Nos. 18-2621, 18-2748, 18-2758

In the United States Court of Appeals for the Third Circuit

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

ABBVIE INC. *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:14-cv-05151
Hon. Harvey Bartle III

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in each industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the Courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The appropriate scope of enforcement powers granted by Congress to the Federal Trade Commission ("FTC" or "Commission") is an important issue to the Chamber's members. Clearly defining and enforcing the limits of these powers enables industries and markets to function effectively. The Chamber's members also have an interest in protecting the rights of businesses under the *Noerr-Pennington* doctrine and the First Amendment to freely petition the government—including the courts—for redress without facing antitrust liability for those petitioning efforts.

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[1] No party's counsel authored any part of this brief. No one, apart from *amicus curiae*, its members, and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The district court's ruling below cuts away important First Amendment protections under the *Noerr-Pennington* doctrine. That doctrine protects businesses from antitrust liability when they petition the government for redress, including petitioning through litigation. Although a "sham litigation" exception exists to that immunity, that exception must remain narrow so that businesses retain their constitutional right to petition the government without facing antitrust liability. The district court, however, improperly lowered the burden to such an extent that a sophisticated litigant can be held to have engaged in sham litigation whenever a district judge considers the suit to be objectively baseless. This ruling eviscerates the doctrine's First Amendment protections and leaves businesses in a state of uncertainty as to when they may properly vindicate their rights.

The district court also committed error by allowing the FTC to obtain monetary relief under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), Pub. L. No. 63-203, 38 Stat. 717 (15 U.S.C. § 41 *et seq.*). Section 13(b) allows the FTC to seek only injunctive relief. It does not provide the FTC with the expansive power to seek substantial monetary awards in the form of restitution or disgorgement. The district court's contrary reading of the statute is inconsistent with the its text, structure, and purpose, as well as the Supreme Court's decision in *Kokesh* *v. SEC*, 137 S. Ct. 1635 (2017), which concluded that such monetary remedies are not equitable in nature.

The judgment in this case is yet another example of the FTC's aggressive and improper pursuit of monetary awards under Section 13(b). The FTC historically sought such awards only in limited circumstances. But recently, it withdrew its own guidance on that issue and now has declared that the FTC will seek restitution and disgorgement for common industry practices, even without a clear violation of the FTC Act. This change has resulted in a surge of money judgments awarded under the guise of "injunctive" or "equitable" relief. The growing harm to businesses from this expanding and unpredictable liability makes the district court's error exceptionally important.

ARGUMENT

I. THE DISTRICT COURT'S APPLICATION OF THE *NOERR-PENNINGTON* DOCTRINE WILL CHILL FIRST AMENDMENT RIGHTS

A. The District Court Misapplied the Standard For A Sham-Litigation That Is Excepted From *Noerr-Pennington* Immunity

The district court's ruling improperly restricts the *Noerr-Pennington* doctrine, as set forth in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Under that doctrine, "a party who petitions the government for redress generally is immune from antitrust liability." *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 250-51 (3d Cir. 2001) (alterations and citation omitted).

Although an exception to the doctrine exists if a party files a "sham" patent lawsuit—which the government alleges here—"it will be a rare case in which a patentee's assertion of its patent in the face of a claim of invalidity will be so unreasonable as to support a claim that the patentee has engaged in sham litigation." *Tyco Healthcare Grp. LP v. Mut. Pharm. Co.*, 762 F.3d 1338, 1345 (Fed. Cir. 2014). The "sham litigation" exception applies only if both a lawsuit is "objectively baseless" and the party filing the lawsuit "subjectively intended to interfere directly with a competitor's business interests by using the government process as an anticompetitive weapon." *FTC v. AbbVie, Inc.*, 329 F. Supp. 3d 98, 117 (E.D. Pa. 2018) (citing *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) ("*PRE*")).

Regarding the subjective prong, the district court "readily acknowledge[d] that a plaintiff claiming that a lawsuit is a sham faces an uphill battle" because "[i]t is well-established that the First Amendment right to petition the government includes the right to have access to the courts." *Id.* at 118 (citing *PRE*, 508 U.S. at 56-57). Accordingly, the subjective intent required for the exception is more than just "the intent to thwart competition." *Id*. at 120. Instead, "the FTC must prove that defendants had actual knowledge that the patent infringement suits here were baseless," and it must make the showing by clear and convincing evidence. *Id.* at 120-21.

After setting forth these restrictions, however, the district court effectively ignored them and found that the sham-litigation exception applied despite no direct evidence of subjective bad faith. Rather, after concluding that the lawsuit was not objectively reasonable, the district court inferred the necessary bad faith merely from the experience and knowledge of the parties' in-house counsel. *See id*. at 125-26. Specifically, the court found critical each party's reliance on their in-house "experienced patent attorneys" in making the decision to file the infringement suits. *Id*. at 126 ("[A]ll of the decision-makers, we reiterate, were very experienced patent attorneys[.]"). The court then leapt from that finding to conclude that because those in-house attorneys were experienced and because they knew of the financial benefits that would come from the lawsuits, they must have had "actual knowledge" that the lawsuits were "shams." *Id*. The court believed that experienced in-house counsel could not possibly reach a conclusion different than that reached by the court and that this alone demonstrated subjective bad faith by "clear and convincing evidence." *Id*.

The district court's confidence in its assessment of the merits of the patent litigation is not, by itself, clear and convincing evidence that all experienced and knowledgeable in-house counsel would see the merits the same way. The district court's contrary view effectively merged the objective and subjective prongs. Thus, this analysis is not the appropriate standard for courts to apply the "narrow" sham exception to the *Noerr-Pennington* doctrine. *Id*. at 120. The court further erred by assuming that, because the court considered the suit to be objectively baseless, it must have been filed for nefarious, much less anticompetitive, reasons. Most obviously, the entity might think it has at least some chance of success and that the suit is worth pursuing because the stakes are high, even if the likelihood of success is low. Because the court pointed only to considerations that are often present in litigation, and that could be consistent with either good or bad faith, it did not establish—much less by clear and convincing evidence—that this is the rare case evidencing subjective bad faith reasons. There are numerous reasons why an entity will contest its patent rights or the rights of another through litigation, not all of which are nefarious.

The sham-litigation exception must be limited to only rare cases or else it would improperly "infringe on a party's constitutional right to petition the government for redress of grievances." *Id.* But the holding below would dramatically expand the exception to apply in common occurrences. In fact, the use of experienced counsel who have familiarized themselves with the case and are aware of the consequences of pursuing litigation is not only common, it should be encouraged, not penalized under the antitrust laws. Under the decision below, if a court finds the suit at issue lacks merit and the plaintiff relied on the advice of experienced and knowledgeable counsel, the court could infer subjective bad faith. If the party never sought that advice, however, the exception would not apply (at least not on that basis). That cannot and should not be the standard, as it would severely undermine the protections of the *Noerr-Pennington* doctrine and create perverse incentives. The exception should apply only in rare cases where bad faith is shown through clear and convincing evidence, not based on speculative inferences drawn from common circumstances, which would impermissibly lower that burden.

B. The District Court's Ruling Improperly Limits The *Noerr-Pennington* Doctrine And Chills First Amendment Protections.

The Supreme Court observed that it "crafted the *Noerr–Pennington* doctrine—and carved out only a narrow exception for 'sham' litigation—to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances." *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014); *see also PRE*, 508 U.S. at 56 ("Those who petition government for redress are generally immune from antitrust liability."). Thus, "[t]he dual principles underlying the *Noerr-Pennington* doctrine are the constitutional right to petition under the First Amendment and the importance of open communication in representative democracies." *Mariana v. Fisher*, 338 F.3d 189, 197 (3d Cir.

2003). The district court's ruling weakens the *Noerr-Pennington* doctrine's important constitutional protections.

By effectively requiring only evidence of objective baselessness, the district court broadly expanded the application of the sham-litigation exception. Fearing the significant disgorgement remedies that the FTC previously has pursued and obtained, many businesses would now be more hesitant to defend their patents through litigation. This effect impermissibly chills those parties' constitutional rights to petition the government, including the judiciary, and cannot stand.

The dangerous and improper impact of the district court's ruling is particularly apparent in this case, where the suit was brought under the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585, which is commonly known as the Hatch-Waxman Act. That statute expressly "allow[s] a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already-approved brand-name drug owner" and "sets forth special procedures for identifying, and resolving [those] patent disputes." *FTC v. Actavis, Inc.*, 570 U.S. 136, 141, 143 (2013). In particular, the statute recognizes that a generic drug manufacturer can "provoke[e] litigation" by asserting that the brand-manufacturer's patent "is invalid or will not be infringed by the manufacture, use, or sale" of the drug described in the Abbreviated New Drug Application. *Id.* (quoting 21 U.S.C. § 355(j)(2)(A)(vii)(IV), also known as "paragraph IV"). This Court has also recognized that the Hatch-Waxman Act "also encourages brand-name manufacturers to file patent infringement suits quickly"—if an infringement suit is brought within 45 days of the paragraph IV certification notice, "the patentee is rewarded with some breathing space before competition can begin: the FDA is required to withhold approval of the generic drug for 30 months or until the infringement case is resolved, whichever comes first." *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132, 144 (3d Cir. 2017) (citing 21 U.S.C. § 355(j)(5)(B)(iii)).

This statutory scheme further demonstrates why the district court's holding is unworkable. The Hatch-Waxman Act is intended to incentivize litigation from both generic and brand name drug manufacturers to resolve patent disputes. This is, therefore, an unlikely context for *lowering* the standard for finding that litigation was a sham.

Finally, these concerns are amplified by the substantial dollar amounts at stake in an FTC antitrust enforcement action. A potential judgment of millions, and indeed hundreds of millions of dollars in this case, serves as a substantial deterrent to any party seeking to vindicate its rights in court. The combined effect of these substantial monetary awards and the diminished standard for subjective intent poses a real risk to litigants' First Amendment right to seek redress in the courts protected by the *Noerr-Pennington* doctrine.

II. THE DISTRICT COURT'S DISGORGEMENT AND RESTITUTION AWARD IS IMPROPER UNDER THE FTC ACT.

A. The FTC's Power To Enjoin Violations of the FTC Act Does Not Permit it to Seek Monetary Relief for Past Actions.

The district court's ruling also is flawed because it incorrectly allows the FTC to seek an award of disgorgement or restitution under Section 13(b) of the FTC Act. *AbbVie*, 329 F. Supp. 3d at 138. In doing so, the court acknowledged that the statute does not expressly authorize that relief. *Id*. at 137-38. To the contrary, Section 13(b) allows the FTC only to seek a "temporary restraining order," a "preliminary injunction," or a "permanent injunction" if the FTC has reason to believe an entity "is violating, or is about to violate" federal law. 15 U.S.C. § 53(b). Despite this language, the district court found that Section 13(b)'s authorization to seek "injunctions" also necessarily includes "the full range of equitable remedies." *AbbVie*, 329 F. Supp. 3d at 137. This holding is not only at odds with the text of Section 13(b), it also ignores the intricate remedial framework that Congress created through other provisions of the FTC Act.

If Congress intended Section 13(b) to authorize anything beyond injunctions, it could have done so as it did elsewhere in the FTC Act. Section 5, for example, empowers the FTC "to prevent" the use of "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). That provision provides courts with the power to "grant mandatory injunctions *and such other and further equitable* *relief as they deem appropriate*." *Id.* § 45(*l*) (emphasis added). These open-ended grants of equitable authority have been used by courts to allow ancillary equitable relief. *See, e.g.*, *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 225-26 (3d Cir. 2005) (finding authority under Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, to "restrain" violations necessarily includes authority to seek restitution because statute did not create "a necessary and inescapable inference" that equitable remedies were limited) (citation omitted). No such broad authority, however, appears in Section 13(b), only in Section 5. There is therefore no basis to conclude that Section 13(b) authorizes any remedies beyond injunctions.

Additionally, the plain intent of injunctions under Section 13(b) is to restrict an entity that "is violating, or is about to violate" federal law. 15 U.S.C. § 53(b). This is a fundamentally different type of proactive remedy than a monetary award of disgorgement like that authorized by the district court. This Court recently acknowledged these textual limits in *FTC v. Shire ViroPharma, Inc.*, where it held that Section 13(b) "prohibits existing or impending conduct" and thus "a violation in the distant past and a vague and generalized likelihood of recurrent conduct" could not state a claim under the statute. 917 F.3d 147, 155-56, 159 (3d Cir. 2019). Instead, this Court required that the FTC allege that the defendant "is violating" or "is about to violate" the law. *Id.* at 159-60. Although *Shire ViroPharma* did not directly address the availability of disgorgement under Section 13(b), its reasoning limits the injunctive powers to current and imminent violations and therefore forecloses the FTC's authority to use that provision to extract monetary awards based on past conduct. It would make little if any sense to construe a statute referring only to injunctions to authorize other forms of relief in circumstances where not even an injunction would be appropriate.

That limited interpretation of injunctive powers under Section 13(b) is consistent with the FTC Act as a whole, which draws a sharp distinction between forward-looking injunctive relief and backward-looking monetary relief. Section 19b of the Act, for example, allows courts to "redress injury to consumers" through relief such as "the refund of money . . . [or] the payment of damages." 15 U.S.C. § 57b(b). The district court's holding, however, which reads Section 13(b) to implicitly authorize monetary relief, renders Section 19b largely unnecessary. *See Bilski v. Kappos*, 561 U.S. 593, 608 (2010) (explaining the statutory canon that courts should not "interpret[] any statutory provision in a manner that would render another provision superfluous," even when "Congress enacted the provisions at different times"). Courts cannot presume that Congress intended for Section 13(b) to authorize monetary relief when it expressly provided for that relief in Section19b. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration in original; citation omitted).

Instead, read together, Sections 13(b) and 19b give the FTC two complementary tools: the former, forward-looking and prophylactic, and the latter, retrospective and remedial. Injunctive relief under Section 13(b) functions as an interim measure allowing the FTC to act quickly to prevent harm. Section 19b provides the FTC the arsenal it subsequently needs to seek financial relief, to punish recalcitrant actors, and to remediate past violations. 15 U.S.C. § 57b. Congress explicitly recognized the distinction between the two remedies and provided distinct requirements for each. *See, e.g.*, *id.* § 45(*l*) (providing that, after a defendant has violated an administrative FTC cease-and-desist order, a district court may grant "injunctions and such other and further equitable relief as they deem appropriate.").

The legislative history further demonstrates that Congress did not intend Section 13(b) to authorize monetary penalties. As this Court has acknowledged, Congress added Section 13(b) to the FTC Act in 1973 to give the FTC a means of enjoining deceptive practices during the pendency of an administrative proceeding. *Shire ViroPharma*, 917 F.3d at 155 ("Section 13(b) was added later in an effort to solve one of the main problems of the FTC's relatively slow-moving administrative regime—the need to quickly enjoin ongoing or imminent illegal conduct."). Before Section 13(b), a defendant could continue to injure consumers until that proceeding resulted in a judgment. A Senate report concerning a draft of Section 13(b) plainly set out its purpose:

> The purpose of [Section 13(b)] is to permit the Commission to bring an *immediate halt to unfair or deceptive acts or practices when to do so would be in the public interest.* At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded. [Section 13(b)] authorizes the granting of a temporary restraining order or a preliminary injunction without bond pending the issuance of a complaint by the Commission under Section 5 . . .

S. Rep. No. 93-151, at 30 (1973) (emphasis added). In the House discussion on Section 13(b), Representative Smith noted that "[i]t is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision." 119 Cong. Rec. 36,609 (1973).

The distinction between injunctive relief and monetary damages is important to the regulated public, which is entitled to fair notice of what the law prohibits so that it can conform its conduct to the law and not be unfairly penalized by retroactive application of new restrictions. The FTC Act broadly prohibits "[u]nfair methods of competition . . . and unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1). These prohibitions are intentionally vague so that the FTC can develop them as a "flexible concept with evolving content." *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 243 (3d Cir. 2015) (citation omitted). Their purpose was such that the

FTC would adjust them over time to capture what it viewed as unfair methods of competition. *Id*. ("The takeaway is that Congress designed the term as a flexible concept with evolving content and intentionally left its development to the Commission.") (alterations and internal quotation marks omitted). But because the prohibitions are purposefully flexible and are expected to change over time, it would generally be unfair to penalize past conduct for failing to comply with new requirements. As a result, the FTC Act imposes certain preconditions before the FTC can seek monetary relief from an entity for an alleged violation.

To obtain monetary relief under Section 19b, the FTC must either (1) prove that the defendant "violate[d] any rule under this subchapter respecting unfair or deceptive acts or practices" (*i.e.*, a rule promulgated by the FTC), or (2) if no such violation exists, obtain a "final cease and desist order" through an administrative proceeding, and then prove to a trial court that the defendant's conduct was such that a "reasonable man" would know it was "dishonest or fraudulent." 15 U.S.C. § 57b(a)(1)-(2). As Judge O'Scannlain recently explained in his special concurrence in *FTC v. AMG Capital Mgmt, LLC*, 910 F.3d 417 (9th Cir. 2018), Section 19 "requires the Commission either to promulgate rules that define unlawful practices *ex ante*, or first to prosecute a wrongdoer in an administrative adjudication that culminates in a cease and desist order." *Id.* at 432 (O'Scannlain, J., specially concurring). Those protections as to monetary penalties are central to Congress's design and to basic fairness to defendants, but they are completely eviscerated if Section 13(b) were expanded to include not only injunctive remedies, but also monetary awards. In that case, the FTC could circumvent the protections of Section 19b by relying instead on Section 13(b).

B. Disgorgement and Restitution Are Not Equitable Remedies Under the FTC Act.

Even if Section 13(b) could be interpreted to authorize "equitable remedies," the Supreme Court's recent decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) made clear that disgorgement and restitution are penalties, *i.e.*, legal remedies, *not* "equitable remedies." *Id.* at 1640 (disgorgement does not fall within the court's "inherent equity power to grant relief ancillary to an injunction") (citation omitted). Although that decision involved the powers of the U.S. Securities and Exchange Commission ("SEC"), the Court provided two inquiries for courts to use to determine whether a remedy, despite its label, is a penalty and, thus, a "legal" rather than an "equitable" remedy: (1) if the sanction seeks to redress a public wrong, as opposed to a private wrong, it is a penalty; and (2) if the sanction seeks to punish a wrongdoer and deter others instead of compensating victims for loss, it is a penalty. *Id.* at 1642.

As to the first inquiry, the Court determined that disgorgement seeks to redress public wrongs because it "is imposed by the courts as a consequence for violating . . . public laws." *Id.* at 1643 ("The violation for which [disgorgement] is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution."). As to the second inquiry, the Court found that disgorgement serves a punitive purpose because the "primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains." *Id.* (citation omitted). The Court noted that disgorged funds are often paid to the United States Treasury rather than to victims, further supporting the conclusion that they are punitive rather than remedial. *Id.* at 1644.

The Supreme Court's determination in the SEC context that disgorgement is a penalty applies with equal force to the FTC Act. *See AMG Capital Mgmt.*, 910 F.3d at 435-37 (O'Scannlain, J., specially concurring) (observing that the *Kokesh* analysis leads to the inescapable conclusion that FTC disgorgement is a penalty and therefore not within Section 13(b)'s injunctive powers). *Id.* at 435-37.[2] The Ninth Circuit panel in *AMG* was bound to follow its prior, pre-*Kokesh*, precedent to uphold

[2] In reaching this conclusion Judge O'Scannlain applied the *Kokesh* factors to find that restitution is a form of legal relief, not an equitable remedy. *AMG Capital Mgmt.*, 910 F.3d at 433 (O'Scannlain, J., specially concurring). Specifically, he concluded that: (i) restitution seeks to redress public wrongs; (ii) restitution is "punitive" rather than "remedial"; and (iii) restitution is not necessarily compensatory. *Id.* Thus, the Court concluded that restitution "bears all the hallmarks of a penalty" and is not an equitable remedy. *Id.* (quoting *Kokesh*, 137 S. Ct. at 1644).

the FTC's ability to seek disgorgement under Section 13(b). This Court is not similarly constrained;[3] rather, in *Shire ViroPharma*, this Court correctly held that Section 13(b) governs current or future actions, it does not remedy past conduct. 917 F.3d at 156, 159 ("If the FTC wants to recover for a past violation—where an entity 'has been' violating the law—it must use Section 5. If the FTC instead chooses to use Section 13(b), it must plead that a violation of the law 'is' occurring or 'is about to' occur.") (citation omitted).

C. The FTC's Pursuit of Monetary Relief Under Section 13(b) Increasingly Harms Businesses.

The FTC's authority under Section 13(b) is an issue of substantial and growing importance as the FTC increasingly pursues aggressive awards of disgorgement and restitution despite having no statutory authority to do so. And to be clear, these awards are not limited only to actions involving alleged antitrust violations. The FTC seeks significant monetary awards under Section 13(b) in a wide range of actions where it contends an entity has engaged in unfair business practices. *See, e.g.*, *AMG Capital Mgmt.*, 910 F.3d at 421-22 (noting award of $1.27 billion "in equitable monetary relief" for unfair or deceptive acts). The escalating

[3] In a non-precedential opinion, a panel of this Court noted in a footnote that Section 13(b) allows courts to award "monetary equitable relief," including "restitution" and "consumer redress." *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (citation omitted). The Court, however, found the argument was waived and not properly presented on appeal, and its non-precedential footnote should not control the Court's resolution here.

use of the FTC's most drastic remedy is, in turn, harming businesses that face the risk of potential liability for common industry practices.

1. The FTC Increasingly Uses Section 13(b) to Obtain Substantial Restitution and Disgorgement Awards.

The $448 million judgment in this case exemplifies the FTC's recent expansion of its so-called equitable powers under Section 13(b). But the agency did not always take this expansive view of its equitable authority. Until 2012, the FTC took the position—through a Policy Statement—that it would seek disgorgement and/or restitution only in "exceptional cases" where there was, among other things, a "clear violation" of the law (such that the defendant was on proper notice) and only if other remedies were insufficient. *Policy Statement on Monetary Equitable Remedies in Competition Cases*, 68 Fed. Reg. 45,820, 45,821 (Aug. 4, 2003). But in recent years, the FTC has moved aggressively to pursue monetary remedies under the guise of equity.

In 2012, the FTC withdrew its prior statement, claiming that the *Policy Statement* took "an overly restrictive view" of the FTC's discretion to seek monetary relief. *Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases*, 77 Fed. Reg. 47,070 (Aug. 7, 2012). The FTC also expanded its powers in other ways, contending that it could seek such monetary remedies regardless of whether the violation was "clear" and declaring itself free to demand disgorgement and/or restitution even where the alleged conduct is "common." *Id*. at 47,071. Under the FTC's new view, it sees no need for a "heightened standard for disgorgement." *Id*.

The effects of this change have been clear. In recent years, the FTC increasingly has pursued actions in federal court, where (in the agency's view) it can seek disgorgement and restitution, as opposed to administrative actions before an FTC administrative law judge ("ALJ"), where it cannot. In 2017 alone, the FTC obtained **<u>$5.29 billion</u>** through court orders for restitution and disgorgement.[4] By contrast, immediately before its policy change, the FTC sought and obtained in 2011 only $223.7 million.[5] The FTC's newly aggressive stance thus has exploded the value of such awards **<u>by more than 23 times</u>** over the span of only a few years.

Given the FTC's mounting campaign to seek monetary relief under the guise of equity, it is critical that this Court reiterate that Section 13(b) does not give the FTC that power.

2. The FTC's Use of Section 13(b) to Extract Large Monetary Awards Harms Businesses.

As the 2012 *Policy Statement Withdrawal* makes clear, the FTC will not hesitate to punish "common" industry practice by seeking substantial monetary

[4] FTC, *A Recap of 2017: FTC's Annual Highlights* (Apr. 10, 2018), https://www.ftc.gov/news-events/blogs/business-blog/2018/04/recap-2017-ftcs-annual-highlights.

[5] FTC, *Annual Highlights 2011: Stats & Data* (Feb. 29, 2012), https://www.ftc.gov/reports/annual-report-standard/ftc-2012/stats-data.

awards. That means businesses could face potential liability for millions of dollars for common industry practices that do not even clearly violate the FTC Act. The danger to business is heightened by the FTC's failure to issue guidance as to when it will seek such remedies. In 2015, two FTC Commissioners criticized the Commission for the lack of "meaningful guidance on when [businesses] will be forced to disgorge their profits for an antitrust violation," and noted that "[t]his uncertainty and lack of predictability faced by firms is unacceptable."[6]

This uncertainty is magnified because, under Section 13(b), once a court finds that disgorgement is warranted, the FTC need not prove the actual amount of the remedy with precision and may seek an award that "reasonably approximates the defendant's unjust gains." *AMG Capital Mgmt.*, 910 F.3d at 427 (citation omitted). Importantly, the "gains" do not mirror typical damages calculations or equate to profits earned. Instead, the amount the entity may be ordered to pay through restitution or disgorgement might represent an entity's **total revenue**, without any consideration or offset to reflect actual profit. *See FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013) ("[T]he amount of net revenue (gross receipts minus refunds), rather than the amount of profit (net revenue minus expenses), is the

[6] FTC, *Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright*, Federal Trade Commission v. Cephalon, Inc. 2-3 (May 28, 2015), https://www.ftc.gov/public-statements/2015/05/separate-statement-commissioners-maureen-k-ohlhausen-joshua-d-wright.

correct measure of unjust gains under section 13(b).”). On top of that, if the parties disagree over the amounts, the burden falls to the defendant to show that the FTC overstated the gains. *AMG Capital Mgmt.*, 910 F.3d at 427. The “risk of uncertainty” if the actual amount cannot be ascertained “falls on the wrongdoer.” *Id*. (citation omitted).

The practical effect of these actions from the FTC is that businesses often are left without a remedy to contest the issue. Because the amounts sought by the FTC continue to grow, and because they need not have any correlation to profit gained, businesses will increasingly be forced to settle claims asserted by the FTC simply because the risk of a devastating disgorgement award is too great. This effectively deprives these entities of the right to defend themselves and is untenable. Perhaps even more importantly, it is not what Congress authorized. The FTC’s expanded use of monetary remedies, and the uncertainty and breadth of those awards, underscore the importance of maintaining the distinction between equitable relief authorized by Section 13(b) and monetary awards authorized by Section 19b.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the lengths permitted by Fed. R. App. P. 29(a)(5), 32(g)(1). The brief contains fewer than 6,500 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief complies with Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared using Microsoft Office Word 2016 and has a typeface of 14-point Times New Roman.

Dated: June 12, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2019, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 12, 2019

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