15-1009-(L), 15-1014(CON)

United States Court of Appeals

for the

Second Circuit

FEDERAL TRADE COMMISSION, STATE OF CONNECTICUT,

Plaintiffs-Appellees,

– v. –

LEADCLICK MEDIA, INC., a California corporation Successor LeadClick Media, LLC, CORELOGIC, INC.,

Defendants-Appellants,

LEANSPA, LLC, a Connecticut limited liability company, NUTRASLIM, LLC, a Connecticut limited liability company, NUTRASLIM U.K. LIMITED, a United Kingdom limited liability company, DBA LeanSpa U.K. Ltd, BORIS MIZHEN, individually and as an officer of LeanSpa, LLC, NutraSlim, LLC, and NutraSlim U.K. Ltd, RICHARD CHIANG, individually and as an officer of LeadClick Media, Inc., ANGELINA STRANO, Relief Defendant,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT, NEW HAVEN

FINAL FORM BRIEF FOR DEFENDANT-APPELLANT CORELOGIC, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, appellant CoreLogic, Inc., states that it is a publicly traded corporation, and that T. Rowe Price Associates, Inc. (a subsidiary of T. Rowe Price Group, Inc., a publicly held corporation) owns more than 10 percent of CoreLogic, Inc.'s stock.

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PRELIMINARY STATEMENT

The decision below requires a concededly innocent party—appellant CoreLogic, Inc. ("CoreLogic")—to disgorge approximately $4.1 million of its own assets to the Federal Trade Commission ("FTC"). The order is contrary both to the governing legal principles and to the undisputed record facts as even the district court construed them.

The theory invoked to justify the order is that the $4.1 million at issue did not in fact belong to CoreLogic, but belonged instead to appellant LeadClick Media, Inc. ("LeadClick"), which is a separate corporate entity—owned by CoreLogic—that the district court found liable under the Federal Trade Commission Act ("FTCA") for allegedly deceptive marketing practices committed by third parties. Under a recognized but controversial device known as the "relief defendant" doctrine, the FTC sought recovery not only from LeadClick as an allegedly culpable party, but also disgorgement from CoreLogic of funds CoreLogic had collected from LeadClick in August 2011—albeit without any showing that CoreLogic was remotely involved in the conduct that led to the liability finding against LeadClick, and without any effort to reach CoreLogic's assets by piercing the corporate veil separating the two entities. The State of Connecticut, a co-plaintiff in the case against LeadClick, did not join in the FTC's efforts to collect from CoreLogic as a "relief defendant."

The relief defendant doctrine is not unprecedented, but its deployment here to reach into CoreLogic's pockets certainly was. This Court and others have consistently made clear that a government agency cannot take assets possessed by an innocent third party unless the party is a mere custodian of funds that are in fact owned by the alleged wrongdoer. Those precedents uniformly hold that an innocent party is *not* such a custodian whenever it has provided any form of "valuable consideration" in exchange for the assets.

Under those controlling precedents, the question here was simple: whether CoreLogic provided valuable consideration to LeadClick in exchange for the $4.1 million CoreLogic collected from LeadClick. The answer was equally simple: the undisputed facts show that CoreLogic did provide valuable consideration, because as the district court itself recognized, the $4.1 million was collected by CoreLogic as recoupment for earlier advances it made to pay LeadClick's bills, pursuant to a preexisting "shared services" agreement between the parties providing both for the advances and the later recoupment. By any legal definition or understanding, CoreLogic's payment of LeadClick's bills was obviously valuable consideration for recoupment of the amounts paid. And on top of that, CoreLogic *also* provided LeadClick with back-office services the district court described as "valuable," further consideration for the funds CoreLogic collected from LeadClick.

On that undisputed record, the government did not and could not carry its

burden of proving that CoreLogic was but an "empty vessel" for storage of LeadClick's assets, as one precedent puts it. The district court's contrary conclusion rested not on any erroneous view of the relevant underlying facts—none of which are disputed—but on a fundamentally erroneous understanding of the legal principles governing recovery from innocent custodial parties as relief defendants. Rather than ask and answer the simple question identified in the controlling precedents, the court inexplicably adverted to bankruptcy law to invoke a completely inapposite inquiry into whether CoreLogic's advances to pay LeadClick's bills constituted a "debt" arrangement or an "equity" investment. But a debt-equity test makes no sense in the relief defendant context, as this very case shows: regardless whether CoreLogic's advances to LeadClick are better classified as debt or equity, they indisputably represented *valuable consideration* for the later-recouped funds, which is the sole relevant inquiry. Unsurprisingly, no court analyzing a relief defendant claims has ever applied a debt-equity test, which radically expands a doctrine that is by design exceedingly narrow, and thereby undermines important protections for innocent parties' assets inherent in the existing doctrine.

Finally, even if the debt-equity test applied in this context, the FTC still would have no claim against CoreLogic for other independent reasons, including the fact that the funds CoreLogic advanced to pay LeadClick's bills did not

constitute an equity investment by any definition. In addition, the $4.1 million at issue was not even transferred initially to CoreLogic, but to its subsidiary CoreLogic US, Inc. ("CLUSI"). Because LeadClick at the time owed CLUSI approximately $8 million under an existing line of credit, CLUSI had its own legitimate claim to the $4.1 million, yet the FTC did not even name CLUSI as a relief defendant, much less prove that CLUSI lacked any legitimate claim to the money the FTC sought from CoreLogic.

For these and other reasons elaborated in this brief, the Court should reject the bankruptcy-law test invoked by the district court, apply already-settled principles to the undisputed record, and order judgment entered in CoreLogic's favor.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered an order on March 5, 2015, granting the FTC summary judgment as against both CoreLogic and LeadClick. That order was final, and CoreLogic timely noticed its appeal on April 2, 2015. R. 104-09a. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The issues presented are:

1. Whether the FTC established that CoreLogic possessed no legitimate

claim to the $4.1 million it collected in August 2011, where the district court itself recognized that CoreLogic collected the funds as partial recoupment of $16 million it had previously advanced to pay LeadClick's bills, pursuant to a preexisting shared services agreement between the parties in which CoreLogic also provided LeadClick valuable back office services.

2. Whether the FTC established that CLUSI—the entity that initially received the $4.1 million in August 2011—itself possessed no legitimate claim to the funds, where CLUSI had a longstanding written loan agreement with LeadClick, under which LeadClick still owed CLUSI approximately $8 million when the $4.1 million was transferred.

STATEMENT OF THE CASE

A. The Parties And The LeadClick Agreements

CoreLogic is a publicly traded provider of financial and consumer information, analytics, and services. In late 2005, Corelogic[1] and another public company, First Advantage Corporation ("First Advantage"), together acquired a 75% interest in LeadClick,[2] an online marketing company. R. 645a (Theologides

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[1] At that time and until its reincorporation in June 2010, CoreLogic operated as First American Corporation. R. 595a (Blake Report at 4).

[2] At the time of its acquisition and until September 30, 2011, LeadClick was known as LeadClick Media, Inc. R. 4a (SJ Op. 4 n.5). In September 2011, CoreLogic closed LeadClick, and as part of a larger corporate reorganization, converted LeadClick Media, Inc. into LeadClick Media, LLC. LeadClick Media,

Decl. ¶ 4). In 2009, CoreLogic and First Advantage acquired the remaining 25% of LeadClick. *Id.* Later that year, CoreLogic purchased First Advantage, thus making First Advantage its wholly-owned subsidiary and LeadClick an indirect subsidiary. R. 645a (Theologides Decl. ¶ 5). First Advantage's name was subsequently changed to CoreLogic U.S., Inc. ("CLUSI"). R. 648a; R. 657-59a (Second Balas Decl. ¶ 4; Second Balas Decl. Ex. C). LeadClick and six other former First Advantage subsidiaries (the "CLUSI subsidiaries") thus became wholly-owned subsidiaries of CoreLogic. R. 595-96a (Blake Report at 4, 5 n.7).

Two agreements between LeadClick and its corporate parents are pertinent to this case.

1. *The CLUSI/LeadClick Loan Agreements*

First Advantage (now CLUSI) and LeadClick entered into a formal loan agreement and promissory note in 2008, when LeadClick was only an indirect, partly-owned subsidiary of CLUSI.[3] CLUSI agreed to lend LeadClick up to $15.7 million on a revolving basis and LeadClick agreed to repay the amounts borrowed. R. 15a; R. 648a; R. 650-56a (SJ Op. 15; Second Balas Decl. ¶ 4; Second Balas

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LLC remains CoreLogic's wholly-owned subsidiary, but has not maintained any operations since that time. R. 4a (SJ Op. 4 n.5).

[3] First Advantage and CoreLogic had purchased a 75% stake in LeadClick in 2005 through a joint venture 70% owned by First Advantage and 30% owned by CoreLogic, but did not purchase the remainder of LeadClick's shares until 2009. R. 645a (Theologides Decl. ¶¶ 4-5).

Decl. Exs. A & B). As of August 2011, LeadClick still owed CLUSI $8 million in principal under this agreement. R. 15a; R. 648-49a (SJ Op. 15; Second Balas Decl. ¶ 5).

2. *The Shared Services Agreement: CoreLogic Advances And Recoups Cash For Payment Of LeadClick's Bills*

CoreLogic and its direct and indirect subsidiaries underwent a significant corporate restructuring in 2010 and 2011. During that period, CoreLogic transitioned LeadClick and its six sister CLUSI subsidiaries into a new "shared services system" intended to streamline and enhance consistency of back office functions across these subsidiaries.

As the district court explained, a shared services system is "a program of consolidated back-office functions across related companies" in which a "single team handles administrative functions for all the other companies." R. 13a (SJ Op. 13) (citation omitted). Such programs are "common among large companies with subsidiaries because of the advantages they provide," including "allowing subsidiaries to focus on their business operations without having to duplicate administrative functions," thereby "decreasing subsidiaries' expenses due to efficiencies and economies of scale, and enhancing the consistencies of operations and recordkeeping." R. 13-14a (SJ Op. 13-14) (citation omitted).

All seven CLUSI subsidiaries were provided the same suite of services—e.g., general ledger, financial reporting, cash management, and payroll services. R.

597a (Blake Report at 6). Most important for this case, the services included handling the CLUSI subsidiaries' accounts payable and accounts receivable. R. 597-600a (Blake Report at 6-9). On the payables side, after a subsidiary (such as LeadClick) approved a particular expense, the CoreLogic shared services team would process and track the payment of that expense using CoreLogic funds, and would record the payment and the responsible subsidiary in the accounting system. R. 599a; R. 628-44a (Blake Report at 8 & Ex. 1). On the other side of the ledger, CoreLogic would similarly track, collect, and record payments made to the subsidiaries from their customers. R. 598-99a (Blake Report at 7-8).

CoreLogic began to integrate the CLUSI subsidiaries into its shared services system in October 2010. R. 14a (SJ Op. 14.) Other subsidiaries were integrated first, and CoreLogic's payment of LeadClick's bills commenced in January 2011. *Id.* Both parties recognized, however, that the accounts receivable process would not be transitioned until "several months later." *Id.*[4] In the interim, the district court observed, the parties agreed that CoreLogic would pay LeadClick's bills

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[4] The accounts receivable program was not established until July 2011—several months after the payables program—for two reasons. First, whereas bills can be paid more-or-less immediately by any new payer, changes to accounts receivable required that customers be notified of the new payee and payment destination and be given sufficient time to redirect payments. R. 661a; R. 664a; R. 667a (Balas Dep. Tr. at 57:18-59:11; 319:20-320:23; First Balas Decl. ¶ 9). Second, LeadClick did not convert to the software system required to operate the receivables program until June 2011. R. 667a (First Balas Decl. ¶ 9).

directly from CoreLogic's own treasury, and LeadClick would later reimburse those advances from its own revenues once the receivables system was established: "LeadClick's and CoreLogic's understanding and agreement from the outset of the shared services transition was that CoreLogic would use its treasury funds to pay LeadClick's invoices during this transition period, but that CoreLogic would eventually begin collecting LeadClick's receipts into its treasury funds as well, thereby recouping those prior advances." R. 14a (SJ Op. 14) (citation omitted); *see* R. 674a; R. 677a; R. 669a (Chelew Decl. ¶ 10; Livermore Decl. ¶ 5; First Balas Decl. ¶ 16). Pursuant to that agreement, "CoreLogic advanced approximately $16 million to LeadClick" to pay bills from January to August 2011. R. 14a (SJ. Op. 14) (citation omitted).

Once the accounts receivable system was established in July 2011, and in accordance with the parties' agreement, CoreLogic began to "recoup[] [its] prior advances" to LeadClick, R. 14a (SJ Op. 14), by executing automatic daily "sweeps" of revenues received by LeadClick. Each CLUSI subsidiary (including LeadClick) maintained a Bank of America ("BOA") bank account linked to other BOA accounts held by CLUSI and CoreLogic. R. 630a (Blake Report, Ex. 1 at 2). Incoming funds received through the shared services accounts receivable program were deposited into the subsidiary's account, and then "automatically swept" first into "CLUSI's BOA account [and then] to another BOA account held by

CoreLogic." R. 13a (SJ Op. 13) (citation omitted).

B. The August 30, 2011 Transfer

The FTC's claim against CoreLogic as a relief defendant is based on a single cash transfer of $4.1 million that occurred on August 30, 2011. Five days earlier, in transitioning its accounts receivable process to CoreLogic's shared service system, LeadClick had closed a bank account it had held at Mechanics Bank and withdrawn the approximately $4.1 million in customer receipts on deposit in the account. R. 667a (First Balas Decl. ¶¶ 9-11). When those funds were deposited into LeadClick's shared services BOA account on August 30, the funds were automatically swept into an account owned by CLUSI, which subsequently transferred the funds into CoreLogic's central treasury, pursuant to the shared services agreement. R. 13a; R. 669-70a (SJ Op. 13; First Balas Decl. ¶ 20). After the August 30 transfer, LeadClick still owed CoreLogic approximately $8 million of the $16 million CoreLogic had advanced LeadClick under the shared services program. R. 15a (SJ Op. 15). LeadClick also owed CLUSI $8 million under its revolving line of credit. R. 648-49a (Second Balas Decl. ¶ 5).

C. The FTC's Suit And The Decision Below

1. On November 7, 2011, the FTC and the State of Connecticut brought suit against a collection of entities (not including either appellant here) alleging unfair trade practices in their online marketing practices. Nearly nine months later, on

July 26, 2012, the complaint was amended to include LeadClick as a defendant. The facts relevant to the complaint against LeadClick are recounted in LeadClick's separate brief on appeal.

In yet another amended complaint, filed more than a year later, the FTC—but not Connecticut—added CoreLogic as a "relief defendant." R. 1a (SJ Op. 1). The FTC sought to compel CoreLogic to disgorge the $4.1 million that it had collected on August 30 as recoupment of its prior advances to pay LeadClick's bills during the shared services program transition. The FTC expressly observed that it was naming CoreLogic "only as a 'nominal' or 'relief' defendant, that is, one who is not accused of wrongdoing." R. 685a (FTC Mem. in Support of Mot. to Amend at 7). According to the FTC, recovery from CoreLogic was proper because CoreLogic lacked any "legitimate claim" to the funds it recouped from LeadClick on August 30, 2011. The FTC did not seek disgorgement of the other transfers that occurred in July and August 2011.

2. Both CoreLogic and the FTC moved for summary judgment. The district court denied CoreLogic's motion and granted the FTC's.

The district court recognized that the principal legal question relevant to whether CoreLogic could be compelled to disgorge funds as a relief defendant depends on "whether CoreLogic has a legitimate claim to the" $4.1 million at issue. R. 35a (SJ Op. 35). The court further acknowledged that CoreLogic's claim

would be "legitimate" so long as it received the funds from LeadClick in exchange for "valuable consideration." *Id.* And the court recognized as a factual matter that all of the cash "sweeps" from LeadClick, to CLUSI, and then to CoreLogic—including the $4.1 million August 2011 transfer—"were related to CoreLogic's decision to bring LeadClick into its shared services program." R. 13a (SJ Op. 13). According to the district court, the undisputed record established all of the following facts relevant to whether CoreLogic had a "legitimate claim" to the funds:

- "[S]ervice programs" of the sort at issue here "are common among large companies with subsidiaries because of the advantages they provide." *Id.* (quotation omitted).

- "LeadClick's and CoreLogic's understanding and agreement from the outset of the shared services transition was that CoreLogic would use its treasury funds to pay LeadClick's invoices [i.e., through the accounts payable program] during this transition period [between the establishment of the payables and receivables program], but that CoreLogic would eventually begin collecting LeadClick's receipts into its treasury funds as well, thereby recouping those prior advances." R. 14a (SJ Op. 14) (quotation omitted).

- "CoreLogic advanced approximately $16 million to LeadClick from January 2011 through August 2011," but LeadClick had by the end of August only transferred a total of $8.2 million back to CoreLogic through the cash management system. *Id.* (quotation omitted).

- "The decision to close LeadClick's Mechanics Bank account"—which resulted in the $4.1 million transfer—"was unrelated to and independent of the later decision [in September 2011] to close LeadClick." R. 15a (SJ Op. 15).

Despite recognizing these undisputed facts, the district court concluded that

CoreLogic had not provided "valuable consideration" in exchange for the $4.1 million it received from LeadClick (through CLUSI) on August 30, 2011. In the district court's view, "for the advances to constitute valuable consideration, they must have been made as part of a bona fide creditor-debtor relationship," and that the advances cannot qualify as "valuable consideration" if they "were essentially investments made in the hopes of future returns." R. 35-36a (SJ Op. 35-36). In other words, answering the question whether CoreLogic's advances constituted "debt or equity" would determine whether CoreLogic had a "legitimate claim" to the $4.1 million August 2011 transfer. R. 37a (SJ Op. 37).

Applying its novel debt-equity test, the district court concluded that "no reasonable jury could find that CoreLogic's advances were bona fide loans extended to LeadClick," because they lacked certain formalities: "[T]here was no agreed upon repayment schedule or repayment deadline, no security for those advances, no written loan agreement, and no interest due in connection with the funds CoreLogic provided LeadClick in 2011," and because "LeadClick's ability to repay was dependent on LeadClick's future business performance and collections." R. 37-38a (SJ Op. 37-38) (citation omitted). "These undisputed facts," the district court concluded, "destroy any basis for a reasonable jury to find an arm's length transaction that would occur in a bona fide loan agreement." R. 38a (SJ Op. 38).

Finally, the district court acknowledged that LeadClick owed CLUSI nearly $8 million under the First American loan agreement and that the challenged $4.1 million transfer was made from LeadClick to CLUSI, but nevertheless held that CLUSI did not have a legitimate claim to the $4.1 million because "CoreLogic controlled the destination of the funds and ultimately ended up holding them." R. 39a (SJ Op. 39).

SUMMARY OF ARGUMENT

It is undisputed that CoreLogic engaged in no wrongdoing, and thus cannot itself be held liable for violating the FTCA. And because the FTC failed to prove that CoreLogic lacks any legitimate claim to the $4.1 million it collected from LeadClick in August 2011, there is no lawful basis for requiring CoreLogic to disgorge those funds on a "relief defendant" theory.

I. A. A "relief defendant" is merely a nominal defendant who has not itself engaged in any wrongdoing, but who may nevertheless be subject to disgorgement of funds if it possesses only a nominal or custodial interest in funds that are actually owned by another party who obtained those funds illegally. The paradigmatic example of a relief defendant is a trustee, agent, or depositary, which itself has no legitimate ownership claim to the funds it is holding, and thus may be joined to a lawsuit for purposes of collection.

The law does not permit recovery from an innocent third party under the relief defendant doctrine, however, when the innocent party has a legitimate claim of its own to the funds. The government has the burden of proving that the innocent party lacks such a legitimate claim to the assets the government seeks to recover. And under precedents of this Court and others, to prove that an innocent party has no legitimate claim to funds in its possession, the government must prove that the party did not provide any valuable consideration in exchange for the funds.

B. The undisputed facts of this case show that the FTC did not and could not prove that CoreLogic provided no valuable consideration to LeadClick in exchange for the $4.1 CoreLogic collected from LeadClick in August 2011. Most obviously, all agree that as part of their shared services agreement, CoreLogic advanced LeadClick approximately $16 million to pay its invoices, with the explicit agreement that CoreLogic would later recoup those advances out of LeadClick's future customer receipts. It is similarly undisputed that the $4.1 million was transferred to CoreLogic in August 2011 as partial recoupment of the earlier $16 million advance, per the parties' prior agreement. The undisputed facts thus make clear that, as a matter of law, CoreLogic has a legitimate claim to the $4.1 million because it received those funds in exchange for valuable consideration. CoreLogic accordingly does not qualify as a relief defendant.

C. The district court's contrary conclusion rested on two fundamental legal errors. *First*, rather than simply asking whether CoreLogic received the funds the FTC seeks to disgorge in exchange for valuable consideration, as this Court's precedents require, the district court imported into relief-defendant law an inapposite inquiry from bankruptcy law, and held that a defendant has a legitimate claim to funds only if it received them under a formalized debtor-creditor arrangement, but not if it received them as a return of an equity investment. No court has ever applied a debt-equity test in the relief-defendant context, and it makes no sense to do so. An equity investor receiving a return of its equity investment has just as legitimate a claim to that equity as does a creditor being repaid on a loan. For that reason, several courts have held in the relief defendant context that equity investors have a legitimate claim to the return of their investments.

Second, even accepting the validity of this debt-equity test, the district court erred in holding that the agreement between CoreLogic and LeadClick did not count as a debtor-creditor relationship. CoreLogic had advanced (i.e., loaned) LeadClick funds, and LeadClick was in the process of paying CoreLogic back, including through the $4.1 million transfer, according to their prior agreement. The district court ignored this obvious debtor-creditor relationship because the shared services agreement lacked some of the formalities one might expect in a

fully arms-length agreement between unaffiliated business entities. But requiring such exacting formalities as evidence of a debtor-creditor relationship makes sense only where there might otherwise be doubt about the bona fides of the parties' agreement. There is no such doubt here. Shared services agreements of the type CoreLogic and LeadClick entered into are routine among parent corporations and their wholly-owned subsidiaries, and they are rarely formalized the way a loan agreement between unaffiliated parties would be. Even the FTC did not contend that the agreement between LeadClick and CoreLogic was invalid or otherwise suspect. There was thus no basis in law or fact for the district court to conclude that CoreLogic lacked a legitimate claim to recoup the funds it had previously advanced to LeadClick pursuant to the terms of the parties' agreement.

II. Even accepting the district court's unprecedented theory that a party has a legitimate claim to repayment of funds only when there is a fully formalized agreement specifying all terms of repayment, the court erred in rejecting CoreLogic's alternative argument that the FTC still was not entitled to disgorgement of the $4.1 million because *CLUSI*—which had received the funds directly from LeadClick before transferring them to CoreLogic—also had a legitimate claim to those funds. CLUSI had previously loaned LeadClick nearly $16 million under a formalized revolving credit agreement established in 2008 when LeadClick had multiple, unaffiliated owners, and LeadClick owed CLUSI

approximately $8 million under that agreement at the time of the August 2011 transfer. CLUSI thus had a legitimate claim to the $4.1 million as a repayment of its formalized loan.

The FTC never named CLUSI as a relief defendant, or attempted to prove that CLUSI lacked a legitimate claim to the funds. The district court nevertheless rejected this argument because the funds were ultimately transferred to CoreLogic. But that transfer is irrelevant—CLUSI had a legitimate claim to the funds, and once it received them, it was free to do with them what it wished, including transferring them to CoreLogic.

STANDARD OF REVIEW

This Court "review[s] a district court's grant of summary judgment de novo, construing all evidence in the light most favorable to the non-moving party, and affirming only where 'there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015) (quoting Fed. R. Civ. P. 56(a); citation omitted).

ARGUMENT

I. THE UNDISPUTED FACTUAL RECORD ESTABLISHES THAT CORELOGIC POSSESSED A LEGITIMATE CLAIM TO THE $4.1 MILLION AT ISSUE AND THUS CANNOT BE COMPELLED TO DISGORGE THOSE FUNDS

This Court and others have recognized the authority of the FTC to seek recovery from innocent parties as relief defendants, but only in narrow circumstances. A relief defendant is a person or entity that has committed no wrongdoing, but is merely the nominal holder or custodian of another's funds. For example, if the FTC proves an advertiser received ill-gotten gains through deceptive practices, it may recover the gains not only from the deceptive advertiser, but also directly from the bank in which the gains are being held. The very definition of a relief defendant thus excludes an innocent third party that holds assets *not* as a custodian for another, but that has *its own* "legitimate claim" to the assets. And under settled law, an innocent party who received assets from the wrongdoer in exchange for some form of "valuable consideration" possesses a legitimate claim that cannot be divested on a relief defendant theory.

Here, the district court itself recognized that CoreLogic received the $4.1 million at issue specifically to recoup part of the $16 million it had previously advanced to pay LeadClick's bills, as part of the shared services agreement between CoreLogic and LeadClick. It necessarily follows that CoreLogic has a legitimate claim to the $4.1 million. The district court's contrary conclusion rests

on a simple—but fundamental—misunderstanding of the law governing the relief defendant doctrine. Correction of that error compels reversal of the judgment below, and the entry of judgment in CoreLogic's favor.[5]

A. A "Relief Defendant" Is A Nominal Defendant Who Merely Possesses The Assets Of Another Without Any "Legitimate Claim" Of Its Own

"A relief defendant, sometimes referred to as a 'nominal defendant,' has no ownership interest in the property that is the subject of litigation but may be joined in the lawsuit to aid the recovery of relief." *Janvey v. Adams*, 588 F.3d 831, 834 (5th Cir. 2009) (citing *SEC v. Cavanagh*, 445 F.3d 105, 109 n. 7 (2d Cir. 2006). The "paradigmatic nominal defendant is a trustee, agent, or depositary," which itself "has no legitimate claim to the disputed property," and is thus "joined purely as a means of facilitating collection." *SEC v. Collelo*, 139 F.3d 674, 676 (9th Cir. 1998) (citation omitted). This Court has described a relief defendant in similar terms, i.e., "a person who holds the subject matter of the litigation in a subordinate or possessory capacity as to which there is no dispute." *CFTC v. Walsh*, 618 F.3d 218, 225 (2d Cir. 2010) (quotation omitted). Because the relief defendant's interest in the funds is purely custodial, its "relation to the suit is merely incidental and 'it is of no moment [to him] whether the one or the other side in [the]

[5] Because the disgorgement ordered from CoreLogic depends entirely on the liability ruling against LeadClick, reversal of the judgment against LeadClick of course would also compel reversal of the judgment against CoreLogic.

controversy succeed[s].'" *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (quoting *Bacon v. Rives*, 106 U.S. 99, 104 (1882)).

Where, however, the innocent third party *does* possess a legitimate claim of its own to the funds, the relief defendant doctrine recognizes and protects that interest—it permits recovery *only* where the innocent party "(1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998). To minimize the risk of error, the burden lies not with the innocent party to prove the legitimacy of its claim, but with the government to prove that the innocent party *lacks* any legitimate claim of its own to the assets the government seeks to recover. *Collelo*, 139 F.3d at 677. To make that showing, the government must prove that the innocent party is merely an "empty vessel into which the true wrongdoers funneled their proceeds." *SEC v. Ross*, 504 F.3d 1130, 1144 (9th Cir. 2007).

The question whether an innocent party has its own legitimate claim to assets it has received from another party (including a wrongdoer) turns on whether the innocent party provided some form of value in exchange for receipt of the property. In this Court's words, "relief defendants who have provided *some form of valuable consideration* in good faith . . . are beyond the reach of the district court's disgorgement remedy." *Walsh*, 618 F.3d at 226 (emphasis added); *see SEC v. DCI Telecomm'ns, Inc.*, 122 F. Supp. 2d 495, 502 (S.D.N.Y. 2000) (relief

defendant who "did not provide value for [the contested] assets" had "no just claim to them"). Under that rule, when the innocent party has received funds absent any exchange of valuable consideration, and thus is merely a "gratuitous donee of fraudulently-obtained funds," the funds *can* be disgorged under the relief defendant doctrine. *SEC v. Better Life Club of Am.*, 995 F. Supp. 167, 180 (D.D.C. 1998); *see SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005) (relief defendant had no legitimate claim to property conveyed by wrongdoer "as a gift"). Enforcing the line between outright gratuities and exchanges for value, this Court has observed, prevents a wrongdoer from "circumvent[ing] the [agency's] power to recapture fraud proceeds, by the simple procedure of giving stock to friends and relatives." *Cavanagh*, 155 F.3d at 137.

This Court and others have made equally clear, however, that if the innocent party received assets not as an outright gratuity, but in exchange for any form of valuable consideration, the government cannot take away those assets on a relief defendant theory. For example, courts have held that "receipt of funds as payment for services rendered . . . constitutes one type of ownership interest that would preclude proceeding against the holder of the funds as a [relief] defendant." *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F. 3d 187, 192 (4th Cir. 2002); *see FTC v. Bronson Partners*, 674 F. Supp. 2d 373, 392 (D. Conn. 2009) (employee not liable as relief defendant when monies she received "were legitimately paid in

consideration for her services"). Investments, financial or otherwise, made to maintain or grow the assets also count as value giving rise to a "legitimate claim." *See SEC v. Quan*, 2014 WL 4670923, at *18-19 (D. Minn. 2014) ("financial and non-financial contributions" made to "preserve and enhance" real estate, including "mortgage payments, gardening services, dues, and other upkeep," established legitimate claim to disputed real estate). And a loan that creates any kind of debtor-creditor relationship is "value" justifying a "legitimate claim" to repayment of the principal and the interest earned. *See Janvey*, 588 F.3d at 834-35 ("debtor-creditor relationship" "constitutes a sufficient legitimate ownership interest to preclude treating [defendants] as relief defendants"); *SEC v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (pre-existing "debtor-creditor relationship" precluded relief defendant status). In each of these examples, the value the innocent party expended to obtain (or improve) the assets rebuts any inference that its "ownership claim is a sham," and demonstrates that the party did not "act[] as a mere conduit of proceeds." *CFTC v. WeCorp*, 848 F. Supp. 2d 1195, 1202 (D. Haw. 2012).

B. CoreLogic Has A Legitimate Claim To The Challenged Funds Because It Indisputably Received Those Funds In Exchange For Valuable Consideration

Under the foregoing settled legal standards, the sole question is whether CoreLogic received the $4.1 million August 2001 transfer in exchange for

"valuable consideration" it provided to LeadClick. That question answers itself. The undisputed facts of this case, as described by the district court itself, establish that the $4.1 million was received in exchange for prior cash advances of $16 million pursuant to the parties' prior agreement, and that CoreLogic also provided various back-office services to LeadClick that the district court recognized as valuable.

Between 2010 and 2011, LeadClick, along with the six other CLUSI subsidiaries, transitioned its general ledger, financial reporting, cash disbursements, payroll, and cash-management functions to CoreLogic's shared services program. R. 598-600a (Blake Report at 7-9). By January 2011, CoreLogic was handling LeadClick's accounts payable, including by making cash disbursements out of its own treasury of approximately $16 million between January 2011 and August 2011 to cover LeadClick's vendor invoices and other expenses. R. 14a (SJ Op. 14). And by July 2011, LeadClick's accounts receivable—i.e., its incoming revenues—had been integrated into the shared services system. Accordingly, in late August 2011, LeadClick closed its former Mechanics Bank account and transferred the funds contained therein to its new BOA account that was integrated into the shared services system. Under the parties' agreement, that system began to automatically sweep LeadClick's revenues into CoreLogic's central treasury to recoup its earlier (and future) cash

disbursements. Those sweeps included the $4.1 million transferred on August 30, 2011.

The most critical—indeed, dispositive—point about the $4.1 million transfer is that it was made pursuant to the parties' prior agreement that CoreLogic's advances to LeadClick would be repaid out of LeadClick's future revenues. That evidence was wholly undisputed: the FTC's own expert explicitly acknowledged that "repayment of the money" CoreLogic had advanced to LeadClick "was expected out of LeadClick's projected future revenue," R. 695a (Van Wazer Report ¶ 17), and executives for both CoreLogic and LeadClick agreed.[6] Summarizing this key undisputed evidence, the district court observed the $4.1 million was collected pursuant to the parties' earlier agreement that "CoreLogic would eventually begin collecting LeadClick's receipts into its treasury funds . . . thereby recouping those prior advances" of $16 million. R. 14a (SJ Op. 14)

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[6] R. 674a (Chelew Decl. ¶ 10 (former LeadClick executive testifying that his "understanding has always been . . . that the funds advanced by CoreLogic and paid by CoreLogic on LeadClick's behalf were funds that both LeadClick and CoreLogic expected and intended would be paid back.")); R. 677a (Livermore Decl. ¶ 5 (former CoreLogic executive explaining that "[c]onsistent with CoreLogic's policy and practice, the funds advanced to LeadClick through Shared Services were intended to be temporary advances that CoreLogic expected would be paid back")); R. 669a (First Balas Decl. ¶ 16 (current CoreLogic executive stating that "[p]ursuant to CoreLogic's Shared Services policies and practices, CoreLogic and LeadClick intended that th[e] intercompany advances would ultimately be repaid")).

(citation omitted).

The district court itself thus explicitly recognized the most obvious "valuable consideration" CoreLogic provided in exchange for the $4.1 million transfer: the earlier $16 million CoreLogic advanced to pay LeadClick's invoices. Indeed, the court itself identified every fact that establishes the legitimacy of CoreLogic's claim to the $4.1 million: the fact of the $16 million in advances, the fact that the parties specifically agreed that CoreLogic would recoup those advances by sweeping LeadClick's revenues into CoreLogic's treasury, and the fact that the $4.1 million transfer indeed partially recouped the advances pursuant to that agreement. Nobody can disagree that an advance of $16 million constitutes valuable consideration for subsequent recoupment of the advance. Nothing more is needed to demonstrate CoreLogic's patently legitimate claim to the $4.1 million it recouped.

Yet the prior $16 million it advanced is not the only consideration CoreLogic provided for the $4.1 million it eventually received from LeadClick. CoreLogic's provision of back office services also alleviated LeadClick's need to maintain and balance separate operating bank accounts or risk overdrafts due to temporary cash needs. R. 597-600a; R. 630-37a (Blake Report at 6-9; Blake Report, Ex. 1 at 2-9). LeadClick and its sister subsidiaries also could increase productivity by devoting more resources to its core business. *Id.* Use of the shared

services system enabled LeadClick to incur fewer costs as it could take advantage of the economies of scale CoreLogic achieved by centralizing the complex system of cash management.. *Id.* Indeed, the FTC's own expert testified that shared services systems are valuable because they "optimize and make more efficient [a company's] accounting functions and other back office operations." R. 711a (Van Wazer Dep. Tr. at 44:3-8).

Not one of the foregoing facts is disputed by either the FTC or the district court. And those facts unambiguously refute any inference that CoreLogic was a mere custodian of the $4.1 million it collected as recoupment in August 2011, or an empty vessel with no legitimate claim of its own to the recouped advances. The undisputed record instead permits only one conclusion, as a matter of law: because CoreLogic provided valuable consideration for the funds it received, CoreLogic possessed a legitimate claim to them, and it therefore cannot be compelled to disgorge them on a relief defendant theory. *See Walsh*, 618 F.3d at 226; *Cavanagh*, 155 F.3d at 136.

C. The District Court's Conclusion That CoreLogic Lacked A Legitimate Claim To The Assets Was Based on Two Distinct Errors Of Law

Although the foregoing conclusion is compelled by facts the district court itself recognized, the court failed to reach that conclusion because it asked the wrong legal questions. The district court did not simply ask whether CoreLogic

had provided something of value to LeadClick—such as the $16 million previously advanced—in exchange for the $4.1 million CoreLogic collected. The court instead invoked a concept from bankruptcy law and asked whether CoreLogic's $16 million advance to LeadClick was more like debt or equity, and concluded that it was equity—and thus did not count as valuable consideration—because the shared services program did not have the formality of a written loan agreement.

The district court's analysis was wrong as a matter of law, for two principal reasons. First, the debt-equity distinction matters for obvious reasons in bankruptcy law, but it has no application whatsoever to the relief defendant context, as evidenced not least by the fact that no court has ever applied a debt-equity test in this context. The proper question has always been simply whether the relief defendant provided anything of value in exchange for the assets it received, and *both* debt *and* equity provide obvious value. Second, even if it was proper to apply a debt-equity test, the district court erred in requiring the written formalities of an arm's-length debtor-creditor agreement as a condition of finding the payments to constitute debt rather than equity. Again, the undisputed facts recognized by the district court itself establish the very sort of debtor-creditor relationship the court refused to recognize in the absence of written formalities.

1. *It Is Irrelevant Whether The Innocent Party Provided Valuable Consideration In The Form Of Debt Or Equity*

The district court ruled that the $16 million CoreLogic advanced could not

constitute "value" if it was an equity investment in LeadClick, rather than having been provided as part of a loan arrangement. "If CoreLogic's advances to LeadClick were essentially investments made in the hopes of future returns," the district court held, "then CoreLogic does not have a legitimate claim to the $4 million transfer of funds from LeadClick." R. 36-37a (SJ Op. 36-37). In the district court's view, CoreLogic could have a "legitimate claim" to the funds only "if CoreLogic's advances were bona fide loans." R. 37a (SJ Op. 37).

That analysis cannot be reconciled with the legal principles underlying the relief defendant doctrine. As explained in Part I.A., *supra*, the correct question is whether CoreLogic was merely a nominal holder or custodian of the $4.1 million, or whether it has a legitimate claim of its own, which arises so long as it provided any valuable consideration in exchange for the funds. That simple test both ensures that the government can recover ill-gotten gains from assets actually owned by the wrongdoer, while simultaneously ensuring that the government does not interfere with legitimate property interests of innocent third parties without due process and/or just compensation. Nothing in that straightforward inquiry turns on whether the consideration provided by the innocent party—such as the $16 million CoreLogic had advanced to LeadClick—was meant as an equity investment or as a loan arrangement. Regardless whether CoreLogic is best classified as a lender or an equity investor, it plainly was *not* a "mere conduit" or "empty vessel" for the

return of the principal it advanced.

As the district court itself recognized, the parties agreed that CoreLogic would recoup the funds it advanced to pay LeadClick's bills under the accounts payable program through transfers from LeadClick's cash receipts. In other words, whether equity or debt, CoreLogic's prior advances were specifically understood to be consideration for CoreLogic's later collections from LeadClick's revenues. That undisputed fact should end the inquiry. The additional debt-equity test superimposed by the district court is irrelevant to the relief defendant analysis, and indeed contrary to its objectives.

Unsurprisingly, no court has ever applied a debt-equity test to determine whether a named relief defendant has a legitimate claim to disputed funds. To be sure, a formal loan or credit arrangement *can* demonstrate the "value" necessary for a claim to be "legitimate," *see Founding Partners*, 639 F. Supp. 2d at 1294, but no court has ever held that such an arrangement is *required* for a claim to be deemed legitimate. And courts have recognized without hesitation that relief defendants may have legitimate claims to equity distributions. *See FTC v. Direct Mkt'g Concepts, Inc.*, 648 F. Supp. 2d 202, 222-223 (D. Mass. 2009) (rejecting FTC's attempt to disgorge shareholder's dividend); *Quan*, 2014 WL 4670923, at *18-19; *SEC v. Heden*, 51 F. Supp. 2d 296 (S.D.N.Y. 1999).

Heden is especially instructive. The defendant in that case used funds from

his mother's brokerage account to purchase stocks on the basis of insider information. When the SEC prosecuted him, it named his mother as a relief defendant, and sought an order freezing her accounts. His mother consented to freezing the *profits* gained by the illegal trade, *id.* at 301, but the court ruled that the *initial principal* used to make the investment were not available to the SEC, primarily because the mother had "a 'legitimate claim' to those funds," *id.* at 302 & n.4. Here, even if the initial $16 million advanced could be characterized as an equity investment, there is no dispute that CoreLogic only recouped approximately half of that initial investment, including the $4.1 million at issue. *See supra* at 10. Like the defendant's innocent mother in *Heden*, LeadClick's innocent corporate parent here possesses a legitimate claim to recoupment of its initial investment, regardless whether it is best described as "debt" or "equity" for other legal purposes.

The only case on which the district court relied in support of its debt-equity test, *SEC v. Aragon Capital Advisors, LLC*, 2011 WL 3278907 (S.D.N.Y. 2011), actually confirms the district court's error. In *Aragon*, the SEC named as relief defendants to an insider trading case certain members of a limited partnership that had distributed ill-gotten funds to some partners uninvolved in the wrongdoing alleged. *See id.* at *4. The relief defendant partners had objected to the SEC's attempt to reach their funds by arguing that Delaware law gave them a "legitimate

claim" to a share of the partnership's profits. *Id.* at *19. The court did not dispute that general point—to the contrary, the court recognized that partners *do* have a legitimate ownership interest "in the profits and losses of" the partnership." *Id.* at *20. The court instead simply held that the funds distributed in that case *did not constitute profits*, because the partnership was not profitable when the distributions were made, and thus instead was a distribution of partnership assets, to which the partners had no legitimate claim under Delaware law. *Id.* at *20 ("At the time of the distribution, [the partnership] had no 'profits' that could legitimately be distributed."). In other words, the distributions were illegal dividends because the innocent partners "had no ownership interest in those distributions when they were made." *Id.* That analysis plainly has no application here: as the undisputed facts showed and the district court itself explicitly recognized, CoreLogic received the $4.1 million specifically as recoupment of a prior $16 million advance made pursuant to a preexisting agreement. *See supra* at 12. That undisputed fact—not a legally irrelevant debt-equity inquiry—must control the outcome here.

2. *The District Court's Requirement Of A Formalized Agreement Between CoreLogic And LeadClick Is Baseless*

Even accepting the district court's bankruptcy-based debt-equity test, the court still erred in holding that the $16 million CoreLogic advanced to LeadClick could not be classified as a loan arrangement because it lacked some formalities associated with an arm's-length loan agreement. The district court concluded that

because LeadClick and CoreLogic did not fix a repayment schedule or sign a written agreement, there was no "basis for a reasonable jury to find an arm's length transaction that would occur in a bona fide loan agreement." R. 38a (SJ Op. 38). That conclusion was legally incorrect: no relevant legal principle requires an innocent party to produce a formalized loan arrangement to prevent the taking of its assets by the government in circumstances like these.

As an initial matter, even if the question asked by the district court—whether CoreLogic's "advances" to LeadClick were "made as part of a bona fide creditor-debtor relationship," R. 35a (SJ Op. 35)—was the correct question, then the court's own description of the undisputed facts provides the answer: "LeadClick's and CoreLogic's understanding and agreement from the outset of the shared services transition was that CoreLogic would use its treasury funds to pay LeadClick's invoices during this transition period, but that CoreLogic would eventually begin collecting LeadClick's receipts into its treasury funds as well, thereby recouping those prior advances." R. 14a (SJ Op. 14). Nobody would describe an equity investment as an "advance," or a return on equity as "recouping" a "prior advance." An "advance" is a loan, and "recouping" an advance is getting repaid on the loan. If a loan arrangement were indeed required for a relief defendant to have a legitimate claim, the court itself recognized exactly that arrangement here.

The only thing the district court actually found lacking were *formalized loan*

documents. But no precedent in the relief defendant context requires an innocent party to show that a loan agreement was formalized in writing. To be sure, when ascertaining whether a particular transfer was made in good faith, courts have noted the existence of written agreements and other formalities as evidence that the transaction was not a sham or otherwise fraudulent. *See*, *e.g.*, *Janvey*, 588 F.3d at 835 (relevant debtor-creditor agreements existed "well before the underlying SEC enforcement action"). Such evidence is especially helpful when it is unclear whether the ownership interest, though perhaps "recognized in law," is not necessarily "valid in fact." *Kimberlynn*, 276 F.3d at 192. Such questions may arise if, for example, the wrongdoer and innocent party are strangers, where a genuine transfer to the innocent party without formal documents would be unexpected and unlikely. *See*, *e.g.*, *SEC v. Sun Capital, Inc.*, 2009 WL 1362634, at *2 (M.D. Fla. 2009) (noting long history of two unrelated parties using "written loan agreements" to verify relief defendant's legitimate claim). The absence of formalities may also matter when the casual nature of the transaction otherwise suggests some impropriety. *See*, *e.g.*, *SEC v. McGinn Smith & Co.*, 752 F. Supp. 2d 194, 215 (N.D.N.Y. 2010) (relief defendant "[w]as unaware how many loans she made, to whom the loans were made, what they were for, or what the interest rates and payment schedules were. . . . Additionally, [she] made loans of $2 million [and] $6 million for which she had no recollection of terms or conditions.

Such conduct belies any claim of a legitimate creditor-debtor relationship.”).

But none of those questions is implicated here, and the district court did not hold otherwise. To the contrary, the relationship between LeadClick and CoreLogic was already well established and clearly defined before the particular transaction in question. Again, the district court itself recognized that CoreLogic collected the $4.1 million to recoup its prior advances pursuant to a preexisting agreement. The district court also recognized—while not appreciating the consequences—that shared services agreements between corporate parents and corporate subsidiaries are “common among large companies with subsidiaries.” R. 13a (SJ Op. 13) (citation omitted). In fact, “[a]bout half of the Fortune 500 companies have established some form of shared services, primarily to support financial transactions, human resources, and information technologies.” R. 597a (Blake Report at 6) (quotation omitted). And, as both CoreLogic and the FTC’s experts agreed, such arrangements generally are *not* documented in written agreements, but rather use internal recordkeeping systems to track parent-subsidiary obligations without resort to formal promissory notes or contracts, as was done here. R. 601a; R. 711-13a; R. 663a (Blake Report at 10; Van Wazer Dep. Tr at 42:21-51:7; Balas Dep. Tr. at 282:6-284:15).

Given the parent/subsidiary context of this entirely common and legitimate arrangement, and the fact that such arrangements do not customarily involve

formalized agreements, there is no reason whatever to expect that the agreement between CoreLogic and LeadClick would bear all the hallmarks of a formal loan. The lack of such formality thus has no bearing on the relief-defendant analysis, *even if* that analysis requires proof that the innocent party's consideration came in the form of debt rather than equity.

The effect of the district court's insistence on the type of formal arrangement between unaffiliated parties in the context of a corporate parent-subsidiary relationship is to eviscerate the principle of corporate separateness that this Court has deemed fundamental. A "corporate entity is liable for the acts of a separate, related entity only under extraordinary circumstances, commonly referred to as piercing the corporate veil." *Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996). No one argues that the corporate veil between CoreLogic and LeadClick can be pierced here, but that is the effect of the district court's decision: the court essentially held CoreLogic liable for a portion of LeadClick's alleged wrongdoing because the court believed the parties' agreement lacked sufficient formality, even though such formality is not required to treat affiliated corporate entities as separate, and even though a parent-subsidiary agreement of this sort is not normally memorialized in the formal manner the district court required.

Under the correct legal analysis, of course, these questions are not even relevant. What matters is simply whether CoreLogic has a "legitimate claim" to

the $4.1 million, and the district court itself described as "undisputed" all the facts that answer that question in CoreLogic's favor: (i) CoreLogic had previously paid more than the $4.1 million on LeadClick's behalf as part of "CoreLogic's decision to bring LeadClick into its shared services program"; (ii) such programs are "common among large companies with subsidiaries because of the advantages they provide"; and (iii) CoreLogic and LeadClick had an "understanding and agreement from the outset" that CoreLogic would advance funds to pay LeadClick's bills and that CoreLogic would "begin collecting LeadClick's receipts" in order to "recoup[] those prior advances." R. 13-14a; R. 674a; R. 677a; R. 669a (SJ Op. 13-14) (citation omitted); Chelew Decl. ¶ 10; Livermore Decl. ¶ 5; First Balas Decl. ¶ 16). Under the correct legal standard, those undisputed facts entitle CoreLogic to judgment as a matter of law.

II. LEADCLICK'S PRE-EXISTING LINE OF CREDIT AGREEMENT WITH CLUSI ALSO PREVENTS THE FTC FROM DISGORGING THE $4.1 MILLION

For the reasons explained in Part I, the district court erred in holding that a party can only avoid disgorgement of funds as a "relief defendant" by proving the existence of a formal debtor-creditor relationship with the alleged wrongdoer from whom it received the disputed funds. But even taken on its own terms, the district court erred in rejecting CoreLogic's alternative argument below that the FTC was not entitled to disgorge the disputed $4.1 million because *CLUSI*—the entity that

actually received the funds directly from LeadClick before transferring them to CoreLogic—had a legitimate claim to those funds, and CLUSI thus was free to handle those funds as CLUSI saw fit.

In October 2008, LeadClick entered into a formalized and written promissory note and accompanying loan agreement with its then indirect majority owner, First Advantage, authorizing LeadClick to borrow up to $15.7 million under a revolving line of credit. R. 648a; R. 650-56a; R. 645a (Second Balas Decl. ¶ 3; Second Balas Decl. Exs. A & B; Theologides Decl. ¶ 4). In January 2011, First Advantage changed its name to CLUSI. R. 648a; R. 657-59a (Second Balas Decl. ¶ 4; Second Balas Decl. Ex. C). As of August 30, 2011, the date of the $4 million transfer, LeadClick owed CLUSI $8 million in outstanding unpaid principal under the line of credit agreement. R. 648-49a (Second Balas Decl. ¶ 5).

This outstanding line of credit constitutes "valuable consideration" sufficient to give CLUSI a legitimate claim to the $4.1 million in funds it received. "[C]reditors whose loans [are] repaid by [the wrongdoer] defendant . . . ha[ve] sufficient legitimate ownership of the funds so as to preclude being treated as relief defendants." *Walsh*, 618 F.3d at 226 (discussing *Janvey*, 588 F.3d at 834-35). And there can be no dispute that CLUSI's line of credit agreement had the formal qualities—e.g., a written agreement with clear terms entered into before the underlying enforcement action—that, in the district court's erroneous view, must

be proved to avoid relief defendant status. *See supra* Part I.C.2. In other words, the longstanding line of credit agreement between CLUSI and LeadClick was exactly the "bona fide loan agreement" the district court was looking for, R. 38a (SJ Op. 38)—which is presumably why the FTC never named CLUSI as a relief defendant or otherwise made any effort to satisfy its burden of showing that CLUSI lacked a legitimate claim to the transferred funds.

The district court nevertheless rejected this basis for precluding disgorgement. The court deemed it "irrelevant" that the $4.1 million was transferred first to CLUSI as required by the written loan agreement, because it was CoreLogic itself that "ultimately ended up holding [the funds]." R. 39a (SJ Op. 39). That analysis misses the mark. CLUSI's indisputably legitimate claim to the $4.1 million means that once it possessed the funds, CLUSI had a right to distribute the funds in whatever manner it deemed appropriate. Under both the Uniform Commercial Code and at common law, an entity that purchases the proceeds of a fraud for "value" and in "good faith" obtains "good title" to the assets. U.C.C. § 2-403(1); *see Bakalar v. Vavra*, 619 F.3d 136, 148-149 (2d Cir. 2010) (Korman, J., by designation, concurring). Having good title, the good faith purchaser for value may then transfer the originally ill-gotten property to yet another party for little or no value whatsoever. As Justice Kennedy observed (on a point not disputed in the case), under "centuries-old concept[s] now codified in 49

States," a "transferee who acquires property from a good-faith purchaser for value . . . obtains good title, even if the transferee did not pay value or act in good faith." *United States v. Parcel of Land, Bldgs, Appurtenances and Improvements Known as 92 Buena Vista Ave.*, 507 U.S. 111, 142 (1993) (Kennedy, J., dissenting). Having provided valuable consideration for the $4.1 million it received from LeadClick, CLUSI was free to trade, invest, or gift those funds however it chose. The fact that CoreLogic ultimately ended up with possession of the $4.1 million cannot somehow retroactively unwind CLUSI's own legitimate claim to the funds, including its ability to use them in whatever manner CLUSI saw fit.

The district court accordingly erred in relying on how CLUSI elected to use the $4.1 million it received from LeadClick. The district court ruled that CLUSI lacked a legitimate claim of its own to the $4.1 million in transferred funds in part because CLUSI ostensibly did not use them to "pay down" LeadClick's $8 million debt to CLUSI. R. 39a (SJ Op. 39). But given CLUSI's indisputable entitlement to the funds as LeadClick's creditor, it is irrelevant whether or how CLUSI formally reflected a debt reduction on its balance sheet. CLUSI's internal recordkeeping practices do nothing to undermine either the legitimacy of CLUSI's claim to the $4.1 million or its authority to transfer the funds with good title to CoreLogic. What ultimately matters is that upon the transfer to CLUSI, *LeadClick itself* no longer had any viable claim to the funds whatsoever, and thus *neither*

CLUSI *nor* CoreLogic can be deemed a custodian of funds owned by LeadClick.

For this independent reason, the order requiring CoreLogic to disgorge the funds is wrong as a matter of law.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, with instructions to enter judgment for CoreLogic.

Respectfully submitted,

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Dated: July 20, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,547 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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Dated: December 21, 2015