ORAL ARGUMENT NOT REQUESTED

In the United States Court of Appeals for the Tenth Circuit

No. 12-4006

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

LOANPOINTE, LLC, *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(HON. DALE A. KIMBALL, U.S. DISTR. J.)

BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

Of Counsel:

Christopher T. Koegel
Stephanie K. Rosenthal
Gregory A. Ashe
Attorneys
BUREAU OF CONSUMER PROTECTION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-2375
iabyad@ftc.gov

April 23, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF RELATED CASES iv

GLOSSARY vii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

A. Nature of the Case; Course of Proceedings; and Disposition Below 1

B. Statement of Facts 4

1. Appellants' Unlawful Lending Practices 4

2. Appellants' Unlawful Collection Practices 6

C. The District Court's Decision 9

STANDARD OF REVIEW 14

SUMMARY OF ARGUMENT 15

ARGUMENT 16

I. THE DISTRICT COURT PROPERLY ORDERED APPELLANTS TO DISGORGE THE FUNDS THEY HAD COLLECTED AS INTEREST USING UNLAWFUL GARNISHMENT PRACTICES 17

Table of Contents—Cont'd **Page**

A. The Remedy of Disgorgement Properly Focuses on the Gains That Wrongdoers Have Made from Their Unlawful Acts 18

B. The Funds That Appellants Collected As Interest Using Improper Wage Garnishment Are Properly Deemed Ill-gotten Gains 23

CONCLUSION 26

STATEMENT REGARDING ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE

CERTIFICATION OF DIGITAL SUBMISSION

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page**

American Fin. Servs. Ass'n v. FTC,
767 F.2d 957 (D.C. Cir. 1985) 11, 20, 21

Clark v. State Farm Mut. Auto. Ins. Co.,
433 F.3d 703 (10th Cir. 2005) 14

Davis v. Mineta,
302 F.3d 1104 (10th Cir. 2002) 14

FTC v. Accusearch, Inc.,
570 F.3d 1187 (10th Cir. 2009) 14

FTC v. Amy Travel Serv., Inc.,
875 F.2d 564 (7th Cir. 1989) 19

FTC v. Direct Mktg. Concepts, Inc.,
648 F. Supp. 2d 202 (D. Mass. 2009),
aff'd, 624 F.3d 1 (1st Cir. 2010) 18

FTC v. Freecomm Comms., Inc.,
401 F.3d 1192 (10th Cir. 2005) 13

FTC v. Gem Merch. Corp.,
87 F.3d 466 (11th Cir. 1996) 18, 19

FTC v. Neovi, Inc.,
604 F.3d 1150 (9th Cir. 2010) 21

FTC v. Verity Int'l, Ltd.,
443 F.3d 48 (2d Cir. 2006) 25, 26

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,
__ U.S. __, 130 S. Ct. 1605 (2010) 12

Cases—Cont'd **Page**

Mitchell v. Robert De Mario Jewelry,
361 U.S. 288 (1960) 19

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 19

SEC v. Blavin,
760 F.2d 706 (6th Cir. 1985) 21

SEC v. JT Wallenbrock & Assocs.,
440 F.3d 1109 (9th Cir. 2006) 13

SEC v. Maxxon, Inc.,
465 F.3d 1174 (10th Cir. 2006) 19, 23, 24

United States v. Nacchio,
573 F.3d 1062 (10th Cir. 2009) 21, 22

United States v. Rx Depot, Inc.,
438 F.3d 1052 (10th Cir. 2006) 19, 21

United States v. Telluride Co.,
146 F.3d 1241 (10th Cir. 1998) 25

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 14

STATEMENT OF RELATED CASES

There are no prior or related appeals.

Statutes, Rules & Regulations **Page**

Debt Collection Improvement Act of 1996,
P.L. 104-134, Title III, Ch. 10, § 31001(o)(1) 6

31 U.S.C. § 3720D 6

31 U.S.C. § 3720D(f)(1) 6

Fair Debt Collection Practices Act,
15 U.S.C. §§ 1692 *et seq*. 2

15 U.S.C. § 1692a(6) 10, 11

15 U.S.C. § 1692a(6)(B) 11

15 U.S.C. § 1692*l* 1

Federal Trade Commission Act,
15 U.S.C. §§ 41 *et seq*. 2

15 U.S.C. § 45(a) 1

15 U.S.C. § 45(n) 10

15 U.S.C. § 53(b) 1, 18, 19

15 U.S.C. § 57b 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1337(a) 1

28 U.S.C. § 1345 1

Statutes, Rules & Regulations—Cont'd **Page**

Fed. R. Civ. P. 56 1

Trade Regulation Rule Concerning Credit Practices,
16 C.F.R. Part 444 2

16 C.F.R. § 444.2(a)(3) 2

31 C.F.R. § 285.11(a) 3

31 C.F.R. § 285.11(g) 6

31 C.F.R. § 285.11(i) 6

31 C.F.R. § 285.12 6

Miscellaneous

FTC Bureau of Consumer Protection,
Complying with the Credit Practices Rule (December 2006) 2

GLOSSARY

For ease of reference, the following abbreviations and citation forms are used in this brief:

App. Br. – Appellants' Opening Brief.

Appx. – Appellants' Appendix.

D.xx – Document Number on District Court's Docket Sheet.

DCIA – Debt Collection Improvement Act of 1996, P.L. 104-134.

FMS – Financial Management Service of U.S. Department of Treasury.

PX – Plaintiff's Record Exhibit.

STATEMENT OF JURISDICTION

This is an appeal from a district court final order, entered on December 9, 2011, pursuant to Fed. R. Civ. P. 56. The district court had subject matter jurisdiction in this case pursuant to Sections 5(a), 13(b), and 19 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a), 53(b), and 57b; Section 814 of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692*l*; and 28 U.S.C. §§ 1331, 1337(a), and 1345.

Defendants-appellants filed their notice of appeal on January 6, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Under both the Federal Trade Commission Act and the Fair Debt Collection Practices Act, courts are empowered to order the disgorgement of funds that were "ill-gotten" from violating those statutes. The question before this Court is whether the district court erred in ordering the defendants to disgorge the funds they collected as interest on their pay-day loans by means of improper garnishment of their customers' wages, in conceded violation of those statutes.

STATEMENT OF THE CASE

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

The defendants—Eastbrook, LLC d/b/a eCash and GeteCash (GeteCash) and LoanPointe, LLC, operating under the close supervision of their founder, president,

and co-defendant Joe Strom—offered consumers, primarily over the Internet, unsecured short-term loans, commonly referred to as "payday loans," for relatively small principal amounts (typically less than $1,000), but with extremely high interest rates (reaching over 1,700% APR). The Federal Trade Commission (FTC or Commission) alleged below that, until the district court entered a preliminary injunction halting the practice, defendants' loan terms included a wage garnishment clause that violated the FTC's Trade Regulation Rule Concerning Credit Practices (Credit Practices Rule), 16 C.F.R. Part 444.[1] The Commission also alleged that the defendants, relying on that garnishment clause, used unfair and deceptive tactics to collect on certain loans made to their customers, in violation of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 41 *et seq*., and the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 *et seq*. These tactics included using "spoofed" versions of United States Department of Treasury forms to misrepresent to those customers' employers that the defendants, like the federal government, had the

---

[1] The Credit Practices Rule prohibits lenders from including wage assignment clauses in their credit contracts, unless the assignment: (i) is, by its terms, revocable at the will of the debtor; (ii) is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment; or (iii) applies only to wages or other earnings already earned at the time of the assignment. 16 C.F.R. § 444.2(a)(3). *See generally* FTC Bureau of Consumer Protection, *Complying with the Credit Practices Rule* (December 2006), *available at* http://business.ftc.gov/documents/bus04-complying-credit-practices-rule.

legal right to garnish wages without first obtaining a court garnishment order.[2] The Commission alleged further that defendants' practices have caused significant harm to consumers (both customers and employers).

The Commission brought this action on March 15, 2010, in the United States District Court for the District of Utah, seeking injunctive and other equitable relief (including disgorgement) against the defendants for violations of the FTC Act, the FDCPA, and the Credit Practices Rule. D.2, Appx. A11-A26.[3] Following discovery, the Commission moved for summary judgment. D.44, Appx. A35-A543. The district court held a hearing on September 7, 2011 (D.63, Appx. A697-A734), and on September 16, 2011, issued a memorandum decision granting the Commission's motion—on all counts. D.65, Appx. A735-A759. On December 9, 2011, following additional briefing by the parties concerning *inter alia* the details of the monetary equitable relief sought by the Commission, *see* Appx. A760-A822, the district court

---

[2] Congress has enacted laws that permit the federal government, as the owner of many types of non-tax debts, to use a more streamlined process than private creditors to garnish the wages of debtors who owe non-tax money to the federal government. 31 C.F.R. § 285.11(a). *See infra* notes 8-9 and accompanying text.

[3] Record items are referred to herein by their district court docket number (i.e. "D.xx"). *See* Appellants' Appendix (Appx.) A1-A10. Items that are included in the appellants' Appendix are cited additionally by their page number in that Appendix (i.e. "Appx. Axx").

issued its Final Order of Judgment and Permanent Injunction D.73, Appx. A823-A834. This appeal followed. *See* D.74, Appx. A835-A837.

B. Statement of Facts

1. Appellants' Unlawful Lending Practices

Since at least September 2008, using the names Ecash and GeteCash, and through Internet websites such as www.getecash.com, defendants-appellants have offered consumers so-called "payday loans" of $1000 or less.[4] D.65 at 2, Appx. A736. They have offered payday loans to, and collected or attempted to collect on those loans from, consumers residing throughout the United States, funding over 7,100 payday loans during that period. *Id.* at 5, A739. Those loans are typically short-term and unsecured, but with extremely high interest rates reaching annual rates of 1700 percent or more. *See, e.g.*, PX08 at 2, 14, Appx. A246, A258; PX09 at 2, 13, Appx. A262, A273; PX11 at 1, 7, Appx. A280, A286; PX12 at 1, 11, Appx. A303, A313.

Defendants directed consumers who were interested in obtaining a payday loan to complete an online application via one of defendants' Internet websites. D.65 at

---

[4] The loans are commonly referred to as "payday loans" because the loan term usually extends only until the borrower's next payday. To obtain such a loan, consumers typically needed only to show that they have a bank account and a steady source of income, however modest, such as a job or periodic social benefits checks. *See* Appellants' Opening Brief (App. Br.) at 6.

2, Appx. A736. The online application required consumers to check a box, identified as an electronic signature, indicating that they accept the terms of the loan. *Id.* One of those loan terms was an inconspicuous clause that read: "NOTICE: I agree to have my wages garnished to pay any delinquent amount on this loan." *Id.* This clause was written in small print, and located near the bottom of the third of four pages of small-print disclosures. *Id.*; *see* App. Br. at 7-8.[5] Defendants used this wage assignment clause to garnish the wages of consumers who purportedly owed the defendants and were late repaying their loans. D.65 at 3, Appx. A737. Defendants have acknowledged that this wage assignment clause was a major focus of their collection strategy, emphasizing in a letter to the Idaho Department of Finance, for example, that "using contracted wage assignment has been useful in collecting from borrowers who refuse to pay back their loans." PX13 at 29, Appx. A358.[6]

---

[5] The small print size and the location of the garnishment clause caused many consumers to be unaware of its existence in defendants' loan agreements. One consumer, for example, first learned of the wage assignment clause when a coworker in her employer's human resources department asked if she had consented to GeteCash garnishing her wages. PX10 at 1-2 ¶5, Appx. A276-A277. Another consumer was unaware that GeteCash could garnish her wages until she discovered that her wages were in fact being garnished. PX12 at 1-2 ¶4, Appx. A303-A304.

[6] For his part, defendant Strom authorized the "Loan Note and Disclosure" form used in making defendants' payday loans, and knew that the form contained the wage garnishment clause at issue in this case. D.65 at 3, Appx. A737; *see* PX03 at 8, Appx. A146 (admission 28), 13, A151 (admission 65). He also approved the sending, and knew the contents, of the wage garnishment packet sent to employers. PX03 at 8-9, Appx. A146-A147 (admissions 31, 32); *see infra* note 7 and accompanying text.

2. Appellants' Unlawful Collection Practices

Using an entirely different name than the ones they used to extend their payday loans to consumers, defendants—now operating under the name LoanPointe— sought to collect on those loans through wage garnishment when debtors did not repay them on time, successfully garnishing wages from over 300 consumers in 39 states and the District of Columbia. PX14 at 4-5 ¶12, Appx. A363-A364.[7] Using LoanPointe's name, defendants faxed to employers copies of the consumers' loan applications and a wage garnishment packet, which included: (1) a "Letter to Employer & Important Notice to Employer"; (2) a "Wage Garnishment" document; (3) a "Wage Garnishment Worksheet"; and (4) a document entitled "Employer Certification." D.65 at 3, Appx. A737. This packet was admittedly modeled after the package of documents used by the federal government to collect on its own non-tax debt,[8] after securing a judgment

---

[7] Defendants' wage garnishment clause was used successfully to garnish approximately 16 percent of all loan repayments from approximately 10 percent of all borrowers. (D.65 at 3, Appx. A737).

[8] *See supra* note 2. Specifically, the Debt Collection Improvement Act of 1996 (DCIA), P.L. 104-134, Title III, Ch. 10, § 31001(o)(1) (codified at 31 U.S.C. § 3720D), allows the federal government to garnish debtors' wages (for non-tax debt) without first having to obtain a court garnishment order, by contacting the employers directly. 31 C.F.R. § 285.11(g). The employer is required then to re-route a specified amount from the debtor's paychecks to the government. 31 U.S.C. § 3720D(f)(1); 31 C.F.R. § 285.11(i). The Treasury Department's Financial Management Service (FMS) is responsible for administering this process. 31 C.F.R. § 285.12.

but without first obtaining a court garnishment order. *Id.*[9] For example, defendants' "Letter to Employer" states:

> One of your employees has been identified as owing a delinquent debt to GeteCash. The Debt Collection Improvement Act of 1996 (DCIA) permits agencies to garnish the pay of individuals who owe such debt without first obtaining a court order. Enclosed is a Wage Garnishment Assignment directing you to withhold a portion of the employee's pay each pay period and to forward those amounts to GeteCash. We have previously notified the employee that this action was going to take place and have provided the employee with the opportunity to dispute the debt.

---

[9] When seeking garnishment on behalf of federal agencies under the DCIA, FMS sends a package of documents to debtors' employers that includes: (1) "Letter to Employer & Important Notice to Employer," (2) "Wage Garnishment Order (SF-329B)," (3) "Wage Garnishment Worksheet (SF-329C)," and (4) "Employer Certification (SF-329D)." PX07 at 1 ¶6, 6-12, Appx. A232, A237-A243. The FMS "Letter to Employer" states:

> One of your employees has been identified as owing a delinquent nontax debt to the United States. The Debt Collection Improvement Act of 1996 (DCIA) permits Federal agencies to garnish the pay of individuals who owe such debt without first obtaining a court order. Enclosed is a Wage Garnishment Order directing you to withhold a portion of the employee's pay each period and to forward those amounts to us. We have previously notified the employee that this action was going to take place and have provided the employee with the opportunity to dispute the debt.

Id. at 6, Appx. A237; PX01 at 3 ¶15, Appx. A122.

See PX01 at 3 ¶22, Appx. A122 (defendants admitting in their Answer to using such a letter until directed by FMS to discontinue the practice); PX04 at 8, 17-18, Appx. A162, A171-A172 (admission 22, 82) (same); PX05 at 8, 17-18, Appx. A185, A194-A195 (admission 22, 82) (same); *compare with* PX07 at 6, Appx. A237 (FMS's version, *see supra* note 9).[10]

Since commencing operations, the defendants have made at least 7,121 payday loans to consumers that included the unlawful wage assignment clause, and collected from consumers a total of $3,013,044 in income from those loans. D.65 at 5, Appx. A739; PX15 at 3 ¶9, 2 ¶6, Appx. A494, A493. Of this amount, defendants have collected a total of $468,020.91 (in principal plus interest) by means of wage garnishment, using their admittedly deceptive wage garnishment packet. D.65 at 5, Appx. A739; PX06 at 10, Appx. A210 (admission 93), 28, Appx. A228 (admission 113); PX15 at 2-3 (¶¶7-8) & 9, Appx. A493-A494 & A500.[11]

---

[10] Defendants have admitted in their Answer that, in numerous instances in connection with their collection of loans from consumers, they have misrepresented to those consumers' employers that defendants were authorized by the DCIA to garnish the wages of those consumers without the need first to secure a court garnishment order. PX01 at 4 ¶¶26-27, Appx. A123.

[11] In addition, the defendants' improper contacts with the employers of their customers have exposed those customers to the embarrassment of having their debts disclosed to third parties, and the risk of adverse employment actions by their employers. *See, e.g.*, PX10 at 2 ¶6, Appx. A277; PX16 at 4 ¶15, Appx. A512; PX14 at 107, 117, Appx. A466, A476 (consumers testifying to same).

C. The District Court's Decision

The district court, having reviewed the record evidence and held a hearing on the Commission's Rule 56 motion, granted summary judgment to the Commission, on all counts,[12] entered a permanent injunction against the defendants, and ordered them additionally to disgorge the ill-gotten profits they made from their unlawful garnishment practices. D.65, Appx. A735-A759; D.73, Appx. A823-A834.

The district court noted first that it was "undisputed" that defendants "made representations that they had authority under the DCIA and that they had notified consumers and given consumers a chance to dispute the debt," and that defendants further conceded that they, in fact, did *not* have such authority under the DCIA to garnish wages. D.65 at 7, Appx. A741. The court also pointed out that defendants made no arguments that they had given the consumers an opportunity to dispute the debt before seeking to garnish those consumers' wages. *Id.* at 8, A742. It found that defendants' misrepresentations "likely * * * misled" employers "into believing that Defendants had the right to garnish," and that "they had given the employee a right to dispute the debt." *Id.* Those misrepresentations were presumptively material under the FTC Act, noted the court, because they were made expressly to the employers who

[12] Appellants' brief leaves the impression that they committed only one violation, of the Credit Practices Rule. This is incorrect. The district court, in fact, entered summary judgment for the Commission on all seven complaint counts, as detailed below.

received the defendants' garnishment packets—twenty percent of whom "actually garnished wages." *Id.* at 9, A743. Thus, the district court concluded, defendants' conduct violated Section 5 of the FTC Act. *Id.*[13]

Turning to the FDCPA, the district court rejected defendants' argument that the statute does not apply to them as lenders collecting their own debts. It pointed out that "a creditor brings itself within the FDCPA's coverage if 'in the process of collecting [its] own debt, [it] uses any name other than [its] own which would indicate that a third person is collecting or attempting to collect such debts'." D.65 at 12, Appx. A746 (quoting 15 U.S.C. § 1692a(6) (alteration by the court)). It also noted the indisputable facts that, while consumers applied for loans to, and received funds from, Getecash, "the wage garnishment package was sent to consumers' employers with a LoanPointe cover sheet, a LoanPointe fax tagline, and a signature by the LoanPointe Garnishment Manager." *Id.* These representations, reasoned the court, "'indicate that a third person is collecting or attempting to collect such debts'." *Id.* (quoting 15

[13] The district court also held that defendants' garnishment practices qualify as unfair under the FTC Act. Noting the statutory standard for finding a trade practice "unfair," *see* 15 U.S.C. § 45(n) ("the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or competition"), and citing court decisions that held that "wage assignment clauses and wage garnishment procedures cause substantial harm to consumers," D.65 at 10, Appx. A744, the district court concluded that "Defendants' practice of disclosing debts and the amount of debts to consumers' employers qualifies as an unfair practice under the FTC Act." *Id.* at 11, A745.

U.S.C. § 1692a(6)). The court also rejected defendants' invocation of the FDCPA's jurisdictional exception for firms related through ownership or corporate control. It pointed out that "this exception only applies 'if the principal business of [the person collecting the debt] is not the collection of debts'," *id.* (quoting 15 U.S.C. § 1692a(6)(B) (alteration by the court)), and reasoned that, because collecting on loans is "[i]nherent in the payday lending business," *id.*, it is "part of Defendants' principal business and the FDCPA applies." *Id.* at 13, A747. Thus, held the court, defendants' misrepresentations— regarding their authority under the DCIA to garnish wages without a judicial order and purported prior notice to consumers with an opportunity to dispute their debts— and their communications with employers and co-workers, without their customers' prior consent, constituted violations of the FDCPA. *Id.*

Finally, the district court found that defendants' wage assignment clause does not meet any of the requirements of the Credit Practices Rule. D.65 at 14, Appx. A748; *see supra* note 1. It rejected defendants' contention that the Commission needed to make an additional showing that the rule violation was a deceptive or unfair practice, reasoning that in promulgating that trade rule, "the FTC already found that improper wage assignment clauses are unfair and cause substantial harm to consumers." D.65 at 14, Appx. A748 (citing *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 974-75 (D.C. Cir. 1985)). The court also rejected defendants' assertion of

"good faith" as "not a defense to liability under the FTC Act, in part because the FTC need not prove intent," *id.*, and concluded that defendants' ignorance of the FTC trade rule "does nothing to negate the need for permanent injunction in this case," because it "does not lessen the deliberateness or seriousness of the conduct." *Id.* at 15, A749 (citing *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, __ U.S. __, 130 S. Ct. 1605, 1612 (2010)).

Regarding remedies, the district court held first that the corporate defendants operated as "a common enterprise" and thus are "liable for injunctive relief and, jointly and severally, for monetary relief." D.65 at 16, Appx. A750. It also held that defendant Strom was "individually liable for both injunctive and any monetary relief," because he "had the authority to control the corporations' activities, and did in fact participate in their activities, and * * * had knowledge of the corporations' wrongful acts." *Id.* at 17, A751. It concluded that "a permanent injunction, with monitoring by the FTC" was "a proper remedy in this case." *Id.* at 18, A752.

The district court emphasized that courts, including this Court, have routinely recognized that Section 13(b)'s grant of authority to provide injunctive relief "'carries with it the full range of equitable remedies, including the power to grant consumer redress," and that where injunctive relief is properly sought, "courts deem any

monetary relief sought as incidental to injunctive relief'." D.65 at 16, Appx. A750 (quoting *FTC v. Freecomm Comms., Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005)).

As for the appropriate monetary equitable relief in this case, the district court noted that disgorgement is "generally used to 'deprive a wrongdoer of unjust enrichment and to deter others from violating * * * laws by making violations unprofitable'." D.65 at 18, Appx. A752 (quoting *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006)). It held that equity nonetheless requires it to balance the need for holding defendants accountable for their deceptive and unfair practices with their right to repayment of their loans. *Id.* at 20, A754. Thus, the court rejected the Commission's position that because all of defendants' loans included an improper wage garnishment clause, in violation of the Credit Practices Rule, then their entire profits from making those loans were "ill-gotten," and should be disgorged. *Id.* It reasoned that "consumers who repaid their loans according to the terms of repayment were not impacted by the inappropriate garnishment clause," and that the only consumers harmed by that clause were those "who had garnishment letters sent to their employers." *Id.* Moreover, "a return of the loan principal," noted the court, "is not actually a 'gain' to Defendants." *Id.* Thus, the court concluded, "the only amounts that can be considered to be 'ill-gotten gains' or 'gains from the illegal activities' are the interest amounts received through the inappropriate garnishments,"

id., which were later determined by the court to be "$294,436.31, with post judgment interest." D.73 at 1, Appx. A823.

STANDARD OF REVIEW

The district court's grant of summary judgment as to defendants' liability—for violations of the FTC Act, the FDCPA, and the Credit Practices Rule—has not been challenged by appellants, and is, therefore, not before this Court.

The district court's permanent injunction, including monetary equitable remedies such as the disgorgement challenged by appellants here, is reviewed in this Court for abuse of discretion. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009); *Clark v. State Farm Mut. Auto. Ins. Co.*, 433 F.3d 703, 709 (10th Cir. 2005). "'A district court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling'." *Id.* (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002) (internal citation omitted)). Accordingly, this Court "examine[s] the district court's underlying factual findings for clear error, and its legal determinations *de novo*." *Id.* (internal quotation marks and citation omitted). But "[t]he district court's discretion in this context is 'necessarily broad and a strong showing of abuse must be made to reverse it'." *Accusearch*, 570 F.3d at 1201 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

SUMMARY OF ARGUMENT

Appellants' challenge to the propriety of the district court's order – that they disgorge the profits they made from their unlawful lending and collection practices – is riddled with legal and factual inaccuracies. Appellants do not argue that the district court lacked the authority to order disgorgement; instead, they argue that the amount of disgorgement is not related to the amount of harm suffered by consumers. But appellants misconstrue the nature of the monetary relief entered by the district court. The equitable remedy ordered by the court below is disgorgement, not restitution or redress (as appellants suggest). Accordingly, the appropriate way to calculate the disgorgement amount is to focus on the wrongdoers' "ill-gotten gains" (i.e., the profits they made from their unlawful activities), as the district court did. Appellants' argument that the district court should have taken into account the actual harm to consumers confuses the disgorgement ordered below with restitution, which is not at issue in this case (but which, had the district court ordered it, would have been a significantly greater amount than the amount of disgorgement it ordered).

The district court's disgorgement order was correctly based on its findings that appellants' garnishment practices were unlawful, and it was properly limited to the gains they made from those unlawful practices. It should, therefore, be upheld.

ARGUMENT

The underlying facts in this case either were not in dispute below or have not been challenged on appeal. Nor are there any genuine legal issues in contention before this Court. Indeed, as appellants themselves note, "this case c[o]me[s] down to what remedy was appropriate to impose." App. Br. at 3. As to this narrow issue, appellants' challenge to the disgorgement ruling below rests neither on disagreement with the underlying facts, which appellants do not dispute, *see* App. Br. at 9, nor on any purported jurisdictional impediment to the particular equitable remedy chosen by the district court, as they also acknowledge the court's remedial authority, *see id.* at 15. Instead, appellants disagree with the inference drawn by the court below that the funds they had collected as interest, by means of their concededly deceptive and unfair garnishment practices, were "ill-gotten" gains. But their reasoning is plainly flawed, in large part because they confuse disgorgement, which focuses on the gains of the wrongdoers from their wrongful conduct, with other equitable remedies that focus, instead, on the harm or losses suffered by the victims of those wrongdoers' unlawful actions, such as restitution and other consumer redress. Appellants argue that the district court's decision lacked certain predicates—such as findings of actual consumer losses from their garnishment practices or actual consumer objection to such garnishment—that, in fact, are not predicates for disgorgement, even if they might be

so for other remedies *not* granted below. Thus, the district court did not abuse its discretion in ordering defendants-appellants to disgorge the profits they gained from their unlawful lending and collection practices, and this court should affirm that order.

I. THE DISTRICT COURT PROPERLY ORDERED APPELLANTS TO DISGORGE THE FUNDS THEY HAD COLLECTED AS INTEREST USING UNLAWFUL GARNISHMENT PRACTICES

Appellants challenge neither their liability for violations of the FTC Act, the FDCPA, and the Credit Practices Rule, nor the permanent injunctive terms imposed on them by the district court's final order.[14] They have limited their appeal, therefore, to the monetary equitable relief ordered by the court below. *See* App. Br. at 5 ("This appeal challenges [the district court's] disgorgement ruling); *id.* at 4 (appellants noting their argument below "that a permanent injunction should suffice"). Furthermore, appellants concede that the district court did possess the authority, under Section 13(b)

---

[14] Appellants do erroneously claim that, aside from its holding that their wage garnishment clause violated the requirements of the Credit Practices Rule, the district court did not find their practices to be "unfair" or "deceptive" under the FTC Act. *See* App. Br. at 16 & n.4. In fact, as detailed above, the district court made explicit separate findings of deception and unfairness, under both the FTC Act and the FDCPA, concerning appellants' wage garnishment practices. *See supra* at 9-11. Specifically, the district court found that appellants' misrepresentations to the employers of their debtor-customers that appellants had been authorized under the DCIA to garnish the wages of debtor-employees without first securing a court garnishment order, appellants' disclosure of their customers' debts and amounts of debts to those customers' employers, and appellants' contacts with those employers and with other third parties without the prior consent of their debtor-customers, constituted deceptive and unfair practices under both the FTC Act and the FDCPA. D.65 at 7-9, 10-12, Appx. A741-A743, A744-A746.

of the FTC Act, 15 U.S.C. § 53(b), "to grant ancillary relief in the form of either restitution (consumer redress) or disgorgement." App. Br. at 15 (citing *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 213 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469-70 (11th Cir. 1996)). Thus, the only question before this Court is whether the district court abused its discretion in ordering appellants to disgorge the funds they had collected as interest by means of wage garnishment—i.e., by relying on their improper wage garnishment clause and employing the collection practices found by the district court to be deceptive and unfair under both the FTC Act and the FDCPA.[15] There was no abuse of discretion in ordering disgorgement of the profits secured by such unlawful practices.

A. The Remedy of Disgorgement Properly Focuses on the Gains That Wrongdoers Have Made from Their Unlawful Acts

Appellants concede, as they must, that the FTC Act authorizes the district court, upon finding a violation of the statute, to employ the panoply of equitable remedies, including disgorgement, to fashion effective and complete relief. *See* App. Br. at 15 (the FTC Act, "allowing injunctions * * *, also gives equitable authority to grant

---

[15] Although appellants make a passing reference to the "good faith" argument they advanced below, which the district court correctly rejected, *see* App. Br. at 12 (appellants "did not know that their wage assignment clause was illegal"), they do not (and cannot) argue that defense on appeal. Not only is good faith not a defense under the FTC Act, *see* D.65 at 14-15, Appx. A748-A749, but appellants' misrepresentations to employers, and their other improper acts in connection with their garnishment practices, can hardly be claimed to have been taken in good faith.

ancillary relief."); *see also* 15 U.S.C. § 53(b) ("in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction"); *Gem Merch.*, 87 F.3d at 468 (the FTC Act's "unqualified grant of statutory authority * * * carries with it the full range of equitable remedies"); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989) (same). Such broad statutory language invoking principles of equity supports a district court's exercise of its inherent and broad equitable powers to secure complete justice, including to order disgorgement. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946); *see also Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288, 291-92 (1960) (upholding "the historic power of equity to provide complete relief in the light of statutory purposes"); *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1055 (10th Cir. 2006) ("under *Porter* and *Mitchell*, when a statute invokes general equity jurisdiction, courts are permitted to utilize any equitable remedy to further the purposes of the statute * * *."). At the same time, it is well settled that the application of equitable remedies to particular circumstances is left to the district court, "in its discretion." *Porter*, 328 U.S. at 400; *see SEC v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006) ("Disgorgement is by nature an equitable remedy as to which a trial court is vested with broad discretionary powers") (internal quotation marks and citation omitted).

Nonetheless, appellants argue that disgorgement is an improper remedy in this particular case, because, they contend, the district court made no findings respecting the actual harm to consumers. *See* App. Br. at 10, 11, 13, 17. Appellants are mistaken in at least two respects. First, contrary to their assertion, the district court did find that appellants' unlawful practices had resulted in consumer harm. *See, e.g.*, D.65 at 9, Appx. A743 ("The evidence demonstrates that approximately twenty percent of the employers that received the documents with those representations [concerning appellants' purported authority under the DCIA and giving consumers an opportunity to dispute their debts] actually garnished wages"). The district court also cited, with approval, the "neither trivial nor speculative" harm in the form of "specific injuries to consumers" that flow from improper garnishment procedures. *Id.* at 11, 10 (A745, A744) (citing *American Fin. Servs. Assoc. v. FTC*, 767 F.2d 957, 974-75 (D.C. Cir. 1985)). Those injuries include, for example, employers' "added administrative costs and burdens"; the adverse employment conditions, which may include the loss of jobs, resulting from those employers' "view[ing] the consumer's failure to repay the debt as a sign of irresponsibility"; and the debtor-employees' "disruption of family finances," with the attendant possibilities of "costly refinancing" or "improvidently

default[ing] on other obligations." *Id.* at 10, A744 (citing *American Fin. Servs.*, 767 F.2d at 974-75).[16]

Second, and more to the point, disgorgement is an equitable remedy that, as appellants themselves concede, focuses *not* on the losses suffered by the victims of the wrongdoer, but on the profits (or "gains") that were ill-gotten by the wrongdoer itself through its unlawful acts or practices. *See* App. Br. at 15 ("The purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains"); *see also, e.g.*, *United States v. Nacchio*, 573 F.3d 1062, 1079 (10th Cir. 2009) (disgorgement "seeks to strip the wrongdoer of ill-gotten gains and deter improper conduct"); *Rx Depot*, 438 F.3d at 1061 (same); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159 n.8 (9th Cir. 2010) ("disgorgement should include all gains flowing from the illegal activities") (internal quotation marks and citation omitted); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) ("the district court possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged"). This Court made that distinction clear in *Nacchio*. Seeking to determine the proper sentence in a criminal insider trading case, this Court noted first that "it is not

[16] The district court also recognized the harm to competition that resulted from appellants' unfair disgorgement practices, noting that the disgorgement remedy it fashioned "also serves to equalize the marketplace." D.65 at 21, Appx. A755. Appellants' violations, reasoned the court, "should not allow them to profit more than other similar businesses who have complied with the law." *Id.*

inappropriate in some situations for sentencing courts to look to the civil sphere for guidance in fashioning a proper criminal sentence." 573 F.3d at 1078. Finding that "disgorgement provides an appropriate, close-fitting civil analogue," *id.* at 1079, it stressed that its analysis "must be constrained by the nature of [its] undertaking in a criminal insider trading matter—that is, determining the *gain* resulting from the offense." *Id.* (emphasis original). "It is not our task," this Court emphasized, "to determine loss to victims from Mr. Nacchio's crimes." *Id.*

Appellants' argument now that the district court should have considered actual consumer harm in fashioning its disgorgement relief confuses that remedy—measured by the wrongdoer's "ill-gotten gains"—with restitution, which focuses instead on making consumers whole. Indeed, had the district court ordered restitution for consumer redress, the equitable monetary judgment against the defendants-appellants would have been significantly higher. *See* D.65 at 19, Appx. A753 (noting the FTC's unchallenged calculus of over $2 million in interest made on appellants' improper loans). Thus, contrary to appellants' claim, *see* App. Br. at 17, the district court need not have considered actual consumer harm in fashioning its disgorgement remedy.[17]

---

[17] Equally without merit is appellants' argument that disgorgement is not an appropriate remedy here because the district court did not find that those consumers objected to appellants' improper collection practices. *See* App. Br. at 10, 11, 19-20. Not surprisingly, appellants provide no authority for this outlandish argument. It would indeed be an extraordinary rule of law if affirmative consumer objection to an unlawful trade practice were to be held a prerequisite to providing equitable relief for

B. The Funds That Appellants Collected As Interest Using Improper Wage Garnishment Are Properly Deemed Ill-gotten Gains

There is little doubt that the funds that the district court ordered to be disgorged were collected unlawfully by appellants. For a direct causal link exists between appellants' ability to secure the collection of those funds and the misrepresentations and other wrongful acts by appellants that the district court found to be deceptive and unfair under the FTC Act and the FDCPA. *See Maxxon*, 465 F.3d at 1179 ("defendant is not required to disgorge profits not causally connected to the violation") (internal quotation marks and citation omitted). As detailed above, the consumers' garnished wages were only collected as a direct result of appellants' unauthorized, extra-judicial garnishment process. In their garnishment letters, appellants represented to employers that they were authorized by the DCIA to garnish the wages of debtor-employees without first securing a court garnishment order, when that was not true. *See supra* notes 7-9 and accompanying text. The DCIA, in fact, authorized such garnishment for only federal non-tax debt, owed to federal agencies, and collected by the Treasury Department's FMS. *See supra* note 8. Appellants also represented to those employers that they had afforded the debtor-employees the opportunity to

---

that unlawful practice. As with their argument concerning actual consumer harm, moreover, appellants confuse the focus of the disgorgement remedy—which is on the wrongdoer's improper conduct and ill-gotten gains, *not* on the victim consumer's conduct and losses.

dispute their debts, when that too was untrue. *See, e.g.*, PX04 at 17-18, Appx. A171-A172 (admission 82) (defendants admitting to including in their garnishment letter to employers the phrase: "We have previously notified the employee that this action was going to take place and have provided the employee with the opportunity to dispute the debt."). It is quite reasonable to conclude, as the district court did below, that but for those misrepresentations, the employers would not have agreed to the garnishment of their employees' wages, and appellants would not have collected the interest at issue. Indeed, with their admission to misrepresentations regarding affording those consumers the opportunity to dispute their debts, even appellants' legal claim to that interest is far from being lawfully established. The district court acted judiciously in seeking to determine the proper amount of disgorgement in this case—rejecting, in the process, the Commission's position that *all* interest collected by appellants constituted "gains flowing from [their] illegal activities." D.65 at 19, Appx. A753 (internal quotation marks omitted). Its decision on that issue should, therefore, be upheld by this Court.

Contrary to appellants' argument, *see* App. Br. at 15-16, the district court's order of disgorgement is not punitive. *See Maxxon*, 465 F.3d at 1179 ("Disgorgement being remedial rather than punitive * * * defendant is not required to disgorge profits not causally connected to the violation") (internal quotation marks and citation

omitted); *United States v. Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998) (noting, in rejecting defendants' argument that a restorative injunction under the Clean Water Act is punitive, that "equitable remedies, such as disgorgement, which sanction past conduct, are remedial"). The garnished wages collected by appellants comprised both the loan principal and any accrued interest, but only the latter portion was ordered by the court below to be disgorged as ill-gotten "gain." *See* D.65 at 20, Appx. A754 ("While the garnishment letter violated federal law, the court does not believe that Defendants should be required to disgorge the principal loan amounts. To the extent that disgorgement applies to 'ill-gotten gains,' a return of the loan principal lent to the consumer is not actually a 'gain' to Defendants.").

Finally, appellants' citation to *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006), to support their argument that disgorgement is somehow an inappropriate remedy in this case, misconstrues the import of that decision, which in fact is fully consistent with the district court's holding below. *See* App. Br. at 18-19. *Verity* concerned the proper calculus of disgorgement when the scheme condemned under the FTC Act involves an *innocent intermediary* service provider and that service provider deducts its costs (for providing the *non-wrongful* intermediary service) *before* the wrongdoer takes its own (ill-gotten) cut. *See* 443 F.3d at 65-70. None of those features of that case, on which the Second Circuit's disgorgement holding was

based, is present in this case. There is no claim here that an innocent intermediary has interrupted the flow of funds to appellants from the victims of their unlawful collection practices. The interest to be disgorged in this case flowed directly from consumers' wages accounts to appellants' coffers, and only made their way there because of appellants' improper garnishment practices. At any rate, the *Verity* court held in the end that the amount of money actually pocketed by the parties responsible for the wrongful practices is the appropriate measure of disgorgement. 443 F.3d at 70. That is precisely the manner in which the district court here calculated the disgorgement amount in its final order: the amount of interest actually pocketed by appellants from their improper garnishment practices. Thus, *Verity* is in fact *contrary* to appellants' position in this case. *See id.* (on remand, "we direct the district court to revise its computations to focus on the benefits unjustly obtained by the defendants rather than the losses of consumers").

CONCLUSION

The district court's disgorgement order was properly based on its unchallenged holding that appellants' practices were unlawful, and it correctly was limited to the gains that appellants made from those unlawful practices. For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

Of Counsel:

Christopher T. Koegel
Stephanie K. Rosenthal
Gregory A. Ashe
Attorneys
BUREAU OF CONSUMER PROTECTION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

/s/ Imad Abyad
IMAD D. ABYAD
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-2375
iabyad@ftc.gov

April 23, 2012

STATEMENT REGARDING ORAL ARGUMENT

The issues in this case are narrow, non-precedential, were correctly resolved below, and are adequately addressed by the parties' briefs to this Court. The Commission does not believe, therefore, that oral argument would contribute significantly more to this Court's understanding of those issues.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,661 words, excluding the parts thereof exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

CERTIFICATION OF DIGITAL SUBMISSION

1) I certify that it was not necessary to make any privacy redactions to this brief.
2) I certify further that this brief has been scanned for viruses—using the Symantec Endpoint Protection, Version 12.1.671.4971, software—and that, according to this program, it is free of viruses.

CERTIFICATE OF SERVICE

I, Imad D. Abyad, certify that on April 23, 2012, I filed the foregoing brief using the court of appeals's CM/ECF system, and the same was served electronically on all counsel of record. Further, I caused 7 hard copies of the foregoing brief to be sent to the court of appeals, and one hard copy to be served on all counsel of record, using express, next-day mail service.

/s/ Imad Abyad
Imad D. Abyad
Attorney
FEDERAL TRADE COMMISSION