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 REPLY BRIEF FOR DEFENDANT-APPELLANT CORELOGIC, INC.

ANTON METLITSKY
O'MELVENY & MYERS LLP
7 Times Square
New York, New York 10036
(212) 326-2000

JONATHAN D. HACKER
BURDEN H. WALKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Defendant-Appellant CoreLogic, Inc.

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 4

I. THE UNDISPUTED FACTUAL RECORD DEMONSTRATES THAT CORELOGIC HAS A LEGITIMATE CLAIM TO THE $4.1 MILLION AT ISSUE AND IS THUS NOT SUBJECT TO A DISGORGEMENT REMEDY 4

A. CoreLogic Provided Valuable Consideration In The Form Of $16 Million In Return For The $4.1 Million At Issue Here 4

B. The Distinction Between Debt And Equity Is Irrelevant To The "Legitimate Claim/Valuable Consideration" Test And Has No Application Here In Any Event 6

1. The "Legitimate Claim/Valuable Consideration" Test Does Not Distinguish Between Debt And Equity Payments 7

2. CoreLogic's Advance To LeadClick Was A Loan 14

3. To The Extent A Formal Loan Agreement Is Required, Such An Agreement Existed Between LeadClick And CLUSI, Which Is An Independent Basis To Reject A Relief-Defendant Finding 17

II. THE DISTRICT COURT'S SUMMARY JUDGMENT RULING CANNOT BE SUSTAINED ON THE BASIS OF A BAD FAITH FINDING THE DISTRICT COURT DID NOT MAKE AND THE RECORD DOES NOT SUPPORT 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986)....................20

Bacon v. Rives,
106 U.S. 99 (1882)....................10

Balintulo v. Ford Motor Co.,
796 F.3d 160 (2d Cir. 2015)....................9

Boston Trading Group, Inc. v. Burnazos,
835 F.2d 1504 (1st Cir. 1987)....................21

CFTC v. Hanover Trading Corp.,
34 F. Supp. 2d 203 (S.D.N.Y. 1999)....................21

CFTC v. Kimberlynn Creek Ranch, Inc.,
276 F.3d 187 (4th Cir. 2002)....................11

CFTC v. Walsh,
618 F.3d 218 (2d Cir. 2010)....................*passim*

HBE Leasing Corp. v. Frank,
48 F.3d 623 (2d Cir. 1995)....................21

Hubbs v. Suffolk Cnty. Sheriff's Dep't,
788 F.3d 54 (2d Cir. 2015)....................20

Janvey v. Adams,
588 F.3d 831 (5th Cir. 2009)....................16

Morris v. New York State Dep't of Taxation & Fin.,
82 N.Y.2d 135 (N.Y. 1993)....................9

SEC v. Aragon Capital Advisors, LLC,
2011 WL 3278907 (S.D.N.Y. July 26)....................11, 12

SEC v. Cavanagh,
155 F.3d 129 (2d Cir. 1998)....................4, 5

TABLE OF AUTHORITIES
(continued)

Page

SEC v. Cherif,
933 F.2d 403 (7th Cir. 1991) 8, 10, 11

SEC v. Constantin,
939 F. Supp. 2d 288 (S.D.N.Y. 2013) 21

SEC v. Contorinis,
743 F.3d 296 (2d Cir. 2014) 10

SEC v. Founding Partners Capital Mgmt.,
639 F. Supp. 2d 1291 (M.D. Fla. 2009)....................16

SEC v. Heden,
51 F. Supp. 2d 296 (S.D.N.Y. 1999) 12, 13

SEC v. Quan,
2014 WL 4670923 (D. Minn. Sept. 19)....................13

SEC v. Ross,
504 F.3d 1130 (9th Cir. 2007) 7

United States v. Bestfoods,
524 U.S. 51 (1998)....................8

United States v. Parcel of Land, Bldgs, Appurtenances and Improvements Known as 92 Buena Vista Ave.,
507 U.S. 111 (1993)....................19

Statutes

15 U.S.C. § 53(b) 10

28 U.S.C. § 1331 10

Other Authorities

Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)....................9

1 Garrard Glenn, *Fraudulent Conveyances And Preferences* § 295 (1940) 21

INTRODUCTION

The FTC's brief confirms that CoreLogic is entitled to judgment in this case. First, the FTC concedes that CoreLogic itself did not violate the FTC Act. Second, the FTC concedes that an agency cannot compel an innocent third party like CoreLogic to disgorge funds as a "relief defendant" in an action against another party if the innocent party had a "legitimate claim" to the funds because it provided "valuable consideration" in exchange for them. Those twin concessions resolve this case, on the basis of district court factual findings the FTC does not contest.

Those findings establish that CoreLogic *did* provide "valuable consideration" for the $4.1 million it received from LeadClick and therefore had a "legitimate claim" to those funds. According to the court's findings, CoreLogic advanced approximately $16 million to LeadClick to cover accounts payable pursuant to a preexisting shared services agreement, with the "understanding and agreement" that LeadClick would repay the advance from its revenues, which is what LeadClick was doing when it transferred $4.1 million to CoreLogic in August 2011. None of these facts is disputed, and together they establish, as a matter of law, that CoreLogic cannot be deemed a relief defendant.[1]

---

[1] These facts become relevant, of course, only if the FTC first establishes that the $4.1 million was the proceeds of FTC Act violations. CoreLogic Br. 20 n.5. For the reasons explained in LeadClick's brief in this consolidated appeal, the FTC has not made that threshold showing. *See also infra* note 2.

The FTC argues otherwise on the basis of a legal theory that is contrary to precedent, logic, and the undisputed facts of this case. According to the FTC, CoreLogic lacked a "legitimate claim" to the $4.1 million it recouped from LeadClick because the $16 million CoreLogic advanced as consideration constituted *equity*, not an extension of credit. Citing an inapposite distinction between equity and credit recognized in bankruptcy law, the FTC—like the district court—asserts that an innocent party has a "legitimate claim" to funds received from a wrongdoer *only* if the funds were received as payment on a formal debt pursuant to a written instrument. The FTC cites no precedent in the relief defendant context supporting that theory, and none exists. To the contrary, multiple cases have held that innocent parties who were paid back their equity in an enterprise had "legitimate claims" to that equity and thus could not be deemed relief defendants. As those cases demonstrate, what matters is simply whether the innocent party paid valuable consideration for the funds, not whether such consideration is classified technically as debt or equity.

What is more, the undisputed facts establish that the $4.1 million *was* a repayment on CoreLogic's $16 million advance to pay invoices, pursuant to the preexisting shared-serves agreement between CoreLogic and LeadClick. The FTC, like the district court, cites absolutely nothing to show that a concededly bona fide intra-corporate transaction like the shared services agreement will give rise to a

"legitimate claim" only if the agreement bears the hallmarks of a business transaction between *unaffiliated* parties. That rule would make no sense, as shown by the amicus brief of the Chamber of Commerce and other organizations, which is surely why no court has ever endorsed it.

Unable to seriously defend the district court's ruling on its own terms, the FTC retreats to an alternative ground not considered by the court and not supported by the record. According to the FTC, CoreLogic *knew* LeadClick's payment was the proceeds of FTC Act violations, and thus even if CoreLogic had a "legitimate claim" to recoupment of its $16 million in advances, it did not obtain that recoupment in "good faith." The FTC, however, neither acknowledges nor satisfies its burden to evaluate the evidence on this issue in the light most favorable to CoreLogic, as required on summary judgment. The FTC instead cites only snippets of misstated and irrelevant testimony, none of which establishes—much less establishes *as a matter of law*—that CoreLogic knew that some portion of the $4.1 million recoupment was the proceeds of FTC Act violations. To the contrary, the actual evidence shows without contradiction that CoreLogic never had such knowledge, but instead simply recouped advances to LeadClick pursuant to the bona fide "shared services" arrangement.

Ultimately, the FTC cannot overcome the concession that resolves this case: CoreLogic did not violate the FTC Act. It is an innocent party in this action. The

district court accordingly lacked jurisdiction to compel disgorgement from CoreLogic, except in the narrowest of circumstances not present here. The judgment should be reversed.

ARGUMENT

I. THE UNDISPUTED FACTUAL RECORD DEMONSTRATES THAT CORELOGIC HAS A LEGITIMATE CLAIM TO THE $4.1 MILLION AT ISSUE AND IS THUS NOT SUBJECT TO A DISGORGEMENT REMEDY

A. CoreLogic Provided Valuable Consideration In The Form Of $16 Million In Return For The $4.1 Million At Issue Here

The FTC admits that "CoreLogic did not violate the FTC Act," FTC Br. 41, and instead seeks to hold CoreLogic liable only as a "relief defendant." FTC Br. 41-51. But under the controlling legal standard (which the FTC concedes) and the district court's factual findings (which the FTC does not dispute), CoreLogic cannot be held liable as a relief defendant as a matter of law.

The FTC agrees that an innocent third party can be compelled to disgorge funds as a relief defendant *only* where the 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). And the FTC concedes that an innocent party has a "legitimate claim" to funds when the party has "'provided some form of *valuable consideration* in good faith in return for the proceeds.'" FTC Br. 41 (quoting *CFTC v. Walsh*, 618 F.3d 218, 226 (2d Cir. 2010)) (emphasis added); *see Walsh*, 618 F.3d at 225 (proper relief defendant "has no ownership interest in the property

which is the subject of litigation" (quotation omitted)).

Under that standard, even assuming some fraction of the $4.1 million CoreLogic received from LeadClick was the proceeds of FTC Act violations,[2] CoreLogic cannot be compelled to disgorge those proceeds if it provided "some form of valuable consideration" for them. The district court's uncontested factual findings conclusively resolve that issue. LeadClick and six other CoreLogic subsidiaries transitioned much of their back office operations to CoreLogic's "shared services" program in late 2010 and early 2011. R. 598-99a (Blake Report at 7-9). Under that agreement, CoreLogic began administering LeadClick's accounts payable in January 2011, and in the first 8 months of 2011, CoreLogic advanced approximately $16 million to pay LeadClick's bills. R. 14a (SJ Op. 14). As the district court expressly found, and as the FTC does not dispute, "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

---

[2] As already noted, LeadClick's brief shows that its conduct did not violate the FTC Act at all, and thus none of $4.1 million was the proceeds of FTC Act violations. *See supra* note 1. Further, the uncontroverted record evidence established that, of the $4.1 million transferred to CoreLogic on August 30, 2011, at most $1,576,040.99 could possibly be attributed to LeadClick revenues derived *from LeanSpa*, which was the sole alleged source of any FTC Act violations. R. 671a (First Balas Decl. ¶¶ 25-27). That amount is accordingly the maximum FTC could justify in disgorgement, even in theory. *See SEC v. Cavanagh*, 155 F.3d 129, 136-37 (2d Cir. 1998) (recovery from relief defendant must be limited to recovery of assets that are the proceeds of violations).

LeadClick's invoices," and that "CoreLogic would eventually begin collecting LeadClick's receipts into its treasury funds . . . thereby recouping those prior advances." R. 14a (SJ Op. 14) (emphasis added). And the FTC does not dispute that CoreLogic recouped the $4.1 million at issue in this case pursuant to that earlier "understanding and agreement."

That uncontested record establishes the only fact that matters under the legal standard the FTC acknowledges as controlling: CoreLogic provided LeadClick with "valuable consideration"—the $16 million advanced to pay bills—in exchange for the $4.1 million CoreLogic recouped from LeadClick pursuant to the parties' agreement. *Walsh*, 618 F.3d at 226. On these facts, CoreLogic cannot be deemed a relief defendant under controlling law.

B. The Distinction Between Debt And Equity Is Irrelevant To The "Legitimate Claim/Valuable Consideration" Test And Has No Application Here In Any Event

Unable to prove that CoreLogic is a proper relief defendant under the existing "legitimate claim/valuable consideration" test, the FTC seeks a dramatic change in the law, albeit without admitting as much. The FTC, following the district court's lead, argues that CoreLogic did not pay "valuable consideration" for the $4.1 million it received, because its $16 million advance constituted an equity investment, rather than an extension of credit. That argument is legally wrong and factually baseless.

1. *The "Legitimate Claim/Valuable Consideration" Test Does Not Distinguish Between Debt And Equity Payments*

As CoreLogic's opening brief explained, no court in the relief-defendant context has ever held that an innocent party can be compelled to disgorge funds only if it can show that it received the funds as repayment of a formal debt. CoreLogic Br. 30-32. The FTC's brief cites nothing to fill that gap. The lack of authority is no surprise—the distinction between debt and equity bears no connection whatsoever to the objectives of the relief defendant doctrine.

a. The debt/equity distinction on which the FTC relies derives from bankruptcy law, where it serves to distinguish creditors from equity-holders and thereby determine the priority of claims—a creditor must be paid before an equity-holder. CoreLogic Br. 28. The relief defendant doctrine is concerned with a very different kind of distinction, i.e., (i) an innocent third party that has only a "possessory" interest in the challenged property, *Walsh*, 618 F.3d at 225, because he is merely an "empty vessel into which the true wrongdoers funneled their proceeds," *SEC v. Ross*, 504 F.3d 1130, 1144 (9th Cir. 2007), versus (ii) an innocent third party with a "legitimate claim" of his own to assets in his possession, because he paid "valuable consideration" for them. *Walsh*, 618 F.3d at 226; *see* CoreLogic Br. 29. Nothing about that distinction depends on whether the consideration was classified as debt or equity.

The FTC, however, contends that equity must be excluded from the analysis

because otherwise wrongdoers might "immunize their unlawful proceeds (and defeat full relief to victims) simply by transferring money back to those who funded the enterprise." FTC Br. 44-45. The FTC even frets that that "corporate structures" could be erected "to shield illegitimate assets." *Id.*

The FTC misunderstands the "legitimate claim/valuable consideration" test for determining whether innocent third parties can be forced to disgorge funds as relief defendants. Obviously if a law enforcement agency can prove that "those who funded the enterprise" violated the law in doing so, then the relief defendant doctrine is simply irrelevant—the agency could pursue that party independently for its own violation. The relief defendant doctrine applies only where, as here, the agency *cannot* show that a party violated the law, and therefore must be treated as innocent of the wrongdoing as a matter of law. *See SEC v. Cherif*, 933 F.2d 403, 415 (7th Cir. 1991) (agency cannot name party as a relief defendant "to excuse itself from having to establish subject matter jurisdiction [over the party], while at the same time implying strongly that [the party] is a violator of the securities laws").

The same is true for "corporate structures" erected "to shield illegitimate assets." The *whole point* of the corporate form—"a general principle of corporate law deeply 'ingrained in our economic and legal systems'"—is that a "parent corporation . . . is not liable for the acts of its subsidiaries." *United States v.*

Bestfoods, 524 U.S. 51, 61 (1998) (quoting Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)); *see Balintulo v. Ford Motor Co.*, 796 F.3d 160, 168 (2d Cir. 2015). That immunity, of course, is not absolute. A law enforcement agency with a judgment against a subsidiary can, like any other judgment-creditor, enforce the judgment against the parent if the agency satisfies the standards for piercing the corporate veil—for example, by showing that the corporate structure was established merely to shield illegitimate assets. *See Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140 (N.Y. 1993) ("Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, 'pierce the corporate veil', whenever necessary 'to prevent fraud or to achieve equity.'" (quotations omitted)). But if the agency cannot satisfy the requirements for veil-piercing, then the agency again must treat the corporate parent as *innocent* of the wrongdoing, which means its assets are *supposed* to be protected from the subsidiary's liabilities. *See id.* at 141.

The relief defendant doctrine is not a "veil piercing lite" standard that allows law enforcement agencies to largely disregard corporate forms when looking for someone other than the guilty party to pay the party's monetary liability. To the contrary, the relief defendant doctrine *by design* confers only extremely narrow equitable authority over assets possessed by innocent third parties. A disgorgement remedy, after all, normally "instantiates the equitable principle that

wrongdoers should not benefit from *their* misdeeds." *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014) (emphasis added). And would-be relief defendants are, by definition, *not* wrongdoers and committed *no* misdeeds. *See Cherif*, 933 F.2d at 414-16. Courts have accordingly restricted the district courts' equitable discretion to cases where the innocent party "has no ownership interest in the property which is the subject of litigation," and instead holds the assets only in "a subordinate or possessory capacity as to which there is no dispute." *Walsh*, 618 F.3d at 225. Put another way, the district court may disgorge funds from an innocent party only when 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] controversy succeed[s].'" *Cherif*, 933 F.2d at 414 (quoting *Bacon v. Rives*, 106 U.S. 99, 104 (1882)).

The strict limits on the court's authority in this area derive not only from principles of equity, but also from the strictly limited scope of a federal court's subject-matter jurisdiction. Because an alleged relief defendant has not violated any federal law, there is no federal claim against him, and thus no underlying basis for subject-matter jurisdiction in the action against him. *See* 28 U.S.C. § 1331 (federal jurisdiction limited to actions "arising under" federal law); 15 U.S.C. § 53(b) (FTC may bring suit in district court against anyone that the FTC believes "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission"). The relief-defendant doctrine creates a limited exception to

that rule—an innocent party may be "joined to aid the recovery of relief without an [additional] assertion of subject matter jurisdiction *only* because he has no ownership interest in the property which is the subject of litigation." *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir. 2002) (quotation omitted). When an innocent party has no legitimate claim to the funds, in other words, "it is not necessary for the court to separately obtain subject matter jurisdiction over the claim to the funds held by the nominal defendant" because he "is joined purely as a means of facilitating collection." *Id.* at 191-92 (quotation omitted); *see Cherif*, 933 F.2d at 414. It follows, then, that when an innocent party *does* have a legitimate claim to the funds, a district court *lacks* jurisdiction to compel their disgorgement—there must be a substantive claim of wrongdoing, or an independent jurisdictional basis for adjudicating the party's claim to ownership of the funds.

In short, the FTC is correct that under the existing "legitimate claim/valuable consideration" test, it can be difficult for law enforcement agencies to obtain assets possessed by innocent third parties. Which is exactly as it should be.

b. Unsurprisingly, no case supports the FTC's contention that equity transfers are categorically excluded from the "legitimate claim/valuable consideration" test. The FTC, like the district court, principally relies on *SEC v. Aragon Capital Advisors, LLC*, 2011 WL 3278907 (S.D.N.Y. July 26), but *Aragon*

in no way limits the "legitimate claim/valuable consideration" analysis to formal debt repayments. *Aragon* involved ill-gotten funds that were distributed as dividends to certain members of a limited partnership who did not themselves violate the law. The SEC successfully obtained disgorgement of those dividend payments on a relief-defendant theory, but *not*, as the FTC contends, because the innocent partners' initial "consideration" had been provided as an equity investment. Rather, as even the FTC recognizes, the court held that the innocent partners lacked a "legitimate claim" to the dividends because they were *illegal* "under state partnership law." FTC Br. 46; *see Aragon*, 2011 WL 3278907 at *19-20; CoreLogic Br. 31-32. Nowhere did the *Aragon* court even suggest that if the dividends had been *lawful* distributions of partnership assets under state law, the dividends would still have been recoverable from the innocent partners merely because they were equity distributions.

The FTC also fails to distinguish the cases cited in CoreLogic's opening brief to establish that equity payments are indeed encompassed by the "legitimate claim/valuable consideration" test. In *SEC v. Heden*, 51 F. Supp. 2d 296 (S.D.N.Y. 1999), for example, the court barred the SEC from obtaining disgorgement from the mother of an accused inside trader on the ground that her son had used funds from her bank account as the principal for his illegal trades. *Id.* at 301-302. The court stated two reasons for denying disgorgement of the

mother's initial equity investment, only one of which the FTC acknowledges. First, the court held that her investment was not "ill-gotten," *id.* at 302 n.4, as the FTC notes, FTC Br. 47. But second, and "perhaps more important," the mother had a "legitimate claim" to the return of her equity, which the FTC completely ignores. 51 F. Supp. 2d at 302 n.4. *Heden* cannot be reconciled with the FTC's theory that only repayment of a *formal loan* gives the payee a "legitimate claim" to the funds paid. And to the extent it matters that the funds the mother received was a *return* of her original equity investment rather than *profit* from that investment, this case is no different—CoreLogic advanced LeadClick $16 million and only received approximately $8 million (including the $4.1 million at issue here) in return, so if the $16 million advance is equity, the $4.1 million is a return of equity just as in *Heden*.

The FTC also fails to distinguish *SEC v. Quan*, 2014 WL 4670923 (D. Minn. Sept. 19), in which the court ruled that a wife's "financial and non-financial contributions" to ill-gotten properties owned by her husband gave her a "legitimate claim" to those properties that could not be disgorged under the relief defendant doctrine. *Id.* at *18-19. All agreed that the wife's time and money were equity investments (not loans), which made the wife "more than a disinterested custodian" and thus "preclude[d] her from being a proper relief defendant." *Id.* at *19. The FTC says only that *Quan*'s holding is "narrow," FTC Br. 47, but it is

certainly broad enough to defeat the FTC's theory that only a repayment of *debt* gives the payee a "legitimate claim" to the payment.

In short, both principle and precedent refute the FTC's effort to restrict the "legitimate claim/valuable consideration" test to a law violator's repayment of a formal debt owed to an innocent party. And absent that unsupported and illogical restriction, the district court's decision must be reversed on the undisputed record of this case. Regardless whether CoreLogic's $16 million advance to LeadClick is treated as an extension of credit or as an investment of equity, it was indisputably "valuable consideration" for the $4.1 million LeadClick paid in return, giving CoreLogic its own "legitimate claim" to that $4.1 million. The district court accordingly had no authority to order CoreLogic to disgorge those funds.

2. *CoreLogic's Advance To LeadClick Was A Loan*

Even if a "legitimate claim" in the relief defendant context can arise only from repayment of a loan—categorically excluding equity transfers—CoreLogic's $16 million advance is properly classified as a loan. CoreLogic Br. 32-37. The FTC itself labels CoreLogic's payments to LeadClick under its shared-services agreement as "advances," FTC Br. 42—another word for "loan." And the district court explicitly found that those advances were to be recouped by CoreLogic pursuant to the parties' earlier "understanding and agreement." *See supra* at 5-6. Even *the FTC's own expert* agreed: "[R]epayment of the money" advanced "was

expected" as part of the shared services agreement. R. 695a (Van Wazer Report ¶ 17). And uncontroverted testimony of executives from both sides of the agreement confirmed the parties' mutual expectation of repayment.[3]

The FTC asserts only one reason the $16 million advance did not qualify as a loan: it did not include the formalities typical of a lending relationship between legally unaffiliated parties. According to the FTC, CoreLogic "imposed no legal obligation on LeadClick to repay the money," and the "advances" did not bear "the hallmarks of a loan, such as an 'agreed upon repayment schedule or repayment deadline,' 'security for those advances,' a 'written loan agreement,' or 'interest due.'" FTC Br. 42-43 (citations omitted). But whereas those formalities might be expected in a lending transaction between two parties that are legally strangers to each other, there is no reason to expect a parent company to impose such formalities on a business arrangement with a subsidiary—especially one designed to *reduce* paperwork and transaction costs in a *shared* working relationship. In that context, the only fact that should matter is whether the parent expected to recoup its advances during the ongoing shared relationship, which is completely

---

[3] R. 674a (Chelew Decl. ¶ 10 ("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 ("Consistent 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.")).

undisputed here.

The FTC gets no help from the cases in which courts required "evidence of a *bona fide* debt obligation entitling the relief defendant to repayment." FTC Br. 45. The cases cited by the FTC all involved dealings between legally unaffiliated persons or entities, where transactional formalities are needed to establish the innocent party's claim to ownership of the assets at issue. *See*, *e.g.*, *Janvey v. Adams*, 588 F.3d 831, 834-35 (5th Cir. 2009) (rejecting relief defendant status where relevant debtor-creditor agreements existed between unaffiliated parties "well before the underlying SEC enforcement action"); *SEC v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (rejecting relief defendant status of unrelated corporation where corporation had "received . . . loan proceeds pursuant to written loan agreements" with conduct defendant).

This case, in contrast, involves a concededly bona fide shared services agreement between a corporate parent and its subsidiary. The undisputed evidence shows, and the FTC does not dispute, that such relationships are common, lawful, and rarely involve any kind of formalized documentation. *See* Amicus Br. of U.S. Chamber of Commerce, et al., at 5; CoreLogic Br. 35. An advance made by a corporate parent to its subsidiary pursuant to a shared services agreement therefore *is* a bona fide debt obligation in any sense relevant to the relief-defendant inquiry. Recognizing that an innocent parent corporation has a legitimate claim to

repayment of advances made under a lawful agreement with its separate subsidiary does not transform a shared services agreement into a "vehicle for insulating ill-gotten money from the reach of a court's equity power." FTC Br. 44. It instead merely affirms what every relief defendant case already holds—*viz.*, that an innocent party that receives funds in exchange for valuable consideration has a legitimate claim to the funds and thus cannot be compelled to disgorge them as a relief defendant. Because the FTC admits that CoreLogic has violated no law here, and the court below found that the $4.1 million merely recouped a legitimate advance, there is no legal basis for the disgorgement order.

3. *To The Extent A Formal Loan Agreement Is Required, Such An Agreement Existed Between LeadClick And CLUSI, Which Is An Independent Basis To Reject A Relief-Defendant Finding*

Even if the FTC were correct that only a formal loan agreement can give rise to a "legitimate claim," the district court's judgment should still be reversed because CLUSI—the party that actually received the funds from LeadClick—*did* have such a formal agreement with LeadClick.

In October 2008, LeadClick entered into precisely the type of formal debt agreement the FTC insists is necessary with CLUSI's predecessor-in-interest. CoreLogic Br. 38.[4] That agreement consisted of a written promissory note and

---

[4] A formal lending arrangement was necessary in 2008 because, at the time, LeadClick was only an indirect, partly-owned subsidiary of CLUSI's predecessor-

accompanying loan agreement authorizing LeadClick to borrow up to $15.7 million. *Id.* As of August 30, 2011, the date on which the $4.1 million was transferred to CLUSI's bank account (and then to CoreLogic's), LeadClick still owed $8 million in unpaid principal under the line of credit agreement. *Id.* Under the FTC's own debt/equity test, there can be no question that this formal, written loan constitutes "valuable consideration" sufficient to give CLUSI a "legitimate claim" to the $4.1 million in funds it received. The fact that CLUSI then transferred those funds to CoreLogic cannot defeat CLUSI's independent, legitimate claim to those funds.

The FTC's brief does not contest any of these facts, but instead argues that, as to CLUSI, the existence of a formalized loan arrangement does not matter because the $4.1 million was not "credited to the promissory note" on CLUSI's balance sheet and because the money was transferred to CLUSI's account via an "automated sweep process." FTC Br. 50-51. According to the FTC, these facts suggest that CoreLogic "controlled the whole process" and that CLUSI never had "possession of the money." *Id.*

---

in-interest, First Advantage Corporation. CoreLogic Br. 6 & n.3. After significant corporate restructuring in 2010 and 2011, LeadClick became CoreLogic's wholly-owned subsidiary. At that time, such formalities were no longer necessary, and LeadClick and six other former CLUSI subsidiaries were transitioned into the shared services program. CoreLogic Br. 7.

None of this makes any sense under the FTC's own view of the law. If, as the FTC believes, a formal loan arrangement grants a party a legitimate claim to funds, it should make no difference how those funds were credited or later transferred. Having provided "valuable consideration" in the form of advances under the line of credit agreement and thus establishing its "legitimate claim," CLUSI could distribute the $4.1 million to whomever it wanted, however it wanted—via U.S. mail, private courier, or the automated sweep process that CLUSI ultimately chose. *Cf. 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) (transferee of a good faith purchaser for value obtains good title "even if [he] did not pay value or act in good faith"). Again, the fact that CoreLogic ultimately received the $4.1 million does nothing to undo or undermine the "legitimate claim" CLUSI had, pursuant to formal documents the FTC itself would (erroneously) demand as a prerequisite before *any* innocent party's claim is deemed "legitimate."

II. THE DISTRICT COURT'S SUMMARY JUDGMENT RULING CANNOT BE SUSTAINED ON THE BASIS OF A BAD FAITH FINDING THE DISTRICT COURT DID NOT MAKE AND THE RECORD DOES NOT SUPPORT

The FTC argues in the alternative that even if the district court erred in holding that CoreLogic did not provide "valuable consideration" for the $4.1 million it recouped from LeadClick, the court's summary judgment ruling can be

sustained on a separate ground—a ground the district court did not consider and the facts do not support.

According to the FTC, even if CoreLogic provided valuable consideration in exchange for the $4.1 million, CoreLogic still lacked a legitimate claim to the funds because it did not provide "valuable consideration *in good faith*." *Walsh*, 618 F.3d at 226 (emphasis added). The FTC's "good faith" argument cannot sustain the summary judgment ruling, for multiple reasons.

First, the FTC does not even acknowledge, much less satisfy, the controlling summary judgment standard. To justify the summary judgment ruling on this alternative basis, the FTC would have to establish that there is no genuine dispute of material fact as to CoreLogic's good faith. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). And the FTC would be required to present and evaluate the evidence in the light most favorable to CoreLogic, drawing *every* reasonable inference in CoreLogic's favor. *See Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015).

The FTC's brief does no such thing. To the contrary, as shown below, the FTC recites the evidence as tendentiously as possible, reporting only evidence ostensibly favoring the FTC, and then *mis*reporting even that evidence to create a demonstrably false impression about CoreLogic's state of mind.

Second, the FTC invokes the wrong legal standard. The FTC suggests that

CoreLogic did not accept repayment of its advances in good faith merely because CoreLogic should have been *suspicious* of some FTC violations at LeadClick, based on supposed "telltale sign[s]" of fraud not even at LeadClick, but at one of its *customers*. FTC Br. 48-49. But the very cases cited by the FTC establish that more was required: the FTC had to prove that CoreLogic *knew* that the $4.1 million LeadClick paid was derived from FTC Act violations. *See* FTC Br. 49 (citing *Walsh*, 618 F.3d at 229 & n.8 (requiring "notice that the money she received . . . was derived from fraud"); *SEC v. Constantin*, 939 F. Supp. 2d 288, 311-312 (S.D.N.Y. 2013) ("knowledge as to the illicit source" of contested funds); *CFTC v. Hanover Trading Corp.*, 34 F. Supp. 2d 203, 204-205, 208 (S.D.N.Y. 1999) ("sufficient knowledge of [the] nature of the conduct to make . . . retention of . . . compensation inequitable")). This Court has further suggested that an agency seeking to disgorge assets from an innocent party must prove that the party accepted them knowing that "the purpose of the trade, so far as the [transferor] was concerned, was the defrauding of his creditors." *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 636 (2d Cir. 1995) (quoting 1 Garrard Glenn, *Fraudulent Conveyances And Preferences* § 295, at 512 (1940)). More generally, courts have cautioned against construing the "good faith" standard too broadly, observing that it adds little once a "legitimate claim" is shown, *see, e.g.*, *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1512 (1st Cir. 1987) (per Breyer, J.), and indeed the FTC

cites no precedent from this Court or any other applying the "good faith" requirement independently to compel an innocent party to disgorge assets to which it has a "legitimate claim."

Third, this Court need not identify the good faith standard with precision in this case, because the FTC did not prove a lack of good faith under any reasonable definition. The only direct evidence of CoreLogic's supposed bad faith cited by the FTC is the statement of *LeadClick* employee Richard Chiang that the use of "fake news sites" by LeadClick's customer LeanSpa was discussed "openly" with CoreLogic officials. FTC Br. 48 (quoting R. 169a (Chiang Dep. at 170)). Remarkably, however, the FTC omits the very next sentence from Chiang's testimony: "No one thought anybody was doing anything wrong, you know, per se at the time, so it was discussed." R. 169a (Chiang Dep. at 170). In other words, restored to its proper context, the very testimony on which the FTC relies actually establishes that CoreLogic did *not* know that LeadClick's revenues were the proceeds of unlawful activity. The FTC's failure to cite and address Chiang's full statement is inexplicable.

The other "evidence" cited in the FTC's brief is inaccurate, irrelevant, or both. The FTC relies upon a single email to falsely assert that CoreLogic knew that "LeadClick's merchant account had been frozen." FTC Br. 49 (citing R. 908-09a (PX-4). In fact, the FTC's own filings and the district court's order make clear

that it was *LeanSpa's* bank account—not LeadClick's—that had been frozen. *See* R. 999a; R. 908-09a; R. 12a (FTC Rule 56(a).1 Statement ¶ 178; PX-4; SJ Op. 12).

Moreover, both the author and the recipient of the email cited by the FTC were the *only* two CoreLogic officials who testified, and *both* affirmatively stated that they knew nothing about the details of LeadClick's business operations, precluding any conclusion that CoreLogic knew LeadClick was violating the FTC Act. R. 1013-14a (Siegrist Dep. 36:13-37:2); R. 940-41a (Livermore Dep. 64:24-66:6). Indeed, the CoreLogic official who wrote the email cited by the FTC testified that she "[didn't] even know what" a "news style website[]" is. R. 1013a (Siegrist Dep. 36:21-24). The FTC inexplicably omits that testimony as well.

The FTC also states that CoreLogic knew that some of *LeanSpa's* affiliate marketers had been sued by the FTC and that *LeanSpa* was losing customers at a steady pace. FTC Br. 49. But whatever FTC lawsuit allegations and loss of business (during a recession) say about *LeanSpa*'s activity, they provide no evidence—much less establish as a matter of law—that CoreLogic knew that *LeadClick's* business violated the FTC Act.

Indeed, CoreLogic (and LeadClick) to this day reject the FTC's argument that LeadClick received any funds in violation of the FTC Act, for the reasons stated in LeadClick's briefs in its consolidated appeal. At the very least, whether LeadClick's role as an intermediary constitutes an FTC Act violation is a novel

question. And most important for present purposes, the FTC has identified no evidence whatsoever establishing that CoreLogic knew *in 2011* that any portion of LeadClick's $4.1 million payment was the proceeds of FTC Act violation.

To the contrary, the undisputed evidence shows that CoreLogic, an innocent party, received the $4.1 million as recoupment of an advance made pursuant to a preexisting, legitimate business arrangement that included an expectation of repayment. The district court found those facts, the FTC does not dispute them, and together they permit only one conclusion: CoreLogic cannot be deemed a proper relief defendant.

CONCLUSION

For the foregoing reasons, and the reasons previously stated, the judgment should be reversed.

Respectfully submitted,

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000

/s/ Jonathan D. Hacker
JONATHAN D. HACKER
BURDEN H. WALKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Defendant-Appellant CoreLogic, Inc.

Dated: November 30, 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 5,466 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.

/s/ Anton Metlitsky
Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000

Dated: December 21, 2015