 pages of exhibits, including *inter alia* internal OTA documents and representations to the FTC, OTA advertisements and marketing materials, transcripts of OTA sales events, a financial expert report, trading data of OTA "instructors" and customers, and declarations from consumers and former OTA employees. Appellants' opposition relied principally on legal arguments

and on declarations of vague and unverifiable claims of success. On that record, and after two rounds of briefing and a live hearing, the district court issued a preliminary injunction—including provisions for an asset freeze and a compliance monitor.

Before this Court, appellants challenge the preliminary injunction principally on the ground that it violates the First Amendment. The district court rightly held that appellants' marketing activities, as a whole, constitute less-protected commercial speech, but it nevertheless carefully tailored the injunction to restrict only constitutionally unprotected misleading or unsubstantiated speech in their advertising and marketing. The court did not restrict appellants' ability to engage in educational activities, such as teaching their customers about trading in the financial markets generally. Likewise, the asset freeze contains detailed provisions that allow appellants to continue operating, consistent with the law. Finally, the monitor merely ensures compliance with the court's order. His role is limited to reviewing appellants' marketing program, not their instruction, and reporting any violations to the court.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345; and 15 U.S.C. §§ 45(a) and 53(b). The court entered a preliminary injunction on April 2, 2020, and appellants filed a Notice of Preliminary Injunction Appeal, pursuant to Circuit Rule 3-3, on April 3, 2020.

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

QUESTIONS PRESENTED

1. Whether the First Amendment precludes the issuance of a preliminary injunction against appellants where the court enjoined only deceptive or unsubstantiated advertising and marketing claims, froze appellants' assets but provided for the continued operation of their business, and appointed a compliance monitor.

2. Whether the district court had the authority to issue a preliminary injunction under the FTC Act and applied the correct standard for doing so.

3. Whether the district court properly exercised its discretion when it froze appellants' assets to preserve the possibility of consumer redress.

STATEMENT OF THE CASE

A. *Appellants' Deceptive Business Practices*

Since at least 2012, OTA has conned consumers into spending hundreds of millions of dollars on OTA services with promises that OTA can show them how to make large amounts of money by trading in the financial markets. OTA typically sells its services (directly and through its franchisees) in three stages. OTA first advertises widely a free seminar to preview its *proprietary* strategy. The preview is bait, designed to lure consumers to the next stage of OTA's sales pitch: a "Market Timing Orientation" where its strategy is revealed in a three-day "course" that typically costs $299. The Orientation event—offered to some customers for free—is itself a sales pitch for ongoing training costing thousands of dollars that can include, for $50,000 or more, the OTA "Mastermind" program and its "Daily Grid"—a listing of potential trades, assembled by OTA *using its strategy*, which customers can monitor and execute to reach the high earnings that OTA advertises. At every step, OTA's scheme is riddled with false, misleading, or unsubstantiated representations.

To keep the scheme going, OTA mollifies disillusioned customers with extra training for free, and often conditions refunds on customers' agreement to forgo reporting their negative experience publicly or to law enforcement agencies.

1. OTA's Advertising and Free Preview Events

Appellants advertise nationwide, via radio, television (including half-hour infomercials), direct mail, and online. EX 2_8; EX 3_20; EX 8_185; EX 13_288-291, 303-304 [SER00008, 00020, 00185, 00288-291, 00303-304]. Appellants themselves control all OTA advertising, including for franchisees. EX 13_7409, 7502 [SER00563, 00578].

The message in OTA's advertisements, regardless of medium, is that people who purchase OTA's training are likely to generate substantial income from trading in the financial markets. OTA's infomercials, for example, tout "a proven step-by-step approach" to generate substantial earnings, with testimonials from consumers who purportedly "made $12,000" in three hours, or "made $32,000 in less than seven trading days." EX 13_5145-5151 [SER00419-425]. One radio ad featured an OTA "student" claiming "it's almost like having a second paycheck without having a second job." EX 13_304 [SER00304].

Another ad touted a "proven step by step approach to investing" that "can work in any market condition," and "create passive income to build your retirement." EX 13_304-305 [SER00304-05]. The OTA ads also claim:

- "[A]nybody could do this from any level. You don't need to have a special type of background." EX 13_5160 [SER00426].
- Substantial income can be made "[w]hether you only have a few hours a week or a few hours a month." EX 13_5186-5187 [SER00428-29].
- 80% of OTA enrollees "don't know a stock from a rock." EX 13_337 [SER00288].

OTA's advertisements direct consumers to attend a free three-hour "preview" seminar. EX 2_8; EX 3_20; EX 13_305, 8136 [SER00008, 00020, 00305, 00814]. There, OTA salespeople induce consumers to sign up for the "Orientation" event by reiterating and expounding on the earnings claims made in OTA's advertisements. They represent, for example, that consumers "could potentially make $50,000 of annual income with an account size as low as $5,000." EX 13_360 [SER00337].

They claim that OTA can help consumers make "trading [their] primary source of … income," calling it "fire [your] boss level" of income. EX 13_1961 [SER00345].

And that is the message that consumers receive. Consumers reported that they understood from OTA's seminars that it is "more profitable to trade … a few hours a day than to work a full time job," EX 1_1-2 [SER00001-02]; and that "with one or two trades, you could make $6,000, or $15,000," EX 3_21 [SER00021]. OTA's message was unequivocal: people signing up for its services can "make more money" and "live comfortably." EX 5_30 [SER00030].

2. OTA's Sales Seminar: The Market-Timing Orientation

The Orientation is a three-day sales pitch and appellants' main sales platform. It "accounted for approximately 80 percent of OTA's revenue in 2018." EX 13_5120 [SER00408]. And as one purchaser put it, while it "did teach some things, … the purpose … seemed to be to get you to sign up for the courses that really cost something." EX 1_2 [SER00001-02].

The Orientation is run by an OTA "instructor" and staffed by "education counselors"—all of whom are actually salespeople. EX 8_184-

185; EX 13_7856-7861 [SER00184-85, 00699-704]. Experience in neither financial markets nor educational counseling is required to work as an instructor or counselor, and they are paid a 2-3 percent commission on their sales. EX 13_7690, 7702-7703 [SER00606, 00609-610]. OTA trains this salesforce and provides them with a slide presentation and an outline to guide their sales pitch. EX 13_5127-5128, 5134, 6193-6201; EX 8_186-187 [SER00409-410, 00413, 00451-59, 00186-87].

During the Orientation, OTA's salespeople expand on the claims made in the advertisements and preview events. As instructed, they use testimonials and hypothetical trades to paint a picture of substantial trading profits awaiting purchasers. For example:

- "I'm profitable 85% of the time," with thousands of dollars in monthly profits. EX 13_857-859, 5474 [ER02663-65, 03816].
- "Student" with only $3,000 to invest (after paying for OTA training) was, a year later, supporting wife and two children with trading income. EX 13_2833-2841 [SER00360-68].
- "Risk of $100" yields "Profit of $3000." EX 13_5454 [ER03796].

- Trading "plan" yields "Avg. $300/Day" using only "$5,000" of capital and "2 Hours/Day." EX 13_5472 [ER03814].
- OTA's "students … [are] averaging about 300 dollars a day" in trading profits. EX 13_4541-4542 [SER00405-06].
- Consumers could make "100 grand a year" with a $5,000 futures account. EX 13_4467-4471 [SER00400-04].

The net impression consumers get from those and other similar representations is that, by purchasing OTA's strategy training, "you would get a high rate of return" and "mak[e] a lot of money with very little to start with," EX 1_2 [SER00002]; that people using that strategy "made thousands, tens of thousands, or hundreds of thousands of dollars," EX 7_148 [SER00148]; and that the "chance of making money was very high," EX 5_31 [SER00031]. OTA also creates the impression that consumers who buy its services can make money even if they do not have much time to devote to it,[2] and even if they have only a small capital with which to start.[3]

---

[2] OTA sales agents "implied that it would only take you a few minutes a day," EX 1_5 [SER00005]; and "said you could do [it] in your spare time," EX 5_38 [SER00038]. Salespeople were instructed in the Orientation's Master Document—their guide to the sales pitch—to

OTA's "education counselors," in meetings with individual consumers, pitch higher-priced packages. EX 4_26 [SER00026]; EX 6_111 [SER00111]. They ask consumers to complete a "questionnaire" that discloses the consumers' assets, then leverage that information in their pitch. EX 1_1-3 [SER00003]; EX 5_30-35 [SER00030-35]; EX 8_186 [SER00186]. Wealthier consumers may thus be pitched the "Mastermind" package—OTA's most expensive offering, at $50,000 or more. EX 1_1-3 [SER00003]; EX 5_30 [SER00030].

Aware that the complexity of the financial markets may prove daunting to consumers, OTA stresses that it is offering an "objective rules-based strategy" composed of "a simple, sequential set of steps" that anyone can learn regardless of experience, education, or aptitude, and that taking those steps yields profits with "mathematical certainty." EX 13_1836-1838, 515-516 [ER03642-44, 2321-22]. Appellant Kimoto, for example, told an Orientation event's attendees that making

---

emphasize that the strategy "Takes Minimal Time: Introduce the concept of set and forget trading." EX 13_7849 [SER00708].

[3] OTA's representatives claimed that "you don't need much money to start with in order to use their algorithm to make money," EX 1_2 [SER00002]. The Orientation Master Document instructed OTA's sales agents to highlight that its strategy "[d]oes not require large assets to start." EX 13_7849 [SER00708].

money with OTA's strategy is as easy as baking cookies: just follow the recipe. EX 13_602-603 [ER02408-09]. The recipe analogy is deliberate, and OTA trains its instructors to use it often. EX 13_6193 [SER00451]. Another presenter claimed that "anyone can attain" proficiency: "just simply plug yourselves into the equation and the outcome will be spitted out." EX 13_2332-2333, 2263 [SER00350-51, 00349]. And that indeed is the impression that consumers got. EX 1_3, 6; EX 6_111 [SER00003, 00006, 00111].

Even when OTA concedes that some trades will result in a loss, it consistently represents that, *overall*, its strategy will yield substantial earnings. Presenters routinely cite a "3-1 reward-to-risk ratio," that is purportedly embedded in the OTA strategy, whereby a winning trade will yield profits of three times what is risked—more than making up for losses on losing trades. EX 13_293-300, 2683-2689, 4289-4295, 6851-6852 [SER00293-300, 00352-58, 00393-99, 00559-560]. By OTA's own calculations, however, most profitable trades using its strategy fail to yield 3 times the amount risked. EX 13_306-308 [SER00306-08].

To drive the high-profits message home, OTA presenters routinely claim that they themselves became successful traders and amassed

substantial wealth using OTA's strategy. EX 1_6-7; EX 4_25; EX 5_36; EX 7_147 [SER00006-07, 00025, 00036, 00147]. Appellant Kimoto claimed at an Orientation event, for example, that he once was "struggling as a trader" with "close to $60,000 in losses." EX 13_624-626 [ER02430-32]. After learning the OTA strategy, however, Kimoto claimed that he quit his day job to trade full-time, and relayed stories of his wealth and extravagant lifestyle—all gained thanks to using OTA's strategy. EX 13_610-614, 827-833, 1028-1031, 1496-1497 [ER02416-20, 2633-39, 2834-37, 3302-03]. Another presenter, Zelek, used the same trick at another event. EX 13_2773-2776, 3074-3075, 3342-3343, 3491-3496 [SER00359-362, 00374-75, 00376-77, 00382-87]. Zelek concluded, "as long as I follow the system, the outcome will be provided." EX 13_2906-2907 [SER00372-73].[4]

But those claims are fake. Appellant Kimoto's trading during the bull market of January 2016 to October 2019 yielded a net loss of over

[4] Presenters reinforce their claims by purportedly making profitable trades during Orientation—often live. *See, e.g.*, EX 13_4141-4144 [SER00389-392] ("So this is a, a live trade we have on right now with the S&P 500"). In fact, those are often simulated trades but attendees are led to believe they are real. EX 13_5132-5133, 319-320 [SER00411-12, 00319-320].

$17,000. EX 13_317-318 [SER00317-18]. OTA presenter Zelek lost money in 2018 and made only a few thousand dollars in the first half of 2019. EX 13_319-325 [SER00319-325]. Sean Kim, who appears in OTA's infomercials and is held up by OTA salespeople as an expert trader, has for years managed only to break even, despite heavy trading on a six-figure account. *Id.* Even appellant Seiden, held up as the inventor and most-skilled practitioner of OTA's strategy, did very little trading from January 2016 to October 2019, and the trades he did make yielded a net loss of approximately $20,000. *Id.*

Trading data from the firms that OTA recommended to its customers as trading platforms showed not only that most OTA customers did not make money, but that the majority who traded on those platforms in fact lost money. EX 10_199-204 [SER00199-0204].

Consumers' experience, moreover, routinely contradicted the net impression that OTA created—that little time, experience or money is needed to generate substantial earnings. Many consumers found the process "time-consuming," and "there was too much to learn to become proficient." EX 1_5 [SER00005]; EX 5_37-38 [SER00037-38]. Respondents to OTA's own customer survey reported the need for more

capital than OTA claimed, and cited lack of time as a barrier to success. EX 13_309-313 [SER00309-313]. Many consumers also found that they lacked the computer or other skills necessary to deploy OTA's strategy. One reported: "You really need[] to be somewhat proficient at computers and be quick of mind," and some in his training session "struggl[ed] with their computers." EX 5_41 [SER00041]. Respondents to OTA's customer survey also cited those deficiencies as additional barriers. EX 13_309-310 [SER00309-310].

3. OTA's "Mastermind" Program and the Daily Grid

OTA's Orientation events are designed to induce consumers to purchase more training—especially OTA's most expensive offering, the "Mastermind" package, which costs tens of thousands of dollars. *See supra* at 11.[5] OTA presentations typically include frequent discussions of one "Mastermind" feature in particular: the "Daily Grid." EX 13_306 [SER00306]. The Daily Grid provides the purported results of OTA's

---

[5] OTA offers to help consumers finance their purchase of OTA training with short-term loans. EX 1_4 [SER00004]; EX 5_33 [SER00033]. OTA leads its customers to believe that they will quickly generate sufficient trading revenue to pay off the loan, avoiding hefty interest charges. EX 1_4 [SER00004]. That impression is false. Few borrowers repay their loans before an interest-free period is up, and nearly half still have not paid off their loans after two years. EX 10_197-198 [SER00197-98].

own application of its strategy, in the form of potential trades that Mastermind subscribers can monitor and execute themselves. *Id.*

The mechanics of the Daily Grid are simple enough: it purports to identify particular price ranges, or "zones," in which a financial asset's price will change direction. If the investor knows when the price will change direction, he can buy or sell as appropriate to reap the difference. As one OTA presenter explained it: "Market timing is simply identifying market [turns] and move[s] before they happen with a high enough degree of probability. That's what these zones are, these pockets are … turning points." EX 13_653 [ER02459]. The OTA Daily Grid is a listing of "zones" for several-dozen specific financial assets, identified by OTA's "best traders" using OTA's strategy, and provided daily to Mastermind subscribers. EX 13_1288-1289, 1918 [ER03094-95, 3724]; *see generally* EX 13_5200-5207 (the Daily Grid "User Guide") [SER00430-37]. Mastermind subscribers place orders to buy or sell the identified assets, as appropriate, when the market price "hits" a particular asset's zone. *Id.*

OTA claims that its Daily Grid identifies market turning points "with a high degree of accuracy," by applying OTA's strategy "in real

market conditions," to reduce the time that Mastermind subscribers need to find profitable trades. EX 13_1918 (Orientation "coursebook") [ER03724]. OTA's sales staff describes the Daily Grid as OTA's "crown jewel," and presents it as a major selling point for the Mastermind offering. EX 13_306, 4727 [SER00306, 00407].

But OTA's own analysis of the Daily Grid's success in identifying profitable trades paints a very different picture. The majority of the Daily Grid's recommendations never yielded an actual trade because the asset's price did not move into OTA's identified zone. EX 13_306-308 [SER00306-08]. Moreover, OTA's reported profitability of actual trades assumed *active* management of those trades—contrary to the "set it and forget it" style it advertises. *Compare* EX 13_306-308 (OTA analysis of Daily Grid success) [SER00306-08] *with* EX 13_1045-1046, 3478-3481 (claims of no need to "babysit[]" trades) [ER02851-52, SER00378-381], EX 13_7849 (Orientation's Master Document instructing presenters: "Introduce the concept of set and forget trading") [SER00708]. Even so, OTA's analysis shows that most of the Daily Grid's trades that were profitable did not in fact produce the "3-1 profit-to-risk" results that

OTA tells consumers they should expect, and that would ostensibly make up for any losing trades. EX 13_306-308 [SER00306-08].

4. OTA Does Not Substantiate Its Earnings Claims

OTA has no reasonable basis for claiming that purchasers of its training services are likely to make the substantial earnings conveyed in its advertisements and sales seminars. OTA does not systematically collect information about the financial performance of its "students," EX 13_6167 [SER00446], and thus cannot have had a basis to represent that typical purchasers of its services will make money trading in the financial markets.

What little such information OTA did obtain indicates that its customers in fact were not making money. A June 2018 OTA survey of the trading performance of its "students," EX 13_7763-7799 [SER00627-663], revealed a performance so disastrous that OTA's CEO and owner, appellant Shachar, forbade anyone from taking a copy of the survey out of the meeting room where it was discussed. EX 13_5216, 7715-7716 [SER00438, 00611-12]. The survey showed that 66 percent of respondents were making no money at all, 31 percent were making "little money," and just 3 percent claimed to be making "a lot of money."

EX 13_7782 [SER00646]. Even among the purchasers of OTA's most expensive offering, "Mastermind"—who obtain the most extensive OTA training and support, including the Daily Grid recommendations—58 percent said that they were making no money, and only 10 percent claimed that they were making "a lot of money." *Id.*

A second OTA survey showed a similarly bleak outcome: a third of the respondents did not trade at all, and of those who traded, over 23 percent said they were losing money, another 22 percent were making no money at all, and fewer than 4 percent claimed that they were making "lots of money." EX 13_5281, 5287 [SER00439, 00440].

Independent trading data from TradeStation, the trading platform that OTA recommended to its customers,[6] shows that they performed even worse than OTA's surveys suggest. TradeStation's records showed that roughly half of OTA customers never made a trade, and of those who did trade, 74.9 percent lost money, and fewer than 5 percent made

[6] Until September 2019, OTA recommended TradeStation as the online brokerage platform for its students' trading. EX 13_814-815 [ER02620-21]. OTA's seminars featured only TradeStation when demonstrating the OTA strategy, and TradeStation paid OTA more than $60,000 per month to advertise its platform to OTA customers. EX 13_7394-7396 [SER00561-63].

more than $10,000 cumulatively. EX 10_200-204 [SER00200-04]; EX 87_43-50 [SER01075-082].

Those results were corroborated by the FTC's expert, Kapil Jain—a financial trader with academic credentials and Wall Street experience. *See generally* EX 11_205-285 (Expert Report of Kapil Jain) [SER00205-285]. After conducting an in-depth review and trade simulations of the OTA strategy, the FTC's expert concluded that the strategy is unlikely to generate substantial income for OTA customers—principally because it is so vague that it yields no actionable trading suggestions. EX 11_212-213, 236-248 [SER00212-13, 00236-248]. Contrary to OTA's claims of an "objective" and "step-by-step" system, the FTC's expert found the strategy silent on critical steps in the process, which left consumers "searching for vaguely-defined patterns in charts, with no way to know for sure whether they have found a relevant pattern or not." EX 11_236, 241 [SER00236, 00241].

The FTC's expert also tested OTA's trading picks—specifically, the "daily income" recommendations in the OTA Daily Grid—for all of 2018. *See* EX 11_252-259 [SER00252-59]. Simulating those trades using actual, historic market prices yielded wildly divergent results across the

recommended assets. Some proved profitable over the course of that year while others sustained significant losses. EX 11_253-255 [SER00253-55].[7] None of the profitable trades came close to the 3-1 reward-to-risk ratio that OTA claimed. *Id*. The divergent results suggest that profits and losses alike are driven less by an objective, "step-by-step" strategy—which purportedly works for everyone regardless of experience, aptitude, or education—and more by subjective elements embedded in that strategy, or just "random luck." EX 11_252-259 [SER00252-59].[8]

In light of those clear indicia that the OTA strategy does not work, appellants also lack a reasonable basis to claim that their mere holding of a patent is proof positive that their strategy works. OTA presenters lend an appearance of legitimacy to their earning claims by telling

---

[7] Mr. Jain used that methodology because the industry-standard "backtest"—an objective, rules-based measure of a trading strategy, typically implemented via a computer algorithm—could not be applied to OTA's strategy due to its subjective elements. EX 11_243-246, 252 [SER00243-46, 00252]. OTA offers consumers no other reliable metric of its strategy's efficacy.

[8] The test assumed $100 of risk per trade, but assuming $1,000 yielded similarly divergent results, with even lower reward-to-risk ratios. EX 11_246, 255-257 [SER00246, 00255-57]. Profits increased with trade size, but due mostly to the diminished impact of fixed fees. *Id*.

attendees that high income is possible because OTA "ha[s] a patent on the fact that you can time the markets," which teaches "a set of rules" that "gives us the ability to know when to get in and when to get out." EX 13_385, 404 [SER00338, 00339].[9] The failure of appellants' strategy to yield the promised results casts serious doubt on that claim.

5. OTA's Refunds and Customer Reviews

OTA has for years endeavored to shield its scheme from public scrutiny by controlling negative reviews of its strategy, marketing methods, and personnel. It sought to placate dissatisfied customers by offering them further training (in the form of repeat classes) free of charge. EX 13_6184-6185 [SER00449-450]. For those who insisted on a refund, OTA would "initially refuse[]," citing its purchase contract's three-day refund window. EX 13_7727-7728 [SER00615-16]. When it did agree to a refund, OTA would often condition the refund on the customer's agreement to a form contract with a non-disparagement

[9] One presenter assured attendees that they can ignore people who "say, 'Oh, they can't time the market,'" because "to get a patent, we had to … prove it to the Government." EX 13_2062-2063 [SER00346-47]. Such claims come straight from the top: OTA's CEO and owner, appellant Shachar, welcomes customers to the Orientation event by touting a "patented supply and demand trading and investing strategy which allows us to *anticipate market moves with a high degree of accuracy*." EX 13_475 [SER00478] (emphasis added).

provision, barring negative statements or reviews about OTA or its employees, and even complaints to law enforcement agencies. EX 2_16-19 [SER00016-19]; EX 6_112-144 [SER00112-144]; EX 13_6182-6185 [SER00447-450]. These provisions are non-negotiable, and have caused many consumers to not report OTA's misconduct. EX 5_41-42 [SER00041-42]; EX 6_112-114 [SER00112-14].

6. Corporate Appellants Operate As a Common Enterprise Controlled and Directed by the Individual Appellants

Appellants OTA Corp., NE Holdings, and NE Services operate as a "common enterprise," controlled and managed by appellants Shachar, Seiden, and Kimoto. Appellants do not challenge this aspect of the case.

The corporate appellants operate as OTA and share common ownership, officers, managers, and employees. OTA Corp. and NE Services are wholly owned by NE Holdings, which in turn is owned by appellant Shachar and his spouse. EX 13_5137-5138 [SER00416-17]. NE Holdings extends credit to OTA's direct customers who finance their OTA purchases, and holds the patent on OTA's trading strategy. EX 13_472-474, 7408-7409, 7658 [SER00340-42, 00565-66, 00581]. NE Services funds the loans that OTA franchisees extend to their

customers, and has guaranteed a loan to NE Holdings. EX 13_7402, 7408, 7426 [SER00564, 00565, 00568]. Bank records suggest that NE Services acts as merely a conduit for funds from a third-party loan servicer to NE Holdings. EX 13_327-328 [SER00327-28].

The three individual defendants control and manage the common enterprise. Shachar is the founder and owner, directly or indirectly, of all three corporate appellants. EX 13_5137-5138 [SER00417-18]. He is President or CEO of each of them. EX 13_328-329, 7410, 7635, 7640 [SER00328-29, 00567, 00579, 00580]. He is directly involved in OTA's day-to-day marketing, finance, and sales operations, and has ultimate control of OTA's business. EX 13_7410, 7816-7819, 7836-7838, 7751-7753 [SER00567, 00680-83, 00695-97, 00622-24]. He received periodic reports on rates of cancellations, loan defaults, and refunds. EX 13_7757-7758 [SER00625-26].

Seiden is the creator of OTA's trading strategy and its "Chief Education Officer." EX 13_329, 7679-7681 [SER00329, 00602-04]. He has been extensively involved in OTA's salesforce, including compensation and performance, and was for three years responsible for the slide presentation used to guide Orientation events and the "Master

Document" that set out the content of the sales pitch. EX 13_5128, 7806-7830, 7839-7853 [SER00410, 00670-694, 00698-0712]. He was aware of OTA's internal surveys which showed that most respondents were not making money. EX 13_7730-7731 [SER00618-19].

Seiden briefly left OTA in late 2018, citing OTA's "Unethical & Deceptive Sales Messaging," and a "decline in student success" that left students "struggling to pay monthly finance payment[s]." EX 13_7800-7804 [SER00664-68]. He called OTA a "fraudulent business," and claimed to have "overwhelming proof of that fraud," stating: "I have seen 2 other companies in our industry be shut down by regulators within 24 hours for far less than what Eyal [Shachar] is allowing to happen through OTA." EX 13_7805 [SER00669]. He also stated that he received emails "every day" from consumers "losing money because of OTA." *Id.* OTA paid $500,000 to Seiden in December 2018, and he returned to work at OTA shortly thereafter. EX 13_328, 6267-6268 [SER00328, 00498-99].

Kimoto is one of OTA's chief salespeople, and the head of its most important sales force: the Orientation "instructors." EX 13_5134-5136 [SER00413-15]. Since the end of 2017, Kimoto has been responsible for

the Orientation's slide presentation. EX 13_5128 [SER00410]. He has routinely (and knowingly) made false or deceptive earnings claims to consumers at Orientation events. EX 13_317-322 [SER00317-322].

7. Appellants' Practices Harmed Consumers

Between January 2014 and May 2019 alone, appellants swindled tens of thousands of consumers out of at least $362 million, with over 11,000 of them paying OTA more than $10,000 each and many $50,000 or more. EX 13_302 [SER00302]. More than 150 of those consumers complained to the FTC, with many reporting losses of thousands of dollars. EX 13_329 [SER00329].

B. *The FTC Complaint and the Preliminary Injunction Proceedings*

On February 12, 2020, the FTC filed an enforcement action against appellants, seeking a permanent injunction and other equitable relief for violations of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a), and the Consumer Review Fairness Act of 2016 (CRFA), which renders void any form-contract provision that prohibits or restricts reviews of consumer goods or services, 15 U.S.C. § 45b(b)(1). *See Complaint for Permanent*

Injunction and Other Equitable Relief (DE.1) ¶¶1, 125-141 [ER004517, 4549-4552].

Together with its complaint, the FTC moved for a temporary restraining order (TRO) and an order to show cause why a preliminary injunction (PI) should not issue. (DE.12, 32). The district court issued both orders on February 25, 2020, and it clarified the TRO on March 6, 2020. (DE.46; DE.64). Appellants responded to the show cause order on March 7, 2020 (DE.67), and the court held a hearing on March 12, 2020. (DE.87). *See* Transcript of March 12, 2020 Proceedings Before Hon. James V. Selna (DE.96) (Tr.) [ER00256-00307].

At the hearing, appellants did not deny that their advertising and sales practices were suffused with unsubstantiated earnings claims, characterizing those issues as merely "peripheral." Tr. 17-19 [ER00272-74]. Their principal argument was that the First Amendment precludes the issuance of a preliminary injunction against them. Tr. 23-39 [ER00278-294]. They claimed that the FTC's *prima facie* showing—that they had made deceptive or unsubstantiated claims to consumers—"is not sufficient under the First Amendment to impose restrictions" on their sales and marketing speech. Tr. 25-26, 27-28 [ER00280-81, 282-

83]. They posited that because their sales claims were made during events where OTA's strategy was also explained to consumers, those sales claims should also be deemed fully protected speech. Tr. 30-31 [ER00285-86]. Finally, they argued that an asset freeze "is the equivalent of a prior restraint." Tr. 33 [ER00288].

On March 16, 2020, the court issued its opinion (in an in-chamber order) disposing of appellants' objections (Op.) [ER0034-0049]. It noted first that the proposed injunction "does not restrict the type of training [appellants] may provide." Op. 8 [ER0041]. Moreover, the injunction was tailored to apply only to deceptive and unsubstantiated claims in their commercial advertising and sales marketing and thus is "limited to speech not entitled to First Amendment protection." *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982)). It also rejected appellants' claim that OTA's "marketing is inextricably linked with its curriculum," observing that appellants can continue their instruction "without simultaneously engaging in deceptive, commercial speech." *Id.* (citing *United States v. Schiff*, 379 F.3d 621 (9th Cir. 2004)).

The court then found that the FTC was likely to prevail on the merits of its complaint. It found that the evidence of deceptive or unsubstantiated claims was "persuasive," and that appellants' proffered evidence "(including declarations of purchasers of the OTA training program) does not negate the force of the FTC's showing." Op. 10 [ER0043]. It found that appellants' purported disclaimers likewise "do not negate" "the overall, net impression [appellants] create through their earnings claims … that purchasers are likely to profit." Op. 11 [ER0044].[10] It found further that the corporate appellants likely acted as a "common enterprise" controlled by the individual appellants, and that the latter likely had knowledge of, or were recklessly indifferent to, the wrongdoing. Op. 13 [ER0046]. Finally, the court found the balance of equities weighed in favor of granting the preliminary injunction. Op. 14 [ER0047].

[10] The court also found that the FTC was likely to succeed on its CRFA claim because the non-disparagement clauses in appellants' "form" agreements "chilled purchasers' ability to publicly comment on their experience with OTA" and "impeded the FTC's ability to gather information from purchasers." Op. 12 [ER0045].

The FTC submitted a proposed PI order consistent with the court's instructions, Op. 16 [ER0049]. (DE.107). Appellants filed objections to that proposed order (DE.121), and the FTC filed a response (DE.125).

On April 2, 2020, the district court entered a PI order (*Order*). (DE.130) [ER0007-0031]. Among other things, the court enjoined appellants from making earnings claims unless they are non-misleading and substantiated. *Order*, at 7 [ER0013]. It also enjoined them from making claims—unless non-misleading and substantiated—concerning the time and effort it takes to attain proficiency in using the OTA strategy; or the time, effort, or capital typically expended by consumers using the strategy to achieve substantial earnings. *Id.* at 7-8 [ER0013-0014]. The court barred appellants from misrepresenting facts material to consumers' purchase of OTA services, including that OTA instructors are active traders who amassed substantial wealth through trading. *Id.* at 8 [ER0014]. It also enjoined appellants from entering or enforcing agreements to restrict consumers' reviews or communications with law enforcement agencies. *Id.* at 8-9 [ER0014-0015].

The court ordered preservation of the individual appellants' assets and a freeze on the corporate assets—but with exceptions for ordinary

business expenses such as employee salaries and payment for services, insurance, rent and utilities. *Id.* at 11-14 [ER0017-0020]. Finally, the court appointed a compliance monitor, and provided for various disclosures and reporting requirements. *Id.* at 17-24 [ER0023-0030].

Appellants bring this appeal to vacate the preliminary injunction order.

STANDARD OF REVIEW

"This Court only subjects a district court's order regarding preliminary injunctive relief to 'limited review'." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996)). The Court "will reverse a district court's issuance of a preliminary injunction only if the district court abused its discretion by basing its decision on an erroneous legal standard or on clearly erroneous factual findings." *Id.*; *accord FTC v. Consumer Defense, LLC*, 926 F.3d 1208, 1211-12 (9th Cir. 2019). "The scope of a preliminary injunction is also reviewed for abuse of discretion." *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004).

SUMMARY OF ARGUMENT

Appellants ran a sales program awash with deception, which they do not deny. Instead, they try to weaponize the First Amendment as a trump card to immunize their dishonesty, comparing themselves to Stanford or U.S.C. Law School. But university professors must have training or expertise in their fields, which appellants' instructors do not; and professors do not earn sales commissions for upsells to expensive classes, as appellants' instructors do.

The district court rightly determined that appellants' marketing activities, as a whole, constitute commercial speech, and it carefully tailored its injunction to reach only their deceptive or unsubstantiated claims. Appellants thus remain free to provide whatever educational content they wish, and may continue to sell classes, so long as they do so without deceit.

The district court applied the correct standard for a preliminary injunction in a case brought under the FTC Act, and it anchored its injunction in adequate findings based on ample record evidence. Its asset freeze and appointment of a compliance monitor comply fully with the law.

1.a. False or misleading commercial speech is unprotected by the First Amendment. Appellants do not dispute that they have made false, deceptive, or unsubstantiated claims in marketing their training program. Whether the constitution protects that program thus turns on whether it is properly characterized as commercial or noncommercial speech.

Appellants' marketing program is unquestionably commercial speech, easily satisfying the *Central Hudson* litmus test of "proposing a commercial transaction." The goal of each of the program's stages—the advertisements; the free seminar; and the three-day Orientation—is to induce a customer to purchase an additional product. "Instructors" and "education counselors" are paid on commission and are not required to have any experience in either education or the financial markets. Those sales events generate at least 80 percent of appellants' revenue. That appellants may teach some financial trading concepts in the course of the sales pitch does not alter its basic commercial nature.

Any actual instruction that appellants provide is also *not* "inextricably intertwined" with the sales marketing activities that the

district court enjoined. Appellants can readily teach financial trading concepts without deceptive sales tactics.

b. The asset freeze and compliance monitor provisions likewise pass constitutional muster. The government has a compelling interest in ensuring that wrongdoers do not dissipate their assets before redressing their victims. The freeze order directly advances that goal by preserving appellants' assets, while allowing for legitimate business expenses, until final adjudication of the FTC's claims. Its scope is also carefully tailored to serve that government interest. The monitor's role is limited to reviewing OTA's advertising and marketing claims—not its instruction—and reporting violations to the court.

2. The district court applied the correct standard for preliminary relief. Where an enforcement statute like the FTC Act authorizes injunctive relief, the government need not show irreparable harm. Appellants' cases involve fully protected political speech, not the unprotected commercial speech at issue here. In any event, the district court expressly found that irreparable injury will result absent preliminary relief.

3. It is the binding law of this circuit that Section 13(b) of the FTC Act authorizes monetary remedies and corresponding asset freezes. A panel is not free to overturn that precedent. And the asset freeze is proper even if some OTA customers believe that they suffered no harm. The harm to the others far exceeds the value of the frozen assets.

4. The injunctive provisions of the order are neither vague nor overbroad. The court did not treat "*everything* said" in appellants' sales seminars as commercial speech. It determined that those events should be analyzed, *as a whole*, as commercial speech, but the injunction only applies to specific types of marketing claims. Likewise, Section I.D. of the order is not a vague, "obey the law" injunction, but governs specific misrepresentations concerning appellants' total cost of service, refund policy, restrictions or conditions on such service, etc.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PRECLUDE THE PRELIMINARY INJUNCTION

Appellants do not dispute the district court's determination that they made deceptive and unsubstantiated claims. Instead, they devote the majority of their brief to arguing that the First Amendment precluded any restraint on their misleading conduct because it is either

fully protected speech or inextricably intertwined with protected speech. But their preview and Orientation events were little more than an advertisement to induce the purchase of a product—i.e. commercial speech—and the district court's injunction applies only to constitutionally unprotected deceptive or unsubstantiated commercial speech. The preliminary injunction therefore is consistent with the First Amendment.

A. The First Amendment Does Not Protect Deceptive or Unsubstantiated Commercial Speech

False or misleading advertising or marketing is constitutionally unprotected. "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985). There is "no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980). Denying constitutional protection to misleading commercial speech ensures that "the stream of commercial information flow[s]

cleanly as well as freely." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

Whether and to what degree appellants' speech is protected depends therefore on whether their speech is (1) commercial and (2) truthful. *See, e.g.*, *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977); *accord Schiff*, 379 F.3d at 626. They do not dispute the second condition. Thus, if their speech is commercial speech, then the preliminary injunction necessarily is constitutional because it applies only to speech that has been shown likely to be false, deceptive, or unsubstantiated.

B. The OTA Marketing Program Is Commercial Speech

The Supreme Court has defined "commercial speech" as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. Commercial speech, at its core, is "proposing a commercial transaction." *Id.* at 562. This Court has similarly described commercial speech as "advertising pure and simple." *Schiff*, 379 F.3d at 626.

As the district court has determined, OTA's marketing scheme as a whole (i.e. its advertisements, and preview and Orientation events)

fits comfortably within the definition of commercial speech, and the deceptive aspects of that speech are properly subject to restriction. But even if some of OTA's conduct could be deemed non-commercial speech, those aspects of its program are readily separable from its purely commercial (and deceptive) parts, and the preliminary injunction is carefully tailored to reach only the deceptive or misleading commercial speech.

1. *The OTA Marketing Program Is Entirely Commercial Speech, Much Of Which Is Deceptive*

At every step, OTA's marketing scheme proposes an economic transaction and amounts to little more than advertising. The first phase is pure traditional advertising solely intended to induce viewers to purchase and attend the three-day Orientation workshop. The workshop, in turn, is little more than an extended upselling session designed to induce attendees to purchase higher-cost products through relentless repetition of the money consumers will make from them. As detailed above, OTA staff is paid a sales commission, EX 13_6165, 7702-7703 [SER00444, 00609-610]; they are employed without the need for experience in either education or the financial markets, EX 13_7690 [SER00606]; and their training focuses on how to sell OTA services,

EX 13_6193-6238, 6304-6361, 8041-8384 [SER00451-496, 00500-557, 00719-01060]. The Orientation workshops generate 80 percent of OTA's revenue, EX 13_5120 [SER00408]. As one consumer participant described it, the purpose of the workshop is "to get you to sign up for the courses that really cost something," EX 1_2 [SER00002], including the "Mastermind" course and associated "Daily Grid," which can cost $50,000 or more.

The OTA sales pitch is premised on claims that lack any basis. The "instructors" falsely claim that they turned large profits from OTA's strategy, when in fact they largely lost money. OTA has fed sales events participants with stories about the supposed success of other attendees, when in fact few purchasers made money and the great majority did not. It touted the high likelihood of making large profits—with no reasonable basis for such claims. The no-effort "set it and forget it" approach is a sham. *See supra* at 8-15, 18-22.[11]

---

[11] A number of OTA student-customers (who have now moved to intervene below, *see* DE.231) filed an amicus brief claiming that the FTC is wrong that "*all* of OTA's 70,000 students over its 22 years of existence have been defrauded." *Amici Br.* 14. We claim no such thing. Such a showing is *not* required to prove a violation of the FTC Act; an act or practice is deceptive "if it is likely to mislead consumers acting reasonably under the circumstances." *FTC v. Cyberspace.Com LLC,* 453

Because the sales pitch is deceptive or misleading commercial speech, it is entitled to no First Amendment protection. The district court could properly restrict it, as courts and the FTC do with any deceptive advertising. *E.g.*, *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994); *FTC v. John Beck Amazing Profits LLC*, 888 F.Supp.2d 1006 (C.D. Cal. 2012), *aff'd*, 644 Fed. Appx. 709 (9th Cir. 2016); *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599 (6th Cir. 2017); *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015). Nevertheless, the district court carefully tailored the preliminary injunction to restrict only untruthful sales pitches. OTA remains free to run its program and sell its services, so long as it steers clear of the deceptive claims it has made until now.

OTA contends in response that all of its speech is fully protected educational content. It likens itself to a university's law or business school and claims that a court can no more restrict its speech than the classroom content at Stanford. *See, e.g.*, Br. at 1, 14, 20, 30 n.22, 37.

F.3d 1196, 1199 (9th Cir. 2006). Likewise, amici's assertion that they have not witnessed misleading conduct by OTA or its instructors, *Amici Br.* 18, "does not negate the force of the FTC's showing" below. Op. 10 [ER0043].

The comparison is risible. Legitimate university classes are taught by professors who have training or experience in their fields, and who are not paid on commission to relentlessly upsell increasingly expensive training and related products. Genuine educators do not tout false credentials and promise easy profits on the basis of exaggerated or phony data. OTA lacks a single hallmark of an authentic higher education program.

Indeed, OTA itself disclaimed any such status when it sought exemption from state licensing requirements applicable to post-secondary educational institutions. DE.55-1 ¶¶4-5 & Att. A, B [SER01061-072]. One of its franchisees argued that OTA's program was more comparable to "cooking courses" or a "ski school." *Id.* [SER01069]. Ski schools obviously are not on a comparable First Amendment footing with a university or a law school.

In the course of its sales pitch, OTA may impart to customers some financial trading concepts, but that incidentally conveyed information does not transform the commercial transaction into a genuine "robust exchange of ideas" that gives educational institutions fully protected First Amendment status. *Keyishian v. Bd. of Regents of*

Univ. of State of N.Y., 385 U.S. 589, 603 (1967). Instead, this case closely resembles the situation in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), where the Supreme Court held that a housewares company that conveyed educational information in connection with its sales pitch at "Tupperware parties" had no First Amendment right to demonstrate its products in a student dormitory. *Id.* at 473.

Like OTA here, the company in *Fox* claimed that including home economics teaching in its marketing presentations rendered the entire commercial solicitation fully protected. The Court rejected that argument out of hand, explaining that "[i]ncluding these home economics elements no more converted [the company's] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Id.* at 474-75. "[A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 475 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

Similarly, in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), the Supreme Court held that pamphlets touting a contraceptive product were purely commercial speech, "notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning." *Id.* at 67-68. This Court reached a similar conclusion in *Schiff*, affirming restrictions on the sale of a book that combined a product pitch with non-commercial information concerning taxes. This Court held that the book was not protected, in its entirety, because it was "an integral part of Schiff's whole program to market his various products." 379 F.3d at 627-29.

Appellants also claim that their marketed product is "education," not a proprietary trading strategy. Br. 34. The record shows otherwise. *See supra* at 5-18. OTA's income comes principally from training people to use their proprietary "strategy" of trading—and especially from the $50,000 "Mastermind" program with its "Daily Grid" of potential trades. *Id.* Their advertisements do not tout education in trading generally, but that their own patented method of trading will yield substantial earnings. *Id.* Their preview events are free, and their Orientation events sometimes are free as well. *Id.* Everything about OTA's conduct

shows it to be an ordinary commercial transaction, but one replete with upsells and deceptive claims.

2. *Appellants' Enjoined Activities Are Not Inextricably Intertwined with Protected Speech*

When commercial speech is "inextricably intertwined" with fully protected speech, it may be entitled to full First Amendment protection. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). *Riley*, however, "took care to leave a corridor open for fraud actions to guard the public against false or misleading … solicitations." *Illinois ex rel Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 617 (2003). This Court has emphasized that the *Riley* test "operates as a narrow exception" to standard commercial speech analysis and is "intended to be applied *only* when a 'law of man or of nature makes it *impossible*' to separate commercial and noncommercial aspects of speech." *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 958, 961 (9th Cir. 2012) (quoting *Fox*, 492 U.S. at 474).

Appellants claim that their commercial speech is inextricably intertwined with fully protected non-commercial speech because they "teach financial and economic concepts relevant to trading" at their preview and Orientation events. *See* Br. 32-34. Not so. Speech is

inextricably intertwined only when it is *incapable of separation*. As the Supreme Court observed in *Fox* about teaching home economics at Tupperware parties, there is nothing inherently inseparable about conveying general educational information and pushing the purchase of a particular product. 492 U.S. at 474. Similarly, in *Schiff*, this Court held that expressive and political portions of a book were separable from its commercial elements because "Schiff can relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products." 379 F.3d at 629.

So too here. Appellants have not articulated a single reason why teaching customers about trading in financial assets (appellants' purported expressive speech) cannot be readily separated from the deceptive claims they make to entice consumers to purchase their proprietary trading strategy. They assert, without elaboration, that "the injunction controls what OTA can teach," and that "Section I broadly regulates 'Business Activities,' not just promotions." Br. 36. But basic common sense dictates that learning about financial trading—concepts like supply and demand; return on investment; stocks versus bonds versus mutual funds; futures markets; etc.—has nothing whatsoever to

do with how much the consumer can expect to earn from using a particular trading strategy, or how much time, effort or capital he or she would need to make substantial earnings, or whether the instructors themselves have used a particular strategy to achieve substantial wealth. *See Order* at 7-8 [ER0013-0014].

Moreover, even such claims are covered by the injunction *only if* they are misleading, or if appellants make them without having a reasonable basis in fact to substantiate them. *Id*. Therefore, appellants' complaints about restrictions on the use of "hypothetical trades" or "market data and charts" to explain financial markets and to demonstrate strategies, *see* Br. 36-38, are just a red herring. Appellants are free to use any method of instruction in their training—so long as the marketing claims they make are non-misleading and substantiated.

C. The Asset Freeze and Monitor Are Consistent with the First Amendment

Appellants also challenge the asset freeze and court-appointed monitor as unconstitutional on the ground that their use of the money is necessary to fund their ongoing speech activity.

The freeze and monitor requirements are assessed under the three-prong *Central Hudson* test for the constitutionality of restrictions

on non-misleading commercial speech: whether (1) "the asserted governmental interest is substantial"; (2) "the regulation directly advances the governmental interest asserted"; and (3) "it is not more extensive than is necessary to serve that interest." 447 U.S. at 566. Both the freeze and the monitor provisions easily meet those criteria.

The asset freeze. The asset freeze doubtless serves a substantial government interest. The court froze appellants' assets, with numerous exceptions, "to maintain the possibility of consumer redress." Op. 15 [ER0048]; *see Order* §§VI-IX [ER0017-0023]. When it comes to the preservation of assets, even when they were generated by protected speech, the government "has a compelling interest in ensuring that victims of [wrongdoing] are compensated by those who harm them," which includes "preventing wrongdoers from dissipating their assets before victims can recover." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). *See, e.g.*, *United States v. First Nat'l City Bank*, 379 U.S. 378, 385 (1965); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (*en banc*); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111-12 (9th Cir. 1982).

Second, the freeze directly advances this interest by preventing the dissipation of assets pending final adjudication of the FTC's claims. *See Order*, at 11-13 [ER0017-0019].

Third, the order is narrowly tailored to serve that interest. Tailoring need not be "perfect," but only "reasonable." *Fox*, 492 U.S. at 480. The freeze is designed carefully to enable appellants to continue operating their business, consistent with the law. *See Order*, at 13-14 [ER0019-0020]. Indeed, the district court has exhibited substantial flexibility in modifying its freeze terms when necessary to maintain the economic viability of appellants' business. *See, e.g.*, DE.64 (modifying initial TRO to allow payment of employees' "usual current salaries" up to $5,000 per month); *Order*, at 14 [ER0020] (doubling salary monthly limit to $10,000).

Appellants' position boils down to the claim that assets may never be frozen if they are the product of speech, commercial or otherwise, which automatically elevates the interests of perpetrators over victims of deceptive commercial practices.

Appellants' cases, *see* Br. 44-46, do not support that untenable proposition. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 50-52

(1989), involved the pre-trial seizure of allegedly obscene books and videos, not an asset freeze to preserve consumer redress. Moreover, the case involved not commercial speech but speech the Court presumed was fully protected. *Fort Wayne* did not address the *Central Hudson* factors and does not remotely cast doubt on the asset freeze here.

Simon & Schuster similarly concerned a restriction on fully protected, noncommercial speech. New York's "Son of Sam" law "require[d] that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account … made available to the victims of the crime." 502 U.S. at 108. The Court invalidated the law as impermissibly content-based. *Id.* at 115-18. Like in *Fort Wayne Books*, the speech was expressive and noncommercial, and the Court did not apply the *Central Hudson* factors or address commercial speech considerations.[12]

---

[12] Appellants' strawman argument that *Simon & Schuster* cannot be distinguished on the ground that the law there was content-based, Br. 46 n.35, is beside the point. The relevant distinction is that it involved expressive, noncommercial speech. Appellants do not—and cannot—deny that. Likewise, *Am. Library Ass'n v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989), *rev'd sub nom. Am. Library Ass'n v. Barr*, 956 F.2d 1178 (D.C. Cir. 1992), *see* Br. 45 n.34, concerned noncommercial speech.

The monitor. Appellants complain about the compliance monitor but they fail to articulate the exact nature of their objection. *See* Br. 13, 17, 24, 36, 57. Under his terms of appointment, the monitor reviews appellants' practices to ensure that they are consistent with the district court's order, and reports purported violations to the court. *See Order*, at 18-22 [ER0024-0028]. His focus is on appellants' sales and marketing materials, not their instructional activities. *Id.* at 18-19 [ER0024-0025]. The monitor thus firmly satisfies the *Central Hudson* factors because his role is directly related and reasonably tailored to advance the substantial government interest in keeping appellants' advertising honest and consistent with the court's restrictions. It is hard to see—and appellants suggest nothing—how this role could violate appellants' First Amendment rights.[13]

---

[13] The FTC initially asked the court to appoint a temporary receiver for appellants' corporate entities. (DE.12). The court decided instead to appoint a compliance monitor—leaving appellants in control of running their business—but it ordered appellants to submit a business plan showing how they can in fact operate lawfully and profitably. After reviewing their plan, the court concluded that it "no longer believe[d] that the business can be run in an economically viable manner consistent with the law." (DE.215). It thus ordered appellants to show cause why a receivership should not be imposed to preserve the assets of the corporate entities. *Id.*

II. THE DISTRICT COURT PROPERLY ORDERED A PRELIMINARY INJUNCTION

Appellants claim that the district court misapplied the standard for issuance of a preliminary injunction (Br. 21-24) and failed to make adequate findings based on the record to support its injunction order (Br. 14-21, 24-31). Neither claim has merit.

A. The FTC Need Not Show Irreparable Injury When Enforcing Consumer Protection Laws

Appellants claim that the district court could not properly enter a preliminary injunction without finding irreparable injury, which they claim it did not. Br. 21. As this Court recognized just last year, the "irreparable injury" showing is not required in a case "involving statutory enforcement, where the applicable statute authorizes injunctive relief." *FTC v. Consumer Defense, LLC*, 926 F.3d 1208, 1214 (9th Cir. 2019); *see* Op. 7 [ER0040]. Appellants contend that that "is the wrong standard for granting preliminary injunctive relief where First Amendment rights are abridged," Br. 22, but they provide nothing that supports that position where commercial speech is at issue.

Their principal case, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), provides no help. It involved a permanent injunction against anti-abortion protests—politically expressive speech plainly

entitled to the highest level of First Amendment protection. *Id.* at 758. The case sheds no light on injunctions involving commercial speech in the consumer protection enforcement context, and does not stand for the idea that irreparable injury is required whenever any First Amendment interests are involved.[14]

Likewise, *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931), concerned a permanent injunction on the publication of a newspaper—indisputably expressive speech—for publishing articles disparaging public officers' handling of crimes. *Id.* at 704-705. The Court struck down the law authorizing the injunction as constituting censorship of the press. The case had nothing to do with the issuance of a preliminary injunction affecting commercial speech.

Equally inapposite are two cases from this Circuit involving preliminary injunctions. Both *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950 (9th Cir. 2010), and *Overstreet v. United Broth. of Carpenters*

---

[14] Indeed, the language that appellants cite from that decision is quoted entirely out of context. *See* Br. 22. The Court in fact noted that there are obvious differences between an injunction and "a generally applicable ordinance" that would require "a somewhat more stringent application of general First Amendment principles" *to the ordinance*. *Madsen*, 512 U.S. at 764-65.

and Joiners of Am., Local Union No. 1506, 409 F.3d 1199 (9th Cir. 2005), involved expressive speech. *McDermott* concerned the editorial control of a newspaper, and *Overstreet* concerned union members' display of banners on public property. In *Overstreet*, the injunction was denied for failure to show a likelihood of success and the Court did not address irreparable injury. 409 F.3d at 1208-19.

Furthermore, those cases show the effect of the Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), on preliminary injunctions in aid of administrative hearings under the National Labor Relations Act. That issue has no relevance here in light of this Court's decision in *Consumer Defense*, which held that *Winter* did not alter the standard for preliminary injunctions under the FTC Act. 926 F.3d at 1213-14. To the extent that this Court discussed an "elevated standard" in cases affecting noncommercial speech, *see McDermott*, 593 F.3d at 958, it is of no moment in this case, which involves both a different statutory framework and unprotected deceptive commercial speech.[15]

---

[15] *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir. 2002), like appellants' other cases, concerned highly protected

At any rate, even if irreparable injury were required, it exists here. The district court found that without the preliminary injunction, "immediate and irreparable harm will result from [appellants'] ongoing violations of the FTC Act and the CRFA." *Order* at 4 [ER0010]. It also found that, absent an asset freeze, "immediate and irreparable damage to the Court's ability to grant effective final relief for consumers … will occur." *Id.*

Finally, appellants may also be claiming that a higher standard applies to preliminary injunctions involving speech because at the preliminary stage the speech has not been classified as commercial or noncommercial. That argument lacks traction in light of the district court's actual ruling: "The Court finds that the Preview Events and MTOs are sales events, and therefore commercial speech." Op. 9 [ER0042].

B. The District Court Made Adequate Findings, Anchored in Ample Record Evidence, to Support Its Preliminary Injunction

Appellants assert that the district court "ignored or misconstrued the evidence," Br. 17; denied them an evidentiary hearing, Br. 28; and

---

expressive speech (the denial of entry to government property to persons wearing symbols of motorcycle organizations).

issued an injunction that "applies—based on one-sided, preliminary showing—to speech not yet adjudged to be deceptive." Br. 24.

These assertions are contrary to the record. As detailed above (at 5-23), the FTC proffered extensive evidence regarding the false, misleading, or unsubstantiated claims in appellants' advertising and marketing presentations, and the district court found the presentations "are sales events, and therefore commercial speech." Op. 9 [ER0042]. The evidence included appellants' own internal documents, including their customer surveys, marketing materials, and sales manual; transcripts of their ads and sales events; sworn declarations of their customers and former employees; trading records of their "instructors"; customer trading data from their preferred platforms; an expert analysis of their trading "strategy" and "Daily Grid" of proposed trades; and the report of scores of complaints from the FTC's consumer reporting database. The district court rightly found that the FTC has "sufficiently demonstrated" that appellants "have made false or unsubstantiated representations." Order at 2-3 [ER008-009].

Contrary to appellants' assertion, the court fully considered the evidence they proffered, but found that it simply "d[id] not negate the

force of the FTC's showing." Op. 10 [ER0043]. Appellants also had the opportunity to argue their position—before, during, and after the PI hearing. *See, e.g.*, DE.37, DE.67, DE.96, DE.121. Their complaint about their lack of opportunity to cross-examine witnesses, *see* Br. 15 n.10, is especially odd. As the court pointed out during that hearing, although the court was receptive to such a request, appellants never asked for discovery (including deposition of the FTC's declarants). Tr. 14 [ER00269]. Likewise, their claim that the court assumed that the FTC "need only allege OTA made unsubstantiated marketing claim" to support the injunction, Br. 26, is patently wrong. The injunction was anchored in extensive, "persuasive" evidence, not mere allegations. Op. 10 [ER0043].

Appellants demand that the court make *final* determination of the facts before issuing preliminary relief. *See* Br. 25-27. But that is not the law. As discussed in Section II.A., above, the standard for a preliminary injunction calls for, not final findings, but a showing of "likelihood" of eventual success. Appellants' position would eviscerate that standard—turning every request for preliminary relief into one for a permanent injunction. Not surprisingly, none of the cases they cite supports that

position. They quote, for example, general or out-of-context statements from *Overstreet* about issuing a preliminary injunction against allegedly false speech (Br. 25-26), but as we showed above, that case is entirely different because it dealt with expressive political speech.

Likewise, *Fort Wayne Books, supra*, and *Adult Video Ass'n v. Barr*, 960 F.2d 781 (9th Cir. 1992), *aff'd following remand sub nom. Adult Video Ass'n v. Reno*, 41 F.3d 503 (9th Cir. 1994), stand only for the proposition that pretrial seizure of material that, although only allegedly obscene, is undoubtedly expressive and thus protected speech, is not permitted under the First Amendment. Those cases have nothing to say about a preliminary injunction against deceptive or unsubstantiated commercial speech.

III. THE DISTRICT COURT PROPERLY FROZE APPELLANTS' ASSETS TO PRESERVE THE POSSIBILITY OF CONSUMER REDRESS

The district court found that "an asset freeze is necessary to maintain the possibility of consumer redress." Op. 15 [ER0048]. Appellants attack the FTC's authority to seek, and the court's authority to grant, such relief under the FTC Act. Br. 39-43. This Court has repeatedly upheld such authority, and appellants' contention is therefore doomed to failure.

A. This Court Has Repeatedly Upheld the Courts' Authority to Award Restitution and Freeze Assets Under the FTC Act

Appellants acknowledge—as they must—that the FTC's authority to obtain restitution and a preliminary asset freeze under Section 13(b) of the FTC Act "has previously been affirmed in this Circuit in a line of authority dating to *H.N. Singer*." Br. 39. Because a panel of this Court is not free to overrule circuit precedent (and the Court recently turned away an invitation to revisit this question *en banc*), their argument fails and the Court need not proceed any further.

Appellants nonetheless argue that because another court of appeals has recently decided to overrule its similar settled precedent and deny the FTC such authority, *see FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019), *pet. for cert. filed*, No. 19-825 (Dec. 19, 2019) (hereinafter, *CBC*), this Court should follow suit. Br. 39. Even if the panel could reverse settled precedent, the Seventh Circuit decision provides no cause to do so.

In *FTC v. AMG Capital Mgmt., LLC*, this Court recognized yet again that "[w]e have repeatedly held that § 13 'empowers district courts to grant any ancillary relief necessary to accomplish complete

justice, including restitution'." 910 F.3d 417, 426 (9th Cir. 2018), *pet. for cert. filed*, No. 19-508 (Oct. 18, 2019) (quoting *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); citing *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994)). Two judges on the *AMG* panel wrote separately, however, to suggest that this Court rehear the case *en banc* to revisit its precedent on this issue. *See AMG*, 910 F.3d at 429-437 (O'Scannlain & Bea, JJ., specially concurring). The *AMG* concurrence made many of the same arguments that the Seventh Circuit adopted in *CBC* a few months later. *See id.*; 937 F.3d at 771-775. Yet when AMG petitioned for rehearing *en banc*, the Court denied the petition without a single judge requesting a vote. Order, *FTC v. AMG Capital Mgmt., LLC*, No. 16-17197 (9th Cir. June 20, 2019).

This Court's precedent was correctly decided. The Court explained long ago that, because "[t]he power to enjoin is part of what used to be the jurisdiction of equity," the FTC Act's grant of authority for an "injunction," *see* 15 U.S.C. § 53(b), summons "all the inherent equitable powers of the District Court" to fashion complete relief, including restitution and an asset freeze. *H.N. Singer*, 668 F.2d at 1112. Especially in law enforcement actions where "the public interest is

involved," "those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); and citing *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960)).

Appellants contend that the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), supersedes *Porter* and *Mitchell* and upends this Court's precedent. Br. 41-42. That is wrong for several reasons. *Meghrig* involved a landowner's private lawsuit to recover from a prior owner the cost of environmental cleanup under a statute that permits a "citizen suit" if contamination presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). In such cases, the Resource Conservation and Recovery Act (RCRA) authorizes courts to "restrain" persons who contributed to the pollution and to order them to "take such other action as may be necessary." *Meghrig*, 516 U.S. at 484 (quoting 42 U.S.C. § 6972(a)). When that case was filed, however, the landowner had already cleaned up the land, and the danger of environmental contamination was no longer present. The Court held that, on those

facts, the statute "does not contemplate the award of past cleanup costs" and "quite clearly excludes waste that no longer presents such a danger." *Id.* at 485-486, 488.

Meghrig does not undermine *H.N. Singer*, its progeny, or the Supreme Court cases on which it relied (*Porter* and *Mitchell*). First, unlike statutes that authorize injunctions without qualification (like the one here, and those in *Porter* and *Mitchell*), RCRA limits a court's remedial authority to cases of imminent and substantial danger. The lawsuit in *Meghrig* failed that statutory criterion because the land had already been decontaminated. *Id.* at 486. Indeed, *Meghrig* expressly declined to rule that an injunctive relief order under RCRA could never require monetary remedies. *See id.* at 488 (reserving question of similar lawsuit for *future* costs).

Also significantly, *Meghrig* involved a private lawsuit, not (as in *Porter* and *Mitchell*, and here) a government enforcement action. As the Third Circuit noted in rejecting the claim that *Meghrig* limits remedies in government enforcement cases, the money sought there "resembles traditional damages far more than * * * restitution." *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 231 (3d Cir. 2005). That court also

noted that RCRA's citizen-suit injunctive provision is integrally tied to "the extensive remedial scheme" that might have been disrupted by allowing monetary relief for already-remediated land. *Id.* at 231-232. That was not the case in *Porter* or *Mitchell* (nor here, *see infra* Section III.B.).

Finally, nothing in *Meghrig* purports to undermine the traditional principles of equitable remedies articulated in *Porter*. Although the Court did not accept an argument that relied partly on *Porter*, it did not suggest in so doing that it was overruling or limiting the earlier decision. *See Meghrig*, 516 U.S. at 487. Indeed, since *Meghrig*, the Court has invoked *Porter* without qualification multiple times. In particular, in *Kansas v. Nebraska*, 574 U.S. 445 (2015), the Court relied on *Porter* in support of its authority to impose a monetary remedy under its equitable authority to apportion interstate water rights. *Id.* at 455-56, 463. The Court indeed endorsed *Porter*'s teaching that "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *Id.* at 456 (quoting *Porter*, 328 U.S. at 398); see also *United States v. Oakland Cannabis*

Buyers' Co-Op., 532 U.S. 483, 496-497 (2001); *Miller v. French*, 530 U.S. 327, 340 (2000).

In light of these factors, other courts of appeals have correctly held that "*Meghrig* did not overrule or limit *Porter* and *Mitchell*." *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1057 n.3 (10th Cir. 2006); *accord Lane Labs*, 427 F.3d at 232.

Appellants next argue (Br. 42) that Section 19 of the FTC Act precludes an asset freeze under Section 13(b). Section 19, in pertinent part, allows the FTC to recover "such relief as the court finds necessary to redress injury to consumers," including "the refund of money or return of property" and "the payment of damages." 15 U.S.C. § 57b(b). Appellants' claim is that Congress specified monetary relief in Section 19, so it necessarily excluded such relief under Section 13(b), which does not mention such relief. Br. 43. And they contend that the Supreme Court accepted a similar argument in *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020).

That is incorrect. To begin with, the claim is flatly precluded as a textual matter. Section 19 cannot preclude any relief under Section 13(b) because it states expressly that "[r]emedies provided in this

section are in addition to, and not in lieu of, any other remedy or right of action provided by state or federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e). Relying on that clause, courts (including this one) have routinely held that Section 19 does not affect remedies under Section 13(b). *See, e.g.*, *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 599 (9th Cir. 2016); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366-67 (2nd Cir. 2011); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991).

Nothing in *Romag* remotely undermines the plain statutory text of Section 19. There, the Court determined that the Lanham Act did not require a trademark infringer to have acted willfully before it could be liable for lost profits. 140 S. Ct. at 1494-95. The Court reached that determination in part by comparing the lost-profits provision, which did not contain a willfulness requirement, with other remedial provisions that did contain one. *Id.*[16] But the Lanham Act does not contain a

[16] The Court also noted that trademark law did not "historically require[] a showing of willfulness." 140 S. Ct. at 1496.

savings clause comparable to Section 19(e), so the Court's reading of the Lanham Act sheds no light on interpreting the FTC Act.

Appellants are wrong that reading Section 13(b) to authorize monetary remedies renders superfluous the procedural requirements for monetary relief under Section 19. In fact, the two provisions operate in harmony to support the FTC's prosecutorial prerogative to choose the enforcement route best suited to a particular case. When the FTC opts to bring a case under Section 13(b) to halt illegal practices and recover money, it cedes to the court the determination whether there has been a violation. By contrast, if it chooses to proceed under Section 19, the FTC retains plenary authority to determine that particular conduct is illegal (through its administrative adjudication or rulemaking authority)—but it does so in exchange for having to satisfy the procedural criteria of Section 19 before seeking judicial redress.

B. Appellants' Remaining Arguments Are Without Merit

Appellants raise a series of passing arguments, all of which lack merit. *See* Br. 46-50.

First, appellants argue that the asset freeze "violates the First Amendment rule against imposing financial penalties before the

government proves speech is unprotected." Br. 47. The argument is doubly specious. First, the order imposes no penalty but only *preserves* assets for consumer redress. And, as we demonstrated above (Section I.B.), the asset freeze is tailored so that it does not affect any protected speech.

Second, appellants argue that the district court improperly estimated potential monetary relief by wrongly assuming that every consumer relied on their marketing claims—and thus that "every dollar [appellants] collected was tainted"—before those claims were finally adjudicated to be deceptive. Br. 48-49; *see Commerce Planet*, 815 F.3d at 603-04 (outlining framework for calculating restitution under the FTC Act). They claim that the court wrongly ignored the "students who confirmed they suffered no harm." Br. 49. But even if appellants can ultimately reduce the final judgment by showing that some customers were not misled, the amount of frozen assets is nowhere near a potential judgment. The record shows that consumer harm could be as high as $362 million while the corporate appellants "claimed to have less than $2 million in cash available at the time of the [asset freeze]." Op. 15 [ER0048].

Lastly, the individual appellants' assertion that they cannot properly be held liable for corporate deception, *see* Br. 49-50, is contrary to the record. The court, citing the *uncontested* record evidence, found expressly that the FTC "has met its burden of proving" that those appellants "had knowledge of or at least were recklessly indifferent as to wrongdoing." Op. 13 [ER0046]. Appellants' assertions that "the FTC did not make even a *prima facie* showing of such intent" and that the court "utterly ignored this failing," Br. 50, are plainly false.

IV. THE INJUNCTIVE TERMS OF THE PRELIMINARY INJUNCTION ARE CLEAR AND SUFFICIENTLY PRECISE TO PERMIT COMPLIANCE

Finally, appellants take issue with the scope of the district court's preliminary injunction. Br. 50-57. They claim that the injunctive terms in Section I.A. are vague and overbroad; specifically, that while Section I.A. is purportedly limited to advertising and marketing claims, the court "treated *everything* said in OTA's Preview and [Orientation] courses as commercial speech." Br. 53.

Appellants are mistaken. The district court correctly found that the preview and Orientation events should be analyzed, *as a whole*, as commercial speech. *See supra* Section I.B.1. But it did not rule that "*everything* said" in those events is "advertising, marketing, promoting,

or offering for sale." Br. 53. The injunctive terms in Section I.A. relate to the particular types of sales and marketing claims that the FTC has sufficiently proven to be false, deceptive, or unsubstantiated—and which are readily extricable from any purported instruction, including the use of hypotheticals. *See supra* Section I.B.2. As shown above, appellants are free to continue their training, including using market- or hypothetical trades, as long as, in so doing, they are not conveying to consumers any misleading or unsubstantiated claims.

The cases on which appellants rely, *see* Br. 54, do not help them. *Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 239 F.3d 172 (2d Cir. 2001), vacated a ban on a union's "fraudulent or defamatory representations" including chants of "No More Lies" and "Shame on You." *Id.* at 176-77. *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016), concerned canons of judicial conduct that prohibited state judges from campaigning as members of a political party. Both cases involved highly protected political speech. As a result, the risk of chilling such speech by using vague injunctive terms was impermissibly high. That is not the case here where the injunction applies only to claims that are undoubtedly

commercial and that were sufficiently proven to be misleading or unsubstantiated.

Backpage.com, LLC v. McKenna, 881 F.Supp.2d 1262 (W.D. Wash. 2012), concerned a challenge to a statute that criminalized the advertising of commercial sexual abuse of children. The court found that certain terms in the statute, including its *mens rea* standard, were vague given that the statute "is both a content-based regulation of speech and a criminal statute." *Id.* at 1279. Those factors merited the heightened caution in that case, but are absent here. The order below does not enjoin conduct across society, under various circumstances, at the risk of criminal penalties. It enjoins particular parties' business practices that already have been shown to be deceptive.

Finally, appellants claim that Section I.D. of the order is a vague "obey the law" injunction. Br. 56. That is demonstrably false. That provision bars misrepresentations of facts material to the purchase of appellants' services, including "the total cost; any refund policy; any material restriction, limitation, or condition; [etc.]." ER0014. It provides "flexibility and reasonable breadth, rather than meticulous specificity," which is consistent with the law. *Grayned v. City of Rockford*, 408 U.S.

104, 110 (1972). But it is hardly a mere restatement of the statutory standard of "deceptive acts or practices." 15 U.S.C. § 45(a)(1). It affords a fair notice of what conduct would violate the injunction. No more is required. *See Grayned*, 408 U.S. at 110 ("Condemned to the use of words, we can never expect mathematical certainty from our language.").

CONCLUSION

For the foregoing reasons, the court's preliminary injunction order should be upheld.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, no other cases in this Court are deemed related to this appeal.

Respectfully submitted,

Of Counsel:

ANDREW SMITH
Director

THOMAS M. BIESTY
RHONDA PERKINS
ANDREW HUDSON
ROBERTO ANGUIZOLA
Attorneys

Bureau of Consumer Protection

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

/s/ Imad Abyad
IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-3579
iabyad@ftc.gov

May 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-55356

I am the attorney or self-represented party.

This brief contains 13,270 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[**X**] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Imad Abyad **Date** 05/29/2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s) 20-55356

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:
[ ] I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:
[ ] I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) *(required for all documents)***:**

Answering Brief for the Federal Trade Commission

Signature /s/ Imad Abyad **Date** 05/29/2020
(use "s/[typed name]" *to sign electronically-filed documents)*