No. 19-11932-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

SIMPLE HEALTH PLANS, LLC, *et al.*,
Defendants,

STEVEN J. DORFMAN,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida
0:18-cv-62593-DPG (Hon. Darrin P. Gayles)

BRIEF OF THE FEDERAL TRADE COMMISSION

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

STATEMENT REGARDING ORAL ARGUMENT

Appellant seeks reversal on a single ground that contravenes thirty-five years of binding circuit precedent. Accordingly, the FTC does not believe that oral argument will materially assist the Court in its consideration of this appeal and does not request it.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345. The district court entered its preliminary injunction on May 14, 2019, and Dorfman timely filed his notice of appeal that same day. This Court has jurisdiction under 28 U.S.C. § 1292(a).

QUESTIONS PRESENTED

Appellant, Steven J. Dorfman, defrauded tens of thousands of Americans of more than $180 million by selling them worthless indemnity plans marketed as comprehensive health insurance. The district court preliminarily enjoined him and his companies from continuing their scam and froze their assets to ensure that funds are available for victim redress.

Dorfman does not appeal the district court's preliminary findings that he violated the Federal Trade Commission Act and the Telemarketing Sales Rule or its preliminary order to cease those practices. His only claim is that the asset freeze should be reversed because the FTC cannot obtain monetary relief for consumers. The single question presented is whether Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the district court to award monetary relief and thus to freeze assets to preserve them for such relief.

STATEMENT OF THE CASE

A. Dorfman's Health Insurance Scam

Dorfman has not challenged any of the district court's preliminary findings of fact. The court determined that Dorfman was the "mastermind" of a "classic bait and switch scheme" to deceive people into believing they were enrolling in comprehensive health insurance while actually providing them with "practically worthless" plans that did not cover their medical bills. D.E.139 (Preliminary Injunction) at 1, 9, 21.[1] Dorfman and a network of companies he owned and controlled paid Google to steer consumers to his websites when they searched for popular terms like "Obama Care." *Id.* at 4-5, 21. Dorfman's sites, operating under such domain names as "obamacarequotes.org" and "healthinsurance2017deadline.com," falsely suggested they were selling plans that complied with the Affordable Care Act (ACA) and were affiliated with the AARP and the Blue Cross Blue Shield Association. *Id.* at 5-6. The websites proclaimed that these plans would "include low co-pays, coverage for hospitalization, and emergency room visits" and portrayed Dorfman's companies as experts in government-sponsored insurance who had helped sign "hundreds of thousands of consumers" up for Obamacare. *Id.* at 6.

[1] Because the Appendix is not consecutively paginated, we cite the underlying district court record instead.

Consumers who expressed interest were called by a telemarketer who read from scripts that Dorfman had personally approved. *Id.* These scripts were designed to give consumers the impression that Dorfman's coverage was "equal to, if not better than, major medical insurance." *Id.* at 7. A telemarketer following the scripts would congratulate the consumer on being approved for a "health insurance plan" and represent that the plan would be "similar" to plans received through an employer. *Id.* In particular, consumers were told that the policy included "a prescription drug plan," "doctor office visits," "diagnostic testing," "hospital coverage," and "medical" and "surgical" care that "can be used at virtually ANY inpatient or outpatient facility in the NATION." *Id.* at 7-8.

After consumers paid an enrollment fee and the first monthly premium, Dorfman's telemarketers would read them a "Post Close Script." *Id.* at 8. That script explained that the customer would be transferred to a corporate verification department, and that some of the information conveyed by that department (*i.e.*, the actual terms of the deal) "will not apply to you." *Id.* At that point, Dorfman's representatives revealed for the first time that the consumers had actually purchased limited benefit plans that were not compliant with the ACA. *Id.* Although those disclosures were recorded, Dorfman's employees would turn off the recording when responding to consumers' questions. *Id.* Dorfman's "verification rebuttal" script directed his staff that if the call was no longer being

recorded, they should stress that "[t]his is health insurance." *Id.* But if the call was still being recorded, the script told them to say the opposite. *Id.*

When Dorfman's customers complained about their lack of coverage, they were "often subjected to additional misrepresentations and delay tactics." *Id.* Consumers were shuffled between various customer service agents, resulting in continued "inadequate coverage, no refund, and lots of frustration." *Id.* at 9.

Dorfman's scheme shattered the lives of many victims. For example, Douglas Meeker was told that his vascular surgeon was "in-network," that his co-pays would not exceed $50, and that his out-of-pocket expenses would be capped at $2,000. *Id.* at 10. None of this was true. Without Mr. Meeker's knowledge, Dorfman's representatives actually enrolled him in "a limited benefit plan with little coverage," after which he had a heart attack and was diagnosed with lymphoma. *Id.* He died in 2017 leaving his family stuck with nearly $300,000 in medical bills, almost none of which were covered by Dorfman's plan. *Id.*

Similarly, Chris Mitchell believed he had purchased an excellent "PPO plan" from an "A-rated carrier" that complied with the ACA. *Id.* at 9. He was told that he would have to pay no more than $10 for doctor's visits and that the plan would also cover diagnostic testing, bloodwork, surgeries, and hospital visits. *Id.* at 9-10. Days before Mr. Mitchell went in for life-saving cancer surgery, however, he

"learned that his plan did not cover surgeries" and was forced to pay out of pocket. *Id.* at 10.

Dorfman's scheme was as lucrative for him as it was devastating for his victims. Between 2014 and 2018, his companies reaped approximately $180 million in commissions reflecting a cut of the monthly "premiums" his customers paid for their worthless plans. *Id.* at 11.

B. The FTC's Complaint and Request for TRO

In October 2018, the FTC sued Dorfman and his businesses, alleging that they had violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices, and Section 310.3 of the FTC's Telemarketing Sales Rule, 16 C.F.R. § 310.3, which prohibits deceptive telemarketing practices. D.E.1.

Upon filing its complaint, the FTC moved *ex parte* for a temporary restraining order and an asset freeze, a temporary receivership, and an order to show cause why a preliminary injunction should not issue. D.E.3. The FTC submitted evidence showing that Dorfman was spending millions of swindled dollars on jewelry, luxury cars, gambling sprees ($368,000 at a single casino), nightclub trips ($57,000 from one night's outing alone), an oceanfront condominium, and a lavish wedding on which he spent $133,000 just for flowers. D.E.12 at 7, 37; D.E.12-1 at 21-22; D.E.12-7 at 84-90, 130-35. On October 31,

2018, the district court issued the TRO, granted the requested asset freeze and receivership, and set a hearing on the FTC's motion for a preliminary injunction. D.E.15.[2]

C. The Preliminary Injunction

After an evidentiary hearing, the district court issued a 46-page ruling granting the preliminary injunction on May 14, 2019. The court found that a "preliminary injunction is necessary to protect consumers, prevent future violations of the law, protect assets, and to preserve the status quo pending the resolution of this litigation." D.E.139 at 2.

The court held the FTC was likely to succeed on the merits by proving that Dorfman and his companies violated the FTC Act and the TSR. Dorfman's representations were "likely to mislead consumers acting reasonably under the circumstances because they provide the net impression that Defendants will provide the promised services and results—namely comprehensive health insurance and/or ACA-qualified plans." *Id.* at 17, 20. The defendants had also falsely held themselves out as "experts on, or providers of," Medicare and ACA health insurance policies who were affiliated with the AARP and Blue Cross. *Id.*

[2] Dorfman attempted to appeal the TRO, but this Court dismissed the appeal for lack of jurisdiction. Order of Dismissal, *FTC v. Dorfman*, No. 19-10840 (11th Cir. Apr. 16, 2019).

at 17. All of these representations were "material" to consumers' purchasing decisions. *Id.*

The court also found that the FTC was "likely to succeed in proving that Dorfman is individually liable" for the violations. *Id.* at 21. Dorfman not only controlled each of the corporate defendants, but "wrote, reviewed, and approved the deceptive sales scripts, [and] trained employees on how to use them." *Id.*

The court preliminarily ordered Dorfman and his companies to cease the deceptive practices, finding that they would otherwise "continue misleading other consumers acting reasonably under the circumstances." *Id.* at 19. The court accepted the receiver's determination that Dorfman's businesses were "largely based on deceiving consumers" and therefore were likely incapable of being turned into profitable, law-abiding enterprises. *Id.* at 22. The court thus rejected Dorfman's request to dissolve the receivership, concluding that the receiver was needed to "preserve assets and maintain the status quo," as well as to "determine the full extent of Defendants' deceptive practices, identify the victims of

Defendants' scheme, and prevent further fraudulent practices during the pendency of the preliminary injunction." *Id.* at 24.[3]

To ensure the availability of funds for monetary relief upon a final judgment, the court froze Dorfman's personal and corporate assets. *Id.* at 22-24, 26-27. It explained that the receiver had located only a small fraction of the $180 million in ill-gotten commissions. *Id.* at 22-23. As of the date of the injunction, the receiver had secured control of $3.2 million in corporate funds, 13 pieces of jewelry, a Land Rover, a Lamborghini, and a Rolls-Royce. *Id.* at 11. And the court was concerned about hiding of assets, given that "Defendants maintain bank accounts in Panama and the Dominican Republic to which they could transfer funds in the absence of an asset freeze." *Id.* at 23.

Finally, the court rejected Dorfman's argument that the FTC lacks statutory authority to obtain asset freezes. The court cited "long-standing Eleventh Circuit precedent [holding] that the FTC may seek disgorgement and restitution," along with pre-trial asset freezes supporting those remedies. *See id.* at 13-15.

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[3] Dorfman attacks the receiver for failing to "raise[] … factual or legal defenses to the FTC Action" on the corporate defendants' behalf. Br. 5. That is because the receiver determined that Dorfman's businesses were permeated with fraud and could not be run lawfully, a finding that Dorfman does not contest on appeal. Dorfman's counsel was free to enter an appearance for the corporate defendants and raise objections on their behalf, but he chose not to do so. *See* D.E.87 (2/22/19 Hearing Tr.) at 22:18-22:25 (FTC counsel disclaimed any "inten[t] to stand in the way of Mr. O'Quinn representing the corporate defendants").

D. Dorfman's Appeal

Dorfman challenges none of the district court's preliminary factual findings or behavioral injunctive restrictions. The sole issue presented on appeal is whether the district court properly froze Dorfman's assets pending the outcome of the case. That question turns entirely on whether the court will have authority to direct monetary relief at the close of the case.

STANDARD OF REVIEW

The legal question whether the FTC Act authorizes an award of monetary relief is reviewed de novo. *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1232 (11th Cir. 2014).

SUMMARY OF ARGUMENT

This Court ruled 35 years ago that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), allows a district court to award monetary equitable relief and to freeze assets to preserve that relief. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984). It has reiterated that holding many times since. *See*, *e.g.*, *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996); *IAB*, 746 F.3d at 1234. Those decisions are the binding law of this Circuit and conclusively determine the outcome of this case.

1. The Court may summarily affirm without further analysis because it has already considered and rejected each of Dorfman's claims. At least six published decisions hold that Section 13(b)'s unqualified grant of statutory power

to issue a "permanent injunction" carries with it the authority to grant monetary relief. The Court has also held that Section 19 of the FTC Act, 15 U.S.C. § 57b, is not a "clear … legislative command" that precludes district courts from exercising "their full range of equitable powers under section 13(b)." *Gem Merch.*, 87 F.3d at 469-70. And the Court has refused to limit monetary relief to assets specifically traceable to the wrongdoing. *FTC v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013).

Those decisions are binding. A panel of this Court may not disregard or overrule circuit precedent even if the panel thinks it is wrong. *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc).

2. The Court's Section 13(b) precedent was correctly decided in any event. The decisions follow from Supreme Court cases holding that once "the equitable jurisdiction of the court has properly been invoked," the court has power to "award complete relief," including "the recovery of that which has been illegally acquired." *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946). Dorfman claims that *Porter* is no longer good law, but the Supreme Court relied on it just a few years ago to uphold a disgorgement remedy. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1053, 1057, 1062-63 (2015).

This Court has correctly determined that Congress did not limit courts' equity jurisdiction under Section 13(b). By the time Congress enacted the statute, numerous courts had already applied *Porter* to hold that a nearly identical statute

authorized equitable monetary relief, and it would have expected courts to interpret the new FTC Act provision the same way. Since then, Congress has twice ratified this Court's interpretation of Section 13(b), recognizing explicitly that it permits courts to award disgorgement and consumer redress.

The Court has also correctly determined that Section 19 of the FTC Act does not limit the relief available under Section 13(b). Congress said so directly when it provided that remedies under Section 19 "are in addition to, and not in lieu of, any other remedy" and that "[n]othing 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). As Congress recognized, the two provisions each serve a distinct function in the administration of the FTC Act, and neither one makes the other redundant.

3. No intervening decisions have overturned the Court's biding precedent. Indeed, Dorfman does not claim otherwise; the most he can muster is that the "reasoning" of certain recent decisions has weakened them. Br. 36. But reasoning alone "is no basis for a panel to depart from [a] prior decision." *Atlantic Sounding Co. v Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007).

a. Even the reasoning of the decisions Dorfman relies on does not call precedent on Section 13(b) into question. Both *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), and *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), expressly state that they do *not* cast doubt on decisions recognizing the availability of equitable

monetary relief. It is hardly surprising that this Court has continued to uphold disgorgement awards—including in FTC cases—after *Graham* and *Kokesh*.

More fundamentally, Dorfman is wrong that simply because disgorgement can be labeled a "penalty" for purposes of a statute of limitations, that necessarily means it is beyond the power of a court of equity. A required payment can function as a penalty for some purposes but not others, and the doctrines of equity and limitations serve distinct purposes. The Supreme Court has recognized that disgorgement is "traditionally considered an equitable remedy" that is unlike "civil penalties" that may be awarded only by courts of law. *Tull v. United States*, 481 U.S. 412, 423-25 (1987). And in any event, unlike the SEC disgorgement remedies in *Kokesh* and *Graham*, the frozen assets in this case will be used entirely for victim redress and are therefore compensatory.

b. Asset tracing is irrelevant to this appeal, both because such a requirement would only apply to a final judgment and because Dorfman does not deny that all of the frozen assets here were the fruits of his illegal conduct. Moreover, Dorfman does not cite—nor are we aware of—any cases requiring tracing when a public agency seeks to enforce its statute to vindicate the public interest.

Dorfman's argument that he has a right to a jury trial is premature because there has been no trial on the merits and incorrect because the remedies sought in this case are equitable in nature.

ARGUMENT

I. THIS COURT'S PRECEDENT DIRECTLY FORECLOSES DORFMAN'S CLAIM

Dorfman's argument that the FTC may not secure an asset freeze because it lacks statutory authority to obtain monetary relief flatly contradicts decades of binding circuit precedent that conclusively resolves this case. The Court should summarily affirm the ruling on review.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), equips the Commission with two basic mechanisms to enforce the law. First, it may file an administrative complaint and ask a federal court to issue a "temporary restraining order or preliminary injunction" in support of that complaint pending an administrative trial and final order. *Id.*; *see also* 15 U.S.C. § 45(b). Alternatively, the Commission may choose to bring an action directly in federal court and forgo an administrative proceeding entirely. *See FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984). The "second proviso" of Section 13(b) states, "*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). In this case, the

Commission filed suit under that second proviso and the district court entered a preliminary injunction and asset freeze pursuant to it.[4]

This Court established 35 years ago in *U.S. Oil & Gas* that in lawsuits seeking a permanent injunction under the second proviso, district courts may "exercise the traditional inherent powers of a court of equity," including by "order[ing] restitution and rescission, and … grant[ing] preliminary relief ancillary thereto," such as a "freeze of assets." 748 F.2d at 1433-34. That binding decision and several others govern this case.

Dorfman's main argument is that Section 13(b) authorizes "preliminary and permanent injunctive relief, nothing less and nothing more," and thus excludes monetary relief by its "unmistakable" "plain text." Br. 6, 19-24. This Court first rejected that claim in *U.S. Oil & Gas*. It reaffirmed the holding in *FTC v. Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996), explaining that "the unqualified grant of statutory authority to issue an injunction under section 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits." *Id.* at 468. The Court has

[4] Dorfman claims the district court violated Section 13(b) when it imposed a temporary restraining order without prior notice. Br. 4-5 & n.1. He is wrong: the notice requirement pertains only to TROs issued under the first part of the statute and not those authorized by the second proviso. This Court has affirmed temporary *ex parte* relief in actions under Section 13(b)'s second proviso. *See FTC v. Atlantex Assocs.*, 872 F.2d 966, 970 (11th Cir. 1989).

reiterated the same principles many times since then. *See FTC v. WV Univ. Mgmt., LLC*, 877 F.3d 1234, 1239-40 (11th Cir. 2017); *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1234 (11th Cir. 2014); *FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1326-27 (11th Cir. 2013); *McGregor v. Chierico*, 206 F.3d 1378, 1387 (11th Cir. 2000).[5] That precedent controls this case and may not now be disturbed. It was also correctly decided, for the reasons discussed in Part II below.[6]

Dorfman also claims that monetary relief under Section 13(b) is precluded by Section 19 of the FTC Act, 15 U.S.C. § 57b(b). The argument is that because Section 19 expressly authorizes various forms of monetary relief in some instances, Congress could not have intended to authorize the same relief in Section 13(b). *See* Br. 3-7, 21-26, 34. *Gem Merchandising* rejected that contention, too, holding instead that Section 19 is not a "clear … legislative command" precluding courts from exercising "their full range of equitable powers under section 13(b)."

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[5] *See also FTC v. Lalonde*, 545 F. Appx. 825, 832, 841 (11th Cir. 2013); *FTC v. Bishop*, 425 F. Appx. 796, 797-78 (11th Cir. 2011); *FTC v. USA Fin., LLC*, 415 F. Appx. 970, 976 (11th Cir. 2011).

[6] To date, eight other circuits have considered the question, and all have ruled that Section 13(b) empowers courts to grant equitable monetary relief. *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598-99 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890-91 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Magazine Sols.*, 432 F. Appx. 155, 158 n.2 (3d Cir. 2011) (unpublished); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989).

87 F.3d at 469-70. Many other courts have reached the same conclusion. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366-67 (2d Cir. 2011); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

The Court has likewise rejected Dorfman's claim that any monetary recovery must be limited to funds that are "specifically traced to consumers." Br. 11-13, 35-36. It has determined to the contrary that a "disgorgement order 'establishes a personal liability, which the defendant must satisfy regardless whether he retains the … proceeds of his wrongdoing.'" *FTC v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013) (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)). That approach is consistent with "[t]he very nature of equitable power," with "its flexible and discretionary nature, its ability to respond to real-world practicalities, and its general aversion to rules that let bad actors capitalize on legal technicalities." *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1359 (11th Cir. 2019).

In reaching that determination, the Court recognized that a tracing requirement that limited recovery to "the actual assets unjustly received would lead to absurd results." *Leshin*, 719 F.3d at 1234 (quoting *Banner Fund*, 211 F.3d at 617). For example, "a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an

order of disgorgement." *Id.* It also would "permit a defendant to retain [unlawfully acquired] funds simply by keeping poor records," *Gem Merch.*, 87 F.3d at 470, thereby preventing the FTC and the district court from isolating which specific assets were tainted by misconduct. Requiring the FTC to trace specific assets "would be a monstrous doctrine for it would perpetuate rather than correct an inequity." *Leshin*, 719 F.3d at 1234 (quoting *Banner Fund*, 211 F.3d at 617). Accordingly, the FTC may recover a defendant's "net revenue (gross receipts minus refunds)" from the wrongdoing, regardless of whether the specific funds can be traced to the violations. *Wash. Data*, 704 F.3d at 1326-27.

Asset tracing would be especially inappropriate when a district court has merely imposed a pre-judgment asset freeze pending trial and a final judgment. As this Court has explained, "[t]he FTC's burden of proof in the asset-freeze context is relatively light," requiring only a "reasonable approximation" of ill-gotten gains. *IAB*, 746 F.3d at 1234 (quotation omitted). Here, Dorfman does not challenge the district court's preliminary finding that he and his companies had $180 million in unjust gains. D.E.139 at 11, 22-23. Nor does he deny that the assets subject to the freeze—$3.2 million in corporate cash, luxury cars purchased with corporate funds, and jewelry (*see id.*)—can be directly traced to funds derived from his victims.

Dorfman recognizes that this Court's precedents foreclose his claims, but he nevertheless asks the Court to overturn them as "wrongly decided." Br. 7, 13-14, 18, 33-37. The Court's controlling decisions were correct for the reasons set forth in Section II below, but it would not matter anyway. Under the "prior precedent rule," one "panel cannot overrule a prior one's holding." *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc). A published panel decision remains the law of the Circuit "[u]nless and until [it] is overruled by the Supreme Court or by the en banc court." *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000). Precedent is binding even if the later panel is "convinced it is wrong." *Steele*, 147 F.3d at 1318. This rule "is an essential part of the governing law of this Circuit," for it promotes "the values of stability and predictability in the law." *Smith v. GTE Corp.*, 236 F.3d 1292, 1302-03 (11th Cir. 2001). The Court therefore need not even consider Dorfman's arguments, but may summarily affirm.

II. THE COURT'S CONTROLLING PRECEDENT WAS CORRECTLY DECIDED

Dorfman complains that this Court's case law was "never the product of careful or adequate analysis" (Br. 34), but the reasoning of those decisions was impregnable. They faithfully apply Supreme Court precedent; show a proper understanding of the FTC Act's text, structure, and history; and are consistent with many other decisions of this Circuit permitting awards of monetary relief under analogous statutes protecting consumers and the public interest.

A. This Court's Decisions Interpreting Section 13(b) Are Firmly Rooted In Supreme Court Precedent

This Court's interpretation of Section 13(b) flows directly from Supreme Court precedent explaining that an unqualified grant of authority to enter a permanent injunction—such as that found in Section 13(b)—carries with it the authority to use "all the inherent equitable powers" of the district court "for the proper and complete exercise of that jurisdiction," including the power to award monetary relief. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Moreover, where, as here, the matter involves furthering the public interest, the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* The "full scope" of equitable jurisdiction applies unless Congress has "in so many words, or by a necessary and inescapable inference, restrict[ed] the court's jurisdiction in equity." *Id.*[7]

[7] *Porter* drew these conclusions from older cases describing the expansive inherent powers of equity courts. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Earlier, the Supreme Court recognized that "[t]he great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown v. Swann*, 35 U.S. 497, 503 (1836). The principal objective of an equity court is "to do justice completely, not by halves." *Camp v. Boyd*, 229 U.S. 530, 551 (1913). To prevent a "multiplicity of suits," equity courts that "take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority." *Id.* at 552.

Porter recognized that the grant of injunctive authority carried with it the power of monetary redress because "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* at 399. Even where the specific monetary relief at issue is the province of courts of law rather than equity, when "the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief." *Id.* at 399. A redress award may be "appropriate and necessary" to achieve the objectives of an injunction, since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 400. Such relief is "within the recognized power and within the highest tradition of a court of equity." *Id.* at 402.

Fourteen years later, the Supreme Court reaffirmed these principles in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). There, the Court recognized that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-92. The Court repeated *Porter*'s admonition that "[u]nless a statute, in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be

recognized and applied." *Id.* at 291. *Mitchell* held that monetary relief was available under a statute that simply authorized a court to "restrain" violations. *Id.* at 296.[8]

The Supreme Court has continued to rely on *Porter*. In *Tull v. United States*, 481 U.S. 412 (1987), the Court, citing *Porter*, recognized that "a court in equity may award monetary restitution as an adjunct to injunctive relief." *Id.* at 424. Even more recently, in *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015), the Court invoked *Porter* to uphold a monetary equitable remedy in a water-rights dispute between two States. *Id.* at 1051, 1053. The Court expressly endorsed the idea that cases involving enforcement of federal law in the public interest allow "even broader and more flexible" applications of equity "than when only a private controversy is at stake." *Id.* at 1053 (quoting *Porter*, 328 U.S. at 398). The *Kansas* Court found that disgorgement was necessary to "remind[] Nebraska of its legal obligations, deter[] future violations, and promote[] the [law's] successful administration." *Id.* at 1057.

[8] Dorfman tries to distinguish *Porter* by arguing that the statute in that case was broader than Section 13(b) because it referred to injunctions and "other order[s]." Br. 30. *Mitchell* rejected that very argument: it upheld monetary relief under a statute without the "other order" language, declaring that *Porter*'s holding "is not to be denied" even if a statute lacks "affirmative confirmation of the power to order reimbursement." 361 U.S. at 291-92, 296.

B. Congress Did Not Limit The Scope Of Equity Jurisdiction Conferred By Section 13(b)

This Court, applying the *Porter* line of cases, has ruled that courts may exercise their "full equitable powers" to award monetary relief under Section 13(b) in light of the significant public interest in "enforc[ing] consumer protection laws" and the absence of a "legislative command expressly limit[ing the] court's equitable jurisdiction." *Gem. Merch.*, 87 F.3d 469-70. Dorfman believes this Court erred, asserting that the principles outlined in *Porter* do not apply to Section 13(b) because (1) the legislative history of the provision forecloses monetary remedies; and (2) reading Section 13(b) as *Porter* requires would put it in conflict with another provision of the FTC Act, Section 19, 15 U.S.C. §57b. Br. 21-27. Both claims are wrong.

Legislative History. Dorfman relies on a Senate report relating that a key purpose of Section 13(b) was to enable the Commission to secure preliminary injunctions in support of ongoing administrative proceedings before the agency. Br. 25. Although that is surely true, this was not Congress's *only* purpose, as is evident from the second proviso itself, which is a standalone grant of permanent injunction authority. In fact, the very Senate report on which Dorfman relies explains that the Commission may proceed directly in district court when "it does not desire to expand upon the prohibitions of the FTC Act," in which case bypassing the administrative process will be a better use of "Commission resources

… and cases can be disposed of more efficiently." S. Rep. No. 93-151, at 30-31 (May 14, 1973). As Congress found, "[v]ictimization of American consumers should not be … shielded" while awaiting the results of an administrative adjudication that could drag on for "several years." *Id.* at 30.

And indeed, by the time Congress enacted Section 13(b) in 1973, courts had already followed *Porter* and *Mitchell* to conclude that provisions of the securities laws authorizing courts to grant an injunction also authorized equitable monetary relief. *See SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-08 (2d Cir. 1971) (collecting cases). Congress would have expected the new statute to be construed the same way, given the judicial assumption that, "when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010).

Congress has twice ratified that understanding. In 1994, years after courts (including this one) held that Section 13(b) permits monetary relief, Congress expanded the venue and service of process provisions of that section. *See* FTC Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat. 1691 (Aug. 26, 1994). Not only did Congress let the judicial decisions stand, but the Senate report accompanying the act recognized that Section 13(b) authorizes the FTC to "go into court ex parte to obtain an order freezing assets, and … also … to obtain consumer redress." S. Rep. No. 103-130, at 15-16 (Aug. 24, 1993).

Twelve years later, and after scores of cases awarding monetary relief under Section 13(b), Congress expressly codified the judicial understanding when it authorized courts to impose "[a]ll remedies available to the Commission … including restitution to domestic or foreign victims" in actions against certain unfair practices abroad. U.S. SAFE Web Act of 2006, Pub. L. 109-455, § 3, 120 Stat. 3372 (Dec. 22, 2006) (amending 15 U.S.C. § 45(a)(4)(B)). When Congress reenacts a statute that has been given a consistent judicial interpretation, "[s]uch a reenactment, of course, generally includes the settled judicial interpretation." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).

Section 19. Dorfman fares no better with his claim that Section 19 of the FTC Act defeats the possibility of monetary relief under Section 13(b). *See* Br. 6-7, 19, 21-24. As discussed at pp. 15-16, above, this Court and others have rejected the claim, and for good reason.

The FTC Act creates separate administrative and direct-litigation tracks for enforcing the law, each serving a distinct and important role in furthering the Commission's mandate to protect consumers. As explained above, the Commission may choose to enforce the Act either through administrative proceedings or directly in court. Both enforcement paths allow for possible monetary remedies. When the Commission seeks to apply the FTC Act in a new setting, it will often proceed administratively, with its findings of fact and

conclusions of law reviewed deferentially on appeal. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986). At the conclusion of the administrative case, the Commission may then in some instances go to court and seek monetary relief under Section 19. In a Section 19 proceeding, the Commission's findings of fact from the administrative case are deemed "conclusive." 15 U.S.C. § 57b(c). The flip side of such deference is that courts may only award monetary relief based on FTC administrative findings when a "reasonable man" would have known that the practices subject to the administrative order were "dishonest or fraudulent," 15 U.S.C. § 57b(a)(2).

On the other hand, when the Commission does not wish to apply its expertise in an administrative setting, it can sue directly in federal court under Section 13(b) and seek monetary relief as part of a permanent injunction. Under Section 13(b), the Commission receives no deference, but it is also not subject to the scienter requirements of Section 19. The two provisions work in tandem, each in its own sphere.[9]

[9] Dorfman's reliance on *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), is misplaced. Br. 5, 32. That case held that the Commission could seek relief under Section 13(b) when it has reason to believe that a defendant "is violating, or is about to violate" the law, an issue that has no bearing here. When the FTC filed its complaint, Dorfman and his companies were actively violating the FTC Act.

Dorfman is therefore wrong that Section 19 would be redundant if Section 13(b) also permits monetary remedies. Br. 19, 21-23. That conclusion does not follow logically from the structure of the statute. As with other agencies, Congress has given the FTC a choice of forum to enforce its statutes; this does not make one of the options "redundant." *See*, *e.g.*, *Bebo v. SEC*, 799 F.3d 765, 768 (7th Cir. 2015) (explaining that Congress gave the SEC a "choice of forums: it can either proceed in federal district court or conduct its own administrative enforcement proceeding").

Further, Dorfman's argument is squarely foreclosed by the text of Section 19 itself. The statute, enacted two years after Section 13, states that its remedies "are in addition to, and not in lieu of, any other remedy." 15 U.S.C. § 57b(e). It also states that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law." *Id.* We can be sure that Section 19 does not foreclose monetary relief under Section 13(b) because Congress directly said so.

For the same reason, Dorfman is wrong that Section 19 necessarily creates exclusively backward-looking remedies while Section 13(b) creates only "forward-looking and prophylactic" remedies. Br. 24. Both sections work to advance their own goals, as outlined above. Moreover, Dorfman fails to understand that monetary relief can be a "forward-looking" remedy. Restitution may be

"appropriate and necessary to enforce compliance with the Act," since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter*, 328 U.S. at 400. Courts may therefore "order disgorgement of gains" in order to "deter future breaches." *Kansas*, 135 S. Ct. at 1057. Section 13(b) thus rests on the established principle that injunctions are frequently coupled with monetary relief "for harms already done." 1 Dan B. Dobbs, *The Law of Remedies* § 2.9(1) at 224 (2d ed. 1993). Indeed, the concept "[t]hat equitable remedies are always orders to act or not act, rather than to pay, is a myth; equity often orders payment." *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009).

C. This Court Has Interpreted Similar Laws The Same Way

This Court has applied the principle of *Porter* in both public and private cases in many different areas. Eighteen years before *Gem Merchandising*, the former Fifth Circuit ruled that under an SEC statute authorizing permanent injunctions, district courts may "force[] the defendant to give up … the amount by which he was unjustly enriched."[10] *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir.

[10] Similar to the FTC Act, the Securities Exchange Act of 1934 authorizes the SEC to bring an action in federal district court "to enjoin [unlawful] acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond." 15 U.S.C. § 78u(d)(1).

1978) (citations omitted).[11] This Court has applied that ruling many times since. *See, e.g.*, *SEC v. Levin*, 849 F.3d 995, 1006 (11th Cir. 2017); *SEC v. Monterosso*, 756 F.3d 1326, 1337-38 (11th Cir. 2014); *SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005); *SEC v. Calvo*, 378 F.3d 1211, 1215-18 (11th Cir. 2004).

The same holds true for the Commodity Futures Trading Commission. In *CFTC v. Wilshire Investment Management Corp.*, 531 F.3d 1339 (11th Cir. 2008), the Court found that the statute was "nearly identical" to the one in *Porter*, and observed that "[w]e have similarly applied the statutory principles in *Porter* to the Federal Trade Commission Act." *Id.* at 1344.[12] Following *Wilshire*, the Court ruled that "a district court may freeze a defendant's assets to ensure the adequacy of a disgorgement remedy." *CFTC v. Levy*, 541 F.3d 1102, 1114 (11th Cir. 2008).

The Court has applied these principles even in private litigation. In *AT&T Broadband v. Tech Communications, Inc.*, 381 F.3d 1309 (11th Cir. 2004), a cable company sought an *ex parte* asset freeze against a seller of "pirate" cable TV descramblers under the Cable Communications Policy Act, which empowers

[11] Decisions of the Fifth Circuit issued before October 1, 1981, are binding precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[12] The Commodity Exchange Act provides that "[u]pon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond." 7 U.S.C. § 13a-1(b).

district courts to "grant temporary and final injunctions on such terms as [they] may deem reasonable to prevent or restrain" cable theft. *Id.* at 1315 (quoting 47 U.S.C. § 553(c)(2)(A)). Relying on *Porter* and *U.S. Oil & Gas*, the Court noted the statute's resemblance to Section 13(b); found that the statute "involves the public's interest in preventing the sale of pirate cable descramblers"; and affirmed the asset freeze. *Id.* at 1316.

III. NO JUDICIAL DECISIONS HAVE ALTERED THE BINDING PRECEDENT INTERPRETING SECTION 13(B)

Dorfman tries to escape from the Court's binding decisions on the ground that subsequent judicial action has abrogated or limited them. He acknowledges that the decisions he relies on are not dispositive and did not involve Section 13(b), but nonetheless claims that "the reasoning" of those cases "has implications" requiring the reversal of the Court's precedent. Br. 36.

The claim fails at the starting gate because even when "the reasoning of an intervening high court decision is at odds with that of [a] prior decision," that itself "is no basis for a panel to depart from [a] prior decision." *Atlantic Sounding Co. v Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007). While "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228,

1230 (11th Cir. 2007). None of the cases Dorfman relies on comes close to mandating that the Court abandon its Section 13(b) precedent.

A. *Graham* and *Kokesh* Do Not Undermine The Court's Section 13(b) Precedent

Dorfman principally contends that this Court's decision in *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), and the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), "substantially undermined" precedent on Section 13(b). Br. 6-7, 14-15, 17-18, 34-39. The argument is that those decisions determined that monetary relief under the SEC statutes authorizing injunctions is a "penalty" or a "forfeiture" for purposes of a statute of limitations, and because courts of equity may not issue penalties or forfeitures, the decisions necessarily mean that monetary relief falls outside the scope of injunctive relief authorized by Section 13(b). Br. 12-13, 33-34, 44. The claim is meritless for several reasons.

1. *Graham* and *Kokesh* expressly state they do not overrule existing law authorizing monetary relief.

First, even if *Graham* were inconsistent with *U.S. Oil & Gas*, *Gem Merchandising*, and other cases, it could not overturn them by virtue of the prior panel precedent rule. When two panel precedents conflict, "the first [decision] … to address the issue" controls. *Smith*, 236 F.3d at 1302; *see United States v. Mozie*, 752 F.3d 1271, 1285 (11th Cir. 2014) ("Under the prior panel precedent rule, when two of our decisions conflict, we are obligated to follow the earlier one."). But

Graham recognized explicitly that it did *not* intend to disturb settled law. The case addressed whether SEC disgorgement awards are subject to the general five-year statute of limitations of 28 U.S.C. § 2462, on "any civil fine, penalty, or forfeiture." 823 F.3d at 1359. The Court held that disgorgement is a "forfeiture" within the plain meaning of that term because it is "imposed as redress for wrongdoing." *Id.* at 1363-64. At the same time, the Court stated directly that *Blatt*—which held that the SEC's statute authorizing injunctions also authorizes disgorgement of ill-gotten gains—remains "binding precedent." *Id.* at 1364 & n.4.

Like *Graham*, *Kokesh* also expressly disclaimed the effect Dorfman ascribes to it. There, the Supreme Court confronted a 14-year course of conduct for which the SEC obtained civil penalties for the most recent five years and disgorgement for the older acts. The question was whether the disgorgement order was a "penalty" under Section 2462. *Kokesh*, 137 S. Ct. at 1641-42. The Court held that it was a penalty, but specifically instructed that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly

applied disgorgement principles in this context." *Id*. at 1642 n.3.[13] Though Dorfman characterizes *Kokesh* as "holding" that disgorgement falls outside a district court's inherent equity powers (Br. 17), the Court disclaimed such a holding in no uncertain terms.

It therefore is hardly surprising that this Court has continued to uphold monetary relief awards after *Graham* and *Kokesh*. Several months after *Kokesh*, this Court twice reaffirmed the district court's "power to grant equitable monetary relief" under Section 13(b). *WV Univ.*, 877 F.3d at 1240; *see FTC v. Primary Grp., Inc*., 713 F. Appx. 805, 808-09 (11th Cir. 2017). Likewise, in *SEC v. Hall*, 759 F. Appx. 877 (11th Cir. 2019), the Court recognized that "[t]he SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains." *Id.* at 882 (quoting *Calvo*, 378 F.3d at 1217). The Court actually cited *Kokesh* in *support* of this holding and did not mention *Graham* (even though

[13] Dorfman relies on the special concurrence of a Ninth Circuit judge relying on *Kokesh* to question the FTC's monetary relief authority. *See* Br. 17-18, 37-38, 44, *citing FTC v. AMG Capital Mgmt. LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., concurring). The concurring judge also wrote the panel opinion recognizing that the controlling law of the circuit allows monetary remedies and that *Kokesh* was not a valid basis to disregard the court's precedent. *Id.* at 426-27. And while the special concurrence encouraged the court to reconsider its precedent en banc, the full court later denied rehearing without even a single judge calling for a vote. *See* June 20, 2019 Order, *FTC v. AMG Capital Mgmt. LLC*, No. 16-17197 (9th Cir.).

the author of *Graham* served on the panel in *Hall*). *Id.*[14] Finally, this Court recently affirmed an order awarding "[d]isgorgement of gross revenues" under a statute authorizing injunctions against violations of the internal revenue laws. *United States v. Stinson*, 729 F. Appx. 891, 898-99 (11th Cir. 2018).

2. A court of equity may order monetary relief even if it is a "penalty" for purposes of a statute of limitations.

Even if both *Graham* and *Kokesh* had not expressly disclaimed the effect Dorfman ascribes to them, they still would not weaken the basis for FTC monetary relief. The Supreme Court has explained that "'[p]enalty' is a term of varying and uncertain meaning." *Life & Cas. Ins. Co. of Tenn. v. McCray*, 291 U.S. 566, 574 (1934). Thus, just because something is a "penalty" for purposes of a statute of limitations does not mean that it is a remedy beyond the powers of a court of equity. For example, in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court held that the payment required by the Affordable Care Act from those who do not have insurance was a "penalty" and not a tax for purposes of the Anti-Injunction Act, 26 U.S.C. § 7421(a), but a tax

[14] Dorfman over-reads a concurring D.C. Circuit opinion from now-Justice Kavanaugh observing that "[t]he Supreme Court's reasoning in *Kokesh* was not limited to the specific statute at issue there." Br. 14, 34, 36, 41, citing *Saad v. SEC*, 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J, concurring). But monetary relief was not an issue in *Saad*, and Justice Kavanaugh did not question the SEC's ability to obtain it. His "sole point" was that after *Kokesh*, industry expulsions and suspensions must be treated as penalties. *Id.* at 306. He did not deny that the SEC was able to obtain such relief. *Id.*

and not a "penalty" for other purposes. 567 U.S. at 543-46, 564-66. Similar considerations led the Sixth Circuit to hold that SEC disgorgement, now deemed a penalty under *Kokesh* for purposes of the statute of limitations, is not a "punishment" for Double Jeopardy purposes. *United States v. Dyer*, 908 F.3d 995, 1003 (6th Cir. 2018) ("The holding in *Kokesh* was narrow and limited solely to the statute of limitations in 28 U.S.C. § 2462.").

"Penalty" can have different meanings in equity and under a limitations period because the two doctrines serve different purposes. Equity serves the purposes of "do[ing] justice completely, and not by halves." *Camp v. Boyd*, 229 U.S. 530, 551 (1913). Statutes of limitation serve the very different interests of repose for defendants and the practical realities of defending against stale claims. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980). It makes complete sense for Congress to have imposed a time limit on penalties while leaving intact traditional equitable powers. That limitation does not create "a necessary and inescapable inference" that Congress meant to "restrict[] the court's jurisdiction in equity." *Porter*, 328 U.S. at 398.

Courts have long recognized that disgorgement is "traditionally considered an equitable remedy" distinct from the "civil penalt[y]" that was available only in courts of law. *Tull*, 481 U.S. at 423-25. Indeed, *Tull* stated that even though an equity court could not impose a civil fine, it "was empowered to provide monetary

awards that were incidental to or intertwined with injunctive relief." *Id.* at 424. These "restitution" awards force a wrongdoer to return his or her ill-gotten gains, thereby "restoring the status quo." *Id.* (quoting *Porter*, 328 U.S. at 402). Thus, "a court in equity may award monetary restitution as an adjunct to injunctive relief," at the same time that it is precluded from assessing civil penalties. *Id.*

Dorfman is therefore mistaken when he cites *Tull* for the proposition that "[a]ny penalty is necessarily a legal remedy" that is beyond the powers of an equity court. Br. 12. *Tull* stands for the very different proposition that disgorgement, *even if* a "penalty" for a different purpose, is an equitable remedy distinct from a civil fine. 481 U.S. at 424. *See also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) ("[W]e have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'") (quoting *Tull*, 481 U.S. at 424)). There is "no … tension" between *Kokesh* and *Tull* because "while disgorgement may constitute a 'penalty' under *Kokesh*'s expansive analysis," it is "entirely distinct from the civil monetary penalties" that are available only in a court of law. Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU L. Rev. 895, 925-26 (2018); *see* Daniel B. Listwa & Charles Seidell, Note, *Penalties in Equity: Disgorgement after* Kokesh *v.* SEC, 35 Yale J. on Reg. 667, 679 (2018) (it is "inappropriate to assume that what is a

'penalty' for the purposes of § 2462 is also a 'civil penalty' as it was understood by the Court in *Tull* … and thus unavailable in equity").

In keeping with that understanding, this Court recently confirmed—post-*Graham* and *Kokesh*—that disgorgement of ill-gotten gains is an equitable remedy. In *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343 (11th Cir. 2019), the Court explained that "the ancient remedies of accounting, constructive trust, and restitution have compelled wrongdoers to 'disgorge'—*i.e.*, account for and surrender—their ill-gotten gains for centuries." *Id.* at 1355 (quoting *SEC v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006)). These remedies were "historically a matter for courts of equity," which provided "a means of 'permitting an award of monetary and injunctive relief in the same action,' and thereby preventing duplicative litigation." *Id.* at 1355-56 (quoting Restatement (Third) of Unfair Competition § 37 cmt. b (Am. Law Inst. 1995)). *Hard Candy* concerned whether a monetary award was subject to jury trial, but the Court relied on the Second Circuit's opinion in *Cavanagh*, 445 F.3d at 119-20, which upheld the SEC's authority to obtain disgorgement.

It therefore does not matter that *Kokesh* considered the deterrent effect of disgorgement as a factor in determining it was a penalty. *See* 137 S. Ct. at 1643-44. Deterrent effects have *always* been considered one function of an equitable remedy. *Porter*, for example, noted that "[f]uture compliance may be more

definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400. And in *Kansas v. Nebraska*, decided just two years before *Kokesh*, the Court relied on *Porter* in holding that equitable disgorgement was appropriate to "deter future breaches." 135 S. Ct. at 1057.[15] Dorfman concedes as much when he argues that "*equitable remedies* are 'forward-looking' remedies designed to prevent *future* violations of law." Br. 15 (emphasis in original).

3. Unlike the remedies at issue in *Graham* and *Kokesh*, FTC monetary relief is compensatory.

Finally, even if a court could not award "penalties" ancillary to an injunction, the monetary relief the FTC seeks in this case is compensatory, not penal. The Court explained in *Kokesh* that relief "operates as a penalty *only* if it is sought for the purpose of punishment … as opposed to compensating a victim for his loss." 137 S. Ct. at 1642 (emphasis added, quotation marks omitted). Here, the district court imposed the asset freeze to "preserve the availability of funds to provide monetary restitution for consumers victimized by Defendants' unlawful practices." D.E.139 at 22. Indeed, the frozen assets amount to a small fraction of

[15] Even the justices who dissented in *Kansas v. Nebraska* accepted the premise that disgorgement is an equitable remedy. *See* 135 S. Ct. at 1070 (Thomas, J., concurring in part and dissenting in part) ("Disgorgement is strong medicine, and as with other forms of equitable power, we should impose it against the States only sparingly.") (quotation marks omitted); *id.* at 1064 (Roberts, C.J., concurring in part and dissenting in part) (recognizing that "our equitable power" is "sufficient to order a remedy of partial disgorgement").

the $180 million that Dorfman stole from his victims. *Id.* at 22-23. Thus, the FTC anticipates that all money ultimately recovered will go to redress the victims' injuries as much as possible.[16]

Because the FTC will use all equitable monetary relief in this case for compensation, the remedy is unlike the SEC disgorgement award at issue in *Kokesh*, which was to be paid to the Treasury (and indeed, was part and parcel with the penalty assessed for the five most recent years of violations). 137 S. Ct. at 1644. To the extent that repaying harmed consumers will incidentally deter future illegal conduct, that beneficial outcome does not transform the relief into "a noncompensatory sanction [paid] to the Government." *Id.* at 1644. The same would be true of any type of compensatory award. *See Mitchell*, 361 U.S. at 293 (explaining that a "public remedy" is not "rendered punitive" when it is compensatory).

[16] The facts of Dorfman's case underscore the limited nature of equitable monetary relief, which only covers the wrongdoer's illicit gains. Although Dorfman had $180 million in gains, that figure does not include the full amount in "premiums" that Dorfman's victims paid for his worthless health plans, the victims' out-of-pocket medical expenses, or the pain, suffering, and lost income they experienced as a consequence of being practically uninsured. These uncompensated injuries likely exceed Dorfman's revenues.

B. *Meghrig* Does Not Undermine *Porter* Or This Court's Section 13(b) Precedents

Dorfman claims that due to the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), *Porter* "has fallen out of favor with the courts" and is "dead." Br. 30-31.[17] He does not explain the high Court's subsequent reliance on *Porter* in *Kansas v. Nebraska* (2015), which imposed a disgorgement award and declared that "our equitable authority to grant remedies is at its apex when public rights and obligations are … implicated." 135 S. Ct. at 1053, 1057, 1062-63; *see also United States v. Oakland Cannabis Buyers' Co-Op.*, 532 U.S. 483, 496 (2001). *Meghrig*, by contrast, involved private civil litigation. Whatever effect the decision may have had on *Porter* in that sphere (and we doubt it was much), it has no effect in this case.

Meghrig turned on the particularities of two environmental statutes allowing private civil suits, and it sheds no light on how to interpret regulatory enforcement statutes like Section 13(b). The Court held that a citizen-suit provision in an environmental law that gives district courts injunctive authority to order the

[17] Dorfman quotes the word "dead" out of context from *Apex Oil*, which declared that a broad reading of the specific environmental statutes at issue in *Meghrig* was now "dead" after that case. 579 F.3d at 736-37. *Apex Oil* did not inscribe the epitaph of *Porter* itself. Indeed, Judge Posner, who authored *Apex Oil*, wrote in another post-*Meghrig* decision that under Section 13(b), "[t]he court's authority to order restitution to the victims and as an incident thereto to place the frozen assets in trust for them is not and cannot be questioned." *FTC v. Think Achievement Corp.*, 312 F.3d 259, 262 (7th Cir. 2002).

remediation of present harms and the prevention of future ones did not allow a court to award compensation to private parties for cleanup costs. 516 U.S. at 484. The Court reached that determination by comparing the statute before it with a similar environmental statute that afforded identical injunctive relief, but expressly provided for the recovery of past cleanup costs. Congress "knew how to provide for the recovery of cleanup costs," the Court explained, so its decision to provide such a recovery in one statute revealed an intent not to do so in the other statute, which lacked the operative language. *Id.* at 485. Moreover, the injunctive authority conveyed in the statute limited relief to instances of "imminent" danger, which an already-cleaned-up site did not pose. *Id.* at 485-86.

Meghrig thus represents a situation presenting a "clear legislative command" restricting the power of equity in a private controversy. *See United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1055-57 (10th Cir. 2006); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 231-32, 235 (3d Cir. 2005). But it did not overrule or even affect *Porter*; to the contrary, soon after it issued *Meghrig*, the Supreme Court again credited *Porter*'s principle that equitable "discretion is displaced only by a 'clear and valid legislative command.'" *Oakland Cannabis*, 532 U.S. at 496 (quoting *Porter*, 328 U.S. at 398).

C. *Montanile* And *Great-West* Do Not Undermine This Court's Precedent Rejecting Tracing

Dorfman suggests that Supreme Court decisions have overruled this Court's holdings that equitable monetary relief is not limited to assets that can be directly traced to wrongdoing. Br. 11-12, 35-36. The claim fails on several fronts.

First, Dorfman has not explained how a tracing requirement would limit the asset freeze here. The order on appeal is a preliminary injunction and Dorfman has provided no reason to doubt that all the money frozen under it is the product of his unlawful conduct. Indeed, he has not appealed the preliminary findings that his entire business model was illegal and that he defrauded consumers out of $180 million. D.E.139 at 9-11, 22-23. Moreover, the point of freezing assets is only to preserve them for the possibility of ultimate relief; thus, even if there were a tracing requirement, it would kick in only at the time of final judgment. *See IAB*, 746 F.3d at 1234.

Second, as discussed at pages 16-17 above, this Court and others have rejected asset tracing when, as here, a government agency is "seeking to enforce explicit statutory provisions" to obtain a "public-regarding remedy." *Bronson Partners*, 654 F.3d at 372-73; *accord FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 601 (9th Cir. 2016). Dorfman has cited "no case in which a public agency seeking to obtain equitable monetary relief has been required to satisfy the tracing rules." *Bronson Partners*, 654 F.3d at 374. Rather, "the Federal Reporter is

replete with instances in which judges … deeply familiar with equity practice have permitted the SEC to obtain disgorgement without any mention of tracing." *Id.* *See also SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016) (explaining that a tracing requirement "finds no support … in the extensive body of case law on securities fraud"). In actions by a public entity to enjoin law violations, courts may impose "an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset." *Banner Fund*, 211 F.3d at 617.

Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651 (2016), and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), do not disturb those holdings. Both cases involved lawsuits by private health plans under the Employee Retirement Income Security Act (ERISA) seeking reimbursement for expenses from plan participants who recovered from third parties. The Act allowed the plans to recover "appropriate equitable relief." 29 U.S.C. § 1132(a)(3). *Great-West* rejected the plan's claim to equitable restitution in the form of a constructive trust or equitable lien over specific property, explaining that because the participant no longer possessed those particular funds, the claim was legal rather than equitable. 534 U.S. at 212-14. *Montanile* held that the plan could not seek an equitable remedy (such as an equitable lien) when the participant had dissipated the particular funds in dispute.

136 S. Ct. at 658-61. Both cases recognized that the traditional equitable remedies of constructive trust or equitable lien require private plaintiffs to identify particular funds that belonged to them but were possessed by the defendant "in trust," or traceable items that the defendant purchased with those funds.

But neither *Great-West* nor *Montanile* addressed remedies available to public agencies under the FTC Act and similar statutes granting an unqualified right to injunctive relief. Nor did they question *Porter*'s holding that courts in a government enforcement action may order "the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief," *even if* "such a recovery could not be obtained through an independent suit in equity." 328 U.S. at 399.

Instead, *Great-West* made clear that its decision rested largely on concerns unique to ERISA, "a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." 534 U.S. at 209 (internal quotation marks and citations omitted). In light of that history, the Court was "especially reluctant to tamper with [the] enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text." *Id.* (internal quotation marks and citations omitted). Consequently, the Court construed ERISA's provision for "appropriate equitable relief," 29 U.S.C. § 1132(a)(3), as evidence that Congress intended a scope of relief more

restricted than otherwise would be available to a court of equity. *Great-West*, 534 U.S. at 209-10; *see also Montanile*, 136 S. Ct. at 660. Yet the Supreme Court acknowledged in another ERISA case that Congress *could* draft broader statutes permitting district courts to impose all forms of "relief a court of equity is empowered to provide in the particular case at issue." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). Whether Congress intended that broader meaning "remains a question of interpretation in each case." *Id.* at 257.

Accordingly, the ERISA cases did not abrogate *Porter*'s holding that when interpreting statutes authorizing government agencies to protect the public interest, "all the inherent equitable powers of the District Court are available" absent a "clear and valid legislative command." 328 U.S. at 398. As the Supreme Court explained in one of the very cases cited by Dorfman, "courts of equity will go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 326 (1999) (internal quotation marks omitted). Thus, in *Kansas v. Nebraska*, the Court ordered disgorgement without mentioning tracing, instead declaring that courts' equitable powers are broader and more flexible in cases affecting public rights under a federal statute. 135 S. Ct. at 1053, 1057, 1062-63.

As the Second Circuit has explained, *Great-West*'s discussion of the tracing requirement in "a private, equitable claim sounding in unjust enrichment" has no application to cases under the FTC Act. *Bronson Partners*, 654 F.3d at 371. Tracing is required in private cases "because liability is premised on the fiction that the victim at all times retained title to the property in question, which the defendant merely holds in trust for him." *Id.* at 373. By contrast, liability under the FTC Act turns on the "specific provisions" of the statute without any fiction of a constructive trust or equitable lien. *Id.* at 371.

Where the basis of liability is statutory, the only question is whether "'the nature of the underlying remedies sought' was historically equitable." *Id.* at 371-72 (quoting *Great-West*, 534 U.S. at 213). The Second Circuit, performing such an analysis, has found that "English equity courts compelled the repayment (in effect, 'disgorgement') of ill-gotten gains in cases decided before our independence," and that "American courts also awarded equitable remedies similar to modern disgorgement in cases decided around the time of our nation's founding." *Cavanagh*, 445 F.3d at 120. *See also Hard Candy*, 921 F.3d at 1355 (crediting *Cavanagh*'s historical conclusions). The Supreme Court has likewise explained that it is "well established" that equity courts may exercise jurisdiction over a "suit to rescind a contract induced by fraud and to recover the consideration paid,"

Deckert v. Indep. Shares Corp., 311 U.S. 282, 289 (1940) (collecting cases), which is precisely the sort of relief the FTC seeks against Dorfman.[18]

D. *Grupo Mexicano* Does Not Undermine The Court's Section 13(b) Precedents

Similarly unavailing is Dorfman's reliance on *Grupo Mexicano*, 527 U.S. at 324-25, for the proposition that the district court could not freeze his assets because the Commission's claims are only for money damages and not equitable relief. Br. 7, 11, 34-35, 37 n.14, 38-40, 42-43. We have shown extensively above that the claims here are for equitable relief, so the argument fails at the outset.

This Court rejected a virtually identical claim in *ETS Payphones*, where the defendant similarly claimed that asset freezes in support of an SEC disgorgement remedy are invalid under *Grupo Mexicano*. This Court disagreed, proclaiming that "disgorgement is an equitable remedy," so *Grupo Mexicano* did not apply. *ETS Payphones*, 408 F.3d at 734 & n.6. *See also Cavanagh*, 445 F.3d at 116-17.

As *ETS Payphones* pointed out, the relevant Supreme Court case here is *Deckert*, which affirmed a preliminary injunction "to preserve the status quo" and

[18] As one leading treatise elaborates, "[t]he purely pecuniary reliefs which courts of equity may administer, as well as courts of law, in matters of fraud, are an accounting in all its various forms and conditions, and simple recoveries, without an accounting, of specific amounts of money which have been fraudulently obtained, or which are equitably and perhaps legally due on account of fraud." 3 Spencer W. Symons, *Pomeroy's Equity Jurisprudence* § 910, pp. 577-78 (5th ed. 1941). The "fundamental theory" behind equitable relief is to "return the parties to the positions which they occupied before the fraud was committed." *Id.*

prevent the "dissipation or depletion" of assets pending trial on investors' claims for equitable rescission and restitution under the Securities Act of 1933. *See* 311 U.S. at 290.

E. The Seventh Amendment Does Not Apply Here

The Court need not reach Dorfman's claim that he has a Seventh Amendment right to a jury trial (Br. 8, 41-43) because this case presents only a preliminary injunction and not a final determination on the merits. The issue is premature.

Dorfman is wrong in any event because the equitable nature of relief under Section 13(b) dooms his claim. "[S]o long as a court limits an award under § 13(b) to restitutionary relief, the remedy is an equitable one for Seventh Amendment purposes and thus confers no right to a jury trial." *Commerce Planet*, 815 F.3d at 602. Courts "have unanimously held that the Seventh Amendment does not provide a right to a trial by jury in actions brought under Section 13(b)." *FTC v. Think All Publishing, L.L.C.*, 564 F. Supp. 2d 663, 665 (E.D. Tex. 2009) (collecting cases). *See also Tull*, 481 U.S. at 424 (explaining that disgorgement is "traditionally considered an equitable remedy" for Seventh Amendment purposes); *Hard Candy*, 921 F.3d at 1359 (no jury trial required for Lanham Act disgorgement claim).

CONCLUSION

For the foregoing reasons, the district court's order granting a preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 11,467 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it 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 was prepared using Microsoft Word 2010 in 14 point Times New Roman type.

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CERTIFICATE OF SERVICE

I certify that on July 24, 2019, I served the foregoing brief on counsel of record using the Court's electronic case filing system. All counsel of record are registered ECF filers.

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