

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**      **Lina M. Khan, Chair**  
                                 **Rebecca Kelly Slaughter**  
                                 **Alvaro M. Bedoya**

**In the Matter of**

**FLEETCOR TECHNOLOGIES, INC., a  
corporation, and**

**RONALD CLARKE, individually and as  
an officer of FLEETCOR  
TECHNOLOGIES, INC.**

**Docket No. D-9403**

**COMPLAINT COUNSEL’S MOTION TO PARTIALLY LIFT STAY OF  
ADMINISTRATIVE PROCEEDINGS TO PERMIT DISPOSITIVE MOTIONS**

Pursuant to the Federal Trade Commission’s Rule of Practice 3.22, Complaint Counsel respectfully request that the Commission partially lift the stay of this administrative action, which has been in place for more than twenty-one months, for the sole purpose of permitting the parties to file dispositive motions. As explained below, the FTC’s action on identical claims before the U.S. District Court for the Northern District of Georgia has now been litigated to conclusion and has determined that Respondents FleetCor Technologies, Inc., (“FleetCor”) and Ronald Clarke are liable on all five counts alleged. *FTC v. Fleetcor Techs., Inc.*, 620 F. Supp. 3d 1268 (N.D. Ga. 2022).<sup>1</sup> As such, the goal of the stay as stated by the Commission—to avoid the need for the parties to spend resources litigating the same case in two forums—can and should

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<sup>1</sup> In June 2023, having granted summary judgment to the FTC, the district court entered a permanent injunction against both Respondents and closed the case.

now be accomplished by permitting this action to be resolved through immediate dispositive motion practice.

Complaint Counsel seek to promptly file a motion for summary decision based on the determinations made in the district court action, thereby bringing the small business customers victimized by Respondents' unfair and deceptive practices a critical step closer to the hundreds of millions of dollars of monetary relief that have been withheld from them during the three-year-plus pendency of the federal court and administrative proceedings.<sup>2</sup> Any proceedings and deadlines in this action other than those directly related to dispositive motion filings should, however, remain stayed: because all issues necessary to resolve this administrative proceeding have been fully litigated in the district court, discovery and evidentiary hearing proceedings would serve no purpose other than to inflict on the parties the burden and expense of duplicative litigation that the stay was initiated to prevent.

## **I. Background**

In December 2019, the Commission authorized FTC staff to file in the Northern District of Georgia a complaint against Respondents under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), seeking both a permanent injunction and equitable monetary relief. The complaint alleged that Respondents, who market and sell "fuel cards" that can be used to make purchases at gas stations and similar fueling locations, had violated the FTC Act in two principal ways: (1) by charging their customers, who overwhelmingly are small businesses, hundreds of millions of dollars of fees without their consent; and (2) by misleadingly marketing their products, such as by misrepresenting the discounts available to cardholders.

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<sup>2</sup> The proposed order sought through the instant motion to partially lift the stay would afford Respondents an equal opportunity to file any dispositive motion.

The parties had conducted full discovery on all claims and defenses in the district court action and were midway through summary judgment briefing when the Supreme Court issued its April 2021 decision in *AMG Capital Management v. FTC*, which held that the Commission cannot obtain monetary relief through Section 13(b). 141 S. Ct. 1341 (2021).

In order to preserve the opportunity for monetary relief for the small business consumers harmed by Respondents' years of unfair and deceptive practices, FTC staff sought and filed the administrative complaint in this action, which is identical in substance to the Section 13(b) complaint. In August 2021, within days of filing the administrative complaint, FTC staff filed two motions:

- a motion before the district court to stay or voluntarily dismiss without prejudice the Section 13(b) action in order that this administrative action—a predicate to monetary relief under Section 19(a)(2), 15 U.S.C. § 57b(a)(2)—proceed without delay; and
- a motion before the Commission seeking to stay this administrative proceeding pending the district court's resolution of the motion to stay or voluntarily dismiss.

The Commission promptly granted the motion to stay the administrative proceeding, which was unopposed. Order Staying Administrative Proceeding, Doc. 603387 (Aug. 25, 2021). In so doing, the Commission found that the interest in avoiding unnecessary burden and expense from duplicative actions provided good cause to stay this proceeding while the district court resolved the motion to stay or dismiss the Section 13(b) action. *Id.*

After full briefing and a hearing on the motion to stay or dismiss the Section 13(b) action, ayliwhich Respondents “staunchly” opposed, the district court denied the FTC’s motion, instead deciding to itself adjudicate the merits, after which the FTC—if successful—could obtain a cease-and-desist order and then return to the district court for monetary relief pursuant to

Section 19(a)(2). Order at 21, *Fleetcor Techs.*, No. 19-5727 (N.D. Ga. Feb. 7, 2022). In successfully arguing that the district court should itself determine liability, Respondents expressly—and correctly—represented that there are no different or additional issues that require discovery or adjudication in this administrative action, and that Respondents will be conclusively bound in this action by the district court’s liability determinations. *See infra* Section II.A.

In August 2022, the district court granted summary judgment in favor of the FTC on all claims. *Fleetcor Techs.*, 620 F. Supp. 3d 1268. In a comprehensive, 32,000-word opinion, the Court held that (1) the challenged marketing representations were materially misleading; (2) FleetCor never procured customers’ consent for the seven challenged fees it imposed on consumers; and (3) FleetCor systematically charged late fees for on-time payments and in circumstances where it had blocked consumers from making timely payment. *Id.* at 1289–1339. The Court also held that FleetCor’s CEO, Ronald Clarke, was liable for the company’s conduct. *Id.* at 1339–43.

In addition, the Court held that permanent injunctive relief was “imperative to protect the public interest” given (1) the “mountain of evidence” that Defendants’ violations “were far-reaching” and “ingrained in the fabric of the company for years”; (2) “unrefuted evidence . . . that the conduct was intentional”; (3) Defendants’ refusal to acknowledge the wrongfulness of their conduct; (4) evidence of ongoing violations of the FTC Act; and (5) the serious harm to consumers that would result should Defendants’ violations continue. *Id.* at 1343–46. To determine the contours of a permanent injunction, the district court solicited multiple rounds of briefing and held a hearing. In June 2023, approximately ten months after the grant of summary judgment, the district court entered an Order for Permanent Injunction and Other Relief against

both Respondents and closed the case. *See* Order for Permanent Injunction and Other Relief, *Fleetcor Techs.*, No. 19-5727 (N.D. Ga. June 8, 2023).

## **II. This Action Should Proceed Immediately to Dispositive Motion Practice**

The Commission is committed to resolving Part 3 proceedings expeditiously; delay is the exception and permitted only upon a showing of good cause.<sup>3</sup> Now that the district court has determined Respondents' liability on all counts, this action should be resolved through dispositive motion practice because all necessary issues have been conclusively determined in the district court and these determinations are ripe for preclusive use. Moreover, failing to proceed immediately to dispositive motion practice would unjustly impose additional delay before Respondents' long-suffering customers can receive the monetary relief to which they are entitled.

### **A. All Necessary Issues Have Been Conclusively Determined in the District Court and These Determinations Are Ripe for Preclusive Use**

It is entirely appropriate for this matter to move directly to dispositive motion practice without discovery or other pretrial proceedings because, as Respondents acknowledged in successfully persuading the district court to deny the FTC's motion to stay the Section 13(b) action, there are no different or additional issues for adjudication in this action beyond those addressed by the district court, and Respondents are bound here by the district court's liability determinations. Among other statements, Respondents represented to the district court that, with

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<sup>3</sup> *See* 16 C.F.R. § 3.1 (“[T]he Commission’s policy is to conduct [Part 3] proceedings expeditiously.”); *id.* § 3.41(b) (“Hearings shall proceed with all reasonable expedition . . . .”); *id.* § 3.41(f) (“The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding” unless “the Commission for good cause, so directs”).

what Respondents viewed as one possible exception,<sup>4</sup> there is “no daylight between what Your Honor would decide in the court and what [the FTC] would need to prove there [in the administrative action].” Att. A, Transcript of Oral Argument (“Transcript”) at 41–42, *Fleetcor Techs., Inc.*, No. 19-5727 (N.D. Ga. Jan. 7, 2022). Respondents further represented to the district court that, for “things that are litigated in front of Your Honor we would have issue preclusion. So anything that Your Honor decides against us, that would bind us.” *Id.* at 41.

Respondents’ representations to the district court were a correct statement of law. Under the doctrine of issue preclusion, “once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit” involving a party to the prior litigation. *United States v. Mendoza*, 464 U.S. 154, 158 (1984). Preclusion is appropriate if (1) the issues at stake are “identical” to those in the prior litigation; (2) the issue was “actually litigated” in the prior action; (3) the issue was a “critical and necessary part” of the prior judgment; and (4) the parties are the same or in privity with each other. *See, e.g., Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989); *Baloco v. Drummond Co.*, 767 F.3d 1229, 1251 (11th Cir. 2014). Because there is “no daylight” between the determinations in the district court and those necessary for a cease-and-desist order—*i.e.*, the same issues were actually and

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<sup>4</sup> As the sole potential difference between the federal court and administrative actions, Respondents claimed, incorrectly, that in this proceeding Counsel would need to overcome a “scienter defense.” Att. A, Transcript at 41–42. There is, however, no scienter defense or requirement in determining a violation of Section 5. *E.g., Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988).

Respondents’ confused statements about a “scienter defense” appear to be references to the “dishonest or fraudulent” standard of Section 19(a)(2). *See* Att. A, Transcript at 41–42, 65. The text of the provision, however, commits to the district court in which a Section 19(a)(2) action is pending, rather than to an administrative adjudication, the determination whether a reasonable person would have known the acts or practices at issue were dishonest or fraudulent. 15 U.S.C. § 57b(a)(2). As such, the “dishonest or fraudulent” standard of Section 19(a)(2) does not represent an additional issue for this proceeding or the Commission.

necessarily litigated between the same parties—Respondents will indeed be bound here by the district court’s determinations.

Respondents further assured the district court—again, accurately—that if the court determined liability, this “would then make the cease and desist proceedings very efficient because . . . anything that needs to be decided that you already decided, that would be done. You resolved it conclusively.” Att. A, Transcript at 41–42; *see also* Att. B, Respondents’ Letter to Hon. Amy Totenberg at 2 (Jan. 12, 2022) (“If the FTC prevails here, it would streamline (if not entirely resolve) the administrative proceeding, because any issues decided by this Court would be conclusive.”). Accordingly, any proceedings and deadlines in this action other than those directly related to dispositive motion filings should remain stayed: discovery and evidentiary proceedings would serve no purpose other than to inflict on the parties the burden and expense of duplicative litigation that the stay was initiated to prevent. *See* Att. A, Transcript at 38 (Respondents’ representations that there are no “meaningful differences between the [federal court] injunction standard and the cease and desist order standard” and that “we see no daylight” on the “type of evidence that would be presented and the decision of the Court or the FTC”).<sup>5</sup>

In addition, the determinations of the district court are ripe for preclusive use. Although Respondents are likely to appeal the district court’s entry of judgment against them, it is well-

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<sup>5</sup> Complaint Counsel agreed with Respondents that the district court and the Commission would apply identical legal standards to determine liability. Att. A, Transcript at 44 (“In terms of liability, the same standard, correct.”). Complaint Counsel noted that there may be “a little bit of daylight” between the factors that the district court and the Commission would respectively consider in determining the scope of injunctive relief, *id.* at 29–32, 44–45, while, as noted in the accompanying text, Respondents saw “no daylight.” In any event, Complaint Counsel agreed that the same factual determinations would be sufficient to decide injunctive relief in either venue. *Id.* at 30–31, 47 (noting that the summary judgment papers filed by the parties in the district court could be re-used in the cease-and-desist proceeding).

established that a possible or pending appeal does not diminish the preclusive effect of a district court’s determinations. *See, e.g., Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (“The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal.”); *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 467 (5th Cir. 2013) (“[a] case pending appeal is res judicata and entitled to full faith and credit unless and until reversed on appeal”); *Ross ex rel. Ross v. Bd. of Educ. of Twp. High Sch. Dist. 211*, 486 F.3d 279, 284 (7th Cir. 2007) (“the fact that an appeal was lodged does not defeat the finality of the judgment” for preclusion purposes); *Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993) (“the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided”); *Erebia v. Chrysler Plastic Products Corp.*, 891 F.2d 1212, 1215 n. 1 (6th Cir. 1989) (“a final judgment retains all of its preclusive effect pending appeal”).

**B. Failing to Proceed Immediately to Dispositive Motion Practice Would Unjustly Delay Monetary Relief**

Significantly, any additional delay before proceeding to dispositive motion practice would be manifestly unjust to the consumers injured at Respondents’ hands. The district court’s summary judgment decision reflects substantial and ongoing injury to consumers. *Fleetcor Techs.*, 620 F. Supp. 3d at 1314–15, 1319 (noting FTC estimates of equitable monetary injury to consumers from unlawful charges of more than \$530 million as of December 2019); *id.* at 1345–46 (unlawful FleetCor practices are ongoing). The affected consumers are not large enterprises that can easily bear an indefinite wait for redress, but overwhelmingly are small, less-sophisticated businesses with limited resources. *Id.* at 1280, 1334, 1346 (citing FleetCor documents and studies describing Respondents’ customers as “small business owners/co-owners” who are “not business people,” are “short on time due to wearing multiple ‘hats,’” and are often “fairly unsophisticated”). There is no good cause to further extend their suffering by



failing to proceed immediately to dispositive motion practice.

**III. Conclusion**

For the foregoing reasons, Complaint Counsel respectfully request that the Commission enter the proposed order to partially lift the stay in this Part 3 action.

June 23, 2023

Respectfully submitted,

/s/ Daniel O. Hanks  
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# Attachment A

The following is the PDF of an official transcript. Official transcripts may only be filed in CM/ECF by the Official Court Reporter and will be restricted in CM/ECF for a period of 90 days. You may cite to a portion of the attached transcript by the docket entry number, referencing page and line number, only after the Court Reporter has filed the official transcript; however, you are prohibited from attaching a full or partial transcript to any document filed with the Court.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FEDERAL TRADE COMMISSION,	:	
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PLAINTIFF,	:	
	:	
vs.	:	DOCKET NUMBER
	:	1:19-CV-5727-AT
FLEETCOR TECHNOLOGIES, INC.,	:	
AND RONALD CLARKE,	:	
	:	
DEFENDANTS.	:	

**TRANSCRIPT OF ORAL ARGUMENT VIA ZOOM PROCEEDINGS  
BEFORE THE HONORABLE AMY TOTENBERG  
UNITED STATES SENIOR DISTRICT JUDGE**

**JANUARY 7, 2022**

**10:28 A.M.**

***MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED***

***TRANSCRIPT PRODUCED BY:***

<b><i>OFFICIAL COURT REPORTER:</i></b>	<b><i>SHANNON R. WELCH, RMR, CRR</i></b>
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**A P P E A R A N C E S O F C O U N S E L**

**FOR THE PLAINTIFF:**

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LEVI M. DOWNING  
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## P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; January 7, 2022.)

THE COURT: All right. Is everyone connected in? I see Mr. Madden just connected.

MR. MADDEN: Yes, Your Honor. I apologize.

THE COURT: No. No. No need to apologize. You are on time. I just was trying to make sure that everyone was present that you-all had organized to be here.

I hope you-all are well. We are here to have oral argument and discuss the present pending motion to dismiss from the FTC and the summary judgment motion -- related summary judgment motions and *Daubert* motion.

But my greatest concern obviously is the motion -- the motion to dismiss and request that it be done on a voluntary basis and the response of the defendant to this.

As I indicated, I allocated a substantial amount of time for this. I have some thoughts about how we might proceed. But I would like to hear from you first as to how much time you would like to have to make any presentation you so desire, first of all.

MS. FRASSETTO: Yes, Your Honor. Again, thank you for accommodating our request to hold this hearing virtually today.

The FTC is prepared to discuss specifically our motion to stay or alternatively dismiss without prejudice. And

1 I would be happy to give some opening remarks on that, if you  
2 would like.

3 THE COURT: Okay. And defense counsel?

4 MR. MUNDEL: Thank you, Your Honor. This is Ben  
5 Mundel on behalf of FleetCor. We're prepared to discuss all of  
6 the motions that Your Honor mentioned today. We're happy to  
7 proceed in any particular order and timing limits, Your Honor.

8 THE COURT: All right. Well, I think first and  
9 foremost I would like to spend time on the motion to dismiss  
10 filed by the FTC. I would like to spend less time on the  
11 motion for summary judgment. I don't know that it will be as  
12 helpful to me at this juncture.

13 But there are issues that -- that might be of some  
14 import. And one of the things I would like everyone to  
15 consider is also what are the -- you know, really looking at  
16 the motion to dismiss, as well as the fact that the Government  
17 also has a pending motion for an injunction -- I mean, has  
18 provided a delineated request for injunctive relief.

19 What is the possibility -- because it is not one that  
20 is really fully explored in anyone's position so far that --

21 I'm sorry. I'm going to have to close the door here  
22 for a moment.

23 **(There was a brief pause in the proceedings.)**

24 THE COURT: I am out of practice with using Zoom from  
25 the house. But so many people have become ill or requested

1 modifications in the way of the proceedings that here I am  
2 again doing it.

3 All right. In any event, what I'm interested in is  
4 partially if the -- also if the FTC -- I ultimately conclude  
5 that the proceedings should continue at least as to injunctive  
6 relief and in this -- this forum, does that in any way preclude  
7 the FTC from basically either continuing with its Section 19  
8 claim possibly in the commission proceeding or just simply  
9 staying -- my allowing them to stay that -- the complaint --  
10 continue to stay their -- that proceeding pending the  
11 conclusion of the injunctive relief claim.

12 And that is a -- and that notion would be essentially  
13 not that I would hold open this proceeding and then stay it  
14 later -- for later on intervention. I mean, obviously it  
15 could -- that might not be a reasonable way of proceeding. It  
16 might be that this matter comes to a close. And if the FTC  
17 decided at some point it was going to come back into federal  
18 court, it could obviously always mark this as a related case.  
19 But this case would be closed.

20 I'm just sort of throwing that out so that you-all  
21 can think about it. And there are other -- lots of other  
22 related issues I have. But that was one that was just an  
23 option that was not discussed in your briefs.

24 So -- all right. I've lost -- let me see.

25 Ms. Frassetto, do you want to proceed? It is your



1 motion.

2 MS. FRASSETTO: Yes. I will proceed, Your Honor.

3 I would like to briefly summarize the key issues  
4 before Your Honor today. First, I would like to discuss the  
5 FTC's sole reason for its request for a stay or dismissal  
6 without prejudice. And that is to preserve the possibility of  
7 giving money back to injured consumers in the wake of the  
8 Supreme Court's decision in *AMG*.

9 Second, I will discuss why all the equities weigh in  
10 favor of granting the FTC's request, why there is no prejudice  
11 to defendant, and why the FTC's proposed course of action is  
12 fully supported by Eleventh Circuit precedence.

13 First, we are here today because the FTC is seeking  
14 to reserve the possibility of getting money back to injured  
15 small business consumers in the middle of the pandemic and post  
16 *AMG*.

17 The extensive evidence presented in this case shows  
18 that these consumers lost more than \$550 million after  
19 defendants lured them in with false advertisements and then  
20 charged them hidden fees. But the *AMG* decision, which  
21 overturned nearly 40 years of circuit court precedent, means  
22 that the FTC can no longer recover a single penny of that money  
23 for consumers in this fashion.

24 The Supreme Court has made clear that the FTC's only  
25 viable path to monetary relief for consumers in cases like this

1 is to first go through administrative litigation. As a result,  
2 the commission authorized the filing of an administrative  
3 complaint against defendants in August of last year. All the  
4 FTC is trying to do here is respect the *AMG* decision and move  
5 forward as seamlessly as possible to protect injured consumers.

6 Our proposed path would preserve the possibility of  
7 getting money back to consumers if defendants are found liable  
8 rather than expending this Court's resources deciding liability  
9 but then leaving consumers with nothing.

10 Second, the issue before Your Honor today is what to  
11 do about this action in a post *AMG* world where the only path  
12 forward for getting money to injured consumers is an  
13 administrative proceeding.

14 We are requesting a stay --

15 **(There was a brief pause in the proceedings.)**

16 MS. FRASSETTO: So, again, we are seeking a stay or  
17 alternatively dismissal without prejudice. Each would allow  
18 proceeding in administrative litigation without simultaneously  
19 litigating in federal court. And both the stay and dismissal  
20 are amply supported by Eleventh Circuit precedent.

21 I will first discuss the stay and then the dismissal  
22 without prejudice. So with respect to the stay, our sole  
23 driving force here is preserving the possibility of monetary  
24 relief for injured consumers. A stay would preserve the  
25 possibility of obtaining a greater amount of relief for those

1 consumers. Without a stay, consumers' relief would potentially  
2 be limited to three years from the date the administrative  
3 action was filed in August 2021, instead of three years from  
4 the date this action was filed in December 2019.

5 THE COURT: Let me ask you -- let me interrupt you  
6 there.

7 So have you assessed what the scope of the impact  
8 will be? I mean, you're talking about a two-year difference;  
9 right?

10 MS. FRASSETTO: Yes, Your Honor. I can provide rough  
11 numbers, if that would be useful.

12 THE COURT: Yes. I mean, I would like to know how  
13 much it truncates the remedy.

14 MS. FRASSETTO: Sure. So if it was three years from  
15 August of 2021, it would be less than half. It would be at  
16 best about 250 million.

17 THE COURT: Okay.

18 MS. FRASSETTO: And I would note that the three years  
19 from December 2019 would still be about 425 million. So that  
20 is still less than we were seeking because of this three-year  
21 statute of limitations.

22 As we noted in the brief, we would potentially argue  
23 for equitable tolling. We think all of that is somewhat  
24 premature here. But just so you have the numbers.

25 THE COURT: Okay. Go ahead.

1 MS. FRASSETTO: Okay. So practically speaking, the  
2 stay would work as follows. If defendants are held liable in  
3 the administrative proceedings, we would then return to court  
4 on a narrower issue, the amount of money that should go back to  
5 victims injured by defendants' practices.

6 All of the traditional stay factors, the interest of  
7 the plaintiff, defendants, courts, nonparties, and the public,  
8 weigh in favor of a stay. The FTC, the public, and most  
9 notably injured consumers would benefit by having the case  
10 proceed in a forum that potentially allows recovery of more  
11 than \$550 in relief. These funds would primarily go to small  
12 businesses injured by defendants' conduct at a time when small  
13 businesses are facing pandemic hardships as well.

14 Administrative litigation would also free up Your  
15 Honor's docket for the time being. As for any follow-on  
16 action, the issues would be narrowed for this Court. Your  
17 Honor would not need to decide liability, only monetary relief.  
18 And defendants have made no credible argument that a stay would  
19 harm their interest.

20 Further, the proposed stay is moderate and analogous  
21 to the *Tomco Equipment* case cited in our opening brief also out  
22 of this district. There, the Court granted a stay pending a  
23 patent reexamination, a process that could take over a year.  
24 The Court felt that the reexamination would simplify and narrow  
25 the issues before it.

1 Here, the administrative proceeding can conclude in  
2 less than a year and would resolve Section 5 liability and  
3 injunctive relief. If the FTC lost, there would be nothing  
4 left for this Court to decide. If the FTC won, Your Honor  
5 would only have to decide issues related to monetary relief.

6 In turning now to dismissal without prejudice, as I  
7 noted before, while the stay would potentially preserve a  
8 larger amount of what was lost for struggling small businesses,  
9 the FTC is moving in the alternative for dismissal without  
10 prejudice. And there *Potenberg v. Boston Scientific* and  
11 *McCants v. Ford Motor Co.* set forth the Eleventh Circuit  
12 standard very clearly.

13 In *Potenberg*, the court held -- and I quote -- in  
14 most cases, a voluntary dismissal should be granted unless the  
15 court will suffer clear legal prejudice other than the mere  
16 prospect of a subsequent lawsuit as a result.

17 And in *McCants*, the court granted voluntary dismissal  
18 without prejudice. And notably in that case, the suit was  
19 likely time-barred where the plaintiff had originally filed and  
20 sought dismissal and not time-barred where the plaintiffs  
21 intended to refile.

22 *McCants* is particularly instructive in refuting  
23 defendants' claim here that losing a defense to monetary relief  
24 is clear legal prejudice. If losing its statute of limitations  
25 defense is not clear legal prejudice, surely losing only one

1 defense also is not. And tellingly defendants did not cite a  
2 single in-circuit decision to support their claim that losing  
3 such a defense was a clear legal prejudice.

4 Likewise, it is not clear legal prejudice to move to  
5 administrative proceedings. Any argument that such proceedings  
6 violate due process is without legal support and was  
7 specifically rejected by the Supreme Court in *FTC v. Cement*  
8 *Institute* and *Withrow v. Larkin*, in which the court  
9 specifically said -- and I quote -- the combination of  
10 investigative and adjudicative functions does not without more  
11 constitute a due process violation.

12 Further, none of the parties' efforts to date will be  
13 wasted. The FTC will be making the same summary judgment  
14 arguments in its motion to the commission. And the FTC will  
15 not seek additional discovery assuming defendants do the same.

16 The facts here are analogous to those in *Daglis v.*  
17 *Coca-Cola* where Your Honor granted dismissal without prejudice  
18 after 21 months of discovery and after defendants filed a  
19 summary judgment motion. Your Honor further noted that the  
20 parties could reuse discovery from that action in any future  
21 proceeding.

22 Finally, I want to close by addressing defendants'  
23 bad faith allegations, which personally upset me because the  
24 FTC has been civil and professional throughout these  
25 proceedings under unprecedented legal change and challenges

1 during the pandemic, which we are still obviously facing today.

2 The FTC has acted in good faith throughout these  
3 proceedings, including in the wake of the Supreme Court's *AMG*  
4 decision. Proceeding administratively is not some eleventh  
5 hour gotcha game to us. We are not doing this for ourselves.  
6 We are here for consumers. We're doing this to preserve the  
7 possibility of getting money back to small business consumers  
8 who faced dire circumstances during the pandemic.

9 We have been clearly transparent with the Court and  
10 defendants that obtaining monetary relief for these consumers  
11 is the sole driving factor in our decision.

12 And I want to thank Your Honor again for your time  
13 today, and I look forward to answering any questions you may  
14 have.

15 Thank you.

16 THE COURT: I have a number of questions. But I  
17 think it would be more useful to hear from defense counsel and  
18 then proceed to ask the questions.

19 MS. FRASSETTO: Yes, Your Honor.

20 MR. MUNDEL: Thank you, Your Honor. This is Ben  
21 Mundel on behalf of FleetCor.

22 I want to start by answering the question that you  
23 have. You asked whether the FTC can litigate liability and the  
24 injunction in federal court and then go back to an admin  
25 proceeding in Section 19 to get the monetary relief if it

1 prevails. And Ms. Frassetto never told the Court that the FTC  
2 could not do that. And, in fact, there is no reason that we  
3 can see at this time why the FTC, if it prevails in front of  
4 Your Honor, could not do that.

5           So that is why it is clear to us from what the FTC is  
6 doing is they are trying avoid this Court from determining  
7 liability. They are trying to take the summary judgment motion  
8 that they filed in front of Your Honor, instead of having an  
9 independent Article III court decide them. The only reason --  
10 the only reason for this motion is because the five  
11 commissioners at the FTC want to decide the very motions that  
12 they have filed in this Court. Instead of allowing an  
13 independent neutral judge to decide it, they want to decide  
14 their own motion.

15           And there are three things beyond that that I would  
16 like the Court to keep in mind up front. The first is that  
17 this is a dispositive motion. It is dispositive because if the  
18 Court permits the commissioners to decide their own summary  
19 judgment motion it would be dispositive.

20           Since 1995, the FTC has prevailed in all of the cases  
21 they filed directly in its own forum. But this is not just any  
22 ordinary case. Because unlike every single one of those cases,  
23 for the first time here, the FTC has actually already filed  
24 summary judgment motions in front of the Court. And in those  
25 motions, it has said it should prevail as a matter of law.



1           And Ms. Frassetto confirmed that today that they  
2 still believe they should prevail as a matter of law. And in  
3 their motion to dismiss and stay, they told the Court that they  
4 demonstrated in its summary judgment papers that FleetCor  
5 violated the law. So it is dispositive because the FTC  
6 commissioners want to decide their very own summary judgment  
7 motion where they have already prejudged that FleetCor violated  
8 the law.

9           The second thing we want the Court to keep in mind is  
10 that this is completely unprecedented. The FTC cannot cite any  
11 precedence for the proposition that it may take a case that it  
12 filed in federal court, litigate it all the way from summary  
13 judgment, and then dismiss it in favor of its own  
14 administrative forum. In the 108-year history of the FTC, they  
15 have never done that before. And no federal agency has ever  
16 done it before either.

17           And certainly *AMG* was an intervening Supreme Court  
18 case. But this is not new. Supreme court cases and court of  
19 appeals cases have decided issues on antitrust and consumer  
20 protection and issues that other agencies dealt with during the  
21 pendency of the litigation and never before has any federal  
22 agency tried to do what the FTC is doing here.

23           The third thing we would ask the Court to keep in  
24 mind is that the burden of proof remains with the FTC. That  
25 is, Rule 41 prohibits the Federal Trade Commission or any

1 plaintiff from voluntarily dismissing a suit at this late stage  
2 without an order of the court. And the reason Rule 41 requires  
3 an order from the court is to protect the interests of  
4 defendants and protect the interests of defendants just like  
5 FleetCor here today.

6           When it comes to the legal standard, the parties  
7 largely agree that the motion to dismiss should be denied if it  
8 will cause a legal prejudice or it was done in bad faith. We  
9 agree on the legal standard, but the burden of proof is on them  
10 to disprove that there was any legal prejudice or any bad  
11 faith. And they haven't done that here, Your Honor.

12           THE COURT: I don't know that it is their burden to  
13 show there is no bad faith. I think that is always your  
14 burden -- the opposing party's burden to show bad faith and  
15 which is a very high standard when you are dealing with an  
16 agency in terms of its decision-making as properly argued by  
17 the FTC. And I don't know that sort of mere supposition in  
18 these contexts where it is -- is meaningful argument.

19           MR. MUNDEL: Certainly, Your Honor. To be clear, bad  
20 faith is not required. We believe the motion should be denied  
21 on the basis of legal prejudice standing alone. But we have  
22 identified bad faith beyond just supposition. And the most  
23 favorable example of that, Your Honor, is the case law from the  
24 Eleventh Circuit -- and the FTC admits this on Page 9 of their  
25 brief -- is that filing a motion to dismiss to avoid an adverse

1 summary judgment motion is bad faith. That is in the *McBride*  
2 case from the Eleventh Circuit. And Page 9 of their briefing  
3 confirmed that. They agree. Yet that is exactly what the FTC  
4 is doing here.

5 We filed on behalf of FleetCor and Mr. Clarke a  
6 motion for summary judgment on restitution. And the FTC cannot  
7 get restitution in this court based upon the plain text of the  
8 statute and the Supreme Court's decision in *AMG*. The FTC  
9 further concedes that we must prevail on that motion based on  
10 the Supreme Court's finding decision in *AMG*. Yet that is  
11 precisely -- avoiding that adverse decision is precisely --  
12 precisely what the FTC is doing.

13 In fact, what Ms. Frassetto said was the sole reason  
14 that the FTC filed this motion. So their own concessions  
15 confirmed under Eleventh Circuit precedent that they are trying  
16 to avoid an adverse summary judgment ruling. And that  
17 constitutes bad faith for the purpose of Rule 41.

18 But there are other reasons for bad faith as well.  
19 But before I get to those, I wanted to talk briefly if I may  
20 about the legal prejudice because I think that is really the  
21 core of why this motion should be denied.

22 And the principal legal prejudice that FleetCor and  
23 Mr. Clarke will face if this motion is granted is that it would  
24 deprive them of a complete and total defense to damages. And  
25 that is the quintessential forum of legal prejudice. The FTC

1 does not dispute otherwise. Using a defense to a cause of  
2 action, using a defense to damages is the core legal prejudice.  
3 Yet again that is exactly what this motion does.

4 If this case proceeds in federal court, FleetCor has  
5 the absolute and complete defense to monetary relief. If they  
6 prevail in their motion and are able to litigate in the  
7 administrative forum, it is no longer a complete and total  
8 defense. That is precisely the definition of legal prejudice.  
9 And precisely in the *Philibert v. Ethicon* case where the court  
10 found that using just a defense to punitive damages was a loss  
11 of a legal right.

12 THE COURT: I'm sorry. I didn't understand your last  
13 sentence.

14 MR. MUNDEL: Yes. I'm sorry, Your Honor.

15 The Court in *Philibert v. Ethicon* determined that the  
16 loss of a defense to punitive damages -- punitive damages  
17 constituted legal prejudice. Here, we have a much stronger  
18 case because it is not just the loss of the defense to a  
19 particular type of extreme damages, punitive damages. It is a  
20 loss of defense to total damages. So under that case, there is  
21 clear legal prejudice.

22 The only argument to the contrary from the FTC is  
23 that there are cases that talk about the loss of the statute of  
24 limitations, but that is limited to the statute of limitations  
25 not being legal prejudice. There is no court that has ever

1 said the loss of a defense to damages does not constitute legal  
2 prejudice because surely it is in the heartland of what is  
3 prejudicial to a defendant.

4 But in addition to the loss of legal defense, the  
5 defendants would also lose the right to a neutral  
6 decision-maker. And this is important because the right to a  
7 neutral decision-maker is an essential guarantee of due  
8 process.

9 But to be clear, we are not arguing that the FTC  
10 administrative structure violates due process. We're not  
11 arguing that. What we are arguing -- and the Court, frankly,  
12 should not reach that question here because it is not  
13 presented. The only thing that is presented here is in the  
14 very specific facts of this case -- of this case where the FTC  
15 has made statements prejudging the summary judgment motion.  
16 Whether allowing them to take their own motion and decide them  
17 is not whether that violates due process, whether it violates  
18 Rule 41's prohibition on causing legal prejudice when granting  
19 a motion for voluntary dismissal at this late stage.

20 The factual scenario is different from what they are  
21 asserting from the legal question is very different. And in  
22 the context of this case where the commission has already taken  
23 the position that it should prevail as a matter of law and then  
24 wants to decide those very same issues that it filed in this  
25 case already and are fully briefed and submitted for

1 decision -- when it has done that already, that shows that  
2 FleetCor, Mr. Clarke will not have a neutral decision-maker.  
3 And that is legal prejudice that justifies denying the motion.

4 And no court has ever granted a voluntary -- motion  
5 for voluntary dismissal when it would move from a neutral  
6 decision-maker to one that has prejudged the merits of the  
7 case. And in every case the FTC cites it is moving from a  
8 federal court to another federal court or a federal court to a  
9 state court where there are neutral decision-makers and there  
10 is not prejudgment.

11 THE COURT: I don't know why you are saying that I  
12 should assume that the -- for instance, the administrative law  
13 judge is not going to be neutral.

14 MR. MUNDEL: You absolutely should not and need not  
15 assume that, Your Honor. The FTC did not put this in their  
16 brief. But under the rules of procedure of the Federal Trade  
17 Commission and what Ms. Frassetto and her colleagues told us,  
18 the administrative law judge will not decide the summary  
19 judgment papers. It will be decided by the commission itself.  
20 The commission has the right to decide those in the first  
21 instance. So it is the commission that would be making the  
22 determination on summary judgment. It is the commission that  
23 has affirmed in this Court repeatedly that FleetCor has in  
24 their view -- and their view is incorrect and not supported by  
25 the evidence -- but has violated the law and should lose

1 summary judgment as a matter of law.

2 And they have issued press releases that have said  
3 that FleetCor has deceived small business customers. So there  
4 is no need to make an assumption about the ALJ at all because  
5 we're only focused on the commission. And even as to the  
6 commission, we're only asking the Court to not make an  
7 assumption into their subjective intent but into the statements  
8 that they have made in press releases and repeated filings in  
9 this court.

10 So that is why it is clear that there is a loss of a  
11 neutral decision-maker. And, in fact, it appears to us that  
12 that is the only legal reason to move this case from federal  
13 court to the administrative proceedings because we never heard  
14 from the FTC and we still haven't heard any reason why they  
15 can't proceed and litigate liability and injunction in this  
16 court. And if they prevail, we can go to the follow-on  
17 proceedings to try to get monetary relief.

18 THE COURT: Tell me about what that would look like  
19 also in terms of the statute of limitations, which was really  
20 part of my question earlier.

21 If they proceed here with their claims for injunctive  
22 relief and prevail, you are saying they can then do what?

23 MR. MUNDEL: They would have -- at least have the  
24 option -- it appears to me they would have the option if they  
25 prevail going to an administrative proceeding with the benefit,

1 by the way, Your Honor, of having a judgment from this Court on  
2 the issue of liability. They would have the benefit of that.

3 They could go to the administrative proceeding, do  
4 what needs to be done there, and then if they need to and they  
5 are able to proceed with Section 19(b) in federal court and  
6 just do exactly as they are doing here except the key  
7 difference is they would not be taking the case out of the  
8 hands of a federal court judge that has held the case for two  
9 years, litigated it all the way through summary judgment,  
10 causing extreme burden to the defense.

11 So that is how they would do it. And as far as the  
12 statute of limitations in relation to that, I agree with  
13 Ms. Frassetto on this. I think it is premature to determine  
14 that issue. But it is absolutely the case that if the Court  
15 grants a stay, not only would that be prejudicial, it actually  
16 increases the prejudice because it gives them an additional  
17 argument to relate that.

18 MS. FRASSETTO: Your Honor, if I may respond.

19 THE COURT: I want to make sure that counsel is  
20 through, and then you can respond to all of this. Okay?

21 MR. MUNDEL: I'll make a few more points, Your Honor.  
22 First on the prejudice.

23 The last point of prejudice I would like to hit  
24 briefly is the cost and expense because this is an important  
25 point. Courts have been clear that ordinarily the cost of



1 litigation is just practical prejudice. It is not legal  
2 prejudice.

3 But when the cost is so great, when the cost is so  
4 high, when it is so significant, it reaches the point of legal  
5 prejudice. And that is what the Eleventh Circuit explained in  
6 *Stephens v. Georgia DOT* where it affirmed the denial of a  
7 motion to dismiss in a case that is either on all fours with  
8 this one but it appears that the prejudice to the defendant was  
9 less substantial. That case had been pending for two years.

10 THE COURT: Tell me the citation to the *Stephens*  
11 case.

12 MR. MUNDEL: Yes, Your Honor. 134 F. App'x. 320,  
13 Eleventh Circuit 2005.

14 THE COURT: All right.

15 MR. MUNDEL: And that court found a denial of the  
16 motion to voluntary dismiss, quote, because during the two-year  
17 period since the filing of the complaint, numerous motions had  
18 been filed, expensive discovery had been produced, and motions  
19 for summary judgment were filed.

20 In our case, two years, there was the voluminous  
21 asymmetrical discovery at great expense. The FTC asked Your  
22 Honor to take more depositions than it was allowed. The FTC  
23 asked Your Honor to have more custodians than normally is  
24 permitted.

25 The defendants produced more than a million pages of

1 documents, more than 6000 gigabytes of data, all at a cost of  
2 more than \$10 million. So this case was litigated to the  
3 extreme in federal court. And when the expense and burden gets  
4 that high under *Stephens v. Georgia* it absolutely reaches the  
5 point of legal prejudice. And counsel for the FTC cites the  
6 (Zoom interference) case --

7 THE COURT: Is that case -- it was a private -- an  
8 individual proceeding? It was an employment proceeding; isn't  
9 that right?

10 MR. MUNDEL: That's correct, Your Honor.

11 THE COURT: And one of the issues here -- yes, there  
12 is the money. But there is also a vast public interest that is  
13 involved in this case. It is not just your -- not just the  
14 defendants' interest. But it is not like the FTC is just  
15 proceeding for its own private benefit.

16 MR. MUNDEL: That's absolutely true, Your Honor. And  
17 I'll say three things.

18 The first is: That is not a factor under Rule 41.  
19 But there is a public interest here. If the Court reviews the  
20 summary judgment briefing, we think it is very clear that the  
21 FTC's statement that they are entitled to \$500 million is  
22 untrue. They have no evidentiary basis to support it.

23 We believe that is the reason why they want to leave  
24 this court. Because the discovery record in this case shows  
25 that the FTC's own expert -- their own expert admitted he did

1 not have any evidence that FleetCor customers were deceived.  
2 This is a deception case. They want \$500 million in  
3 restitution. Their expert says no evidence to support it.  
4 Their 30(b)(6) witness said they have no evidence that even  
5 ten percent of FleetCor customers saw deceptive advertising.  
6 There is no evidence that more than ten percent of FleetCor  
7 customers thought those advertisements were material or relied  
8 upon them. There is no evidence according to the FTC's own  
9 30(b)(6) witness that any fees were charged by FleetCor without  
10 prior notice.

11 So the evidence in this case shows not only that  
12 there is no liability but there is absolutely no basis for the  
13 demand for \$500 million in restitution. Where that number  
14 comes from is that the (Zoom interference) at the FTC simply  
15 added up the number of fees that FleetCor charged during a  
16 particular time period on a particular card program.

17 It is a number that would not withstand any scrutiny  
18 of a neutral decision-maker. So the public interest here is  
19 not in reserving the right for the FTC to seek an amount of  
20 damages that is not supported by the evidence. But the public  
21 interest is in putting a baseless lawsuit behind this company  
22 so that its employees and shareholders can move on and create  
23 value for their customers so their customers don't have  
24 increased cost and less services because of the burden and  
25 expense of this litigation.

1           And we believe the evidence strongly supports that.  
2     But if Your Honor is still concerned about potential relief for  
3     customers if they were injured, there are many avenues for  
4     relief. The FTC is not the only avenue for relief. There are  
5     private plaintiff class actions. There are state attorneys  
6     general. There is the Department of Justice. There are many  
7     other forums.

8           And the FTC apparently has a way they can get relief  
9     through this proceeding if they litigate the case in front of  
10    Your Honor to the merits.

11           THE COURT: Going back -- I mean, your argument is,  
12    among other things, that they can -- they have their case  
13    pending -- their administrative proceeding pending at this  
14    point in the commission. And if I needed to, at the conclusion  
15    of the Section 5 part of the case, they could -- I should stay  
16    that -- basically close my case and allow it to be -- then to  
17    come back if they have satisfied whatever they need to do under  
18    the administrative proceedings?

19           MR. MUNDEL: You are saying -- just to make sure I  
20    understood the question -- litigate in the court first for  
21    liability and the injunction? And if the FTC prevails, stay  
22    the case for the administrative proceedings to continue? Is  
23    that your question?

24           THE COURT: Yes.

25           MR. MUNDEL: Your Honor, I think that would be one

1 option. The truth is I don't think it is a -- in the event the  
2 FTC prevails in front of Your Honor, our preference would be to  
3 close the case because a stay is not actually the right vehicle  
4 because the FTC never intends to litigate the case they have  
5 brought further. They would come back and bring a new  
6 complaint, different cause of action, different legal standard,  
7 different legal theories, different facts.

8 So I'm not -- so our view is the better course would  
9 be to close the case; let the FTC go to the administrative  
10 proceeding; let them file a new 19(b) action. They could still  
11 make the same tolling and equitable arguments they can. It is  
12 just under a new case number. I think they can still do that.

13 We would oppose that they could do it. But, Your  
14 Honor, if your preference is to do that, I think our view is  
15 that would be better than the alternative. That would be  
16 better than allowing -- dismissing the case now and allowing it  
17 to go directly to the administrative proceeding.

18 THE COURT: Thank you. All right. Let me hear now  
19 the response of FTC counsel.

20 MS. FRASSETTO: Sure, Your Honor. There is a lot to  
21 discuss. But I'll be brief and am happy to answer any  
22 questions.

23 You know, again, I just want to start with it really  
24 does upset me that the defendants just simply don't believe the  
25 reason that we are doing this. You know, there is no evidence

1 we have acted in bad faith. There is no evidence the  
2 commissioners won't come in with an open mind, which is, quite  
3 frankly, the standard. And I just -- I don't know how much  
4 more I can say. I'm here before you, Your Honor. And I am  
5 telling you that is the whole reason that we are here is *AMG*.

6 And on that point with respect to whether we should  
7 just have these proceedings play out, the problem, Your Honor,  
8 is that the Supreme Court in *AMG* said that we need a cease and  
9 desist order from the commission before we can pursue the  
10 follow-on Section 19 action.

11 It strikes as duplicative and certainly to my  
12 knowledge unprecedented to have a federal judge decide all of  
13 the factual issues that the commission would normally view with  
14 their expertise in consumer protection law. To have whatever  
15 those findings are go to the commission to potentially rubber  
16 stamp though, to be quite honest, I just don't know what that  
17 would look like because we still at the end of the day need  
18 this cease and desist order from the commission. So it is  
19 unclear how that would work.

20 So the reason that we are trying to do this now is it  
21 is a clean break. It is not looking for a better outcome. It  
22 is simply that the commission is the one that needs to issue  
23 the cease and desist. It makes sense for them, particularly  
24 because this is what they are there for, to do the factual  
25 findings to and from those findings come up with their cease

1 and desist order.

2 THE COURT: All right. Let me stop you for a second  
3 and remember to go a little slower if you would.

4 MS. FRASSETTO: I apologize, Your Honor.

5 THE COURT: It is all right. But you want a good  
6 record also in terms of what is being argued.

7 But let me make -- all right. The injunctive relief  
8 order that you are requesting is, in fact, a cease -- in effect  
9 a cease and desist, among other things, order that you  
10 submitted for this Court to enter. And it doesn't mean that  
11 the commission wouldn't be in a position to consider my  
12 findings and basically do that rapidly.

13 Or am I -- what is in error in that? I mean, it may  
14 have been -- it may be sort of somewhat unprecedented. But I  
15 think that the Supreme Court's decision after, as you said, 40  
16 years of authority including in this circuit -- the Eleventh  
17 Circuit -- you know, it presents some very unique circumstances  
18 for those cases that are sort of caught in the headwaters of  
19 all of this.

20 So, you know -- and there are other cases I know  
21 that -- where the commission has decided just to allow the case  
22 to proceed in federal court, which apparently are ones where  
23 the biggest issue is injunctive relief. It must be, or else  
24 they would be in the same pickle that I'm in.

25 But -- so all right. So we have a unique

1 circumstance because of the procedural history of this case and  
2 the timing of AMG. And, you know, I don't see though why it  
3 would present such a challenge for the commission to rule based  
4 on whatever finding I might issue.

5 MS. FRASSETTO: So, Your Honor, one issue too that we  
6 have flagged in the briefs is that there is a little bit of  
7 daylight between the standard for federal injunction and the --

8 THE COURT: All right. And I understand that. I  
9 understand that.

10 MS. FRASSETTO: And so there could be some issues  
11 where there is some, you know, duplicative efforts and some  
12 inefficiencies there where the commission can't simply rubber  
13 stamp the federal injunction because there is this different  
14 standard. So I would just --

15 THE COURT: And I understand that fully. I think it  
16 would be helpful for the Court if you would delineate how you  
17 think that would play out in this case since you have already  
18 gone through the summary judgment record and you are familiar  
19 with the record.

20 MS. FRASSETTO: Sure, Your Honor. So, you know, with  
21 respect to the defendants' affirmative motion, if we were to  
22 play this out and then go back to admin, it strikes me that a  
23 lot of the work that Your Honor would be doing there would be  
24 not particularly relevant to the admin proceedings. Obviously,  
25 we are aware that we cannot get money under 13(b). So any



1 decision there would not preclude us from going to  
2 administrative proceedings.

3 And then on the injunction, again, many of the  
4 defendants' arguments are based on 13(b). And that is not to  
5 say that what they are doing they couldn't reuse because I  
6 think it is slightly different for the parties. The parties  
7 are essentially arguing what the practices show that they meet  
8 this standard. But, Your Honor, for the commission, there is a  
9 slightly different standard of applying those facts to the law.  
10 And so that is where --

11 THE COURT: I understand that. But I'm asking you to  
12 tell me how that plays out, more specifically how you can  
13 conceptualize what that different standard would mean in terms  
14 of the evidence being presented in front of the Court versus --  
15 I mean, I realize the commission would have to consider that  
16 and would have to go to the proceeding to consider that and  
17 then present -- and that there is some type of more bad faith  
18 like element of that standard.

19 But tell me how that would play out here. I mean, it  
20 would be -- it would have to play out whether you proceed  
21 obviously now if I let you dismiss or later on.

22 So I'm just trying to understand what it actually in  
23 practice you think the shape of the case is, the evidence that  
24 would be -- type of evidence that would be presented.

25 MS. FRASSETTO: Yes, Your Honor. I mean, as we

1 mentioned, the summary judgment brief and the arguments we have  
2 raised would be at least for us the same. And there was no  
3 reason to think that defendants would present any different  
4 evidence, particularly on the injunctive point.

5 So, again, that is where it would be duplicative  
6 because Your Honor would be deciding based on the federal  
7 standard and then the commission.

8 You know, here is where I think the issue potentially  
9 is. So if Your Honor was to grant an injunction, then it  
10 strikes me that the FTC or the commission would still have to  
11 consider its own standard and spend more time. So you would  
12 have two judicial proceedings where that was happening. And  
13 then I also could --

14 THE COURT: All right. Stop for a second. What I'm  
15 trying to say -- tell me -- I don't live in the FTC world. I'm  
16 sorry.

17 So you have to tell me what does it mean in terms of  
18 the difference in the standard that would be applied by the  
19 commission for a Section 19 claim. I know that there is -- I  
20 mean, there is a statute of limitations and fine  
21 requirements -- some sort of -- and I don't know what that --  
22 surely there are Section 19 cases.

23 So could you explain to me what in practice in this  
24 case, knowing the nature of the evidence in this case, what  
25 would that mean.

1 MS. FRASSETTO: So, Your Honor, if it would be  
2 helpful, I can provide you with the high-level considerations  
3 of the commission and the cease and desist standard. I can  
4 give you the citations. I don't believe we have done them  
5 before.

6 So there is *Stouffer Foods Corporation*, which is 118  
7 FTC 746, and the pin cite is 811. And that is from 1994.

8 THE COURT: Okay. Let me just say: You can tell me  
9 the name of the case, and then you can provide me later the pin  
10 citation. All right?

11 MS. FRASSETTO: Okay. Thank you, Your Honor.

12 And *POM Wonderful* is another one from 2019 -- another  
13 FTC proceeding.

14 Essentially, there are three considerations: The  
15 seriousness and the deliberateness of the violation; the ease  
16 with which the violative claim may be transferred to other  
17 products; and whether the respondent has a history of prior  
18 violations.

19 And certainly we think that those standards are met  
20 here as much as we think the standard for federal injunction is  
21 met. Certainly I'm sure defendants disagree. But that is for  
22 if this case was transferred to the commission to decide.

23 THE COURT: How long do you think it would take if I  
24 deny summary judgment -- which, of course, is not what the  
25 defendant thinks is appropriate. But if that were to occur on

1 the -- on the injunctive relief claim before me, obviously not  
2 the Section 13 claim, how long would it take do you think to  
3 try the case?

4 MS. FRASSETTO: In front of Your Honor?

5 THE COURT: Uh-huh (affirmative).

6 MS. FRASSETTO: I'm sorry, Your Honor. Would that be  
7 in terms of like prepping and doing all the pretrial work as  
8 well or just how long do we think --

9 THE COURT: How long would the trial last?

10 MS. FRASSETTO: You know, sitting here today, I admit  
11 I haven't thought about it. You know, there are several  
12 counts. There are several experts. You know, many witnesses  
13 we deposed. I don't know. Three to four weeks potentially.

14 MR. MUNDEL: Our view is the case would be less than  
15 a week overall. We could try our case depending upon the scope  
16 of the FTC's in just a few days. Two days maybe. So we think  
17 a week overall would be more than sufficient. The FTC has only  
18 one expert. That was a rebuttal, I believe.

19 THE COURT: Okay. Well, is there anything else  
20 necessary to be done in the case to have a trial on the  
21 remaining claims not disposed of by *AMG*?

22 MR. MUNDEL: Not from the defendants' perspective,  
23 Your Honor. We're prepared.

24 THE COURT: What about from the FTC's perspective?

25 MS. FRASSETTO: It would depend on Your Honor's

1 rulings on summary judgment how much is left and whether any  
2 motions in limine would be appropriate at that time.

3 THE COURT: Well, you have a motion in limine  
4 pending; right?

5 MS. FRASSETTO: Right. I'm sorry. And I would note  
6 that that is very specific to defendants' use of Professor  
7 Wind's testimony in the summary judgment motion, which is why  
8 we think that that would also be useful in a commission  
9 proceeding.

10 MR. MUNDEL: Could I respond to a few points, Your  
11 Honor?

12 THE COURT: Yes.

13 MR. MUNDEL: You already mentioned other cases that  
14 the FTC has pending in federal court before or since *AMG* was  
15 decided. And in none -- Your Honor I think either said or  
16 implied in none of those cases has the FTC done what they are  
17 doing here. They have not tried to dismiss those in favor of  
18 the administrative forum.

19 And in those cases, it is not because the injunctive  
20 relief is their primary form of relief. In those cases, the  
21 FTC is seeking restitution or at least was seeking restitution  
22 prior to *AMG* too. And the FTC touts on its website and its  
23 annual report that billions of dollars in restitution would be  
24 obtained.

25 So it is clear from the face of those cases that

1 restitution was a primary form of relief. But the reason we  
2 believe they could not move those cases to the administrative  
3 forum is because they are doing exactly what Your Honor  
4 suggested here, which is continue litigation in front of the  
5 Court. And then when they -- when and if they succeed, do the  
6 administrative proceedings to get money. The reason they are  
7 not doing that here is because their case at summary judgment  
8 is not substantial.

9 The second thing --

10 MS. FRASSETTO: Your Honor --

11 THE COURT: All right. So before you go to the  
12 second thing, let me let Ms. Frassetto respond to that.

13 MS. FRASSETTO: Yes, Your Honor. Thank you.

14 I just want to point out that, you know, each FTC  
15 case that is in litigation has very unique facts and  
16 circumstances and there are a variety of -- I'm sorry I'm  
17 talking too fast.

18 There are a variety of reasons why we would have made  
19 any decision. And I just want to point out that many of those  
20 had rule violations that allows the FTC to stay in federal  
21 court and obtain monetary relief. So, for example, *FTC v.*  
22 *Credit Bureau Center*, which was -- which is currently in the  
23 Northern District of Illinois but went to the Seventh Circuit  
24 and was at one point a companion case to *AMG* in the Supreme  
25 Court, there was a rule violation there. The FTC initially

1 only pled monetary relief under Section 13(b); in the wake of  
2 *AMG* sought to then seek relief under Section 19 because of that  
3 rule violation. And the Court not only accepted that argument  
4 but, you know, had really interesting language when the  
5 defendants were attacking the FTC's good faith, as they are  
6 doing here. And if it is okay, I would like to read that.

7           And that reads, from the day the complaint was filed  
8 until the Seventh Circuit decided the appeal in this case,  
9 there was controlling circuit precedent permitting the FTC to  
10 seek restitution using Section 13(b). In fact, prior to *AMG*  
11 *Capital*, eight circuits permitted the FTC to seek monetary  
12 damages under Section 13(b). It cannot be true that a party  
13 who proffers arguments based on overwhelming and longstanding  
14 precedent has unclean hands once that precedent is overturned  
15 after over 30 years. The fact that other parties have been  
16 arguing against the prior interpretation of Section 13(b) might  
17 be proof that wisdom comes late -- even to courts -- but it is  
18 not proof that the FTC is an abusive litigant.

19           And, Your Honor, I think that is really relevant  
20 here. We are not trying to, you know, get out of that summary  
21 judgment ruling. It is simply that because we don't have the  
22 rule violation hook we cannot get money here. And we need to  
23 get a cease and desist order and judgment from the commission  
24 before we can do that.

25           THE COURT: You have to give me the cite again to

1 what you were reading from.

2 MS. FRASSETTO: Yes, Your Honor. That was *FTC v.*  
3 *Credit Bureau Center*. It is 2021 Westlaw 4146884. And that  
4 was out of the Northern District of Illinois, and that was  
5 issued on September 13 of last year, 2021.

6 MR. MUNDEL: Just to be clear, Your Honor, there are  
7 many cases the FTC has in federal court with no rule violations  
8 where they were seeking restitution. They can't seek it now  
9 directly in federal court under Rule 13(b). But they are doing  
10 exactly what Your Honor suggested. Commission the case and  
11 then if they win going to the administrative proceeding.

12 And, again, we have never heard anything from the FTC  
13 about they cannot do that here. They have never provided any  
14 reason where they cannot reserve their right to get full  
15 restitution by litigating the case efficiently and particularly  
16 in this court and then going to the administrative proceeding.

17 There was one issue raised about the scope of the  
18 injunction and whether the injunction standard is similar or  
19 different from the FTC proceedings. The answer is, first,  
20 getting an injunction would be more beneficial it seems to me  
21 than a cease and desist order. Because unlike a cease and  
22 desist order, an injunction has immediate federal court effect  
23 and must be complied with.

24 With a cease and desist order, they have to take  
25 another step to enforce it in federal court. So if they wanted



1 to stop ongoing conduct, what they would be doing is continuing  
2 to seek an injunction here. That would be the efficient  
3 manner.

4 The only reason you have heard from the FTC not to  
5 follow the path Your Honor suggested was because of duplication  
6 and inefficiencies. And, Your Honor, that is not a valid basis  
7 given the duplication and inefficiencies that have already  
8 imposed and caused on this court and on the defendant.

9 It is -- they cannot suggest now I think credibly  
10 that any meaningful differences between the injunction standard  
11 and the cease and desist order standard are so great that it  
12 would justify moving to the administrative proceeding.

13 When we look at the two standards, we see no data to  
14 answer your specific question. And the type of evidence that  
15 would be presented and the decision of the Court or the FTC  
16 would make we see no daylight.

17 The evidence that we will present is primarily -- on  
18 the injunction is primarily two-fold. First, that there is no  
19 liability at all. Because in order to get an injunction or a  
20 cease and desist order, they first need to prove liability and  
21 they can't do it. And if the Court reaches that determination,  
22 it would resolve the issue.

23 The second type of evidence we would present on the  
24 injunction would also be presented on the cease and desist  
25 order. And that is there is no ongoing conduct that's even

1 being challenged by the FTC. The advertisements that they  
2 challenge ceased years ago. They were not deceptive. They  
3 were not unfair. They were not unlawful. But they are not  
4 even in circulation today.

5 All of the things they challenge ceased years ago.  
6 And for that reason, they can't get the injunction and they  
7 can't get a cease and desist order.

8 So to answer your question directly, the evidence  
9 that would be presented, the decision we believe is precisely  
10 the same when Your Honor rules on it as we think you should  
11 that there should be no injunction in this case.

12 MS. FRASSETTO: Your Honor, if I can be heard  
13 briefly.

14 THE COURT: Go ahead.

15 MS. FRASSETTO: So with respect to whether Your Honor  
16 completes the case and it goes back to the commission, quite  
17 frankly, it is unprecedented and I understand that because of  
18 *AMG* and that is why we are here.

19 So we are just really concerned that if there is any  
20 risk that consumers wouldn't get money by going this route that  
21 is unprecedented and hasn't been tested or challenged before  
22 that at the end of all of this we would have spent all this  
23 time with no money for consumers.

24 Whereas, if we move now, we would simply be going  
25 under the commission's existing rules to move for summary

1 decision, get a cease and desist order, and come back to  
2 federal court, which is exactly what was contemplated by the  
3 Supreme Court in *AMG*. But that is all we are trying to do  
4 here.

5 MR. MUNDEL: Your Honor, if the FTC was so cautious  
6 and concerned about that, then they would have proceeded under  
7 19(b) to begin with. Because when they filed their case, the  
8 Seventh Circuit already held they couldn't get restitution. So  
9 this did not come as a surprise.

10 Additionally, if it was their 100 percent sole focus,  
11 they could have done that -- they frankly should have done that  
12 from the beginning when they made a strategic choice not to.  
13 And it would be legally prejudicial at this stage. And that is  
14 all we are required to show. Not that it was bad faith or that  
15 it was an abuse of litigation position. But that it would  
16 cause legal prejudice.

17 And we have absolutely met that standard here because  
18 of the loss of the defense. But in addition, the FTC says they  
19 are concerned that they don't know how -- they don't know if it  
20 would work. They have never identified any reason in our brief  
21 -- you pointed this out -- Your Honor pointed out today, they  
22 never identified any way of limiting (Zoom interference) for  
23 them to litigate the case fully in front of Your Honor. We're  
24 prepared for trial as soon as Your Honor sets it for trial if  
25 our summary judgment motion is denied.

1           And they could then proceed expeditiously to the  
2 administrative proceeding. And they haven't presented a single  
3 reason why that wouldn't work.

4           THE COURT: Well, they have argued that it is an  
5 enormous addition of -- a piece of additional work. But  
6 from -- from your perspective, let's say I rule against your  
7 client, which you don't think will happen -- but on the merits  
8 in a trial.

9           Are you going to -- if they then proceed on their  
10 pending petition, what other -- you know, I cannot believe you  
11 are not going to be arguing a whole other set of defenses. I  
12 know -- I understand that there is a different standard of  
13 proof as to -- as to 13 and 19. So you are saying it is easy  
14 for them. But I'm sure you will not make it easy for them once  
15 they get back to the commission.

16           MR. MUNDEL: No, Your Honor, I don't think that is  
17 the case. I think the only additional defense between the  
18 federal court proceeding and the FTC proceeding would be a  
19 scienter. That is the only defense that would be different.

20           And it would not be additional work to continue this.  
21 First, if we prevail, that ends the case. So that is a very --  
22 if we don't prevail, things that are litigated in front of Your  
23 Honor we would have issue preclusion. So anything that Your  
24 Honor decides against us, that would bind us.

25           So it would then make the cease and desist

1 proceedings very efficient because the -- anything that needs  
2 to be decided that you already decided, that would be done.  
3 You resolved it conclusively.

4 So the scienter defense, that is the only issue that  
5 we see that would be different in the cease and desist  
6 proceeding.

7 MS. FRASSETTO: So, Your Honor, just to that point,  
8 there is no scienter defense. I don't quite understand what  
9 the defense counsel is speaking of.

10 If he is talking about the reasonable person standard  
11 in Section 19(a)(2), that would be determined by a federal  
12 judge in a follow-on action. The cease and desist action in  
13 admin would be specifically Section 5, precisely what Your  
14 Honor is hearing today.

15 MR. MUNDEL: Well, if there is no scienter defense,  
16 Your Honor, then -- you know, if that is the position of the  
17 FTC, we can litigate that legal issue. But if that's their  
18 position, then there is no daylight between what Your Honor  
19 would decide in the court and what they would need to prove  
20 there.

21 And that admission from the FTC is justifying  
22 precisely why the Court should keep this case, decide summary  
23 judgment, and, if necessary, set the case for a trial in short  
24 order.

25 THE COURT: I gather you don't though agree that that

1 is the case.

2 Would either of you point us to -- Ms. Frassetto,  
3 first of all, to any authority as to that that is the case?

4 I mean, I understand that is what I was trying to  
5 pursue earlier. What would have -- because you were arguing at  
6 some point I thought that there was an additional -- it would  
7 require additional work on your part in front of the commission  
8 to be presenting it at that point. That is what I was trying  
9 to get at.

10 Ms. Frassetto, do you understand what I'm asking you?

11 MS. FRASSETTO: No. I apologize, Your Honor.

12 THE COURT: That's all right. It was a long  
13 question.

14 As I understand it, the FTC is required to show that  
15 a reasonable man would have known under the circumstances that  
16 the conduct at issue was dishonest or fraudulent in order to  
17 obtain monetary damages on behalf of consumers.

18 Is that right?

19 MS. FRASSETTO: That's correct. But that would be in  
20 a follow-on federal court action after the FTC -- it is after  
21 the commission gave us a cease and desist order. Yes.

22 THE COURT: All right. So that is my -- so it is  
23 argued by -- Mr. Mundel, why is that, in fact, not a pretty  
24 simple step of going back to the commission to get the cease  
25 and desist order that is based on the evidence and rulings of

1 the Court and then come back to the Court for the Section 19  
2 relief?

3 Because you were saying at some juncture -- and maybe  
4 I misunderstood -- that it would be more work. I mean, I  
5 understand you would be going back and forth. But I'm not sure  
6 that it is, in fact, then -- if all of that showing has to be  
7 in front of this Court, then it is not really an enormous  
8 amount of work in front of the commission to do this in two  
9 steps.

10 MS. FRASSETTO: So if I understand Your Honor's  
11 question, you are saying why not keep the case here, resolve  
12 liability -- let me ask, Your Honor. Would you also be  
13 resolving injunctive relief in federal court as well?

14 THE COURT: Well, you've asked for injunctive relief.  
15 You have a proposed order that you filed. And I would -- if I  
16 am authorized to do so, I would enter that. And then you would  
17 go back to the commission and get whatever cease and desist  
18 order.

19 And what Mr. Mundel has argued is that this is an  
20 easy -- there is no daylight between the two. All right. Then  
21 they issue that. Then you come back here for the Section 19  
22 relief.

23 MS. FRASSETTO: I understand, Your Honor. Yes. In  
24 terms of liability, the same standard, correct. On injunctive,  
25 there is a slightly different standard, which is where we think

1 that there could be issues with judicial inefficiencies.

2 The bigger issue is the uncertainty with this being  
3 proper and whether defendants would then challenge that somehow  
4 because the federal court decided and then it went to the  
5 commission to essentially rubber stamp. But, again, who knows  
6 because of the difference in the injunctive relief standard  
7 whether there is any procedural impropriety there.

8 So that is our concern is that this just strikes as  
9 open to more challenges. And when we really just want to get  
10 relief for consumers, we're at a place where it makes sense to  
11 go to the commission and just have them hear everything under  
12 the rules that the Supreme Court contemplated in *AMG*.

13 THE COURT: Well, one of my concerns, frankly, is  
14 given what I've observed in this case -- and I understand why  
15 you think that would be a proper and more immediate win. But  
16 then, of course, it is also possible that the defendants here  
17 may appeal my decision too if I rule in your favor.

18 So if you are concerned about procedural obstacles,  
19 it could become worse in a whole other way. I don't see any  
20 lack of interest on their part of litigating the issue. And I  
21 understand your concern. But I have a concern that I'll be  
22 basically holding up all these proceedings.

23 I mean, I have cases that have been up in the Court  
24 of Appeals -- and this is no offense to them because it is just  
25 the way things are at this moment -- that have been up there



1 for two years. It is very hard to get, of course, anything to  
2 trial at the moment -- a civil case -- because of the fact that  
3 there are people who have been sitting in prison for years at  
4 this point who haven't been able to get a trial. So we  
5 certainly always because of the Speedy Trial Act have to  
6 prioritize that.

7 That is why I was asking you how long do you think it  
8 would take to go to trial. Because it makes a difference in  
9 terms of when I could conceptualize trying to expedite this and  
10 conduct a trial in the public interest.

11 And you now at least have a petition in front of the  
12 the commission that is -- or complaint that at least for  
13 purposes of what you have got has a -- I understand a  
14 three-year statute of limitations.

15 It may not be the whole pie. But it is at least a  
16 portion of the pie, assuming you win. And if, in fact, your  
17 evidence is -- construing your evidence and your allegations in  
18 the light most favorable to the plaintiff, you are arguing that  
19 this is a repeat performer -- a repeat violator. So those  
20 violations would be meaningful.

21 We're in a unique and difficult circumstance. And if  
22 we were to schedule a trial and I were to deny summary --  
23 basically say that I have to decide based on the evidence,  
24 then, you know, you would have enough time to prepare because  
25 there is no way I could probably hear this case until fall or

1 winter of -- next winter.

2 So that is not really a question. You have sort of  
3 held your place, at least. Because alternatively -- let's just  
4 look at -- you know, the defendants argue, well, then you need  
5 to pay their fees or a portion of their fees. And we really  
6 haven't discussed that.

7 And -- but I can't imagine that the commission is  
8 very willingly wanting to -- let's say -- I don't know, you  
9 know, how this money might be spliced and diced. But, of  
10 course, you understand their argument that at least anything  
11 that you litigated after the Supreme Court issued its decision  
12 in April that the commission should be responsible for in terms  
13 of fees because it should have just stopped at that point  
14 according to -- what is the argument against that as being a  
15 condition for a voluntary dismissal?

16 MS. FRASSETTO: Sure, Your Honor.

17 For starters, there just is no prejudice in terms of  
18 the work that was done in that time frame precisely because we  
19 intend to file substantially identical papers in the admin  
20 litigation in summary decision. So all of that work can be  
21 reused.

22 And, second, if it is, you know, balancing the  
23 equities and doing justice between the parties, you know, this  
24 is -- again, this is taxpayer money. It is consumers' money,  
25 potentially redress on the line.

1           So we just think that that weighs in favor of no  
2 conditions, particularly where there is no prejudice here.

3 So --

4           THE COURT:     So, Mr. Mundel, why do you say there is  
5 prejudice? Because if you are going to have to be litigating  
6 this at the FTC, you would -- the same evidence would be  
7 necessary.

8           MR. MUNDEL:    Yes, Your Honor. If I may just in ten  
9 seconds touch on two topics you mentioned earlier.

10           About the appeal, I think you are absolutely right.  
11 This is an issue that the defendants take very seriously and  
12 would appeal if they were to not prevail on this. And that  
13 would take time.

14           As far as the trial goes, because it is a bench  
15 trial -- we are certainly well aware of the issues in the  
16 federal courts right now for trials. But with a bench trial,  
17 it could be broken apart into pieces, if necessary. It could  
18 be done, you know, a little bit easier than a jury trial, which  
19 we know would be the Court (Zoom interference).

20           So we believe the trial could be done as soon as Your  
21 Honor is available and the way that is most efficient for Your  
22 Honor.

23           On the question of fees, we prepared a PowerPoint  
24 presentation that you may have available to you. It is on  
25 Page 6. We have a chart of the fees. And I can walk through

1 those and explain the prejudice.

2 THE COURT: Okay. Let me just pull it up. All  
3 right?

4 MR. MUNDEL: Page 6 of the PowerPoint.

5 If I may start, Your Honor, with the following --

6 THE COURT: All right. I'm just pulling it up.

7 All right. I'm on Page 6.

8 MR. MUNDEL: The FTC's argument here that there is no  
9 prejudice is based upon what Ms. Frassetto said that they would  
10 file substantially identical papers to what they filed in  
11 federal court -- they would file substantially identical papers  
12 with the FTC.

13 That proves the point that we have just been  
14 discussing, that there is no daylight between the -- in their  
15 view the usual standard in the proceedings in front of this  
16 court and in front of the FTC.

17 So in their view, there is absolutely no reason why  
18 they shouldn't litigate the case in front of Your Honor, have  
19 Your Honor decide the case, and then go to the administrative  
20 proceedings. Because they say the standard and the materials  
21 are substantially identical. So that is, I think, what we  
22 should get to first.

23 If we do reach the issue of fees, the fees here are  
24 substantial. The total fees from when the FTC began this  
25 litigation are over \$17 million. So this is not an ordinary

1 case, at least an ordinary case that I'm familiar with.

2 The fees since litigation began are more than \$10  
3 million. And at the time the FTC brought this case, we're not  
4 saying bring it in federal court. We're absolutely not saying  
5 that. But we are saying that when they decided to bring the  
6 case in federal court they knew that the ability to get  
7 monetary relief in federal court was in doubt. They knew that  
8 because the Seventh Circuit held that. They knew it because  
9 commentators and parties and commissioners had been saying it  
10 for years. And they knew it because the same text of the  
11 statute (Zoom interference).

12 But the FTC made a strategic risk -- it was  
13 strategic. They determined they would rather assume that risk  
14 in federal court instead of going directly to their  
15 administrative proceeding.

16 They should be held to that completely, have this  
17 motion denied. At a minimum, they should bear the burden of  
18 that cost and expense that they imposed on the defendants by  
19 making that choice.

20 So the litigation fees are \$10 million. We believe  
21 that is the appropriate fee. The 17 million, that is prior to  
22 litigation, Your Honor. But the 10 million since litigation  
23 started, that would be appropriate.

24 If the Court wanted to break it down further, there  
25 are other particular categories where the prejudice is even

1 more egregious.

2 One example is in the data that was produced for  
3 damages. After more meet-and-confers on the topic that I have  
4 maybe done in total on my career, we discussed data with the  
5 FTC. And we produced 6000 gigabytes. It cost more than  
6 \$574,000. And the use of that data, according to the FTC, was  
7 for their damages. And in order for them to have a damages  
8 model, we produced that. That money deduction is not going to  
9 be reused because the data that they used in the court  
10 proceedings is different from the standard they have to meet  
11 not for the cease and desist but for monetary relief under  
12 19(b). Because they can't just show a violation restitution.  
13 They have to show a higher standard of reasonable man and  
14 fraudulent and knowing deceit.

15 The second piece of the fee amount that should be  
16 shifted is the million dollars in our expert report that has  
17 rebutted their damages calculation because that was -- that  
18 damages rebuttal was based on the Section 5 in court standing,  
19 not based upon the standard in 19(b). So it can't be reused.  
20 It will have to be redone.

21 And the third significant category of fees are what  
22 was incurred since *AMG* was decided. Because when -- this  
23 didn't just come out of the ether. We were all watching it.  
24 Right? We knew that it was coming. We discussed it with the  
25 FTC counsel repeatedly. And there were dozens and dozens of

1 discussions.

2 Some cases with the FTC were stayed early on in the  
3 litigation pending a decision by the Supreme Court in *AMG*. The  
4 FTC did not want to stay this case. So we proceeded. So they  
5 were planning what they would do if *AMG* was decided -- because,  
6 you know, of course, they were.

7 And when *AMG* came down, instead of at a minimum  
8 calling us and saying, FleetCor, Mr. Clarke, this is what we  
9 may do, this is being considered, why don't we put the  
10 litigation on hold so we don't run up the burden and the  
11 expense on either the court or the parties, they didn't do  
12 that. They continued to file more briefs, more motions. And  
13 it cost \$686,000 since *AMG* was filed.

14 And that is to us the most egregious fee shifting,  
15 that there is no basis for them not to have given advance  
16 notice, sought a stay. And the decision not to do that, to  
17 have us file all these briefs, more than 4000 pages between the  
18 parties, that at a minimum, 686,000 of the fee should be  
19 shifted.

20 THE COURT: That is since -- when you say *AMG* --  
21 \$686,000 roughly in fees since the petition was granted or  
22 since the Supreme Court decision was issued?

23 MR. MUNDEL: Since the decision was issued, Your  
24 Honor. The decision was issued. Again, when the petition was  
25 granted in the (Zoom interference) the case, we think they

1 should have known that the writing was on the wall and they  
2 could have made a different determination. And they should pay  
3 fees for that.

4 But at a minimum --

5 THE COURT: When was the petition granted?

6 MR. MUNDEL: The petition was granted -- one second,  
7 Your Honor.

8 It was granted, I believe, in December of 2019. But  
9 let me confirm that.

10 Yes. It was granted a few days before they filed  
11 their complaint in December 2019. So they knew at that point  
12 not only was the petition granted but prior to that they --  
13 normally on behalf of the United States the solicitor general  
14 files a petition with the Supreme Court.

15 We believe it may be the second or third time in  
16 history the solicitor general did not file a petition. The FTC  
17 filed it on their own litigating authority. And they continued  
18 not to stay the case but to seek restitution from us, seek  
19 discovery about restitution from us. And that was to the tune  
20 of \$10 million because that was the beginning of the  
21 litigation.

22 But, again, at a minimum, once *AMG* was decided and  
23 the Supreme Court said once and for all that they could not  
24 obtain restitution directly in this proceeding, if they were  
25 going to do this, at a minimum they should have informed us,



1 given us an opportunity for a stay, not filed additional  
2 briefing.

3 Say, for example, they filed a motion to exclude an  
4 expert months after *AMG* was decided. There was no reason to  
5 file that motion (Zoom interference).

6 THE COURT: Ms. Frassetto, do you want to respond to  
7 that?

8 MS. FRASSETTO: Yes. Thank you, Your Honor.

9 Again, I just want to start with it is incredibly  
10 upsetting to me that defense counsel continues to assume that I  
11 was saying or doing or the FTC was saying or doing something  
12 than what we have told defendants and the Court. That is just  
13 simply not true.

14 With respect to defense counsel seeking the  
15 10 million, I mean, there is -- there was no way to know that  
16 *AMG* would go that way. In fact, after we filed our complaint,  
17 the Eleventh Circuit confirmed in the *FTC v. Simple Health*  
18 *Plans* case that the Eleventh Circuit precedent was that there  
19 was monetary relief available under 13(b).

20 And I already read to Your Honor the language from  
21 *Credit Bureau Center* in the Seventh Circuit, which confirmed  
22 that view that there just wasn't a (Zoom interference) with  
23 respect -- with any certainty until the decision came out.

24 With respect to the data, it is inaccurate to say  
25 that was only for restitution. As I noted in my declaration

1 and the supporting documents, the data was 100 percent used to  
2 prove, for example, that the savings were not as advertised,  
3 that was substantial harm from unfair fees. And that  
4 absolutely would be reused in a Section 19 action. It is still  
5 the same underlying conduct.

6 With respect to defendants' rebuttal report on  
7 damages, again, that went to liability. In fact, the  
8 defendants cited that in support of their opposition to our  
9 summary judgment. She concluded that the savings were as  
10 advertised. That goes to liability. And that FleetCor posted  
11 payments on time. We disagree with that. But, again, that  
12 goes to liability, not restitution.

13 With respect to the summary judgment briefs, as we  
14 have stated many times now, those will be reused. So we don't  
15 see any prejudice there. And defendants haven't given any  
16 reason why that work product will be wasted.

17 And then, finally, with respect to the *Daubert*  
18 motion, as I also mentioned before, that was, in fact, filed as  
19 a motion to exclude the testimony that was proffered in support  
20 of the summary judgment motion. And certainly assuming that  
21 defendants would again use Professor Wind in the commission  
22 proceedings, we certainly would reuse that work.

23 MR. MUNDEL: I mean, Your Honor, if I may just  
24 correct two things. It was December 2019 when the FTC sought  
25 cert in *Credit Bureau*. And that was when the Department of

1 Justice refused to join. It was July 2020 when the Supreme  
2 Court granted cert in both *Credit Bureau* and *AMG*.

3 THE COURT: All right. I know the defendant has  
4 asked to address the summary judgment briefing. And I'll  
5 certainly give you some opportunity to do that. But I don't  
6 really basically -- A, I think that the issues raised in the  
7 Government's *Daubert* motion are very substantive ones. I'm not  
8 sure I would be able to explore all of that in a meaningful  
9 fashion today. But I do think that it is not -- this is not a  
10 fly-by-night motion. There are some very significant concerns  
11 that they have raised.

12 But as a whole, I'm not sure other than saying that I  
13 don't have jurisdiction at this point to consider the -- a  
14 monetary claim for relief. Though I might later on. It would  
15 seem to me that this would be a very difficult case to grant  
16 summary judgment on based on the evidence presented.

17 I mean, there are evidentiary disputes even if -- and  
18 you are -- I know that the defendant vigorously argues that the  
19 evidence -- that there is not basically sufficient evidence to  
20 support the FTC claim. But it would be hard for me to -- it  
21 seems to me to jump to that high of a hurdle to make -- given  
22 the record here.

23 And -- but that is what you are arguing, aren't you?  
24 This is to Mr. Mundel.

25 MS. FRASSETTO: Your Honor, before we begin on this,

1 I just want to note that defendants' request for oral argument  
2 was only about the stay and dismissal without prejudice. So I  
3 am not fully prepared to discuss this.

4 THE COURT: That's fine.

5 MS. FRASSETTO: I can answer some questions, but I  
6 just wanted to let you know that.

7 THE COURT: Well, I'm not going to spend much time on  
8 it. But I'm just trying to understand the defendants' position  
9 as a whole without going through all of the evidence.

10 MR. MUNDEL: No, Your Honor. I think we are not  
11 seeking -- I think the way you described the evidence is  
12 exactly right. When it comes to liability, there are many,  
13 many facts in dispute. It is hard to imagine a case that has  
14 more facts in dispute when it takes 5000-plus pages to go  
15 through all the facts.

16 There is a lot of competing expert testimony. There  
17 is competing fact testimony. There is interpretations of  
18 documents. There is even some witnesses where they filed a  
19 declaration saying one thing and they testified to something  
20 else.

21 So there's many areas of dispute. And that is why  
22 our principal view is summary judgment should be denied on  
23 liability and it should proceed to trial under the issues.

24 Our motion for summary judgment was really limited in  
25 two respects. The first respect was restitution. That we

1 don't need to talk about.

2 The second respect when we moved for summary judgment  
3 was solely on the injunction issue because the FTC has not  
4 presented in our view any evidence of ongoing conduct, let  
5 alone misconduct. It stops at a particular point in time. It  
6 is a much more limited issue in our motion.

7 But generally on liability, we absolutely agree there  
8 are more facts in dispute than we can talk about today even if  
9 we wanted to.

10 THE COURT: Ms. Frassetto, do you want to just  
11 respond to that limited question as addressed by Mr. Mundel?

12 MS. FRASSETTO: Sure, Your Honor.

13 We disagree that there are facts in dispute. And  
14 most notably, I would note that the defendants relied very much  
15 on Professor Wind. And that is, in fact, why that *Daubert* is  
16 necessary to decide the summary judgment. Because without his  
17 findings, their defense really falls apart. And there is not  
18 much to attack on what we have established from the actual  
19 record based on the documents and advertisements and our own  
20 survey.

21 THE COURT: So, Mr. Mundel, if I were to grant in  
22 whole or in large part the Government's motion as to this  
23 expert witness, what do you have?

24 MR. MUNDEL: That is only one piece of our case, Your  
25 Honor. Professor Wind did a -- we believe should not be

1 excluded. His survey conclusively shows that there is not  
2 deception here. But that is only one piece of the case.

3 Our other -- one of our other experts, Professor  
4 Antoinette Schoar, the professor at MIT, she ran an analysis,  
5 as Ms. Frassetto said, on liability and she concluded that  
6 there was no deception as to savings claims and the issues. So  
7 we have expert testimony that certainly creates a dispute of  
8 fact.

9 Second, we have a rebuttal to the FTC's primary  
10 expert. They have one expert. And what he did was he did --  
11 this is a primary evidence conception. He did a memory test  
12 where he asked FleetCor customers years -- sometimes up to  
13 eight, nine, or ten years after they signed up do they recall  
14 being informed about the fees at the time they signed up. And  
15 he refused to let them say they don't know. If they said I  
16 don't know, he didn't record it.

17 So that is their primary evidence. And we believe it  
18 is not -- it is not enough to meet that burden. And we have a  
19 rebuttal expert who reran this and explains if you look at the  
20 data the best way it actually proves FleetCor customers were  
21 informed of their fees.

22 So, again, valid expert is a basis for you to deny  
23 summary judgment. In addition, they rely on fact witnesses.  
24 They have a fact witness who says FleetCor employees told me X.  
25 We don't get what X is. But FleetCor told me X.



1           One, there are other cases post *AMG* where the FTC has  
2 switched strategies. None where we have gone to admin  
3 admittedly. But that is because there is the rule violation.  
4 So they are still on the hook for monetary relief. I'm happy  
5 to give you those, if you would like.

6           Otherwise, the other one I can think of is -- one  
7 second. Let me pull it up for you. I apologize. I have the  
8 wrong document up.

9           THE COURT: Well, you can send it to me. You can  
10 send it to me.

11           MS. FRASSETTO: I found it, Your Honor.

12           THE COURT: All right.

13           MS. FRASSETTO: So this just has to do again with  
14 the, you know, showing of bad faith and presumptions. And that  
15 is *Wicker v. Colvin*. The case citation is 2016 Westlaw  
16 3072260. The pin cite is 5. And that is out of the Northern  
17 District of Florida from May 31st, 2016.

18           THE COURT: I'm sorry. 307 --

19           MS. FRASSETTO: -- 2260. And essentially the facts  
20 there are that the plaintiff did not overcome the presumption  
21 of regularity and good faith in a federal agency when he failed  
22 to identify a single agency employee or the date of any alleged  
23 conversation that he claims misled him. And that strikes us as  
24 relevant here, particularly with Mr. Mundel's declaration.

25           THE COURT: Well, are there any others where a -- you



1 know, there are certainly lots of other agencies that have had  
2 significant adverse rulings against them that sort of probably  
3 caused a little bit of havoc in terms of how the cases were to  
4 proceed.

5 Is there anything else that you have identified? And  
6 if there is, you are welcome to send the submission to us. I  
7 think if you can get it to us by Tuesday, I would appreciate  
8 it.

9 MS. FRASSETTO: Thank you, Your Honor. I don't have  
10 anything sitting here today. But I am happy to pass along  
11 anything.

12 THE COURT: And, Mr. Mundel, if you have anything,  
13 you are welcome to do that as well.

14 So as I understand it, in terms of this -- the  
15 standard for showing a Section 19 violation -- having enough  
16 evidence, you are really talking about from your perspective I  
17 guess -- from the commission's perspective is that -- is it  
18 that the evidence would tend to indicate that a reasonable --  
19 the customers who were actually -- is it that the FTC has to  
20 show that the customers were actually deceived or do they only  
21 have to -- or does the FTC only have to show that the ad had a  
22 tendency to deceive or the materials provided to the customers?

23 MS. FRASSETTO: Your Honor, we -- I'm sorry. I  
24 apologize.

25 The latter. The underlying Section 5 standard would

1 not be changed. It is simply whether in the defendants' view a  
2 reasonable person would have considered that conduct to have  
3 been dishonest or fraudulent. That is our view.

4 THE COURT: So proof of actual deception is not  
5 required? It is just what a reasonable person under these  
6 circumstances would be deceived?

7 MS. FRASSETTO: Well, again, it is the FTC's view  
8 that that reasonable person standard applies to the defendant.  
9 Did the defendant -- should the defendant have known that it  
10 was dishonest or fraudulent.

11 THE COURT: Right.

12 MS. FRASSETTO: The Section 5 standard in terms of  
13 what the consumer takeaway was, that is no different under  
14 Section 19 than it is under Section 5.

15 THE COURT: All right. Well, just go over both of  
16 those with me in the context of this case. All right? Because  
17 we may end up having to obviously review this on the record.  
18 And I want to make sure I understand exactly how these two  
19 standards are different or not and what they are. All right?

20 MS. FRASSETTO: Yes. Under Section 5, no evidence of  
21 actual deception, that is correct. The latter standard -- I  
22 can't remember how you put it. But it was good with the FTC.

23 THE COURT: It would have a tendency to mislead.

24 MS. FRASSETTO: That's correct.

25 THE COURT: All right.

1           Versus under 19 -- go ahead from there. What would  
2 have to --

3           MS. FRASSETTO: Well, Your Honor, it would still be  
4 the tendency to deceive on the consumer end. And, again, a lot  
5 of this has not really been tested because we have gone the  
6 13(b) route for so long.

7           But based on our reading of the statute, it is simply  
8 whether -- I suppose putting those two together whether  
9 defendant -- or whether a reasonable person sitting in  
10 defendants' shoes would have understood the advertisements to  
11 have been deceitful, if that is helpful.

12           THE COURT: Mr. Mundel, would you answer that  
13 question as well.

14           MR. MUNDEL: Yes. I will start with what the FTC  
15 needs to prove in the first proceeding in this Court under  
16 Section 5 of the FTC act --

17           THE COURT: All right.

18           MR. MUNDEL: -- the liability question and then move  
19 to 19(b), the new money question.

20           In order to show that there was deception, the Court  
21 analyzes whether an advertisement is likely to mislead. To do  
22 that, the FTC must first prove the net impression of the  
23 advertisement -- meaning, what do consumers take away from this  
24 advertisement? -- and that the net impressions is false. In  
25 analyzing that question, courts look at the advertisement as a

1 whole, not as to individual pieces of it. But look into the  
2 advertisement as a whole with the context and considers  
3 intrinsic evidence to determine if consumers are likely to be  
4 deceived that the ad is not false.

5           If the ad is false and there is a false statement,  
6 the Court can look at it and say, that is false. When it is a  
7 question of a true statement that is likely to deceive, the  
8 Court must look at empirical evidence. And the question is  
9 whether a significant percentage of consumers acting reasonably  
10 are likely to be deceived under the circumstances. That is  
11 liability.

12           Once you get past liability (Zoom interference),  
13 under Section 19, there is a further burden to get monetary  
14 relief. And there they need to show that the conduct by the  
15 defendant was not just deceptive but, in fact, it was  
16 fraudulent or dishonest. There is a scienter requirement that  
17 a reasonable person would know what they were doing was  
18 fraudulent or dishonest.

19           And that 19(b) if you ever -- if you ever get to the  
20 first part, that is where we think the Court should determine  
21 it given where we are and the legal prejudice that would be  
22 caused if at this late stage the FTC is able to take the case  
23 to administrative proceedings.

24           THE COURT: I know that seems like a very basic  
25 question to both of you. But since we have been dealing with

1 both things and I am obviously enlightening them in my mind, so I  
2 wanted to sort of straighten that out for myself.

3 All right. Well, this has been very helpful. If  
4 there is any -- I know there were a number of cases,  
5 Ms. Frassetto, that you wanted to reference before and I said  
6 just send them to me because I will be -- in follow-up be able  
7 to get it so quickly accurately down. And in response to my  
8 other questions, if there is something -- a case you want to  
9 point out -- but I'm not looking for briefs. Just give me the  
10 topic and -- put the topic and then put the cases that are  
11 going to be for that topic.

12 And anything you want to send, send by Tuesday  
13 because I'm really not looking for a brief. It is something  
14 that you probably have looked at and know up to -- upside down  
15 and all around.

16 This has been very helpful. I appreciate the briefs  
17 that have been provided as well as the advocacy on both  
18 parties' part.

19 Ms. Frassetto, you know, I know that -- I just want  
20 to respond very briefly to the concerns that you expressed as  
21 to the -- in some ways your feeling that your integrity has  
22 been challenged.

23 And maybe Mr. Mundel feels it in a different way. I  
24 don't know. You know, I completely respect that you are trying  
25 to vindicate the public interest via the FTC's authority and

1 that you -- and that people have worked hard on this matter.  
2 And I know that the defendants have expressed their deep  
3 concerns as well.

4 But it is almost though -- there is a reality that is  
5 such a huge -- it is not even a sea change. It is a complete  
6 tide change that is different and this would create a lot of  
7 ripples for those who are right in the middle of it.

8 And I just want to assure you and your fellow counsel  
9 that I don't think that -- maybe there will be some issue at  
10 some juncture about so-called bad faith. But, you know, this  
11 is -- we are in very unique circumstances. And I want the  
12 defendants to also understand that.

13 So I'm not prepared to presume the worst by any means  
14 because I think people including the commission and the  
15 defendants are trying to basically do what you think is best  
16 under the circumstances, which are just, you know, a true  
17 change in tide of -- probably because I've spent some time by  
18 the ocean in the last few weeks that it is -- you can be --  
19 believe it or not, on a day on water in ocean where it is  
20 completely flat and the next day the waves are roaring because  
21 a storm has come in and sent the -- and everything is -- the  
22 currents change direction. Everything has changed. And  
23 everyone is making sense of it and trying to handle their boats  
24 or handle their swimming and whatever else. So -- I'm a big  
25 swimmer. So that is why it all occurs to me that knowing what

1 it is to be in the middle of that and you have got to figure  
2 out what you are going to do.

3 But the Court understands that context. And so I  
4 want to sort of say that it is not -- I'm not jumping to any  
5 conclusions about any bad faith or anything else like this.  
6 This is the circumstances we face. And we're going to try to  
7 as logically and reasonably as possible sort out where we're  
8 going from here and also address the public interest in this  
9 context.

10 Thank you again. Is there anything else we need to  
11 do before we close today?

12 I guess not.

13 MR. MUNDEL: Not from the defense perspective, Your  
14 Honor.

15 THE COURT: All right. Ms. Frassetto, anything from  
16 the FTC's perspective?

17 MS. FRASSETTO: Nothing from the FTC. Thank you,  
18 Your Honor.

19 THE COURT: Thank you very much. And, everyone, I  
20 hope you stay well. And I'm glad we were able to proceed today  
21 because it also allows us to put this in front of ourselves and  
22 get going on our analysis and conclude that hopefully in a  
23 reasonable time.

24 I know that Ms. Taylor was a clerk in this court.  
25 And I want to say hello to her as well because I haven't seen

1 her in a good amount of time. Not in my chambers. But she was  
2 very dedicated to the Northern District of Georgia. And it is  
3 good to see her.

4 MS. TAYLOR: Thank you, Your Honor. It is nice to  
5 see you as well. I miss everyone there. I hope you guys are  
6 doing okay.

7 THE COURT: We are. We are. It is a little insane.  
8 But other than that --

9 MS. TAYLOR: I understand.

10 THE COURT: Well, the thing is I had really come back  
11 to court completely. So, you know, it is sort of like --

12 MS. TAYLOR: Well, I think you are -- what you are  
13 talking about with the ocean is so appropriate for life right  
14 now. I think, you know, all of us back to the office,  
15 everything was moving more smoothly, court resumed, and then  
16 not. So it is just life.

17 THE COURT: Yeah. Yeah. It is. It is.

18 Well, we'll see what happens next. But there are  
19 greater tragedies than being sent home.

20 MS. TAYLOR: Absolutely.

21 THE COURT: All right. Be well, everyone. Take care  
22 of yourselves and your family.

23 MS. FRASSETTO: You too, Your Honor. Thank you.

24 **(The proceedings were thereby concluded at**  
25 **12:17 P.M.)**



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C E R T I F I C A T E

UNITED STATES OF AMERICA  
NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 69 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 9th day of February, 2022.

*Shannon R. Welch*

\_\_\_\_\_  
SHANNON R. WELCH, RMR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

_____	)	
	)	
Plaintiff(s)	)	
	)	Case No. _____
V.	)	
	)	
_____	)	
Defendant(s)	)	

**NOTICE OF FILING OF OFFICIAL TRANSCRIPT**

Notice is hereby given that an official transcript of a proceeding has been filed by the court reporter/transcriber in the above-captioned matter. Counsel/Parties have twenty-one (21) days from the date of delivery of the transcript to the Clerk to file with the Court a Request for Redaction of this transcript. If no Request for Redaction is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days.

Any counsel or party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter/transcriber or view the document at the Clerk’s Office public terminal.

_____	_____
Date	Court Reporter

**VERIFICATION OF FINANCIAL ARRANGEMENTS**

Proceeding Type: \_\_\_\_\_

Proceeding Date: \_\_\_\_\_

Volume Number: \_\_\_\_\_

Notice is hereby given that financial arrangements for a copy of the transcript have been made with the following individual(s): \_\_\_\_\_

\_\_\_\_\_

as counsel/party in this case. He/She is to be provided with remote access to the transcript via CM/ECF and PACER.

_____	_____
Date	Court Reporter

# Attachment B

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January 12, 2022

**By ECF**The Honorable Amy Totenberg  
United States District Judge  
2388 United States Courthouse  
75 Ted Turner Drive, SW  
Atlanta, GA 30303Re: ***FTC v. FleetCor Technologies, Inc. & Ron Clarke, No. 1:19-cv-5727-AT***

Dear Judge Totenberg:

At the January 7, 2022 hearing on the FTC's Motion to Dismiss, the Court invited the parties to submit citations to authorities bearing on discrete issues, but directed the parties *not* to submit supplemental briefs. In contravention of this instruction, the FTC has served a three-page, single-spaced sur-reply that makes new arguments never raised in the FTC's briefs or at the hearing. While the FTC's improper sur-reply should be ignored, Defendants write very briefly to correct the record.<sup>1</sup>

*First*, even though the FTC never previously identified any reason why it could not obtain a cease-and-desist order and then monetary damages if it prevails in obtaining an injunction in this Court, the FTC asserts for the first time that allowing this case to proceed to judgment could jeopardize its ability to obtain a cease-and-desist order. Specifically, the FTC argues that, if the Court enters an injunction, "defendants would likely argue" that "there [would be] no remaining conduct for the Commission to enjoin through a cease and desist order." Dkt. 190 at 3. This is incorrect. The FTC, tellingly, cites no case or rule supporting the proposition that the Commission cannot enter a cease and desist order when challenged conduct has ended. *Id.* To the contrary, by the FTC's own admission, ongoing conduct is not one of the "three factors" "the Commission considers . . . for cease and desist orders." *Id.* at 3. In addition, the FTC has already argued and ruled that "discontinuance does not of itself bar a cease-and-desist order." *See, e.g.*, Complaint Counsel's Post-Trial Reply Brief 31, *In re POM Wonderful LLC*, No. 9334 (F.T.C. Feb. 7, 2012) (citing FTC and judicial precedent); *see also* Commission Decision, *In re Pom Wonderful LLC*, 155 F.T.C. 1, 52 (2013) (rejecting Defendants' argument that "injunctive relief is not warranted with respect to the [challenged ads] because [the defendant] has already stopped running the ads"). Finally, to assuage any concerns, Defendants

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<sup>1</sup>Defendants are prepared to submit a complete response to the FTC's submission, if directed to do so by the Court.

# SIDLEY

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represent to the Court that they will not argue that a cease and desist order is improper on the grounds that an injunction has issued.

*Second*, the FTC argues that its request to transfer a fully briefed summary judgment motion from an Article III Court to the Commissioners themselves was somehow blessed by *AMG*. See Dkt. 190 at 2–3 (“[T]he Supreme Court in *AMG* made clear that moving to administrative proceedings is the proper path in this case.”). This is false. The Supreme Court said nothing about “moving” a pending case between these two proceedings. Rather, the Supreme Court recognized that the FTC *may first* obtain an injunction under section 13(b) *and then* seek a cease and desist order in an administrative proceeding to make money damages available. See *AMG Cap. Mgmt. LLC v. FTC*, 141 S. Ct. 1341, 1349 (2021) (“[T]he Commission may use §13(b) to obtain injunctive relief **while administrative proceedings are foreseen or in progress** . . .”) (emphasis added). That is precisely what the Court inquired about and what the FTC should try to do here.

*Third*, the FTC asserts that resolving liability expediently is of the utmost concern. Defendants agree. Proceeding to trial in this Court is the most expeditious path forward. Doing so would avoid a multiyear delay caused by an appeal of a Court order granting the FTC’s motion to dismiss. If the Defendants prevail in this Court, it would end the issue. If the FTC prevails here, it would streamline (if not entirely resolve) the administrative proceeding, because any issues decided by this Court would be conclusive.

Finally, the FTC’s letter does not identify a single other case where it is attempting to do what it is trying here. The letter also fails to identify the many cases where, since *AMG*, it has not taken any action to pursue monetary relief in federal court. As in this case, see Dkt. 157, the FTC has informed other courts that it “is not currently seeking equitable monetary relief under Section 13(b) of the FTC Act.”<sup>2</sup> However, in none of those cases has the FTC disclaimed its ability to seek monetary relief under section 19(b) if it prevails in the pending federal court action.

[Signatures on next page]

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<sup>2</sup> See, e.g., Notice (Dkt. 44), *FTC v. F&G Int’l Group Holdings, LLC*, No. 20-cv-73 (S.D. Ga. Aug. 5, 2021); accord, e.g., Opp. to Mot. for Judgment on the Pleadings (Dkt. 99), at 1, *FTC v. American Future Systems, Inc.*, No. 20-cv-02266 (E.D. Pa. July 7, 2021) (“[S]ince the decision in *AMG*, the FTC has pursued only nonmonetary injunctive relief in this case.”); Notice of Supplemental Authority (Dkt. 104), *FTC v. Mail Tree Inc.*, No. 15-cv-61034 (S.D. Fla. Apr. 30, 2021) (similar); Notice of Supplemental Authority (Dkt. 47), *FTC v. Neora, LLC*, No. 20-cv-01979 (N.D. Tex. Apr. 30, 2021) (similar).

# SIDLEY

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**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS: Lina M. Khan, Chair  
Rebecca Kelly Slaughter  
Alvaro M. Bedoya**

**In the Matter of**

**FLEETCOR TECHNOLOGIES, INC., a  
corporation, and**

**RONALD CLARKE, individually and as  
an officer of FLEETCOR  
TECHNOLOGIES, INC.**

**Docket No. D-9403**

**[PROPOSED] ORDER PARTIALLY LIFTING STAY OF ADMINISTRATIVE  
PROCEEDINGS TO PERMIT DISPOSITIVE MOTIONS**

Upon consideration of Complaint Counsel's Motion and Respondents' Response:

**IT IS HEREBY ORDERED** that Complaint Counsel's Motion is **GRANTED**.

**IT IS FURTHER ORDERED** that, within 15 days of the entry of this Order, Complaint Counsel may file, and Respondents may file, any dispositive motions. Except for the date for filing the motion, any such motion and any responses or replies thereto shall follow the relevant requirements of the Commission's Rules of Practice.

**IT IS FURTHER ORDERED** that, except for deadlines and proceedings directly related to the dispositive motions permitted under this Order, all proceedings before the Commission and the Chief Administrative Law Judge in this matter, including all filing deadlines and the evidentiary hearing, shall remain stayed pending further order by the Commission.

By the Commission.

April J. Tabor  
Secretary

SEAL:  
ISSUED:

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

**In the Matter of**

**FLEETCOR TECHNOLOGIES, INC., a  
corporation, and**

**RONALD CLARKE, individually and as  
an officer of FLEETCOR  
TECHNOLOGIES, INC.**

**Docket No. D-9403**

**CERTIFICATE OF SERVICE**

I hereby certify that on June 23, 2023, I filed the foregoing document electronically using the FTC's E-filing system, which will send notification of such filing to:

April Tabor  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave NW, Rm. H-113  
Washington, DC 20580

The Honorable Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave NW, Rm. H-110  
Washington, DC 20580

I further certify that on June 23, 2023, I caused the foregoing document to be served via electronic mail to:

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*Counsel for Respondent  
FleetCor Technologies, Inc.*

*Counsel for Respondent  
Ronald Clarke*



The Honorable Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave. NW, Rm. H-110  
Washington, DC 20580

June 23, 2023

By: /s/ Daniel O. Hanks  
Daniel O. Hanks  
Federal Trade Commission

*Counsel Supporting the Complaint*