No. 11-18023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

KYLE KIMOTO,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Nevada
No. 2:09-cv-01349-PMP-RJJ

BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

Of Counsel:
ROBERTO ANGUIZOLA
TRACEY THOMAS
DOTAN WEINMAN
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

BURKE W. KAPPLER
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2043

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JURISDICTION

The Federal Trade Commission ("Commission" or "FTC") initiated an action in the United States District Court for the District of Nevada seeking relief under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Section 917(c) of the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693o(c), for deceptive acts and practices that violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), Section 907(a) of EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b).

On October 25, 2011, the district court entered summary judgment in favor of the FTC, and on November 2, 2011, entered a final monetary judgment. Appellant Kyle Kimoto timely filed his notice of appeal on December 19, 2011, pursuant to Fed. R. App. P. 4(a)(1)(B). This court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1) Whether this Court should review appellant's claim that the FTC Act is unconstitutionally vague where Kimoto did not present it to the district court and first raised it on appeal, and where Kimoto had ample notice of the statute's

application.

2) Whether Kimoto can avoid liability under the FTC Act based on his asserted receipt of advice from counsel, where his actions and level of knowledge satisfy the established standards for such liability.

3) Whether the Court should hold that the district court's interpretation of the FTC Act was absurd, where the district court applied the Act to award relief consistent with prior Ninth Circuit case law and where the evidence of appellant's deceptive conduct was essentially unchallenged.

STATEMENT OF THE CASE

A. Nature of the case, the course of proceedings, and the disposition below

This appeal arises from an action by the FTC, pursuant to Sections 5 and 13(b) of the FTC Act, 15 U.S.C. §§ 45 and 53(b), and EFTA and its supporting Regulation E, 12 C.F.R. § 205.10, seeking preliminary and permanent injunctive relief, as well as equitable monetary relief, against Kimoto and a group of other defendants for misrepresentations in the online marketing and sale of several products, including government grant opportunities, lines of credit, work-at-home opportunities, and health supplements.

The FTC filed its complaint on July 27, 2009. Doc. 1.[1] On July 28, 2009, the district court granted the FTC's motions for TRO and for appointment of a receiver over the assets of the corporate defendants. Docs. 18, 19. Following additional briefing and a hearing, the district court granted the FTC's motion for a preliminary injunction on September 22, 2009. Doc. 83.

Following discovery, the parties filed cross-motions for summary judgment. Docs. 155, 266-270, 272-273, 275, 314. Finding no genuine issues of material fact for trial, on October 25, 2011, the district court granted summary judgment for the FTC on all counts while denying all of the summary judgment motions filed by the remaining defendants.[2] Doc. 343. In doing so, the district court concluded that all individual defendants, including Kimoto, had the requisite participation and knowledge to be held personally liable for equitable monetary relief. Doc. 343, at 2-13, 20-25, 48-54. The district court found that all defendants were jointly and severally liable for equitable monetary relief in the amount of $29,784,770.52, representing the total sales from the products in question, minus chargebacks and

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[1] Unless otherwise indicated by citations to other cases, citations to docket entries from the district court record are in the form "Doc. ___." Citations to plaintiff's exhibits are in the form "Px. __."

[2] The FTC had previously entered into stipulated judgments with defendants Johnnie Smith, Juliette Kimoto, Pink, LP, Vertek, LP, Vantex, LP, and the Juliette M. Kimoto Asset Protection Trust. Docs. 329-330, 337-338. Juliette Kimoto was married to Kimoto during the time relevant to this action.

refunds, with an additional monetary award in the form of prejudgment interest. Doc. 343, at 20-25, 50-54. The district court also awarded injunctive relief, permanently banning Kimoto and the other defendants from (1) engaging in negative option marketing, continuity programs, preauthorized electronic funds transfers, and the use of testimonials, and (2) marketing and selling products related to grants, credit, business opportunities, and diet supplements or nutriceuticals. Doc. 343, at 48-50; Doc. 346.

B. Facts and proceedings below

1. The defendants and their common enterprise

This case involves twenty-two corporate entities and nine individuals who engaged in a scheme to deceptively create, market, and sell products and services online. All of these offers were billed through "negative option" continuity programs, meaning that consumers continued to pay for the products or services on a monthly basis unless they proactively canceled.[3]

The defendants were organized into two groups, one based in Las Vegas, Nevada, and one based in Reno, Nevada. The following discussion focuses on Kimoto, who was the focal point of the Las Vegas group, and who developed the relationships necessary for the Grant Connect scheme.

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[3] This brief will refer to this scheme collectively as "Grant Connect."

a. Kimoto and the Las Vegas defendants

The Grant Connect scheme was not Kimoto's first exposure to FTC enforcement. In 2002, the FTC sued Zentel Enterprises, Inc. in connection with *FTC v. Capital Choice Consumer Credit, Inc.*, Civ. No. 1:02–cv-21050-UU (S.D. Fla. 2002). *See* Doc 275-2, at 47. Kimoto was the president of Zentel and signed a Stipulated Final Judgment and Order in that case on Zentel's behalf. *FTC v. Capital Choice Consumer Credit, Inc.*, No. 1:02-cv-21050-UU, Doc. 260, at 18 (S.D. Fla. 2002). Two years later, the FTC sued Kimoto directly in connection with *FTC v. Assail, Inc.*, Case No. 6:03-CV-7 (W.D. Tex. 2003), which involved an advance fee credit card scam similar to the line-of-credit scam at issue in this case. *See* Doc 275-2, at 48. In *Assail*, the FTC obtained a permanent injunction banning Kimoto from telemarketing, as well as a monetary judgment of over $105 million. *FTC v. Assail, Inc.*, Case No. 6:03-CV-7, Docs. 162, 387 (W.D. Tex. 2003). Kimoto was later convicted in the Southern District of Illinois on criminal charges related to his involvement in *Assail*. *United States v. Kimoto*, No. 3:07-cr-30089-MJR, Docs. 1, 116 (S.D. Ill. Oct. 14, 2008). These criminal proceedings occurred during the time Kimoto and the other defendants were developing the Grant Connect scheme.

Kimoto played a central role in Grant Connect, bringing together the Las

Vegas and Reno groups that undertook the scheme. In Las Vegas, Kimoto participated in and controlled, directly or indirectly (through his then-wife Juliette Kimoto, also a defendant in this matter), several corporate defendants, including Vertek, LP, Vantex, LP, Pink, LP, and the Juliette M. Kimoto Asset Protection Trust. Doc. 275-2, at 49-50, 60-62. Kimoto hired or employed defendants Tasha Jn Paul and Johnnie Smith to oversee and run his companies Vertek and Vantex. Doc. 275-2, at 57-60. Defendant Michael Henriksen, his lifelong friend, was Vertek's and Vantex's accountant and managed these companies together with his sister, defendant Rachael Cook. Doc. 275-2, at 51-52, 56; Doc. 343, at 2. Kimoto and his employees and companies worked closely with defendant Steven Henriksen, brother to Cook and Michael Henriksen.[4] Doc. 275-2, at 55-56; Doc. 343, at 2. Steven Henriksen owned and operated defendant Global Gold and several other companies. *Id.* Kimoto and the others worked cooperatively, initially operating out of Steven Henriksen's house on real estate, and later, internet marketing. Doc. 275-2, at 70; Doc. 343, at 22. Kimoto held leadership positions

[4] Like Kimoto, Steven and Michael Henriksen were not strangers to the FTC. Michael Henriksen was directly involved in the *Assail* scheme and was placed under a permanent injunction and telemarketing ban in that case. Doc. 275-2, at 51-52. And though Steven Henriksen was not a named defendant in that case, he was placed under order and temporarily jailed for helping Kimoto and Michael Henriksen dissipate receivership estate assets. Doc. 275-2, at 55-56; *FTC v. Assail, Inc.*, 410 F.3d 256, 261 (5th Cir. 2005).

in Vertek and Vantex until September 2008, when he was sentenced to 350 months' incarceration in connection with the *Assail* scheme. *United States v. Kimoto,* No. 3:07-cr-30089-MJR, Doc. 116 (S.D. Ill. Oct. 14, 2008).

b. The Reno defendants and the development of the Grant Connect scheme

The defendants based in Reno included James Gray and Randy O'Connell who together controlled several companies. Doc. 343, at 2-3. Through these companies, Gray and O'Connell had developed a customer management software program known as AWARE that was used to track and organize customer records and orders. Doc. 275-2, at 69-70; Doc. 343, at 2-3.

Kimoto first contacted O'Connell and Gray in late 2006, seeking their experience with online marketing and lines of credit for Steven Henriksen's Global Gold. Doc. 343, at 2-3. Soon after, Kimoto recruited O'Connell and Gray to work with Vertek on the grant opportunity portion of the Grant Connect scheme. Doc. 343, at 3. Gray and O'Connell and their companies were responsible for securing content and using AWARE to manage customer information, while Kimoto's Vertek handled marketing and website development. Doc. 343, at 3-4. As the scheme grew successful and branched into other offerings, defendants similarly coordinated responsibilities between Las Vegas and Reno. Doc. 343, at 22-24.

2. The Grant Connect schemes

a. Grant Connect

Defendants marketed their Grant Connect product as a grant search tool through a variety of websites. Doc. 1, at 6-8; Doc. 343, at 4-5. These sites were rife with representations that consumers could easily obtain government grants that could be used for personal or household purposes, often supported by "testimonials" from apparently-satisfied customers. *Id*.

The FTC's expert on grants found that these representations were false. Doc. 343, at 7, 25. Using the Grant Connect tool, the expert was unable to find any grants of the sort defendants claimed were available to individuals. Doc. 343, at 7, 25. *See also* Px. 398.

b. Line-of-credit offers

Defendants marketed line-of-credit offers, such as First Plus Platinum, through various websites. Doc. 343, at 7-8. Defendants represented that if consumers applied and paid a modest fee, they would receive a general purpose unsecured credit card or line of credit worth thousands of dollars at 0% interest for twelve months. Doc. 343, at 8-9. Defendants reinforced these claims with images of credit cards to convey the message that consumers would receive a general purpose unsecured credit card. Doc. 343, at 8.

In fact, consumers who accepted defendants' offer did not receive a general purpose unsecured credit card. Instead, defendants enrolled them in a costly online shopping club, where consumers could only use their credit to purchase items from defendants and only after the consumers put money down on nearly every purchase. Doc. 343, at 9, 28-29, 34-35. Defendants also failed to disclose additional fees associated with this membership, Doc. 343, at 34-35, and did not permit consumers to view the online store until after the consumer submitted their payment information. Doc. 343, at 10, 29.

c. Other material terms / upsells

In addition to their direct misrepresentations about the nature of the products they offered, defendants also misrepresented other material terms of the transactions in two ways: (1) they failed to disclose that consumers who signed up for their products and services would be enrolled in an ongoing membership program and would have to cancel to avoid additional monthly charges; and (2) they failed to disclose that consumers who purchased one of defendants' products and services would be automatically enrolled, or upsold, *other* products or services involving even more fees and charges unless the consumers affirmatively canceled.

Defendants did so through clever use of web advertising, including banner ads, e-mails, and multiple webpages. Defendants first lured consumers to their

websites with eye-catching advertisements and e-mails. Once consumers navigated there, defendants used two consecutive webpages that were nearly identical to distract from and minimize their disclosures. *See, e.g.*, Doc. 343, at 5, 8-10, 42-43. These additional services upsold included MemberLegalNet, a legal support program, for $12.95 per month, SmartHealthGold, a medical discount program, for 19.95 per month, and VComm, a long distance calling service. Doc. 343, at 5-6, 9. For all of these products and services, consumers would be billed until they cancelled, and consumers were required to cancel each of them individually. Doc. 343, at 11, 45.

d. Other schemes and misleading conduct

Defendants also undertook other schemes or methods of misleading consumers. For one, defendants marketed several work-from-home opportunities with representations about expected income, but defendants' income claims were baseless and unsupported. Doc. 343, at 36-38. Similarly, defendants offered nutriceuticals and health supplements, including one known as Acai Total Burn, with statements about purported health benefits that were completely unsubstantiated. Doc. 343, at 38-40. And defendants also presented testimonials from purported consumers of the products, including testimonials from celebrities such as Oprah Winfrey and Rachael Ray, most of which, if not all, were

completely fabricated. Doc. 343, at 40-42. Finally, defendants also failed to disclose that they treated a consumer's online acceptance of Grant Connect or the other offers as the written authorization required to make recurring debits from the consumer's bank account, contrary to EFTA and federal regulations. Doc. 343, at 45-47.

3. Summary judgment briefing and the district court's summary judgment order (Doc. 343)

The parties filed ten summary judgment motions with the district court: one from the FTC, one from Kyle Kimoto, and several submitted by Steven Henriksen and his corporate entities. Docs. 155, 266-270, 272-273, 275. The court also reviewed a Motion under Rule 201 submitted by Kyle Kimoto. Doc. 314. It denied all of these motions but for the FTC's motion, which it granted with one minor alteration. Doc. 343.

In Kimoto's motions, he argued that the FTC did not show he participated in any of the violations, and that even if he did, he did so with advice of counsel and therefore without the requisite scienter. Docs. 155, 314. The court rejected these arguments, noting that O'Connell and Gray had both given declarations naming Kimoto as the mastermind behind the schemes, and that the FTC had substantial evidence showing Kimoto's involvement. Doc. 343, at 14. Regarding scienter, the court rejected Kimoto's claim that any level of intent above that established in *FTC*

v. Cyberspace.Com LLC, 453 F.3d 1196, 1202 (9th Cir. 2006), was required. *Id.*

Turning to the remaining motions, the court denied all of the motions filed by Steven Henriksen and his companies, while it granted the FTC's motion for summary judgment. Doc. 343, at 15-17, 53. The court found no genuine issues of material facts on any of the eight counts in the amended complaint. Doc. 343, at 25-47. In doing so, the court concluded that the corporate defendants operated as a common enterprise, and that the individual defendants – including Kimoto – had the requisite participation and knowledge to be liable for the corporate defendants' violations. Doc. 343, at 2-13, 20-25, 48-54..

Having found for the FTC on all counts of liability, the court then addressed the FTC's requests for relief. The court first found that injunctive relief was warranted based on the deliberateness and seriousness of the present violation and the violators' past records. Doc. 343, at 48-50. As the court found, the defendants in this case were all either repeat offenders or individuals with substantial prior contacts with the FTC. *Id*. Given defendants' recidivism, misconduct, willingness to flout the law, and highly adaptable scheme, the court permanently banned defendants from the types of conduct at issue in the case. *Id.*; *see also* Doc. 346.

The court also awarded equitable monetary relief, applying the traditional two-step, burden-shifting analysis. Doc. 343, at 50-51 (citing *FTC v. Direct Mktg.*

Concepts, Inc. 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008)). The FTC offered evidence to prove total consumer injury, and while defendants challenged the method of analysis, they did not argue that the figures were inaccurate or unreliable. *Id.* at 51. Accordingly, the court accepted the FTC's calculation, and ordered equitable monetary relief in the amount of $29,784,770.52.[5] *Id.*

STANDARD OF REVIEW

1. Waiver. Appellate courts will generally not hear an issue raised for the first time on appeal. *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996); *accord Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). To have been properly raised below, the argument must be sufficiently presented for the district court to rule on it. *Broad*, 85 F.3d at 430. Failure to do so prevents appellate review on the merits. *Id.*

2. Summary judgment. This court reviews a grant of summary judgment *de novo*, *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004), and may affirm on any ground supported by the record. *Simo v. Union of Needletrades*, 322 F.3d 602, 610 (9th Cir. 2003). The appellate court's review is governed by the same standard

[5] The FTC also sought prejudgment interest. The court granted this request, but set the rate at the statutory rate, not the 4.4% requested by the FTC. Doc. 343, at 52-53. This was the only aspect of the FTC's motion for summary judgment that the court denied.

used by the trial court under Fed. R. Civ. P. 56. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). This Court must determine, "viewing the evidence in the light most favorable to . . . the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

3. Statutory construction. Courts of appeals review questions of statutory construction *de novo*. *Hellon & Assocs., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992). If the statutory language is clear, courts need look no further than the language of the statute itself in determining its meaning. *Sullivan v. Stroop*, 496 U.S. 478, 481-82 (1990).

SUMMARY OF ARGUMENT

Construed liberally, Kimoto's brief presents three reasons why he should not be found liable and subject to relief. All of these reasons fail.

Kimoto first claims that the FTC Act – the basis for the judgment and injunctive relief – is unconstitutionally vague. Kimoto has waived this argument by failing to present it to the district court. Even if this Court were inclined to review this claim, however, it is plain that the FTC Act is not unconstitutionally vague. Kimoto is claiming that he had no notice that his conduct was illegal or that he could be subject to injunctive relief. But there are ample authorities – including

other FTC enforcement cases involving Kimoto himself – that provided more than enough notice that Kimoto's conduct was unlawful. Kimoto's claim of vagueness, should this Court elect to review it on the merits, is utterly without basis.

Kimoto also claims that he acted under the advice of counsel, suggesting that he therefore lacked the scienter necessary for liability under the FTC Act. Kimoto raised a similar claim below, but the court rejected it, holding that Kimoto's participation in and knowledge of the unlawful acts at issue support liability regardless of any advice of counsel.

Finally, Kimoto claims that the FTC Act should not be interpreted to produced absurd results. Kimoto does not proffer any alternative reading of the statute, and apparently refers to the results in this case. But even a cursory review of the record shows no such absurdity. The relief imposed by the district court was entirely consistent with relief awarded in other FTC enforcement actions in the Ninth Circuit and in other circuits. This relief was entirely warranted with respect to Kimoto, who was a linchpin and leader of an orchestrated and collaborative effort to defraud consumers across a range of online products and services. Moreover, Kimoto had experience with this sort of deception, using similar tactics in two other cases prosecuted by the FTC. There was nothing absurd about the relief imposed by the court below, and this Court should affirm.

ARGUMENT

I. Kimoto's claim that the FTC Act is unconstitutionally vague is waived, and in any event, baseless.

Kimoto opens his brief by claiming that "the statutes by which the FTC secured injunctive relief are unconstitutional . . . [,]" primarily because they are unconstitutionally vague. Appellant's Br., at 2-4. Specifically, Kimoto claims that the vagueness in the statutes at issue failed to put him on notice his conduct was illegal, and further allowed "opportunistic and arbitrary" prosecutions that led to the relief imposed. Appellant's Br., at 4. The statutes at issue are the FTC Act and EFTA. The authority for the injunctive relief arises from Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and interpreting case law.

Kimoto waived this claim by failing to raise it to the district court. *Broad*, 85 F.3d at 430; *accord Smith*, 194 F.3d at 1052. Thus, the Court should decline to review this claim.

Even if the Court chose to review the claim on the merits, however, it is apparent that it fails. In alleging "vagueness," Kimoto is claiming he lacked notice his conduct was illegal. But there are ample authorities, easily accessible to Kimoto, providing such notice. It is disingenuous for Kimoto to assert that he did not understand that the scams described above were "deceptive acts or practices," 15 U.S.C. § 45(a). The language of the FTC Act is clear enough on its face, and, to

the extent he had any doubt, Kimoto could have reviewed any number of FTC enforcement cases involving misleading or deceptive online marketing, including the two cases he was directly involved in: *Capital Choice*, a case involving advance fee credit cards and unfair debiting of consumer bank accounts for upsells, and *Assail*, which also involved advance fee credit cards like the line-of-credit offers here. Moreover, EFTA and Regulation E are detailed and specific authorities that plainly require that preauthorized electronic fund transfers from consumer accounts be authorized only in writing, with a copy provided to the consumer when made. 15 U.S.C. § 1693e(a); *accord* 12 C.F.R. § 205.10(b).

Kimoto also had ample notice that he could be subject to the injunctive relief imposed. The fact that Section 13(b) authorizes courts to issue permanent injunctions whenever a defendant violates any of the laws enforced by the Commission and is likely to continue to do so, has been recognized in the Ninth Circuit for thirty years and upheld repeatedly. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982); *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1083 (N.D. Cal. 2009). Moreover, as Kimoto well knows from his experiences in *Capital Choice* and *Assail*, it is also well-recognized that courts may craft injunctive relief broadly to prevent such illegal conduct in the future, including the imposition of permanent

bans from particular lines of business. *See Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 391 (9th Cir. 1982); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *see also FTC v. Gill*, 265 F.3d 944, 957-58 (9th Cir. 2001) (ban on engaging in credit repair). The availability of equitable monetary relief under the FTC Act is also well-established. *See*, *e.g.*, *FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009); *Pantron I*, 33 F.3d at 1102.

For these reasons, Kimoto's claim that the FTC Act or EFTA were unconstitutionally vague because they did not inform him whether or how it would be applied to him has no basis in fact or law and should be rejected.

II. The district court correctly rejected Kimoto's advice of counsel defense.

In the course of his vagueness argument, Kimoto also claims that he relied upon advice of counsel. Specifically, Kimoto argues that the statutes at issue were so unconstitutionally vague that he consulted counsel, followed counsel's advice, and nonetheless still ran afoul of the law. He appears to be arguing that, because he relied on the advice of counsel, he could not have had the intent necessary for liability under the FTC Act.

Kimoto raised a similar advice of counsel defense in his motion for summary judgment, and in a related motion for "judicial notice" of his arguments regarding scienter. *See* Doc. 155, at 3; Doc. 314. The district court rejected these

arguments, recognizing that there is no elevated scienter requirement under the FTC Act. Doc. 343, at 14. Instead, to be liable, an individual must (1) participate directly in the acts or practices or have authority to control these acts, and (2) have actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of a misrepresentation, or awareness of a high probability of fraud along with an intentional avoidance of the truth. *Id.* (citing *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006)). In light of the undisputed facts, Kimoto plainly meets these requirements for liability. Moreover, in *Cyberspace*, this court explicitly rejected the advice of counsel defense Kimoto attempts to raise here. *See Cyberspace*, 453 F.3d at 1202 (citing *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 575 (7th Cir. 1989)). Thus, for all these reasons, whether he consulted with counsel is simply immaterial.

III. The FTC Act does not produce absurd results.

Kimoto's final argument on appeal invokes a familiar principle of statutory construction – i.e., that statutes should not be read to produce absurd results. He does not explain, however, what is supposedly absurd about the results in this case, and he offers no alternative reading of the statute. The cases cited by Kimoto are inapposite because the courts there were grappling with two competing interpretations of statutory language in order to assess Congress's intent. *See, e.g.*,

Clinton v. City of New York, 524 U.S. 417, 428-29 (1998) (interpreting whether "individual" included both natural persons and corporations); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 508-11 (1989) (interpreting whether Federal Rule of Evidence 609 admitting prior crimes applied to civil plaintiffs as it did to criminal defendants); *United States v. Kirby*, 74 U.S. 482, 483-84, 485-86 (1868) (interpreting whether statute penalizing interference with the mails applied to a sheriff and his posse who delayed mail-carrying steamboat to arrest a passenger).

In any event, the relief imposed in this case is fully consistent with how the FTC Act has been applied by courts nationwide, including this Court and the district courts within this Circuit for over thirty years. The injunctive relief imposed in this case is standard and well-recognized part of the relief available to the FTC in enforcement actions. *See, e.g.*, *Singer*, 668 F.2d at 1112-13 (9th Cir. 1982) (finding that FTC had access to a district court's full range of equitable powers); *accord FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-69 (11th Cir. 1996); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 719 (5th Cir. 1982). The availability of equitable monetary relief is similarly well-recognized. *See, e.g.*, *Stefanchik*, 559 F.3d at 931; *Pantron I*, 33 F.3d at 1102; *Singer*, 668 F.2d at 1112-13. Thus, nothing about the relief

imposed in this is absurd or unwarranted.

In fact, the relief imposed on Kimoto is particularly apt. Kimoto is a recidivist, involved in two prior FTC enforcement cases concerning line-of-credit schemes like the one at issue here. And here Kimoto diversified the range of deceptive products to include grant opportunities, work-from-home opportunities, and health supplements and nutriceuticals. In addition to deceptive and misleading advertising about these bogus products and services, Kimoto and his fellow defendants also bilked consumers through negative option upsells, repeatedly billing them for products and services they did not know they had purchased and did not want. The Grant Connect scheme was complicated, involving groups of defendants collaborating on various aspects in order to most effectively lure consumers to their deceptive offerings. And Kimoto was at the center of it: running and managing Vertex and, later, Vantek and working with other defendants to build the scheme. Given the breadth of the conduct and Kimoto's role and culpability, there is nothing absurd about the relief granted by the district court.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

s/ Burke W. Kappler

BURKE W. KAPPLER
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
202-326-2043

OF COUNSEL:
ROBERTO ANGUIZOLA
TRACEY THOMAS
DOTAN WEINMAN
Federal Trade Commission
Bureau of Consumer Protection

June 11, 2012

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, to the following non-CM/ECF participants on June 11, 2012.

Kyle Kimoto
Register # 07791-025
Federal Correctional Institution (FCI) – Beaumont
Medium
P.O. Box 26040
Beaumont, TX 77720

s/ Burke W. Kappler

BURKE W. KAPPLER
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
202-326-2043

Dated: June 11, 2012

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, plaintiff-appellee, Federal Trade Commission, states that it is aware of the following related case pending before this Court:

FTC v. Grant Connect, LLC, et al., Case No. 12-15481.

Respectfully submitted,

s/ Burke W. Kappler

BURKE W. KAPPLER
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
202-326-2043

Dated: June 11, 2012.

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Signature s/ Burke W. Kappler

Attorney for Plaintiff-Appellee Federal Trade Commission

Date June 11, 2012

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9th Circuit Case Number: 11-18023

I, Burke W. Kappler, certify that this brief is identical to the version submitted electronically on June 11, 2012.

s/ Burke W. Kappler

BURKE W. KAPPLER
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
202-326-2043

Dated: June 12, 2012