No. 11-55431

IN THE UNITED STATES COURT APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION
Plaintiff-Appellee,

v.

EDEBITPAY, LLC, et al.
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 2:07-cv-04880-ODW-AJW

BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

FEDERAL STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

STATEMENT OF JURISDICTION

The Federal Trade Commission ("Commission" or "FTC") initiated an action in the United States District Court for the Central District of California, seeking relief under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), for deceptive acts or practices that violated Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. § 53(b). On January 22, 2008, the FTC's Section 13(b) action settled when the district court (per Hon. Otis D. Wright II) entered a Stipulated Final Order for Permanent Relief ("Stipulated Final Order").

On February 3, 2011, the district court entered an order holding defendants, EDebitPay, LLC, Dale Paul Cleveland, and William Richard Wilson, in contempt of the Stipulated Final Order. Because the district court had jurisdiction over the Commission's Section 13(b) complaint, it had jurisdiction to enforce compliance with the Stipulated Final Order through civil contempt. *See*, *e.g.*, *Spallone v. United States*, 493 U.S. 265, 276 (1990); *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir. 1995). A notice of appeal was timely filed on March 16, 2011, pursuant to Fed. R. App. P. 4(a)(1)(B).

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court properly held that the Stipulated Final Order that settled the FTC's 2007 enforcement action against defendants applies to defendants' online marketing of shopping club memberships.

2. Whether the district court properly found clear and convincing evidence that defendants' marketing of the Century Platinum online shopping club memberships violated the Stipulated Final Order by misleading consumers to believe that defendants were offering a general line of credit.

3. Whether the district court properly found clear and convincing evidence that defendants' online marketing of the NetSpend prepaid debit card violated the Stipulated Final Order by failing to clearly and conspicuously disclose various fees to consumers.

4. Whether the district court properly ruled that defendants did not establish the affirmative defense of substantial compliance with respect to their shopping club and prepaid debit card marketing.

5. Whether the district court abused its discretion in determining that compensatory sanctions should equal the amount of consumer losses that defendants caused.

STATEMENT OF THE CASE[1]

A. Nature of the case, the course of proceedings, and the disposition below

This is an appeal from an order finding defendants, EDebitPay, LLC ("EDP") and its principals, Dale Paul Cleveland and William Richard Wilson, in contempt of a Stipulated Final Order entered by the United States District Court for the Central District of California. EDP, a Nevada limited liability corporation, is in the business of online marketing and advertising.[2] Cleveland and Wilson own and control EDP and, at all relevant times, served as EDP's Chief Executive Officer and President, respectively.[3] In the underlying action, the Federal Trade Commission ("FTC" or "Commission"), alleged that defendants had violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by using deceptive practices to market and sell prepaid debit cards, and sought a permanent injunction and monetary equitable relief for injured consumers. Doc. 1 (AER 1166-81). The

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[1] Citations to documents in defendants' Excerpts of Record are in the form "AER __." Citations to documents in the FTC's Supplemental Excerpts of Record are in the form "SER __."

[2] Jt. Exh. 529 (Compliance Report) 4:8-9, 4:13-14 (AER 841); Jt. Exh. 171 ¶ 3, Att. A (AER 780-81, 787-97).

[3] Jt. Exh. 171 ¶ 3, Att. A (AER 780-81, 787-97); Tr. 41:11-24 (AER 46); Cleveland 2009 Dep. 16:15-16 (SER 000292), 37:11-13 (AER 430); Jt. Exh. 529 (Compliance Report) 4:9-10 (AER 841); Wilson Dep. 15:17-25 (SER 000287), 17:10-15 (SER 000288), 17:24-18:1 (SER 000288-89).

case settled, and the parties signed a Stipulated Final Order, which the district court approved and entered on January 22, 2008. Doc. 35 (AER 1099-1121).

In May 2010, the Commission filed an application for an order to show cause why defendants should not be held in contempt of the Stipulated Final Order with respect to their promotion of the Century Platinum shopping club and NetSpend prepaid debit card. *See e.g.*, Doc. 43-4 (AER 1073-98). The court convened a three-day show cause hearing at which the Commission and the defendants presented evidence and live testimony. On February 3, 2011, the court entered an order holding each of the defendants in civil contempt. Doc. 114 (AER 8-29). The court found that the injury to consumers totaled $3.7 million, and ordered defendants to pay that sum to the FTC to be used to compensate consumers for their losses. Doc. 114 at 19-22 (AER 26-29); Doc. 131 (AER 6-7). The district court granted defendants a stay of execution of the monetary award pending resolution of this appeal. Doc. 174.

B. Facts and Proceedings Below

1. The Commission's 2007 complaint

On July 30, 2007, the Commission filed a complaint and *ex parte* application for a TRO and asset freeze, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), alleging that defendants had violated Section 5(a) of the Federal Trade

Commission Act ("FTC Act"), 15 U.S.C. § 45(a), in connection with their online marketing of prepaid debit cards. Doc. 1 (AER 1166-81). The district court entered a TRO and asset freeze and appointed a receiver for the corporate defendant. Doc. 12 (AER 1132-65). EDP discontinued operations after service of the TRO. Doc. 28 at 3-4 (AER 1124-25); Tr. (Cleveland) 130:4-22 (AER 127).

Shortly thereafter, defendants sought to resume certain business operations under the Receivership. They presented the Receiver and FTC counsel with a plan for marketing a $49.95 Sterling VIP debit card (Jt. Exh. 35 (SER 000274-78); Jt. Exhs. 36, 40 (AER 566-75, 575-90)), and met with the Receiver and the FTC on or about August 9 to discuss it.[4] At the meeting, the parties discussed only the proposed marketing of the $49.95 Sterling VIP debit card; they did not mention the product types that were challenged in the contempt action: shopping club memberships and purportedly "free" or "no cost" debit cards.[5] Following the meeting, defendants submitted revised versions of their proposed debit card marketing. Jt. Exh. 40 (AER 576-90). On August 13, 2007, defendants and the Receiver stipulated to a modified TRO that allowed defendants to resume certain

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[4] Jt. Exhs. 35 (SER 000274), 36 (AER 566-75); Tr. (Cleveland) 131:5-9, 133:24-134:23 (AER 128, 130-31).

[5] Jt. Exh. 35 (SER 000274-78); Tr. (Cleveland) 102:7-103:6, 207:17-20, 210:5-12 (AER 99-100, 204, 207).

operations during the pendency of the TRO. Doc. 16 (AER 1127-30).

In the meantime, negotiations progressed on the terms of a final order that would resolve all the allegations of the Commission's Section 13(b) complaint. Ultimately, defendants and the FTC agreed on the terms of the Stipulated Final Order. The district court approved the Stipulated Final Order and entered it on the docket on January 22, 2008. Doc. 35 (AER 1099-1121).

The Stipulated Final Order proscribes specific conduct, and "fences in" defendants to prevent them from using the same or similar deceptive practices to promote or sell products and services other than those that led to the Commission's 2007 complaint. It enjoins defendants, *inter alia*, from: (1) misrepresenting, expressly or by implication, any fact material to a consumer's decision to apply for or purchase any product or service (Subsection I.B); (2) failing to "clearly and conspicuously" disclose, prior to the time when a consumer applies for or purchases any good or service, the material attributes of the product or service, "e.g., that the product has the characteristics of a credit card, debit card, or stored value card" (Subsection I.E.5); and (3) failing to "clearly and conspicuously disclose the costs, fees, and charges to obtain and use" any prepaid card, debit card, or charge card in close proximity to statements that represent that such a card can be obtained "'free,'

without obligation, or at reduced cost * * *."[6] Subsection I.D. Doc. 35 at 5-7 (AER 1103-1105). The Stipulated Final Order also required payment of $2.3 million in equitable monetary relief for injured consumers. *Id.* at 8-11 (AER 1106-09).

2. Century Platinum shopping club promotion

In July 2007, shortly before the FTC filed the original complaint in this action, defendants launched the promotion of a Century Platinum shopping club through their startercreditdirect.com website. On January 16, 2008, days before the district court entered the Stipulated Final Order, defendants began marketing Century Platinum on a second website, supereliteoffer.com. Until November 19,

[6] Definitional provisions in the Stipulated Final Order provide specific guidance for defendants regarding the appearance of the required disclosures. "Clearly and [c]onspicuously" is defined to mean, with respect to textual communications, disclosures that appear, *inter alia*, "of a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend * * *." Doc. 35 at 3, Definition 4(a) (AER 1101). Additionally, disclosures online or in interactive media must be "unavoidable." Doc. 35 at 4, Definitions 4(d)(i) (AER 1102). For cards that are described as "'free,' without obligation, or at reduced cost," disclosures regarding the costs, fees, and charges to obtain and use a prepaid card, debit card, or credit card must appear in "close proximity," meaning they must appear "on the same webpage * * * proximate to the triggering representation, and [they] shall not be accessed or displayed through hyperlinks * * *." Doc. 35 at 4, Definitions 4(d)(ii), and 6, Section I.D (AER 1102, 1104).

2009, defendants promoted Century Platinum on multiple versions of startercreditdirect.com and supereliteoffer.com,[7] using the lure of a generous line of credit to entice consumers to enter their personal information and pay a $99

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[7] All eight versions of supereliteoffer.com consisted of two webpages. The "landing page" requested consumers' contact information. The "application page" asked for financial information. The landing page had an "Apply Now" button that, when clicked, transferred consumers to the application page. The application page also had an "Apply Now" button that, when clicked, submitted the application. The various versions of the supereliteoffer.com websites appear in the record as follows:

a. From January 16 (one week prior to entry of the Final Order) to August 27, 2008 (Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827);
b. From August 27 to September 22, 2008 (Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080827-20080922);
c. From September 22 to October 9, 2008 (Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080922-20081009);
d. From October 9, 2008 to January 9, 2009 (Jt. Exh. 137 (AER 777) at century\supereliteoffer\20081009-20090109);
e. From January 9 to April 8, 2009 (Jt. Exh. 137 (AER 777) at century\supereliteoffer\20090109-20090408);
f. From April 8 to June 9, 2009 (Jt. Exh. 137 (AER 777) at century\supereliteoffer\20090408-20090609);
g. From June 9 to August 21, 2009 (Jt. Exh. 137 (AER 777) at century\supereliteoffer\20090609-20090821); and
h. From August 21to November 19, 2009 (Jt. Exh. 137 (AER 777) at century\supereliteoffer\20090821 20091119).

In Joint Exhibit 137 (AER 777), landing pages are designated by filenames ending in "index_short.htm" and application pages are designated by filenames ending in "index.htm."

All eight versions of Super Elite shared certain features. An example can be seen at Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827.

application fee.

Even before landing on defendants' websites, consumers were led to believe that defendants were offering a general line of credit. Most consumers learned about the websites when they received an email, consisting of an advertising graphic with a red "Apply Now" button.[8] The email graphic stated, *inter alia*, **"Get an Immediate Guaranteed $10,000 Credit Line***" in large, bold font. The phrase "Guaranteed $10,000" was highlighted in red, and the figure "$10,000" appeared in a font significantly larger than any other text. The email graphic also stated (but only in small font at the very bottom of the graphic), "* To Purchase Brand Name Merchandise exclusively From Our Online Mega-Store!"[9] The text referring to purchases of "Brand Name Merchandise" appeared separately from the "Apply Now" button and the offer to "Get an Immediate $10,000 Credit Line," and in a font significantly smaller than any other text on the graphic.

Clicking on the "Apply Now" button opened the supereliteoffer.com

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[8] In addition, defendants posted "banner advertisements" on the websites of affiliate marketers. The banner advertisements promoted credit lines and cash advances, but, with one exception, did not refer to a shopping club. Consumers who clicked on the banner advertisements were transferred directly to startercreditdirect.com or supereliteoffer.com. Tr. (Cleveland) 73:17-77:22 (AER 70-74).

[9] Tr. (Cleveland) 70:3-19 (AER 67); Jt. Exh. 17, EDPFTC-15178-80 (SER 000279-81). The e-mail did not disclose that consumers were required to pay an application fee and monthly membership fees.

webpage.[10] There, consumers viewed a generous $10,000 credit line offer in large, red, boldface type above the fold – *i.e.*, the part of a webpage that is immediately viewable without scrolling down.[11] The offer appealed to consumers with a poor credit rating because it promised:

> **Instant $2500 Account Advance**
>
> **Guaranteed $10,000**[1]
>
> **No Job Requirements**
>
> **No Credit Checks**
>
> **100% Online Approval**

Defendants ran essentially the same offer on another website, startercreditdirect.com.[12] The appearance of the two websites was essentially the

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[10] Tr. (Cleveland) 66:10-67:7 (AER 63-64); Jt. Exh. 17, EDPFTC-15178-80 (SER 000279-81).

[11] Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827\index_short.htm.

[12] The nine versions of the startercreditdirect.com appear in the record at the following locations:

a. From October 25, 2007 (prior to entry of the Final Order) to October 15, 2008 (Jt. Exh. 137 (AER 777) at century\startercreditdirect\20071025-20081015\index.htm);
b. From October 15 to October 23, 2008 (Jt. Exh. 137 (AER 777) at century\startercreditdirect\20081015-20081023\index_short.htm and index.htm);
c. From October 23, 2008 to April 8, 2009 (Jt. Exh. 137 (AER 777) at

same, except for an oblique reference to "Century Platinum Membership Credit Line" in smaller point typeface immediately below the large red "$10,000" that appeared only in supereliteoffer.com. Also, offers of a $1,500 account advance and a prepaid debit card at the top of this website were followed by cryptic text stating

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century\startercreditdirect\20081023-20090408\index_short.htm and index.htm);

d. From April 8 to July 24, 2009 (Jt. Exh. 137 (AER 777) at century\startercreditdirect\20090408-20090724\index_short.htm and index.htm);

e. From July 24 to November 19, 2009 (Jt. Exh. 137 (AER 777) at century\startercreditdirect\20090724-20091119\index_short.htm and index.htm);

f. From November 1, 2007 (prior to entry of the Final Order) to September 30, 2008 (Jt. Exh. 152 (SER 000273) at https://builderimpact.com/FTCProd/century/startercreditdirectblue/20071101-20080930/index.asp and indexa.asp);

g. From September 30, 2008 to April 14, 2009 (Jt. Exh. 152 (SER 000273) at https://builderimpact.com/FTCProd/century/startercreditdirectblue/20090410-20090414/index.asp and indexa.asp);

h. From April 14 to June 9, 2009 (Jt. Exh. 152 (SER 000273) at https://builderimpact.com/FTCProd/century/startercreditdirectblue/20090414-20090609/index.asp and indexa.asp); and

i. From June 9 to November 19, 2009 (Jt. Exh. 152 (SER 000273) at https://builderimpact.com/FTCProd/century/startercreditdirectblue/20090609-20091119/index.asp and indexa.asp).

All nine versions of startercreditdirect.com shared certain features, illustrated by way of example in the version that was used from October 23, 2008 to April 8, 2009 (Jt. Exh. 137 (AER 777)) at century\startercreditdirect\20081023-20090408).

"Century Platinum Membership Required."[13]

Defendants' offer of a $10,000 line of credit was illusory. Consumers who responded to the startercreditdirect.com or supereliteoffer.com promotions by submitting their personal information did not receive – and were not considered for – a general $10,000 credit line. Instead, after paying a $99 application fee, they were enrolled in the Century Platinum Shopping Club, with an obligation to pay monthly dues of $14 and the "right" to use credit only to purchase merchandise from an online catalogue.[14] Having received something completely different from defendants had promised, only 86 people, or less than 0.3 percent of the approximately 30,000 consumers enrolled by EDP in the Century Platinum shopping club, even attempted to place orders from the Century Platinum catalog.[15]

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[13] *Compare* Jt. Exh. 137 (AER 777) at century\supereliteoffer\20081009-20090109\index.htm, *with* century\startercreditdirect\20081023-20090408\index.htm.

[14] Jt. Exh. 137 (AER 777) at subfolder T&C\supereliteoffer\T&C\century (Century Platinum Terms & Conditions by date) (AER 777); Jt. Exh. 171, Att. F (SER 000264-70).

[15] Jt. Exh. 171 ¶¶ 20-21 (AER 785-86); Jt. Exh. 166 ¶ 2 (SER 000271); Cohen Dep. 55: 10-16 (SER 000285); Jt. Exhs. 555-56 (SER 000259-60). Moreover, as a result of the large volume of complaints they received about startercreditdirect.com and supereliteoffer.com, defendants were on notice that consumers did not understand what they purchased. *See*, *e.g.*, Tr. (Cleveland) at 104:18-110:13 (AER 101-07)

Although defendants had stipulated to a Final Order that required clear and conspicuous disclosures and prohibited misrepresentations of material terms (Doc. 35 at 5-7 (AER 1103-05), they buried the true nature of their offer in small print in obscure locations and in hyperlinked terms and conditions that required even the most diligent consumers to launch a virtual scavenger hunt to find them. In fact, the disclosures featured so prominently in defendants' brief (App. Br. 11-12, 12-13) bear no resemblance to what consumers actually viewed. For example, the reference to a shopping club appeared on the Super Elite application webpages only as a footnote, below the fold, below the boxes consumers must complete to apply, below the "Apply Now" button, and below the copyright symbol and date. Only the footnote number appears at the top of the page, next to "Guaranteed $10,000."[16] Furthermore, this key disclosure that appears in defendants' brief in 14-point, boldface type (App. Br. 11-12), appears on the webpages that consumers actually viewed only in tiny 7.5-point, single-spaced type in the middle of other dense footnotes of like typeface and spacing that also describe disclosures related to the E-Sign Act and the USA PATRIOT ACT.[17]

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[16] *See, e.g.*, Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827\index.htm. The disclosure on the shorter landing page is identical in form and placement.

[17] Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827\index.htm. In some versions of the Super Elite webpages, the reference

Thus, to view the shopping club disclosure on either the Starter Credit or Super Elite websites, a consumer would have to first notice the "footnote" appearing at the very top of the screen, scroll down through numerous content boxes, blanks, checked boxes, and drop-down menus to reach the bottom of the page. Once arriving at the bottom, a consumer would have to sort through four different disclosures of varying relevance, all appearing in dense, single-spaced 7.5-point typeface. There was no assurance that consumers would view even this inadequate disclosure because defendants did not require consumers to view the footnote before enrolling them.[18] Tr. (Desa) 304:10-22 (AER 302).

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to a shopping club was not bolded. *Compare* Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827\index.htm, *with* Jt. Exh. 137 (AER 777) at century\supereliteoffer\20090821-20091119\index.htm. But it was consistently embedded in text using the same typeface conventions, thus ensuring it would be easy to overlook.

[18] To complete their applications, consumers needed to check a box next to another set of disclosures. These disclosures did not inform consumers that they were buying a membership in a shopping club and that they could use the credit line only to purchase items from the shopping club. Moreover, though defendants accurately quote the text of that disclosure, App. Br. 12-13, the appearance of the quoted text in defendants' brief bears no resemblance to what consumers actually viewed on defendants' webpage. On the webpage, the first sentence – "By checking the box you understand: StarterCreditDirect, not Century Platinum™, will electronically debit your checking account for our one-time $99.00 Application and Processing fee." – appears in large bold type. Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827\index.htm. But the rest of the disclosure appears only in small, single-spaced type. *Id.* (AER 777).

Additionally, while one of the disclosures states that, by checking the box,

3. Defendants' promotion of the NetSpend debit card

Defendants followed a similar approach in marketing the NetSpend prepaid debit card on three different websites, each with multiple versions.[19] They lured consumers to apply by announcing "Get a Prepaid Visa Debit Card at NO COST!" using bold red font, but omitted a "clear and conspicuous" disclosure of the

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the consumer has read and agreed to the terms and conditions of the program, consumers actually view the terms and conditions by clicking on an optional hyperlink that leads them to a pop-up box. *Id.* (AER 777).

[19] Defendants marketed the NetSpend "NO COST" debit card on three websites during the following time periods:

a. simplecreditmatch.com from July 29 to Sept. 11, 2009 (Jt. Exh. 157 at http://builderimpact.com/FTCProd/other/simplecreditmatch/20090729-20090911/index.asp) (AER 779);
b. simplecreditmatch.com from Sept. 11 to October 28, 2009 (Jt. Exh. 157 at http://builderimpact.com/FTCProd/other/simplecreditmatch/20090911-20091028/index.asp) (AER 779);
c. simplecreditmatch.com from Oct. 28, 2009 to March 15, 2010 (Jt. Ex. 157 at http://builderimpact.com/FTCProd/other/simplecreditmatch/20091028-20100315/index.asp)(AER 779);
d. eplatinumdirect.com from Aug. 6 to Nov. 25, 2009 (Jt. Exh. 137 at cmg\eplatinumDirect\20090806-20091125\index2.htm) (AER 777);
e. eplatinumdirect.com from Nov. 25 to Dec. 29, 2009 (Jt. Exh. 137 at cmg\eplatinumDirect\20091125-20091229\index2.htm) (AER 777);
f. eplatinumdirect.com from Dec. 29, 2009 to Jan. 20, 2010 (Jt. Exh. 137 at cmg\eplatinumDirect\20091229-20100120\index2.htm) (AER 777);
g. eplatinumdirect.com from Feb. 1 to Feb. 12, 2010 (Jt. Exh. 137 at cmg\eplatinumDirect\20100201-20100212\index2.htm) (AER 777);
h. supereliteoffer.com from June 9 to Aug. 21, 2009 (Jt. Exh. 137 at century\supereliteoffer\20090609-20090821\index.htm) (AER 777); and
i. supereliteoffer.com from Aug. 21 to Nov. 19, 2009. (Jt. Exh. 137 at century\supereliteoffer\20090821-20091119\index.htm.)(AER 777).

required fees "in close proximity," as the Stipulated Final Order requires.[20] In seven of the nine different versions of the websites, consumers who provided the required information and clicked "Yes" saw a drop-down message with a hyperlink to additional terms and conditions, but without any disclosure of any fees. In only two cases, this drop-down message disclosed only a $9.95 monthly service fee.[21] But when consumers received the card from the card operator, they learned they could incur a number of different additional fees to use it. These included – in addition to the $9.95 monthly service fee – a "PIN Purchase Convenience" fee, a "Signature Purchase Convenience" fee, an "ATM Cash Withdrawal" fee, and an "Account-to-Account Transfer" fee, among others. Jt. Exh. 131 at 3 (AER 771); Jt. Exh. 133 (AER 773); Tr. (Cleveland) 94:3-95:11, 98:2-25 (AER 91-92, 95). Defendants disclosed those fees only in the middle of a 4,720-word hyperlinked document that consumers were not required to view before entering their personal

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[20] *See*, *e.g.*, Jt. Exh. 13 (AER 777) at cmg\eplatinumDirect\20090806-20091125\index2.htm.

[21] The two sites that disclosed the $9.95 monthly service fee on the same page as the offer were eplatinumdirect.com from Aug. 6 to Nov. 25, 2009 (Jt. Exh. 137 at cmg\eplatinumDirect\20090806-20091125\index2.htm) and eplatinumdirect.com from Feb. 1 to Feb. 12, 2010 (Jt. Exh. 137 at cmg\eplatinumDirect\20100201-20100212\index2.htm) (AER 777). In their brief, defendants claim that the failure to include this on the other websites was inadvertent error because after the Stipulated Final Order they had a policy to disclose monthly fees on the same page as the offer. App. Br. 15-17.

information. Tr. (Cleveland) 95:5-11 (AER 92); Jt. Exh. 137 (AER 777) at cmg\eplatinumDirect\20090806-20091125\netspend.htm.

4. Post-Order communications between defendants and the FTC

Following entry of the Stipulated Final Order in January 2008, defendants and the FTC communicated about certain aspects of defendants' business. For instance, the FTC periodically conveyed consumer complaints to defendants for resolution. Tr. (McKown) at 253:1-14 (AER 250). Also, in July 2008, defendants provided the FTC with a hyperlink to www.ultimateplatinumoffer.com, a website that marketed the "E-Elite Platinum Shopping Card" and the USA Credit Shopping Club.[22] FTC counsel discussed the website with defendants' counsel, but did not approve those promotions or tell defendants or their counsel that they complied with the Stipulated Final Order. Tr. (McKown) at 248:11-255:16 (AER 245-52). The FTC also was not asked to review or approve defendants' marketing for the Century Platinum shopping club. Tr. (McKown) at 255:3-6 (AER 252). At the time of those discussions, defendants had been running the offending Century Platinum promotions for over one year on startercreditdirect.com and for nearly

[22] *See* Jt. Exh. 137 (AER 777) at cmg\ultimatePlatinum\20081015-20090408\index.htm.

eight months on supereliteoffer.com.[23] Tr. (Cleveland) at 89:9-22 (AER 86); Jt. Exh. 137 (AER 777) at century\startercreditdirect and century\supereliteoffer (listing startercreditdirect and supereliteoffer websites by date).

5. The Civil Contempt Proceedings

On May 27, 2010, the Commission applied for an order to show cause why EDP and its principals should not be held in contempt of the Stipulated Final Order with respect to its misleading promotion on startercreditdirect.com. Doc. 43-4 (AER 1073-98).

The FTC alleged that defendants had violated the Stipulated Final Order by: (1) misrepresenting they were offering a general line of credit; (2) failing to clearly and conspicuously disclose that they were actually offering a shopping club membership and that the line of credit could only be used to purchase items from the shopping club; and (3) failing to obtain consumers' express informed consent to be charged for the shopping club membership. Doc. 43-4 at 16-24 (AER 1088-96).

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[23] At one point in the contempt proceedings, CEO Dale Paul Cleveland submitted a declaration in which he stated that another website, ultimateplatinumoffer.com, was a template for startercreditdirect.com. *See* Doc. 59 ¶ 7 (AER 937). But he admitted later at the show cause hearing that the statement in his declaration was inaccurate because (1) startercreditdirect.com predated ultimateplatinumoffer.com by nearly a year and (2) there were material differences between the disclosures appearing on ultimateplatinumoffer.com and those appearing on the two websites used to market the Century Platinum shopping club. *See* Tr. (Cleveland) at 89:12-92:8 (AER 86-89).

In support of its allegations, the Commission attached the offending Century Premium promotion as it appeared on startercreditdirect.com. Doc. 43-2, Att. D (SER 000256-58). The FTC also alleged violations of provisions of the Stipulated Final Order that prohibited defendants from marketing prepaid debit cards as "No Cost" without clear and conspicuous disclosure of fees that consumers would be charged for consumers to obtain and use them. Doc. 43-4 at 18-19, 22 (AER 1090-91, 1094).

The Commission's contempt application did not include examples of defendants' virtually identical Century Premium shopping club promotion on supereliteoffer.com because the Commission did not learn about the true extent of defendants' violations – *i.e.*, that defendants were also promoting Century Premium on a second, very similar website – until shortly after the Commission moved for contempt.[24] *See*, *e.g.*, Doc 75 at 20-24 (SER 000082-86). After the defendants

[24] Based on information from Insite Marketing Group, the third party that operated the Century Platinum shopping club, the FTC believed that all customers who signed up for the club did so through startercreditdirect.com. *See* Doc. 43-4 at 12-13 (AER 1084-85); Doc. 60 at 5 n.4 (AER 922). After defendants stated in their opposition to the FTC's contempt application that many consumers signed up through other websites, see Doc. 50 at 18 n.15 (SER 000254), the FTC sought discovery about those websites. *See* Doc. 75 at 95-154 (SER 000157-216). Defendants refused to produce that information until October 2010, after Magistrate Judge Wistrich ordered defendants to produce it. *See* Doc. 83 (SER 000062). Shortly after defendants provided the information, the FTC notified them that it was seeking contempt for the supereliteoffer.com marketing. Jt. Exh. 174 (SER 000261-62). Thus, any delay is the result of defendants' failure to respond to

finally responded to the Commission's discovery requests about supereliteoffer.com in October 2010, the Commission formally advised defendants that it intended to expand its request for contempt sanctions with regard to the Century Premium shopping club to include supereliteoffer.com. Jt. Exh. 174 (SER 000261-62). Initially, defendants objected to the addition, claiming the FTC should have brought the charges earlier. Doc. 114 at 9-10 (AER 16-17). But they decided to "waive[] any due process concerns and requested that the District Court consider the Super Elite marketing * * * ." App. Br. 7 n.3

On February 3, 2011, after three days of trial and examining numerous exhibits, depositions, and the parties' proposed findings and memoranda of law, the district court entered an order holding defendants in contempt of Subsections I.B and I.E.5 of the Stipulated Final Order with respect to their online marketing of the Century Platinum shopping club on the Starter Credit and Super Elite websites and in contempt of Subsection I.D with respect to their marketing of the NetSpend prepaid debit card. Doc. 114 at 7-11, 12-14 (AER 14-18, 19-21). The court did not agree with the Commission that defendants had also violated Subsections I.A and I.F. Doc. 114 at 11-12 (AER 18-19).

As a threshold matter, the district court addressed, and rejected, defendants'

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appropriate discovery, and, in any event, defendants have waived their challenge. App. Br. 7 n.3.

contention that the Stipulated Final Order applies only to their marketing of the specific products and services at issue in the Commission's 2007 complaint – *i.e.*, prepaid cards, debit cards, and credit cards. Doc. 114 at 6 (AER 13). The court noted that each of the relevant subsections of Section I – I.A, I.B, I.E.5, and I.F – apply to "any product or service" or do not contain language limiting the subsection to certain products or services. *Id.* For that reason, it ruled that "according to the plain language, the provisions at issue are not limited to Defendants' marketing of prepaid cards, debit cards, and credit cards, but also apply to Defendants' marketing of the Century Platinum shopping club."[25] *Id.* Citing plain and unambiguous text, the court rejected as impermissible defendants' offer of extrinsic evidence of the parties' negotiations. *Id.* at 6 n.3 (AER 13).

Having rejected defendants' efforts to rewrite (and limit) the scope of the Stipulated Final Order, the district court turned to the Commission's contempt allegations – namely, that defendants in marketing the Century Platinum shopping club on startercreditdirect.com and supereliteoffer.com, had (1) misrepresented that they were offering a general line of credit in violation of Subsection I.B; (2) failed

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[25] The court compared the prohibitions of the provisions at issue with the more specific constraints of Subsections I.C and I.D, which prohibit defendants from failing to make certain disclosures in marketing a "prepaid card, debit card, or credit card." Doc. 114 at 6 n.4 (AER 13). The court agreed with the Commission that the narrower prohibitions of those subsections showed that, if the parties had intended to limit the scope of the relevant provisions, they knew how to do so. *Id.*

to clearly and conspicuously disclose that they were actually offering a shopping club membership and that the line of credit could be used only to purchase items from the shopping club, in violation of Subsection I.E.5; and (3) failed to obtain consumers' express informed consent to be charged, in violation of Subsections I.A and I.F. Doc. 114 at 5 (AER 12).

The court looked first at defendants' marketing on startercreditdirect.com. The court agreed with the Commission that defendants' offer, in large font, of an "Immediate Guaranteed $10,000 Credit Line" and "$2,500 Account Advance" conveyed the overall impression that consumers would receive a general line of credit. Doc. 114 at 7-8 (AER 14-15). The court found that disclosures about the true nature of the offer appeared only in small font and in obscure locations on the website, and not in proximity to more general representations about a credit line.[26] Doc. 114 at 8 (AER 15). Thus, the court concluded that these buried disclosures did not overcome "the overarching misrepresentation that consumers would receive a general line of credit." *Id.*

The district court found similar deficiencies on defendants'

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[26] As the district court observed, defendants' so-called "disclosures" sometimes appeared "in footnotes far below the application information and submit button, lodged between vast amounts of other information regarding the E-Sign Act and the USA PATRIOT Act, while others appear[ed] in hyperlinked terms and conditions. Doc. 114 at 8 (AER 15).

supereliteoffer.com websites. Doc. 114 at 9-10 (AER 16-17). With regard to defendants' cryptic references to "Century Platinum membership," the court ruled they were too "limited and obscure" to correct the impression, conveyed by defendants' announcement in bold, large font, that consumers would receive a general line of credit. Doc. 114 at 9 (AER 16).

Based on these findings, the court concluded that "clear and convincing evidence" established that the shopping club promotional websites violated Subsections I.B and I.E.5 of the Stipulated Final Order. Doc. 114 at 7-11 (AER 14-18). The court did not find defendants liable for violating provisions in Subsections I.A and I.F that prohibited them from debiting consumers' accounts without first obtaining their express and informed consent. *Id*. at 11-12 (AER 18-19).

The court turned next to the allegation that defendants had violated Subsection I.D by failing to clearly and conspicuously disclose the fees that consumers would incur in using their NetSpend card. *Id*. at 12 (AER 19). The court rejected defendants' claim that they merely had generated consumer leads for NetSpend, the true provider of the service. *Id.* at 13-14 (AER 20-21). The relevant issue for purposes of the contempt proceeding, the court explained, is whether the fees were disclosed as required by the Stipulated Final Order, not whether defendants sold the product to consumers. *Id*. Because the Stipulated Final Order

requires defendants to disclose any fees "in close proximity" to statements such as "No Cost," the court also rejected as irrelevant defendants' assertions that consumers may have received explanations after they ordered the card, or were not charged while they were actually online. *Id*. at 14 (AER 21).

Having found that defendants violated the Stipulated Final Order by clear and convincing evidence, the district court considered defendants' affirmative defenses – estoppel and substantial compliance. *Id*. at 15-19 (AER 22-26). The court rejected defendants' assertion that the FTC was estopped from pursuing contempt with regard to the Starter Credit website because, *inter alia*, the startercreditdirect.com marketing program commenced while defendants were still under receivership.[27] *Id.* at 16 (AER 23). The court found that the FTC did not know about or approve the Starter Credit website, or lead defendants to believe that it complied with the Stipulated Final Order. *Id*. at 16-17 (AER 23-24). The court rejected defendants' claim of estoppel with respect to the NetSpend card as well, given that it rested on the erroneous assumption that the FTC's review of a "markedly different" product – the Sterling VIP debit card – was tantamount to approval of defendants' NetSpend marketing. *Id*. at 18 (AER 25).

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[27] The district court noted that defendants did not attempt to assert an estoppel defense for their marketing on the Super Elite website. Doc. 114 at 15 n.9 (AER 22).

The district court also rejected defendants' "substantial compliance" defense, ruling that defendants' contention that the contempt proceedings related to only a small percentage of their business was irrelevant. *Id.* at 19 (AER 26). Furthermore, because defendants "with very little effort" could have informed consumers about the true nature and cost of their products, the court refused to conclude that the violations were "merely technical," or that defendants had made every reasonable effort to comply. *Id.*

Finally, the court addressed whether monetary sanctions should be based on defendants' profits or the amount of consumer loss. *Id.* at 19-22 (AER 26-29). The court concluded that the total amount of fees paid less refunds was the appropriate measure, given that defendants had flouted core provisions of the earlier order over a long period on multiple versions of their websites. *Id.* at 20 (AER 27). The court also refused to accept defendants' arguments for a reduction of sanctions, holding that sanctions should be calculated from January 22, 2008, when the Stipulated Final Order was entered and the contemptuous conduct began, and that they properly included monies that defendants had split with Insite, a third-party operator of the Century Platinum shopping club. *Id.* at 20-21 (AER 27-28). Based on this analysis, the district court ordered defendants to pay

compensatory sanctions in the amount of $3.7 million.[28] *Id.* at 21 (AER 28).

STANDARD OF REVIEW

This Court reviews the district court's decision to impose contempt sanctions for abuse of discretion. *See*, *e.g.*, *FTC v. Affordable Media*, *LLC*, 179 F.3d 1228, 1238 (9th Cir. 1999); *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993); *Reebok Int'l Ltd.*, 49 F.3d at 1390. The underlying factual findings are reviewed for clear error. *United States v. Bright*, 596 F.3d 683, 694 (9th Cir. 2010); *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004). The Court reviews a district court's construction of a consent decree *de novo*. *Labor/Community Strategy Ctr. v. L.A. County Metro Transport. Auth.*, 564 F.3d 1115, 1119 (9th Cir. 2009).

SUMMARY OF ARGUMENT

Clear and convincing evidence presented by the Commission during a three-day contempt hearing supports the district court's conclusion that defendants were jointly and severally liable for the violations it found. This evidence showed that, following entry of the Stipulated Final Order for Injunctive Relief, defendants conducted online promotions on a total of 17 versions of two different websites

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[28] To correct a mathematical error, the court entered an order on April 20, 2011, increasing the amount of compensatory sanctions from $3,720,774.50 to $3, 778,315.04. Doc. 131 (AER 1-7).

that, through clever placement of text and manipulation of typeface and hyperlinks, concealed the true nature of their offer. They offered consumers a line of credit, but hid the fact that they were really providing membership in a shopping club. They also utterly failed to satisfy the specific requirements for credit and debit card promotions representing that the cards were "free," choosing to ignore specific disclosures that the Stipulated Final Order required them to make for the costs of using (as well as obtaining) a card. Given that these blatant violations persisted for more than one year, leading to more than $3.7 million in consumer losses, the district court properly awarded compensatory sanctions in the amount of gross sales less refunds.

Defendants cannot evade contempt sanctions by limiting the Stipulated Final Order to the products and conduct that led to the Commission's 2007 complaint. Their construction of the Order is completely at odds with its clear and unambiguous text. Consequently, the district court properly refused to consider defendants' proffer of negotiated changes to support their self-serving construction. (Part I.A, *infra*.)

Defendants' assertion that the Order is too vague is belied by the selective manner in which they presented information to consumers, which shows that they understood the requirements of the Order, but simply decided to ignore them. In

any event, this objection comes too late. Given defendants' failure to object to the text of the Order before they signed it in 2008, the only question is whether defendants violated it. (Part I.B, *infra*.)

Defendants next set of excuses relates to the marketing itself. The district court properly found that defendants violated the Stipulated Final order because the Super Elite websites did not clearly or conspicuously disclose the true nature of defendants' service and misled consumers into believing that defendants were offering a $10,000 credit line. Indeed, defendants' violations of the terms of the Stipulated Final Order did not cease even after consumer complaints alerted them that deception was widespread. (Part I.C, *infra.*)

Similarly, the district court properly found that the defendants' NetSpend card marketing did not clearly and conspicuously disclose the fees associated with using the card. Defendants offer a slew of excuses, blaming the FTC and giving reasons why the violations were harmless and technical. But none of these justifies why the defendants violated the clear terms of the Stipulated Final Order and failed to notify consumers of the multiple fees associated with a so-called "NO COST" card for months on end. (Part I.D, *infra.*)

Defendants reliance on the defense of "substantial compliance" is also unavailing. Defendants must show that they took "all reasonable steps to comply"

and that their violations were technical or inadvertent. Defendants do not satisfy either element of this test. Defendants deceived consumers as to the very nature of the product they were offering and continued to do so even after numerous consumer complaints alerted them that they were deceiving consumers. Defendants cannot establish that such violations were technical, or that they took "all reasonable steps" to comply. (Part I.E, *infra.*)

Finally, the district court did not abuse its discretion in imposing compensatory sanctions in the amount of consumer losses. The district court has ample inherent authority to use compensatory sanctions to remedy violations of an injunctive order. And such relief is particularly appropriate here, where consumers were misled as to the very nature of the product that defendants were promoting. Likewise, the district court did not abuse its discretion in refusing to credit defendants for the costs of running a contumacious enterprise. Defendants are not entitled to shift those costs to injured consumers. (Part II, *infra.*)

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Holding Defendants In Contempt of the Stipulated Final Order

A. The District Court Properly Construed the Stipulated Final Order to Apply to Defendants' Marketing of Shopping Clubs

The principal issue in this appeal is whether the requirements of the Stipulated Final Order apply to defendants' marketing of a shopping club on their Super Elite webpage. Having stipulated to an order that bars them from misrepresenting or failing to disclose material facts in marketing *any product or service* and facing the prospect of paying contempt sanctions for violating it, defendants offer a strained construction of the Order that would limit it to the specific types of products and conduct at issue in the underlying action – *i.e.*, defendants' marketing of prepaid cards, credit cards, and debit cards – and render the Order's broader "any products or services" language surplusage. App. Br. 22-25. Given the plain and unambiguous text of the Order, the district court properly found that defendants marketing practices fell squarely within the Order's scope. The district court also properly refused to consider defendants' offer of extrinsic evidence in support of their efforts to rewrite the Order's terms.

Defendants' self-serving interpretation of the Order flies in the face of the plain and unambiguous text. In general, Section I of the Final Order imposes

various restrictions "in connection with the advertising, promotion, marketing, offering, or sale *of goods or services* by Internet or otherwise * * * directly or indirectly * * *." Doc. 35 at 5 (AER 1103) (emphasis added). Furthermore, by contrast to subsections with specific obligations for marketing prepaid cards, debit cards, and credit cards,[29] each of the subsections relevant to this appeal (*i.e.*, Subsections I.B and I.E.5) apply specifically to the marketing of *any product or service*. *Id.* at 5-6 (AER 1103-04) (emphasis added).

Subsection I.B, for example, prohibits defendants from "[m]isrepresenting * * * expressly or by implication, any fact material to a consumer's decision to apply for or purchase *any product or service offered by any Defendant*, including but not limited to" six different examples of the types of material facts. Doc. 35 at 5 (AER 1103) (emphasis added). The six different examples of material facts are then enumerated in Subsections I.B.1 to I.B.6. Doc. 35 at 5-6 (AER 1103-04).

In similar fashion, Subsection I.E broadly prohibits defendants from "[f]ailing to clearly and conspicuously disclose prior to the time when a consumer applies for or purchases *any good or service offered by any Defendant* * * * (5) the material attributes of the product or service offered or marketed, e.g., that the

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[29] For example, Subsections I.C and I.D specifically prohibit defendants from failing to make certain disclosures regarding a "prepaid card, debit card, or credit card," demonstrating that the parties knew how to limit the scope of other provisions to prepaid cards, debit cards, or credit cards.

product has the characteristics of a credit card, debit card, or stored value card * * *." Doc. 35 at 6-7 (AER 1104-05) (emphasis added). Therefore, the district court correctly found that the Stipulated Final Order applies to defendants' marketing of shopping clubs. *See* Doc. 114 at 5-6 (AER 12-13).

While defendants claim that the FTC's reading is selective (App. Br. 23-24), it is defendants' interpretation that ignores the clear language and effectively reads out Section I.B and the "including, but not limited to" provision. The FTC's interpretation, as adopted by the district court, is consistent with the entire text and gives effect both to Section I.B as a general prohibition on misrepresentations and to the enumerated subsections as specific, though nonexclusive, examples of prohibited conduct.

Furthermore, contrary to defendants' contention (App. Br. 31-33), the court properly refused to consider defendants' offer of extrinsic evidence. Without ambiguity, the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971); *accord*, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975); *United States v. Asarco, Inc.*, 430 F.3d 972, 980 (9th Cir. 2005). As shown above, no such ambiguity exists here.

In any event, defendants' proffered extrinsic evidence is not helpful. *See* App. Br. 32. An earlier version of Subsection I.E.5 prohibited defendants from failing to clearly and conspicuously disclose "the material attributes of the product or service offered or marketed." Jt. Exh. 5 § I.E.5 (AER 488). After negotiations, the parties agreed to add examples of "material attributes," so the Stipulated Final Order signed by the parties prohibits defendants from failing to clearly and conspicuously disclose "the material attributes of the product or service offered or marketed, e.g., that the product has the characteristics of a credit card, debit card, or stored value card." Doc. 35 at 6-7 (AER 1104-05). But contrary to defendants' contention (App. Br. 29-30, 32), it does not follow that disclosures required by the Subsection I.E.5 are limited to specific card products. To the contrary, the addition of "e.g." serves to clarify that disclosing that a product has the characteristics of a card is merely one illustrative example of types of material information that must be disclosed.

B. The Stipulated Final Order is Enforceable

Defendants next attack the basic validity of the consent decree. They contend that, without their suggested limitations, the Stipulated Final Order merely codifies what is already prohibited by Section 5 of the FTC Act, and therefore is "too indefinite and unspecific" to be enforced in civil contempt. App. Br. 18, 30.

It is far too late for defendants to contend that an order they bargained for in 2008 is too broad, or so vague that they are unable to comply with it. If the Stipulated Final Order reads more broadly than defendants intended, "the time and manner of avoiding that breadth was by objections to the decree before its entry and not by disobedience of it afterwards." *NLRB v. Alterman Transport Lines, Inc*., 587 F.2d 212, 216 (5th Cir. 1979).[30] Their current complaints about the breadth of the order are mere buyers' remorse.

In any event, contrary to defendants' assertion (App. Br. 25-28), an injunction is not rendered "vague and unenforceable" merely because it is framed in language that closely tracks a broad statutory mandate. *See*, *e.g*., *McComb v. Jacksonville Paper* Co., 336 U.S. 187, 192 (1949); *United States v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978). As Professor Jaffe has observed, "there is sometimes an assumption that 'broadness' and 'vagueness' are equivalent. But an order that is broad simply in the sense that it incorporates the prohibitions of the statute is not for that reason vague unless the statute is vague." Louis L. Jaffe, *Judicial Enforcement of Administrative Orders*, 76 Harv. L. Rev. 865, 885-86

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[30] *Accord, McComb v. Jacksonville Paper Co*., 336 U.S. 187, 192-93 (1949); *NLRB v. Leslie Metal Arts Co*., 1980 U.S. App. LEXIS 16972 at *6-8 (6th Cir. 1980); *NLRB v. Retail Clerks Int'l Ass'n*, 203 F.2d 165, 169 (9th Cir. 1953); *cf. John Zink Co. v. Zink*, 241 F.3d 1256, 1260 (10th Cir. 2001) (defendants forfeited arguments related to interpretation of injunction by not raising them on direct appeal).

(1963). Thus, it is entirely proper for an injunction to repeat a statutory prohibition, and it is sometimes necessary to do so to prevent further violations in a slightly different form – for example, where a defendant who offers a broad array of products or services can readily transfer his misleading practices from one product or service to another.[31] *See*, *e.g.*, *Power v. Summers*, 226 F.3d 815, 819 (7th Cir. 2000).

The facts of this case underscore this reasoning. Here, in the underlying case, the FTC alleged that defendants buried a crucial fact material to consumers – that they would charge a substantial fee – to induce consumers to apply for prepaid debit cards. Doc. 1, at ¶¶ 52-57 (AER 1178-79). In the contempt action, the district court found that defendants again buried crucial facts material to consumers – the nature of the products being sold and the fees involved – to convince consumers to apply for different products. Doc. 114, at 7-14 (AER 14-21). The fact that defendants are using similar methods to deceive consumers about slightly different products illustrates why orders like this one need to be broad.

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[31] *See*, *e.g.*, *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 305 (7th Cir. 1979) (upholding order covering any food, drug, cosmetic or device on the basis of, *inter alia*, an advertiser's ability to expand product line without expense of modifying facilities and ongoing testing and marketing of new products); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972) (court did not abuse its discretion in framing injunction in terms of specific statutory provision it concluded had been violated).

Thus, the relevant question is whether the Stipulated Final Order, regardless of whether it tracks a statutory mandate, gives "fair notice" of the acts that are restrained or required and is adequately clear to prevent "uncertainty and confusion." *FEC v. Furgatch*, 869 F.2d 1256, 1263 (9th Cir. 1989). Defendants cannot seriously claim that uncertainty or confusion led to their misdeeds. It had to have been obvious to anyone, much less experienced marketers, that the true nature of the product they offered would be "material" to a consumer's purchasing decision and therefore that, in using language and graphics that deceived consumers, making it appear to be a general line of credit, they risked contempt. Why else would they have gone to such lengths to bury the crucial disclosures that they were offering a shopping club membership and that the $10,000 credit line could only be used to purchase items from that club? *See* p. 13-14, *supra*. Furthermore, if defendants were truly uncertain about whether describing a shopping club membership as a line of credit was a "material" representation (and therefore subject to the requirements of the Stipulated Final Order), they had detailed guidance (including illustrative examples), *see* 1983 FTC Policy Statement on Deception (appended to *In re Cliffdale Associates, Inc*., 103 F.T.C. 110, 174 (1984), and longstanding precedents at hand. *See*, *e.g*., *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); *FTC v. Pantron I Corp*., 33 F.3d 1088, 1095-96

(9th Cir. 1994). Unlike the orders addressed in their cited cases, *see* App. Br. 27, the Stipulated Final Order gave "fair notice" and was adequately clear. *See Furgatch*, 869 F.2d at 1263.

C. Defendants' Super Elite Marketing Violated Clear and Unambiguous Requirements of the Stipulated Final Order

Given that Subsections I.B and I.E.5 of the Stipulated Final Order plainly apply to defendants' shopping club promotions (pp. 30-33, *supra*), the district court concluded correctly that the Super Elite website violated the Order by (1) misrepresenting the material terms of a product or service (Subsection I.B); and (2) failing to "clearly and conspicuously" disclose the material attributes of a product or service prior to purchase (Subsection I.E.5).

Defendants drove targeted cash-strapped consumers to their Super Elite Offer webpage with emails and flashing banners touting the availability of a $10,000 credit line. For example, the e-mails to consumers stated "**Get an Immediate Guaranteed $10,000 Credit Line***" in large, bold font.[32] The e-mails further advertised "INSTANT $2,500 Account Advance," "NO Job Requirements," "NO Credit Checks," "Approval in 60 Seconds," and included a red "Apply Now"

[32] Jt. Exh. 17, EDPFTC-15178-80 (SER 000279-81).

button.[33] Clicking on this button took consumers to defendants' landing page. When consumers landed on the webpage, their expectation of a $10,000 line of credit was reinforced by new prominent offers for $10,000 at the top of the webpage. All of defendants' post-Order versions of the Super Elite website featured three offers at the top of the landing page: a $10,000 credit line with an instant $2,500 account advance; a $1,500 account advance; and a prepaid debit card.[34] The $10,000 credit line offer appeared on the top left of the webpage, above the fold, with the figure "**$10,000**" appearing in bold and in a font considerably larger than any other words on the website. Below that claim is text in a smaller font stating "Century Platinum Membership Credit Line."[35]

Furthermore, all versions of the Super Elite website that defendants used post-Order reinforced the expectation of a general $10,000 credit line by promising:

> **Instant $2500 Advance**
>
> **Guaranteed $10,000**[1]

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[33] *Id.* The district court concluded that these e-mails were "essentially the same, if not more egregious" than the Starter Credit or Super Elite websites. Doc. 114, at 5 n.1 (AER 12).

[34] *See, e.g.,* Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827\index.htm.

[35] *See, e.g.*, *id.*

No Job Requirements

No Credit Checks

100% Online Approval

See, *e.g.*, *id*. at century\supereliteoffer\20080116-20080827\index.htm.

Defendants frankly concede that their Super Elite marketing "could have been better." App. Br. 37. Nonetheless, because they used the word "Membership" in the header (*i.e*., "Century Platinum Membership Credit Line"), they contend that only consumers who "turned a blind eye" to the word "membership" would not have known that the true nature of the offer was for a shopping club. App. Br. 19, 35-36.

The district court properly found that such cryptic references – which were notably absent from the banner advertising and emails that directed consumers to the website to begin with – cannot correct the overarching and prominent message that defendants were offering a $10,000 general line of credit. *Cf. FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (fine print disclosures on reverse side do not preclude liability); *Standard Oil Co. v. FTC*, 577 F.2d 653, 659 (9th Cir. 1978) (predominant visual message not corrected by accompanying verbal disclosure); *Floersheim v. FTC*, 411 F.2d 874, 875-78 (9th Cir. 1969) (small print disclaimers not sufficient to correct the misimpression created by appearance and repetition of words). Furthermore, issuers of general-purpose credit cards

commonly refer to their cardholders as "members" or "cardmembers."[36] For example, American Express issued cards to consumers using the slogan "Membership has its privileges" for nearly nine years. *See* Stuart Elliott, *American Express Gets Specific and Asks, 'Are You a Cardmember?'*, N.Y. Times, Apr. 6, 2007. Thus, defendants are wide of the mark in assuming that their cryptic reference to "membership" on the Super Elite website was a "plain and unambiguous phrase" that "alone refutes that the credit line being offered was a general line of credit."[37] App. Br. 34. Had defendants achieved that end, surely at least some of the consumers would have attempted to order merchandise after paying a $99 enrollment fee. Instead, only 86 consumers (or 0.3%) even attempted to do so after paying a $99 fee, showing conclusively that actual deception was widespread.[38] *See* p. 12, *supra*; *Cyberspace.com*, 453 F.3d at 1201.

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[36] *See, e.g., McCoy v. Chase Manhattan Bank, USA*, 654 F.3d 971, 975 (9th Cir. 2011) ("cardmember"); *Perry v. First Nat'l Bank*, 459 F.3d 816, 824-25 (7th Cir. 2006) ("membership"); *Rossman v. Fleet Bank (R.I.) Nat'l Ass'n.*, 280 F.3d 384, 388-89 (3d Cir. 2002) ("membership").

[37] Defendants' claim that the FTC has "essentially conceded" that references to a shopping club or membership club are sufficient to inform consumers about what they were really offering is spurious. *See* App. Br. 38. This so-called "concession" actually refers to a *question* in a deposition asking about website content.

[38] The fact that the FTC in various pleadings used the word "membership" to describe Century Platinum is irrelevant. *See* App. Br. 37-38, 40. The FTC referred to Century Platinum as a membership program because that it is what it is. But that is not what consumers understood they were getting based on the way

Defendants' reliance on the "explanations" they buried in small font footnotes is also misplaced. Subsection I.E.5 of the Final Stipulated Order prohibits them from failing to "clearly and conspicuously" disclose the material attributes of any product or service. Doc. 35 at 3-4, 6-7 (AER 1101-02, 1104-05). "Clearly and conspicuously" is defined by the Order to mean of a "type size and location sufficiently noticeable for an ordinary consumer to read and comprehend." Doc. 35 at 3 (AER 1101).

Defendants' footnoted "disclosures" flagrantly violated these standards. As the district court explained, those "disclosures" appeared in small font at the bottom of the webpages, below the "Apply Now" button, and below the copyright symbol and date. Doc. 114 at 10 (AER 17). In many versions, these disclosures appeared below or embedded in similarly-sized text relating to other matters. In some instances, the disclosures were hidden in hyperlinked "Terms and Conditions" that consumers were not required to click before making a purchase. *Id*. at 11 (AER 18). Defendants' excuse for these blatant violations of the Order – that consumers "share some responsibility when making online purchase

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defendants advertised it. Defendants could have used the same large bold red font to announce "Shopping Club." Instead, they called their product a "line of credit" and displayed pictures of a stack of $100 bills and a credit card to reinforce consumers' perception. *See*, *e.g.*, Jt. Exh. 137 (AER 777) at century\supereliteoffer\20080116-20080827\index_short.htm..

decisions" (App. Br. 39) – is ironic indeed, given defendants' efforts to hide the real nature of their products in fine print.

D. Defendants' NetSpend Marketing Violated Clear and Unambiguous Requirements of the Stipulated Final Order

Although conceding that they violated the Final Stipulated Order by failing to disclose the $9.99 monthly fee for the NetSpend debit card, defendants contend that their failure to list over a dozen other possible usage fees was based on a "good faith and reasonable interpretation" of the court's order and, in any event, that these were harmless, technical violations that do not justify a finding of contempt. App. Br. 41-44.

First, defendants try to switch the blame to the FTC and the Receiver. According to defendants, they concluded that they did not have to disclose usage fees on the basis of discussions that took place during the Receivership regarding their proposed marketing of a Sterling VIP debit card. As to the Sterling card, defendants assert that "[t]he FTC never indicated that potential fees related to card usage needed to be disclosed on the face of the website." App. Br. 42. Defendants' argument is at best spurious. Defendants did not propose marketing the Sterling VIP card as "free" or "no cost." Thus, the question whether such representations should trigger a disclosure of fees on the same page as the triggering representation and not in a hyperlink simply did not arise. *See* pp. 6-7 &

n.6, *supra*.

Nor can defendants dismiss their failure to make fee disclosures as either "technical" or "inadvertent."[39] Defendants repeated the same violations on multiple versions of different websites over several months. Tr. (Cleveland) 217:3-218:15 (AER 214-15). Defendants' contention that their failure to disclose was remedied by after-the-fact disclosures is also unavailing. That option was not available to them. The Stipulated Final Order requires disclosures to be placed "in close proximity" to representations of "NO COST" – meaning "on the same webpage, online service page, or other electronic page, and proximate to the triggering representation[,]" Doc. 35 at 4 (AER 1102). For this reason, defendants' claim that they had a policy of disclosing monthly service fees on the face of the website, while hyperlinking to other usage fees, is an admission that they did not comply with the Stipulated Final Order. The Stipulated Final Order does not distinguish among different types of fees, but requires defendants to disclose all fees clearly and conspicuously. Doc. 35 at 4, 6 (AER 1102, 1104). There is nothing clear or conspicuous about the way defendants disclosed the myriad of

[39] In any event, even a showing of "technical" or "inadvertent" violations is not enough to establish an affirmative defense of substantial compliance. Defendants must also show that they took "all reasonable steps" to comply. They plainly did not make such a showing here. *See* pp. 44-48, *infra*.

NetSpend fees.[40]

Finally, while defendants may have received minimal revenue from NetSpend sales (App. Br. 44), it does not follow that these blatant violations were "technical."[41] For example, in *Lasar v. Ford Motor Co*., 399 F.3d 1101, 1110-12 (9th Cir. 2005), this Court held, following a mistrial resulting from an attorney's willful violation of an *in limine* order, that the district court acted properly in finding him in contempt and in ordering him to reimburse the court and the plaintiff for unnecessary expenses and attorney's fees. *See also United States v. Dowell*, 257 F.3d 694, 699-700 (7th Cir. 2001) (attorney, who was held in civil contempt for failing to appear at trial, required to pay costs incurred by United States for impaneling a jury). Contumacious conduct does not have to be lucrative.

E. Defendants Did Not Establish a Defense of Substantial Compliance

To establish the affirmative defense of substantial compliance, defendants must show they took "all reasonable steps within [their] power to comply," and

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[40] Defendants' expansive discussion in their brief of the usage fees associated with their NetSpend card (App. Br. 14-15) stands in marked contrast to the information they provided consumers.

[41] Defendants state (App. Br. 44) that only 0.6% of consumers who requested the card were charged the monthly fee. But that does not show that their failure to disclose fees in compliance with the Order was a "technical" violation. Rather, it suggests that the vast majority of consumers who applied for the card did not use it once they learned about the fees they would incur. *See Cyberspace.com*, 453 F.3d at 1201 (low usage is probative of widespread deception).

that their violations were merely "technical." *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d at 695; *Stone v. City and County of San Francisco*, 968 F.2d 850, 856-57 (9th Cir. 1992); *accord*, *FTC v. Lane Labs-USA, Inc*., 624 F.3d 575, 591 (3d Cir. 2010).[42] The key question is whether the challenged violation frustrates the fundamental purpose of the decree and defeats the object which the parties intended to accomplish. *Compare Jeff D. v. Otter*, 643 F.3d 278, 288 (9th Cir. 2011) (focusing on whether the violations frustrated the goals the order was designed to achieve), *with Dual-Deck*, 10 F.3d at 695-96 (focusing on whether a "technical violation" was related to principal purpose of order). Because the challenged violations defeated the purpose of the decree – to ensure that consumers would have clear and conspicuous disclosures and would not be misled, defendants cannot show they substantially complied.

First, defendants did not take "all reasonable steps within [their] power to comply." App. Br. 47. In fact, they did not adhere to even the most basic requirements of the Stipulated Final Order. Defendants violated core provisions of

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[42] Defendants err in relying on *Stone* to support their assertion that there must be (1) a history of noncompliance or (2) noncompliance while a contempt motion is pending. *See* App. Br. 48. In that case, the Court merely noted that a history of noncompliance and the failure to comply even while the motion was pending were two factors that demonstrated that the city had not taken all reasonable steps to comply. *Stone*, 968 F.2d at 857. The Court did not hold that either one of the two factors present in that case was a necessary predicate to contempt sanctions. *Stone*, 968 F.2d at 856 n.9

the Stipulated Final Order and misrepresented the essential nature of products they sold. As a result, defendants misled thousands of consumers into purchasing services that, as shown by the tiny percentage of consumers who even attempted to place an order, few understood or even wanted. *See* p. 12, *supra*. As the district court correctly found, "with very little effort, [d]efendants could have modified their marketing so that it complied with the Final Order * * * [and] could have easily clarified what products they were actually offering and disclosed the costs and fees associated with those products." Doc. 114 at 19 (AER 26). It no doubt was far more difficult for defendants to conjure up clever ways to bury the true nature of their offer – for example, by juxtaposing different typeface styles and hiding disclosures in dense text related to other matters – than to clearly disclose that they were offering a shopping club membership with a line of credit only for purchases from the club's online catalogue. Compliance would have been far easier than subterfuge.

Defendants continued to employ their deceptive marketing even though they knew that it was causing thousands of consumers to complain. See Tr. (Cleveland) at 104:18-110:13 (AER 101-07). In fact, as reflected in the various versions of startercreditdirect.com, defendants took disclosures that appeared in earlier versions above the fold and in later versions embedded them in unrelated text in

footnotes at the bottom of the page.[43] This sounds a lot more like conscious evasion than all reasonable steps toward compliance.

Defendants' claims that they relied on their post-Order communications with the FTC, App. Br. 46-47, likewise do not establish that they took all reasonable steps to comply. According to defendants, they solicited comments from the FTC on another shopping club website – ultimateplatinumoffer.com – and then used that website as a template for the offending Century Platinum offer. App. Br. 46-47. But that claim was debunked when EDP's CEO, defendant Dale Paul Cleveland, admitted at the show cause hearing that defendants launched startercreditdirect.com more than a year *before* ultimateplatinumoffer.com and further acknowledged material differences between ultimateplatinumoffer.com and the websites at issue in the contempt proceedings. *See* Tr. (Cleveland) at 89:12-92:8 (AER 86-89). As for defendants' reliance on discussions with the FTC regarding their marketing for the Sterling VIP debit card (*see* App. Br. 47), as discussed above, the Sterling VIP card was an entirely different product that was not marketed as "free" or "no cost." Therefore, it would not have triggered the specific disclosures required by the Stipulated Final Order for cards (*e.g.*,

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[43] *Compare* Jt. Exh. 137 (AER 777), at century\startercreditdirect\20070828-20071025\index.htm , *with* \century\startercreditdirect\20081023-20090408\index.htm; *see also* Doc. 60 at 4-5 (AER 924-25).

NetSpend) that are promoted as "free" or "no cost." *See* pp. 6-7 & n.6, *supra*. As the district court correctly found, defendants did not make "every reasonable effort" to comply because they could have "easily clarified what products they were offering and disclosed the costs and fees associated with those products." Doc. 114 at 19 (AER 26).

Second, defendants did not establish that their violations were merely technical or inadvertent. Courts permit a substantial compliance defense only where the violations are trivial and do not contravene the purpose of the order. *Compare*, *e.g.*, *Dual Deck*, 10 F.3d at 695-96 (finding substantial compliance despite three "harmless technical violations" that were not related to principal purpose of order), *with Henry Schein, Inc. v. Certified Bus. Supply, Inc.*, 2008 U.S. Dist. LEXIS 81826 at *22 (C.D. Cal. Aug. 20, 2008) (declining to find substantial compliance where sporadic violations went to "heart of the Injunction"). Here, defendants' deceptive marketing violated the explicit terms and central purpose of the Stipulated Final Order – protecting consumers from deceptive marketing – by misrepresenting and failing to disclose key information about what they were selling. The district court properly concluded that defendants' "marketing violates the most fundamental purposes of the Final Order" and rejected defendants' legally insufficient substantial compliance defense. Doc. 114 at 19 (AER 26).

II. The District Court Did Not Abuse Its Discretion in Sanctioning Defendants for the Full Amount of Consumer Losses

The district court did not abuse its discretion in directing defendants to pay $3.7 million to the FTC to be used to compensate injured consumers for their contumacious conduct. A court may impose sanctions to coerce obedience to an order, or to compensate victims of contumacious behavior. It has broad discretion to fashion a remedy, taking into account both the nature of the harm and the effect of alternative sanctions. *See*, *e.g.*, *General Signal Corp. v. Donallco*, 787 F.2d 1376, 1380 (9th Cir. 1986); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147 (9th Cir. 1983).

Defendants contend, however, that the district court should not have awarded the FTC the full amount of consumer losses because their violations were "isolated." App. Br. 50. Not so. In marketing the shopping club and debit card products on numerous versions of their websites over a period of more than 18 months, defendants artfully and consistently concealed the very nature of the products they offered, resulting in widespread deception. Moreover, they drove consumers to their websites with emails and banner advertisements that, as the district court acknowledged, were "the same, if not more egregious" (Doc. 114 at 5 n.1 (AER 12)), thus maximizing the likelihood that consumers would be deceived once they landed on defendants' webpages. Indeed, defendants' buried disclosures

failed utterly to alert even the most diligent consumers of the true nature of the promotion, as reflected in the extraordinarily small number of consumers who even attempted to place an order for merchandise after they paid a $99 fee. *See* p. 12, *supra*.

These flagrant and repeated violations were remedied appropriately by sanctions that, so far as possible, will place consumers in the position they would have been in had defendants not violated the Stipulated Final Order. See *FTC v. Trudeau*, 2011 U.S. App. LEXIS 23704 at *5 (7th Cir. Nov. 29, 2911) ("*Trudeau II*"). Contrary to defendants' assertion (App. Br. 50), the fact that their *other* websites and promotions went unchallenged by the FTC does not show that the violations at issue were "isolated." The relevant question is whether the district court abused its discretion in finding defendants in contempt with respect to the promotions they ran "below the radar screen," not whether other aspects of their operations were not challenged.[44] It is undisputed that, for more than one year, defendants ran multiple versions of deceptive promotions on a number of different

[44] Given that the purpose of sanctions was to compensate consumers for their losses, it is also not relevant that defendants' products were no longer being marketed when the Commission filed its contempt application. App. Br. 50. The district court's power to grant relief survives discontinuance of the offending conduct, even in a direct action to enforce the FTC Act. *See*, *e.g.*, *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009); *SEC v. Koracorp Industries, Inc.*, 575 F.2d 692, 698 (9th Cir. 1978).

websites. *See* pp. 7-9 & nn. 7, 12, *supra*. These are not "isolated" occurrences in any conceivable sense of the word.

Additionally, defendants have no basis for complaining about a "staggering difference" between net revenues and consumer losses. App. Br. 50. As the Seventh Circuit observed in its recent decision, the authority of the district court to impose remedial fines measured by consumer loss is grounded in "longstanding precedent." *Trudeau II*, 2011 U.S. App. LEXIS 23704 at *4. Indeed, "[c]onsumer loss is a common measure for civil sanctions in [both] contempt proceedings and direct FTC actions." *FTC v. Trudeau*, 579 F.3d 754, 771 (7th Cir. 2009) ("*Trudeau I*").[45] Net revenues may sometimes be an appropriate basis for calculating sanctions – for example, where injury is too difficult or costly to calculate. But the district court acted well within the scope of its ample discretion in deciding that full compensation for injured consumers was an appropriate basis for sanctions here. Defendants' flagrant violations tricked consumers into purchasing something that was completely different from what they thought they were getting and what they paid for. In such a circumstance – where consumers

[45] *See*, *e.g.*, *FTC v. Leshin*, 618 F.3d 1221, 1239 (11th Cir. 2010); *FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009) (direct action); *FTC v. Kuykendall*, 371 F.3d 745, 764-65 (10th Cir. 2004) (en banc); *McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (direct action); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir. 1993) (direct action).

have paid for something that has virtually no value for its intended purpose – it was eminently reasonable for the district court to decide they should be made whole.[46]

Finally, the district court did not err in failing to credit defendants for monies debited from consumers' accounts by a third party, Insite Marketing Group, for monthly membership fees.[47] *See* App. Br. 52. Defendants' reliance on *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006) to support that proposition is misplaced. This Court has not adopted *Verity*, even in direct FTC actions.[48] Rather, as this Court said in *FTC v. Stefanchik*, 559 F.3d at 924, 931(9th Cir. 2009), "equity may require a defendant to restore his victims to the status quo

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[46] Indeed, courts have used gross receipts as a basis for calculating sanctions even where injured consumers have been left with something of value. *See*, *e.g.*, *Kuykendall*, 371 F.3d at 766-67; *McGregor*, 206 F.3d at 1388.

[47] EDP collected and processed online membership applications and debited a $99 application fee from consumers' bank accounts. Cohen Dep. 25:16-26:6 (SER 000283-84); Tr. (Cleveland) 85:14-19 (AER 25). Insite provided the Century Platinum shopping catalog and debited $14 a month in membership fees from consumers' bank accounts. Tr. (Ortega-Leon) 333:12-24 (AER 330). Insite and EDP evenly shared the $14 monthly revenue from membership fees. *Id.*

[48] Furthermore, on this issue *Verity* was wrongly decided because, in interpreting the Commission's remedial authority, the Second Circuit relied on the Supreme Court's decision in a private action, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). *Great-West* held that "equitable relief," as used in the Employee Retirement Income Security Act ("ERISA"), should be narrowly construed. The Court reached this conclusion based on the specific wording of ERISA. The enforcement actions that the Commission brings in the public interest under Section 13(b) of the FTC Act differ from the private actions at issue in *Great-West*. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 397 (1946); *Stefanchik*, 559 F.3d at 931.

where the loss suffered is greater than the defendant's unjust enrichment." Furthermore, as the Second Circuit clarified in *FTC v. Bronson Partners*, *LLC*, 654 F.3d 359, 374-75 (2d Cir. 2011), *Verity* merely held that, when the Commission prosecutes violations of the FTC Act, it may not obtain equitable monetary relief for injured consumers for monies paid directly to a third party and that never reach the wrongdoer. It did not hold that someone who has violated the FTC Act may deduct the cost of conducting an unlawful enterprise. *Id.*

In any event, the district court's remedial authority in contempt derives not from the FTC Act, but from its inherent authority to remedy violations of its own orders. It awards contempt sanctions free from any remedial restrictions in the agency's underlying enforcement authority. *See*, *e.g.*, *McComb,* 336 U.S. at 193. Thus, even if *Verity* were to limit the court's equitable discretion when the Commission prosecutes violations of the FTC Act, it does not do so here.

CONCLUSION

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

Respectfully submitted,

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December 5, 2011

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Pursuant to Circuit Rule 28-2.6, plaintiff-appellee, Federal Trade Commission, states that it is not aware of any related cases pending before this Court.

s/ Leslie Rice Melman
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