No. 20-55858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

JASON CARDIFF and EUNJUNG CARDIFF, et al.,
Defendants-Appellants,

and

VPL MEDICAL, INC.,
Intervenor-Appellant.

Appeal from the United States District Court
for the Central District of California
No. 5:18-cv-02104-DMG-PLA
The Honorable Dolly M. Gee

ANSWERING BRIEF OF THE FEDERAL TRADE COMMISSION

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

MARK S. HEGEDUS
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2115
mhegedus@ftc.gov

Of Counsel:
ELIZABETH JONES SANGER
SHIRA D. MODELL
JAMES A. PRUNTY
EDWIN RODRIGUEZ
Attorneys
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

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INTRODUCTION

Appellants Jason Cardiff and a company he owns and/or controls, VPL Medical, Inc. (together "Cardiff"), appeal a district court order entering a Preliminary Injunction freezing VPL's assets and appointing a Receiver to manage the company. The district court issued this PI after concluding that (1) the assets were subject to an earlier preliminary injunction whose terms covered Cardiff's interests in VPL, (2) Cardiff has a record of hiding and dissipating assets, and (3) the additional freeze was needed to preserve assets from further dissipation. Cardiff fails to show that the district court abused its discretion in entering a second PI. This Court should affirm.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in freezing assets and placing them in receivership after concluding that the assets were subject to a previously issued preliminary injunction and might otherwise be dissipated.

2. Whether the district court abused its discretion in applying controlling Circuit precedent that authorizes a district court to preserve assets pending a final judgment that could include equitable monetary relief while concluding that *Liu v. SEC*, 140 S. Ct. 1936 (2020), was not controlling.

3. Whether the district court abused its discretion in concluding that the public interest in asset preservation outweighed Cardiff's private interest in operating his company free from a receivership.

JURISDICTION

The FTC brought the underlying complaint under 15 U.S.C. §§ 45(a), 52; 15 U.S.C. § 8404; 15 U.S.C. § 1693o(c); and 15 U.S.C. § 6105. ER984. The district court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345; 15 U.S.C. §§ 45(a) and 53(b); 15 U.S.C. § 8404(a); and 15 U.S.C. § 1693o(c). On July 7, 2020, the district court entered the preliminary injunction on review, ER006, which Cardiff timely appealed on August 19, 2020, ER132.[1] This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF THE CASE

A. The FTC's Complaint, the District Court's First TRO and PI, and Subsequent Contempt Orders

In October 2018, the FTC sued Jason and Eunjung Cardiff and others for making false and unsubstantiated claims that their products would help people quit smoking, lose weight, and improve their sexual performance. The Complaint also charged a related unlawful auto-ship continuity program that resulted in unauthorized shipments and charges, abusive telemarketing through robocalls, and

[1] Cardiff also filed in this Court a motion for summary reversal (Dkt. 4-1), which the FTC opposed (Dkt. 9). That motion is pending.

unsubstantiated claims regarding a multi-level marketing scheme. Those acts violated the FTC Act, 15 U.S.C. §§ 45(a), 52, the Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8404, the Electronic Fund Transfer Act, 15 U.S.C. § 1693o(c), and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6105.[2] ER985-ER998.

On October 10, 2018, the district court entered a temporary restraining order (First TRO) against Defendants, SER182, which it extended two weeks later, ER130. On November 8, 2018, the court entered a preliminary injunction (First PI) against them. ER060. Section XVI.D of the First TRO and First PI froze Defendants' assets and appointed a Receiver who is directed and authorized to, among other things, "[c]onserve, hold, manage, and prevent the loss of all Receivership Property, and perform all acts necessary or advisable to preserve the value of those Assets." SER201, ER082-ER083. The First TRO and First PI grant the Receiver "full power to sue for, collect, and receive, all Receivership Property[.]" *Id*. As pertinent here, Definition M of the First TRO and First PI defines "Receivership Property" as: "any Assets, wherever located, that are: (1)

[2] The other defendants are Danielle Cadiz, a/k/a Danielle Walker; Redwood Scientific Technologies, Inc. (California); Redwood Scientific Technologies, Inc. (Nevada); Redwood Scientific Technologies, Inc. (Delaware); Identify, LLC; Advanced Men's Institute Prolongz LLC; Run Away Products, LLC; and Carols Place Limited Partnership. ER060-ER062.

owned, controlled, or held by or for the benefit of … Jason Cardiff, … in whole or in part; (2) in the actual or constructive possession of … Jason Cardiff …; or (3) owned, controlled, or held by, or in the actual or constructive possession of, or otherwise held for the benefit of, any corporation, partnership, trust, or other entity directly or indirectly owned or controlled by … Jason Cardiff … .” SER187, ER068.

The Asset Freeze is designed to preserve funds so that they remain available for consumer redress if a monetary judgment is entered at the conclusion of the case. Paralleling the definition of Receivership Property, the Asset Freeze provision, Section VII.A, covers “any Assets that are” (1) owned or controlled, directly or indirectly, (2) held, in part or in whole, for the benefit of, or (3) in the actual or constructive possession of any Defendant. SER193, ER073-ER074. It also covers “any Assets that are” (4) owned or controlled by, in the actual or constructive possession of, or otherwise held for the benefit of any corporation, partnership, asset protection trust, or other entity that is directly or indirectly owned, managed, or controlled by any Defendant. SER193, ER074.

Importantly for this appeal, Section VII, Final Paragraph 3 of the First TRO’s and First PI’s Asset Freeze provision specified that it “shall include” *all* Cardiff assets, personal and business, whenever acquired, not simply assets held when the First TRO was entered or those later acquired and derived from

prohibited activity. SER193-SER194, ER074. As set forth in Section VII, Final Clauses 1 and 2, other defendants did not face such a broad freeze. *Id*. That differential treatment (including placing the Cardiffs' individual assets under receivership) was justified by evidence showing that the Cardiffs used elaborate asset-protection vehicles designed to shield their assets from creditors and potential creditors. SER219-SER224; *see also* ER043-ER044.

Subsequent events have proven the prescience of such provisions. The FTC and Receiver have documented the Cardiffs' violations of the First TRO, such as Jason Cardiff's attempts to transfer more than $200,000 to third parties, including parties outside the United States. SER164-SER166. Indeed, since entry of the First PI, the district court has found the Cardiffs in contempt three times for failing to disclose assets, failing to turn assets over to the Receiver, and dissipating and wasting assets covered by the PI. SER154, SER132, SER039. The first contempt involved an elaborate scheme, aided by their friend Jacques Poujade, to hide the Cardiffs' control of a Canadian company, while maintaining that Jason Cardiff was merely an unpaid consultant to the operation. Cardiff used the company to transfer $1.56 million (Canadian or CAD) from a company bank account (for which the Cardiffs were the only signatories) to subsidiary accounts that, among other things, funded the Cardiffs' extravagant lifestyle, in violation of the First TRO and PI. At

a contempt hearing, the district court rejected the Cardiffs' explanation for the transfer, stating:

> I would say of the 16 years I've been on the federal court, I've never presided over a matter where the fraud committed by the defendants was so clear, the deception so extreme. I'm astounded.

SER176 (Tr. 389:3-6). It continued:

> I've heard carefully from the Cardiffs. Their stories are totally unbelievable. It's pretty clear to the Court that they've lied, that they worked in concert with each other and with others to avoid, violate the conditions of the orders of the Court.

SER177 (Tr. 390:3-7). The district court found the Cardiffs and Poujade in contempt of the asset freeze. SER155.[3]

The second contempt involved the Cardiffs' refusal to pay their mortgage, thereby dissipating the value of their house (also a frozen asset)—while at the same time spending freely on nonessential living expenses, such as multiple luxury car leases, using money from an unknown source. SER143-SER146. The Cardiffs also failed to truthfully and completely account for their assets. SER150. The district court ordered the Cardiffs to reimburse the Receivership Estate for their unpaid mortgage and truthfully and completely account for all of their assets, SER136, but they have not done so. SER048.

[3] The contempt orders against Poujade are under appeal in this Court in No. 19-56397. *See, infra*, Statement of Related Cases.

The district court found the Cardiffs in contempt a third time for failing to comply with the purge conditions set forth in the second contempt order. SER039. Specifically, the court found that the Cardiffs failed to disclose accounts containing hundreds of thousands of dollars that were "ferreted out" by the FTC, SER046, and that they continued to lie about the source of funds from which they paid their expenses from May 2019 through July 2020, SER043-SER045. The Cardiffs remain in contempt. SER035.[4]

B. VPL Medical, Inc.

VPL, the corporate appellant here, appears to be the Cardiffs' latest attempt to conceal their assets and income. On March 2, 2020, the Cardiffs' counsel reported (as required by the First PI) Jason Cardiff's intent to create a "business entity that will manufacture and market disposable sanitary masks to be marketed and sold wholly to distributors and wholesalers of the mask. Jason will be the owner, principal, and agent for the business." SER076. On April 27, Cardiff submitted to the FTC and the Receiver a disclosure concerning his involvement in VPL. The report outlined a byzantine but not fully formed structure for multiple entities to carry out this mask business. As in the past, Cardiff downplayed his role, referring to himself as merely a "consultant," although he co-founded the

[4] The district court held Jason Cardiff in contempt a fourth time for obtaining a new Irish passport in violation of an order requiring him to surrender his passports to the Receiver. SER168-SER172.

company, served as the CEO, and called it "my biggest company to date." ER866. The Cardiffs' report provided no details about his role at VPL, which later secured millions of dollars in government contracts.

Although Cardiff reported that no one associated with defendant Redwood Scientific was involved in the new company, in fact, Cardiff chose a long-time colleague from Redwood, Bobby Bedi, as a front man for VPL. Bedi served on Redwood's Board and as its head of technology, wrote blog posts touting Redwood products, provided it search-engine optimization services, helped it launch a multi-level marketing scheme, and helped it apply for merchant accounts. SER079.

Even though Cardiff used Bedi's name on some VPL documents, third-party documents confirm that Cardiff controlled VPL. In mid-April, 2020, the Veterans Administration (VA) and the Department of Health and Human Services (HHS) awarded VPL contracts for up to $6.4 million and $14.5 million, respectively, to supply surgical masks. SER082, SER084-SER097. VPL received another mask contract from the Federal Emergency Management Agency (FEMA) at the end of April. SER082, SER107-SER108. In correspondence with the VA, Stacey Barker, the head of VPL's enterprise sales, copied only Cardiff. SER118. Similarly, an email from Barker to FEMA stated that she was copying Cardiff, "my CEO." *Id.* VPL phone records show approximately 600 calls totaling nearly 2,000 minutes between Barker and Cardiff between March 25 and the end of May. *Id*.

Cardiff also served as the public face of VPL. A mid-March Twitter post directed to the U.S. President listed jc@vplmedical.com as VPL's contact person. SER118-SER119. Investigative reporting by ProPublica referred to Cardiff as a VPL representative. SER119.

C. Second TRO and PI

As described above, Cardiff's control over VPL makes its assets Receivership Assets subject to the Asset Freeze. Because of Cardiff's proven history of concealing his assets, on June 24, 2020, the FTC sought a second TRO on an *ex parte* basis freezing VPL's assets and appointing a Receiver over the company. SER109. The district court entered the Second TRO the same day. ER039. The court found that the FTC would likely succeed in showing that Cardiff controls VPL and its assets, which therefore are Receivership Property. ER043. The court also found that, given Cardiff's past contemptuous conduct, he was likely to conceal or dissipate the VPL assets and destroy evidence of his ownership of VPL absent the Second TRO. ER044. That would irreparably harm the FTC's ability to obtain monetary relief for the victims of Cardiff's illegal conduct. *Id*. The Second TRO also authorized expedited discovery regarding Cardiff's involvement

in and relationship with VPL, the nature and disposition of VPL assets, and Cardiff's compliance with the Second TRO. ER056.[5]

Two days later, Cardiff and VPL sought to dissolve the Second TRO, largely on the ground that the First PI did not apply to Cardiff's businesses started after the entry of the First TRO and PI that have no relationship to his prior misconduct. ER900, ER901-ER902. The district court readily denied the motion to dissolve. ER032, ER036. It concluded that the First PI's definition of Receivership Property contains no "temporal limitation and does not preclude the Receiver from taking possession of Jason Cardiff's later-acquired assets, including VPL's assets." ER034. The court explained that it specifically relied on the First PI's Asset Freeze provision which covered "any Assets that are … owned or controlled … by any Defendant" and which specified that the freeze "'shall include … all Assets owned or controlled, directly or indirectly, by Defendant Jason Cardiff … .'" *Id.* (quoting ER074). The court cited evidence submitted by the FTC and the Receiver that "only underscores the likelihood that VPL is in fact co-owned and controlled by Jason Cardiff and Bobby Bedi … ." ER034-ER035.

When it issued the Second TRO, the district court also issued an order to show cause why it should not enter a new PI. ER058. In response, Cardiff and Bedi

[5] As noted above, the district court previously held Cardiff in contempt for failing to disclose his assets.

maintained that Cardiff was only a consultant to VPL, not its CEO. ER026. Yet documents found by the Receiver in VPL's office referred to Cardiff variously as a director (along with Bedi), founder, CEO, COO, and president of VPL. *Id*. The Receiver found emails in which Cardiff described VPL as "my biggest company to date" and expressed his desire to own "super-majority shares" and to have the ability to call all of Bedi's stock at any time and at minimal cost. *Id.*

Following a hearing, the district court entered the Second PI on July 7. It again noted that the First PI's Receivership Property and Asset Freeze provisions had no temporal limitation and applied to any "[a]ssets owned or controlled, directly or indirectly," by Cardiff. ER025, ER027. It rejected Cardiff's claim that he was merely a consultant. "Given inconsistencies in how Bedi described Cardiff's position; [others'] belief that Cardiff acted as the CEO; Cardiff's history of dishonesty before this Court; and the undisputed facts that Cardiff helped to found VPL and wields final authority over many crucial business decisions," the Court concluded that "the preponderance of the evidence supports the FTC's argument that Cardiff owns or controls VPL, whether directly or indirectly, even if he is not technically VPL's CEO." ER027. It thus held that VPL belonged in the receivership and its assets frozen under the First PI. *Id.*

* * * * * * * *

On October 9, 2020, the district court granted, in part, the FTC's motion for summary judgment, finding Cardiff and the other Defendants liable on all sixteen counts in the FTC's Complaint. SER001, SER022-027. The court denied, in part, Defendants' motion for summary judgment. SER021, SER027. It deferred a ruling on the appropriate remedies pending a decision by the Supreme Court in *FTC v. Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2019), *cert. granted*, 2020 WL 3865251 (U.S. July 9, 2020), and *AMG Capital Management, LLC v. FTC*, 910 F.3d 417 (9th Cir. 2018), *cert. granted*, 2020 WL 3865250 (U.S. July 9, 2020). SER015, SER028. In the meantime, the First and Second PIs remain in effect. SER028.

SUMMARY OF ARGUMENT

Preliminary injunction orders are subject to only limited review for abuse of discretion, and Cardiff has failed to show that the district court abused its discretion when it froze Cardiff's VPL assets.

1. The court properly concluded that the FTC had shown both that any assets owned or controlled by Cardiff, whenever acquired, are subject to the First PI's asset freeze and that the equities favored preserving those assets for possible consumer redress.

The district court was correct to conclude that the First PI is "crystal clear" that "Assets that are … owned or controlled" by Cardiff are frozen as Receivership Property and include Cardiff's current assets with no temporal limitation. Cardiff's attempt to sow ambiguity rests on the linguistic error that "owned" and "controlled" function as past tense verbs referring to Cardiff's prior ownership or control of assets. In fact, "owned" and "controlled" function as adjectives modifying assets that Cardiff currently owns or controls. That is all the more clear given that "Receivership Property" explicitly refers to "Assets … that *are* ... owned or controlled" … by any Defendant, while the Asset Freeze covers "any Assets that are … owned or controlled … by any Defendant" and specifies that it "shall include" Cardiff's assets with no limitation. It would have made no sense for the Second PI to freeze assets that Cardiff no longer owned or control. Instead, the district court correctly concluded that the only logical meaning is that the First PI freezes assets that *are* owned or controlled by Cardiff whenever acquired. And even if there were any ambiguity, a district court's interpretation of its prior order is entitled to heavy weight.

2. The district court correctly followed controlling Circuit precedent governing preliminary equitable relief under the FTC Act. The Supreme Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), did not overturn this precedent. *Liu* did not even involve asset freezes; it concerned only the calculation of a final

monetary judgment. *Liu* also involved equitable relief under the securities laws, not the FTC Act. This Court has recognized that relief under the FTC Act is broader than that authorized by statutes like the Securities Exchange Act provision at issue in *Liu* and includes restitution and the return of unjust gains. Indeed, *Liu* reaffirmed the very Supreme Court holdings on which this Court relied to support the scope of equitable relief under the FTC Act.

Even if *Liu* were pertinent here, it does not follow from that decision that the district court abused its discretion. Nothing in *Liu* requires that frozen assets be tethered to the deceptive scheme alleged in the complaint or tied to any specific assets. Rather, *Liu* simply requires that the *amount* ordered to be disgorged not exceed the defendant's net profits. At this preliminary stage, that requirement is met because the amount of potential disgorgement far exceeds the amount of assets frozen.

Liu also held that the calculation of net profits should reflect legitimate expenses. The burden to show such expenses rests with Cardiff, but he has made no effort to satisfy that burden. In fact, the record thus far shows that Redwood and Cardiff incurred expenses to market worthless, deceptive products and to support a lavish lifestyle. These are classic illegitimate expenses.

3. The district court properly weighed the equities. The public interest in preserving funds for restitution strongly outweighs Cardiff's private interests.

Cardiff asserts that the Second PI hampered VPL's ability to operate and deprived the public of protective masks, but the facts show that the company was and is not capable of producing those masks.

ARGUMENT

I. STANDARD OF REVIEW.

"This court only subjects a district court's order regarding preliminary injunctive relief to 'limited review.'" *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996)). This standard also applies to decisions to impose asset freezes, *id.* at 1236-37, or to subject assets to a receivership, *SEC v. Wallenbrock*, 313 F.3d 532, 536 (9th Cir. 2002). The Court "will reverse a district court's issuance of a preliminary injunction only if the district court abused its discretion by basing its decision on an erroneous legal standard or on clearly erroneous factual findings." *Affordable Media*, 179 F.3d at 1233. "A district court's decision is based on an erroneous legal standard if: (1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues in the litigation." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999) (cleaned up). "A district court's decision is based on clearly erroneous factual findings if 'the reviewing court on the entire evidence is left with

the definite and firm conviction that a mistake has been committed.'" *Id*. (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

II. THE DISTRICT COURT CORRECTLY ENTERED A PRELIMINARY INJUNCTION FREEZING CARDIFF'S ASSETS AND PLACING VPL UNDER RECEIVERSHIP.

In cases under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), "the district court is required (i) to weigh equities; and (ii) to consider the FTC's likelihood of ultimate success before entering a preliminary injunction." *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989). "Harm to the public interest is presumed." *Id*. (citing *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175-76 (9th Cir. 1987)). In addition, "[w]here an injunction is authorized by statute, and the statutory conditions are satisfied …, the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury." *Odessa Union Warehouse*, 833 F.2d at 175.

Cardiff challenges the district court's rulings on both the merits and the balance of equities, but his attacks are groundless.

A. The First PI Covers Cardiff's Assets, Whenever Acquired.

In ruling that VPL assets should be under receivership and subject to the Asset Freeze, the district court relied on two provisions of the First PI. The first, Definition M, defined "Receivership Property" to include "any Assets … that are … owned, controlled, or held by … Jason Cardiff." ER025 (quoting ER068). The

second, Section VII, Final Paragraph Clause 3, specified that the Asset Freeze "shall include … all Assets owned or controlled, directly or indirectly, by [Cardiffs]." ER025 (quoting ER074). Stating that the "crux of the matter is whether the FTC has shown a likelihood of success on the merits that Cardiff owns or controls VPL," ER025, the district court held that "significant evidence" supported the conclusion that "Cardiff owns or controls VPL" and that "VPL belongs under receivership, with its assets frozen, pursuant to the [First PI]." ER026-ER027.

Cardiff does not challenge the district court's conclusion that Cardiff owns or controls VPL. Instead, he asserts that the phrase "Assets owned or controlled, directly or indirectly by Cardiffs," as used in Definition M and Clause 3, is ambiguous and should be construed in Cardiff's favor, and that a provision of the First PI in which the phrase appears, Section VII, should be interpreted "as a whole," like a contract, in order to determine the district court's intent. Br. 18-21. Neither of these assertions is valid.

First, the district court itself declared that the terms "owned" or "controlled" are "crystal clear," ER025, and "not ambiguous," ER035. Nevertheless, attempting to sow ambiguity, Cardiff states that the "plain meaning of the terms 'owned' or 'controlled'" refers to the "past tense," that is, assets previously owned by the Cardiffs. Br. 21. Setting aside the inconsistency of asserting that the meaning is

simultaneously ambiguous and plain, Cardiff makes a linguistic error. The terms do not function as past tense verbs describing Cardiff's prior actions. Rather, "owned" or "controlled" function as adjectives that modify the word "Assets" and appear after the present tense verbs "are" and "include." In other words, the terms cover Cardiff's current assets.

This meaning is the only logical one. Definition M, "Receivership Property," explicitly refers to "Assets … that *are* ... owned or controlled" … by any Defendant, SER187, ER068, while the Asset Freeze covers "any Assets that are … owned or controlled … by any Defendant," SER193, ER074. It would have made no sense for the First PI to have frozen assets that a Defendant no longer owned.

The Cardiff-specific provision of the Asset Freeze reinforces this understanding. Section VII, Final Paragraph Clause 3, singles out Cardiff's assets without temporal or causal limitation. ER025. Final Paragraph Clause 1 freezes "Assets of Defendants as of the time [First] TRO was entered." SER193, ER074. Final Paragraph Clause 2 freezes "Assets obtained by Defendants after the TRO was entered if those Assets are derived from any activity that is the subject of the Complaint … or prohibited by this Order." SER193-SER194, ER074. By contrast, Final Paragraph Clause 3 states that the freeze "shall include … all Assets owned or controlled … by Jason Cardiff," and does so without limitation. SER194, ER074. As explained above at pages 4-5, Clause 3 was purposefully broad given

Cardiff's record of concealing and dissipating assets. Cardiff's reading would defeat that purpose.

Second, even if Cardiff had shown ambiguity, he is wrong that the injunction should be construed in his favor. Br. 18. The cases on which he relies, *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988), and *Natural Resources Defense Council v. Southwest Marine, Inc.*, 242 F.3d 1163 (9th Cir. 2001), do not stand for that proposition. *Advocates for Life* concerned whether an injunction satisfied Fed. R. Civ. P. 65(d)'s requirements for "specificity" and "reasonable detail." 859 F.2d at 685. *Southwest Marine* concerned modification of an injunction under Fed. R. Civ. P. 62(c). 242 F.3d at 1169 n.2. Neither case held that all ambiguities in an injunction must be resolved in favor of the enjoined party. To the contrary, the district court's interpretation of its own injunction is entitled to "particularly heavy weight," *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 908 (7th Cir. 1995), a standard that would make no sense if the rule were simply that the restrained party automatically got the benefit of any doubt.

Third, there is no need to resort to contract interpretation principles to determine the district court's intent behind the First PI. Br. 18, 21. The court's task was not to determine what the parties before it meant by their words. The PI is not a contract, like a consent decree, but is the district court's own order. As such, the

court knew exactly what it meant when it entered the First PI and could state with utter surety that it intended to cover assets such as VPL.

But even if it were appropriate to apply contract interpretation principles, the district court did not abuse its discretion in rejecting Cardiff's interpretation. He argues that Final Paragraph Clause 1 (Defendants' assets at the time of the First TRO) and Clause 2 (Defendants' later acquired assets tied to conduct alleged in the Complaint or prohibited by the PI) limit the meaning of Final Paragraph Clause 3 (Cardiff's current assets), and that Clause 3 serves as a "catch all" for assets that are already covered by Clauses 1 and 2. Br. 18, 20-21. But as explained above, Clause 3 distinguishes and specifically applies to Cardiff's current assets and would be meaningless if it merely tracked the assets already covered by Clauses 1 and 2. The district court thus properly rejected Cardiff's interpretation as "illogical[]" and concluded it would make Clause 3 "redundant." ER035. That determination fell well within the court's discretion.

B. The Supreme Court's *Liu* Decision Does Not Require Reversal.

In *Liu v. SEC*, 140 S. Ct. 1936, the Supreme Court held that the term "equitable relief" in the Securities Exchange Act allows the SEC to recover a monetary remedy for violations of the law, but limits the remedy to unlawfully derived net profits as opposed to revenue. Cardiff contends that *Liu* mandates reversal of the Second PI because the district court applied an incorrect standard of

relief based on Circuit precedent that has now allegedly been overturned. His contentions fail.

1. *Liu* did not reverse this Court's precedents interpreting the FTC Act.

Cardiff first claims the district court improperly "failed to apply the correct standard enunciated in *Liu* to determine whether a court may freeze assets of a non-party where, as in this case, the assets are not derived from 'ill-gotten gains' or 'net unlawful profits' from the alleged unlawful activities." Br. 8. That argument fails right off the bat because *Liu* had nothing to do with an asset freeze. The case concerned only the calculation of a final monetary judgment. At this preliminary stage of the case, the freeze serves to preserve assets so they are not dissipated before final judgment. *See Affordable Media*, 179 F.3d at 1236. *Liu* did not address that situation. And because the potential final judgment in this case could exceed $18 million, while the frozen assets total at most $5 million, the freeze is appropriate even if *Liu* were read to restrict any final award (an issue that is not presented at this point, and that is inconsistent with Circuit law, as described below).

More fundamentally, Cardiff argues that *Liu* "implicitly overruled *FTC v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982), and *FTC v. Commerce Planet*, 815 F.3d 593 (9th Cir. 2016), to the extent these decisions allowed equitable restitution or disgorgement based on consumer loss." Br. 9. Circuit law says otherwise. "Once

a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting *en banc*, or by the Supreme Court," or unless Congress changes the law. *Hart v. Massanari*, 266 F.3d 1155, 1171 & n.28 (9th Cir. 2001).

Liu did not overturn *Commerce Planet* and *H.N. Singer*. *Liu* interpreted a provision in the securities laws that allows a court to order "equitable relief." 15 U.S.C. § 78u(d)(5). The FTC Act, by contrast, authorizes a "permanent injunction." 15 U.S.C. § 53(b). The Court has recognized that "equitable relief" serves as "a limitation on the relief available" from a court of equity, whereas "permanent injunction" conveys a broader power "to award complete relief," including legal remedies. *Commerce Planet*, 815 F.3d at 602. *Liu* did not address that matter, so the interpretation of the FTC Act set forth in *Commerce Planet* remains binding. In keeping with *Commerce Planet*, the district court concluded that *Liu* involved the narrower understanding of equitable relief, not the broader one implicated by the phrase "permanent injunction." ER029-ER030. Cardiff is therefore wrong that the district court erred in declining to apply *Liu*.

If anything, *Liu* supports existing precedent. In upholding the SEC's ability to obtain disgorgement of profits as "equitable relief" under 15 U.S.C. § 78u(d)(5), *Liu* reaffirmed the holding of *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), that "[o]nce a District Court's equity jurisdiction has been invoked … a decree

compelling one to disgorge profits … may properly be entered." *Liu*, 140 S. Ct. at 1943 (quoting *Porter*, 328 U.S. at 398-99). The securities laws say nothing about disgorgement, but following *Porter*, *Liu* concluded that "[u]nless otherwise provided by statute, all … inherent equitable powers … are available for the proper and complete exercise of [equitable] jurisdiction." *Id.* at 1947 (quoting *Porter*, 328 U.S. at 398). This Court relied on these very principles from *Porter* when ruling that Section 13(b) of the FTC Act permits "restitution" and the return of "unjust gain from past violations." *Commerce Planet*, 815 F.3d at 599. *Liu*'s unqualified endorsement of *Porter* thus reinforces this Court's precedent interpreting Section 13(b).

Moreover, like the FTC Act, the statute in *Porter* authorized a "permanent … injunction," and the Court held that monetary remedies "may be considered as an equitable adjunct to an injunction decree." *Porter*, 328 U.S. at 399. The Court explained that "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* "[W]here, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to … award complete relief." *Id.*

2. The Asset Freeze and Receivership are proper under *Liu*.

Even if *Liu* applied here, it does not follow that the district court abused its discretion in freezing Cardiff's VPL assets and subjecting VPL to the Receivership.

a. Liu does not require asset tracing.

Cardiff maintains that, under *Liu*, the district court could not freeze Cardiff's VPL assets because the assets are not "tethered" to the Redwood deceptive scheme. Br. 15-16, 17. The district court, however, correctly rejected such a requirement. ER026 (n.4). *Liu* did not address asset tracing or hold that only the actual property obtained by unlawful means is subject to disgorgement. Rather, the Court ruled that the securities laws permit the imposition of a money judgment reflecting ill-gotten gains untethered to specific assets. Furthermore, *Liu* held that in some cases defendants may face collective liability for profits that accrued to a partner, 140 S. Ct. at 1945, 1949, which necessarily would require disgorgement of assets that are not tethered to the defendant's individual wrongdoing. *Liu* also relied on the Restatement, which explains that disgorgement "involves no claim to particular assets and no requirement of tracing." Restatement (Third) of Restitution, § 51 cmt. *b* & Reporter's Note *b*. Indeed, Justice Thomas dissented in part on the ground that "[d]isgorgement … has no tracing requirement." *Liu*, 140

S. Ct. at 1953-54 (Thomas, J., dissenting). Consistent with *Liu*, this Court does not require tracing under the FTC Act. *Commerce Planet*, 815 F.3d at 601.

The core holding of *Liu* is that (under the securities laws) the *amount* of a final disgorgement judgment should not exceed the defendant's profits from its wrongdoing. 140 S. Ct. at 1949-50. Measured against this requirement, the freeze on Cardiff's VPL assets is proper. The Cardiffs' unjust gains from the Redwood scheme amounted to at least $18.2 million from January 1, 2015, through October 12, 2018, SER181, SER053,[6] while the frozen assets total less than $5 million.[7] Even if *Liu* directly controlled this case, the district court did not abuse its discretion in freezing the VPL assets. ER030.

b. Cardiff has not proven legitimate expenses

Liu held that the measure of disgorgement is "net profits from wrongdoing after deducting *legitimate expenses*." 140 S. Ct. at 1946 (emphasis added). The calculation thus "requires ascertaining whether expenses are legitimate." *Id*. at 1950. As the cases relied on by *Liu* explain, a legitimate expense is one "untainted by dishonesty." *Rubber Co. v. Goodyear*, 76 U.S. 788, 803 (1869). A defendant has no right to deduct expenses incurred "while … violating the [victims'] rights,"

[6] Cardiff has not refuted this calculation. ER036.

[7] Prior to the freeze of VPL assets, the FTC had frozen approximately $560,000 USD and $1.56 million CAD (equivalent to about $1.2 million USD). ER030. VPL assets may total nearly $3 million. ER863.

for that would "compel[]" victims "to pay the defendant for [the] time and expenses" necessary to defraud them. *Callaghan v. Myers*, 128 U.S. 617, 664 (1888). *Liu* thus held that crediting a defendant's expenses would be "inequitable" where "the 'entire profit of a business or undertaking' results from the wrongful activity." 140 S. Ct. at 1945 (quoting *Root v. Ry. Co.*, 105 U.S. 189, 203 (1882)). Nor may a wrongdoer subtract the cost of "materials … bought for the purposes of" violating the victims' rights. *Id.* at 1945-46 (discussing *Rubber Co.*, 76 U.S. at 803). If the record is unclear about whether an expense is legitimate, "every doubt and difficulty should be resolved against" the wrongdoer. *Rubber Co.*, 76 U.S. at 803-04.

As noted above, *Liu* concerns the proper calculation of disgorgement at the conclusion of a proceeding once a court renders factual findings and holds a defendant liable. At this preliminary point in the case, it is not possible to determine which of Cardiff's claimed expenses would be deemed "legitimate" and which would not. But to the extent there is a record, it does not show legitimate expenses to offset the $18.2 million disgorgement amount.

The burden to prove legitimate expenses rests on Cardiff. *See Commerce Planet*, 815 F.3d at 604. In an apparent attempt to suggest no net profits from wrongdoing, Cardiff states that Redwood and the Cardiffs lost money. Br. 2. He makes no effort to show that such losses reflect legitimate expenses. To the

contrary, Redwood's own records reveal millions of dollars spent on media and advertising to promote and broadcast false and unsubstantiated claims. SER071. The Cardiffs also spent hundreds of thousands of dollars on luxury vehicles, cruises, resorts, and private air charter travel. SER072. Expenditures incurred to market worthless, deceptive products and lavish personal expenses are classic "inequitable deductions." *Liu*, 140 S. Ct. at 1945. Cardiff's failure to show legitimate expenses underscores that the district court did not abuse its discretion.

C. The District Court Correctly Weighed the Equities.

"When a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight." *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir.1989). Further, the public interest in preserving funds for restitution is great. *Affordable Media*, 179 F.3d at 1236. The district court did not abuse its discretion when it concluded that the "public's interest in redress would be harmed without a preliminary injunction ensuring that VPL's assets remain under receivership, particularly given the likelihood of dissipation." ER030.

Cardiff suggests that the public interest in a U.S.-based supply of surgical masks during the Covid-19 pandemic outweighs the FTC's interest in freezing funds that might be needed to provide equitable monetary relief at the conclusion of the case. Br. 9-11. Notably, he makes no showing or claim that VPL was

uniquely situated to supply such masks. Rather, at its core his claim is that the Second PI harmed his private interest in operating VPL, but he has failed to show that it even had that effect.

He asserts that the Second PI prevented VPL from fulfilling an HHS order for 20,000,000 facemasks, but the Receiver concluded that VPL could not timely fulfill the HHS contract; he characterized it as "doomed to fail." ER003. Rejecting Cardiff's motion to remove the Receiver, SER050, the district court declined to second-guess that determination. ER004. Instead, the court found that removing the Receiver "would cause the estate irreparable harm" due to the real risk of asset dissipation. ER004.

In any event, on August 29 the district approved a plan for ongoing VPL operations in the hopes that profitable operation of VPL would grow the Receivership Estate, making more money available for any future monetary relief. SER036. On October 1, the Receiver filed a court-required status report on VPL's operations. SER029. Although the Receiver has released hundreds of thousands of dollars for VPL's operations, VPL has still not managed to begin production of masks. The Receiver reported that "[c]ontrary to previous representations by VPL that it could have been operational within days of the Receiver's appointment on June 24, 2020, it is still not operational despite Cardiff and Bedi having access to all necessary resources and a month of work on operational issues." SER032. In

other words, the difficulties the Receiver previously identified remain and cannot be attributed to the Second PI. Even having resumed operations with funding, VPL still is not in a position to produce masks. The district court thus correctly weighed the equities. ER031.

CONCLUSION

For the foregoing reasons, this Court should affirm the Second PI.

October 13, 2020

Respectfully submitted,

Alden F. Abbott
General Counsel

Joel Marcus
Deputy General Counsel

/s/ *Mark S. Hegedus*
MARK S. HEGEDUS
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Of Counsel:
ELIZABETH JONES SANGER
SHIRA D. MODELL
JAMES A. PRUNTY
EDWIN RODRIGUEZ
Attorneys
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

STATEMENT OF RELATED CASES

Federal Trade Commission v. Poujade, et al., Nos. 19-56397 & 20-55066, involves third parties, Jacques Poujade and True Pharmastrip, Inc., whose conduct and assets are subject to the First PI but are not subject to the Second PI challenged in No. 20-5585. Oral argument in Nos. 19-56397 & 20-55066 is scheduled for November 20, 2020.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7) and Circuit Rule 32-1, in that it contains 6,559 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

October 13, 2020

/s/ *Mark S. Hegedus*

Mark S. Hegedus
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

CERTIFICATE OF SERVICE

I certify that on the 13th day of October, 2020, an electronic copy of the foregoing Answering Brief of the Federal Trade Commission was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system and that service will be accomplished via that system.

/s/ *Mark S. Hegedus*
Mark S. Hegedus
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580