IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

FEDERAL TRADE COMMISSION,)
Plaintiff,)
)
vs.) CIVIL CASE NO. 20-cv-3538-GLR
)
RAGINGBULL.COM, LLC,)
et al.,)
Defendants.)
_____)

Friday, March 19, 2021
Virtual Hearing via Zoom
Baltimore, Maryland

Hearing on Motion for Preliminary Injunction

BEFORE: THE HONORABLE GEORGE LEVI RUSSELL, III, Judge

For the Plaintiff, Federal Trade Commission:
Colleen Robbins, Esquire
Sung Kim, Esquire

For the Defendant, RagingBull.com
Greenberg, Traurig, LLP
Steven Malina, Esquire
Miriam Bahcall, Esquire
Brett Doran, Esquire
Andrew Berg, Esquire
David Barger, Esquire

For the Defendant, Kyle Dennis and the Winston Corp. entities:
Boies Schiller Flexner LLP
Matthew Schwartz, Esquire
John Zach, Esquire
Sabina Mariella, Esquire
Jonathan Shaw, Esquire
(Appearances continued on following page)

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Reported by:
Nadine M. Gazic, RMR, CRR
Federal Official Court Reporter
101 W. Lombard Street, 4th Floor
Baltimore, Maryland 21201
410-962-4753

A P P E A R A N C E S (Continued)

For the Temporary Receiver, Peter Keith,
Gallagher Evelius and Jones LLP
Mark Saudek, Esquire
Meghan Casey, Esquire

Also Present:
Defendant, Jason Bond, Jeffrey M. Bishop
Temporary Receiver, Peter Keith

P R O C E E D I N G S

THE COURT: All right, everyone. All right, good morning. Why don't we go ahead and have the case called.

THE CLERK: The matter now pending before this Court is Civil Number GLR-20-3538, Federal Trade Commission versus RagingBull.com, LLC; Jeffrey M. Bishop; Kyle B. Dennis; Jason Bond; Jason Bond, LLC; Winston Corporation; Winston Research, Inc.; and Sherwood Ventures, LLC. This matter now comes before the Court for the purpose of a Preliminary Injunction.

Counsel, please identify yourselves for the record, beginning with Ms. Robbins.

MR. ROBBINS: Your Honor, Colleen Robbins with the Federal Trade Commission. Good morning.

THE COURT: Good morning.

MR. KIM: Good morning, Your Honor. Sung Kim with the Federal Trade Commission.

THE COURT: Good morning, Mr. Kim.

MR. MALINA: Steve Malina, Your Honor, with Greenberg Traurig on behalf of the RagingBull defendants.

MS. BAHCALL: Miriam Bahcall with Greenberg Traurig on behalf of the RagingBull defendants.

MR. DORAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. DORAN: Brett Doran on behalf of the RagingBull defendants as well.

MR. BERG: Good morning, Your Honor. Andrew Berg from Greenberg Traurig on behalf of the RagingBull defendants as well.

THE COURT: Good morning.

MR. BARGER: Your Honor, David Barger on behalf of the RagingBull defendants as well. Good morning.

THE COURT: All right. I want to thank everyone for getting together for this.

MR. SCHWARTZ: One more.

THE COURT: I didn't mean to miss you, Mr. Schwartz.

MR. SCHWARTZ: That's all right. I take it as a good sign that they were forgetting about me. On behalf of Kyle Dennis and the Winston entities you have Matthew Schwartz, John Zach, Sabina Mariella and Jonathan Shaw from Boies Schiller Flexner; and Brian Levin from Levin Law and we are joined by our client, Kyle Dennis. Good morning.

THE COURT: All right. Mr. Saudek, you're on mute. We cannot hear you.

MR. MALINA: Your Honor, also Defendants Bond and Bishop are also present this morning.

THE COURT: Very good. Mr. Saudek, we still can't hear you.

MR. SAUDEK: Thank you very much, Your Honor. Mark Saudek on behalf of Temporary Receiver Peter Keith. With me is Mr. Keith. We are on one audio feed and so my audio feed is

also linked to Mr. Keith. We thought that would be easier for the Court. It turns out it was a little more complicated at the outset. We can mute from our end, Ms. Moyé, so we're happy to do that and keep ourselves muted and unmuted as we move forward ourselves to make it easier for the Court.

THE CLERK: That's fine, thank you.

THE COURT: That makes sense, all right.

MR. SAUDEK: Thank you.

MS. CASEY: Good morning, Your Honor. Meghan Casey also on behalf of Temporary Receiver Peter Keith. Good morning.

THE COURT: Okay. Did I miss anyone? All right, very good. As indicated from the docket, we are here for the purposes of a hearing on a Motion for Preliminary Injunctive Relief that is sought by the Federal Trade Commission. As I indicated in our previous teleconference, I'd like to give a general overview of where we are as far as the litigation is concerned and a procedural history of the case. Subsequent to that I will hear from the FTC regarding a presentation related to the balance of the equities.

I've had the opportunity to digest much of the material related to the likelihood of success on the merits and so my primary focus today will be on the balance of the equities.

Subsequent to our hearing, I will hold the matter

over for a formal ruling on the Motion for Preliminary Injunctive Relief that will be set this Friday or the following Friday, a week from today. The full force and effect of the Temporary Restraining Order will remain until such time as I issue a ruling on the Motion for Preliminary Injunctive Relief.

This case arises out of a complaint that was filed on December 7th of 2020. In addition, a three-count complaint in essence alleging two counts of violation of the Federal Trade Commission Act, as well as one count related to the Restore Online Shoppers' Confidence Act which is Count Three. Concurrent with that filing, the FTC sought a Motion for a Temporary Restraining Order with an asset freeze and appointment of a Temporary Receiver in addition to seeking other relief, as well as an order to show cause why the preliminary injunction should not be issued.

The next day, the Court entered into an ex parte order resulting in a TRO being imposed and an asset freeze on personal bank accounts with Defendants Bond, Bishop and Dennis, and I also appointed a Temporary Receiver to take control of RagingBull's current day-to-day operations. We certainly enjoined, that order enjoined the Defendants from engaging in certain advertising practices. This Court modified on December 17th of 2020 the Temporary Restraining Order to release Defendant, MFA Holdings Corporation from the TRO asset

freeze and allowed the FTC to file an amended complaint dropping MFA Holdings as a defendant in its entirety.

The parties fully briefed the Motion for Preliminary Injunction and attempted to reschedule the Preliminary Injunction hearing for February 5 of 2021. As indicated, the defense filed a consolidated response to the Motion for PI on January 13. The FTC filed a reply on January 27 in further support and, of course, the Temporary Receiver filed an initial status report on February 1 of 2021. On February 3 I convened a teleconference after review of the pleadings to discuss the upcoming Preliminary Injunction hearing and expressed my interest in an additional briefing regarding RagingBull's business operation. At the conclusion of the call, the parties agreed to set in a briefing schedule and RagingBull, in fact, submitted a proposed business plan and the FTC, as well as the Temporary Receiver, filed a response and RagingBull indeed filed a reply to the responses that were submitted. We had this hearing set for this morning, March 19 of 2020.

FTC's complaint arises out of -- the first two counts arise out of misrepresentations regarding RagingBull's potential earnings by its gurus, Bishop, Bond, and arguably Dennis. The second, Count Two deals with misrepresentations of the consumers' ability to deploy the RagingBull's strategies, namely mirroring of trades, et cetera.

Finally, the Restoration Online Shoppers' Confidence Act which is contained in Count Three has as its genesis the business transaction of offering or imposing a negative option feature that would require the seller to opt out of the services that are offered by RagingBull instead of having a positive option feature. In other words, if the consumer did no action, it would automatically renew instead of an option where the consumer could in essence automatically cancel the services that they ended up ordering.

There are a number of documents. In fact, I've got boxes and boxes of documents in my chambers supporting both the FTC's position regarding their claims and I've got boxes of documents and evidence from RagingBull attempting to refute the claims that were made by the FTC.

Section 13(b) of the FTC Act as codified in Title 18 United States Code Section 53(a) grants this Court the authority to issue preliminary injunctive relief to enjoin practices that violate any law enforced by the FTC. In order for the Court to grant a preliminary injunction, the FTC must demonstrate a likelihood of success on the merits of its claims and that the equities weigh in favor of a preliminary injunction.

Regarding likelihood of success on the merits, the FTC must show preliminarily by affidavits or other proof that it has a fair and tenable chance of ultimately success on the

merits.

The balancing of the equities element of this case is one that the Court reached out to the parties on to focus their attention and argument on today. The RagingBull has made a number of concessions that they have memorialized in a most recent proposed preliminary injunction order that has been presented to the Court for its consideration. This proposed injunctive relief related to RagingBull involves numerous -- well, at least two phases of operation, both of which would be overseen by a compliance monitor that would be chosen by the Court.

RagingBull has proposed a compliance monitor, Affiliated Monitors as the suggested monitor overseeing RagingBull's reconstitution of its operation. Affiliated Monitors has been chosen or used by the Federal Trade Commission in the past.

There are a number of precautions that have been put in place as well by RagingBull to ensure not only lawful compliance, but also ensuring that certain customers who believed that they are entitled to refunds get them, specifically some of the 31 affiants, some or all of the 31 affiants that are the subject in the fulcrum of this litigation, as well as present customers of RagingBull or past customers of RagingBull who have sought to have these refunds. And to ensure this, both Bishop and Bond have agreed to place

into escrow the sum of $10 million to ensure compliance with both Phase I and Phase II in conjunction with the monitor.

The question that I have and I posed to I guess the FTC and Ms. Robbins is here and I think she's speaking on behalf of the FTC, initially and at the outset was in light of these concessions which would be memorialized in a court order that would have the strength and authority authorized by federal statutes, as well as the Federal Rules of Civil and Criminal procedure as far as enforcement which would include both contempt mechanisms as well as arguably complete rollback of the phasing system and arguably the reimposition of a temporary asset freeze, why with those precautions, the balancing of the equities would tip in favor of the asset freeze and the continued receivership.

I would ask at the outset, Ms. Robbins, to address these issues, or if Mr. Kim is there, or anyone else to provide me an understanding of how it is that a current asset freeze would not completely kill the business. In light of the Court's backlog due to the coronavirus and just general caseload in general, a trial on the merits of this case before me may not take place until 2023 or 2024. There is protracted litigation involved with numerous attorneys. The Receiver, the latest costs by the Receiver is close to $500,000. Those assets are going to dwindle RagingBull's assets as well. The Receiver monitoring RagingBull's activities over the course of

the protracted litigation, participation in depositions, otherwise investigating things, it could be an astronomical amount of money that has to be expended with no money coming in whatsoever. And there appear to be some pretty significant safeguards as to the viability of the company to ensure that the company will be operating in a lawful manner. And certainly while I understand that there may be some skepticism both on the Receiver's part, as well as the FTC's part as to RagingBull's ability to operate lawfully and profitably during the two or three-year pendency of this litigation, it seems to make sense under some circumstances for me to give them a shot. And instead of having 160-plus employees remain unemployed, to have past customers who are awaiting refund and demanding a refund for their services, having them wait three years until the final disposition on the merits to get refunds, you have present customers who will now demand refunds because the services that they paid for were not provided. In addition to that, I would note that there are approximately 30,000 at least according to RagingBull, current customers that are willing to despite the knowledge of this particular lawsuit, willing to stick with RagingBull because they value RagingBull's services. This seems to undercut the revenue based damage stream of $137 million fairly significantly.

While I don't have before me the exact amount of

services that were offered or the price of those services, given that we've got 31 affiants and potentially 30,000 present customers that are willing to reengage RagingBull, it seems to weigh heavily in the one thing, in blunting or reducing the damage claim, the ultimate damage claim that is sought. But the reality is is that there appears to be an opportunity for RagingBull to continue to earn money during the years pendency of this litigation. And so that's why in weighing this and in considering these arguments, that's why I wanted to have the parties focus primarily this morning and today, on that particular element which, of course, must be met.

I note that in RagingBull's proposed preliminary injunction order which seems to address the motion that was submitted by the FTC, it seems to me that this order would be a standalone order and if I believed that FTC could not meet its burden, the Motion for Preliminary Injunction as filed would be denied and this particular order would be instituted separate from the preliminary injunction that was sought by RagingBull, again, with the full force and effect of enforcement through federal statutes or the Federal Rules of Criminal or Civil Procedure.

So with that, those preliminary comments, you know, I will sort of go round-robin in a really short form and just ask whether or not I've sort of got it. And then I will ask

Ms. Robbins to address the issues that I raised in my preliminary remarks, as well as further develop the second prong of that preliminary injunctive relief.

So I hope that I've sort of put forth a procedure or methodology for moving forward. But Ms. Robbins, I can either start with you for a relatively short comment to point out the flaws in my -- not necessarily the flaws in my analysis, but where from a factual procedural standpoint I am incorrect.

MR. ROBBINS: Your Honor, we don't -- everything you said does sound correct of the procedural history of this case. The FTC feels strongly about an asset freeze and preservation order and a Receiver should remain in place and we would like to argue the balance of the equities as to that.

We are also able to address if the Court does feel that a monitor is appropriate in this case, we would also like to address the Defendants' proposed order. And so we would like that opportunity. But everything you have said so far is correct.

THE COURT: Okay, that's good. All right, RagingBull, I'll just hear from one by one whoever is going to speak on behalf of the attorneys for the Defendants.

MR. BARGER: Yes, Your Honor, good morning. This is David Barger. Just very briefly from my standpoint and I appreciate the opportunity from other counsel to make sure I don't overstep. Without conceding the factual premises, I

think the Court's summary is absolutely accurate. Thank you.

THE COURT: Okay, thank you very much.

MR. SCHWARTZ: With respect to Mr. Dennis, Your Honor, we also agree that everything you said is accurate. We would add that there's a further sort of second set of inequities that apply uniquely to Mr. Dennis and we'll be prepared to address those.

THE COURT: Okay, thank you.

MR. SAUDEK: Your Honor, this is Mark Saudek. Can you hear me?

THE COURT: I can, thank you.

MR. SAUDEK: Your Honor, just very briefly, two points I think worth raising the facts that you described. One is the number of refund requests. While there are 31 affiants, I know that Your Honor has seen that we have received approximately 1,500 requests for refund without soliciting any requests for refund. We think that is the current number that we are aware of. And I believe that the current proposed preliminary injunction does not, in fact, provide for any payment to any of those who have requested refunds other than the 31 that Your Honor described.

And the only other point, Your Honor, is that I believe the 30,000 customers figure is one that the Temporary Receiver has not in any way attempted to validate or I think at this point could validate. That is a number that RagingBull

has proposed that they believe is reasonable and we do not have any position, Your Honor, on whether that is accurate or not.

THE COURT: Okay. And all of that -- thank you for that, Mr. Saudek, and I will await Mr. Barger or another attorney for RagingBull to address the issue of the proposed 1,500 and whether or not there's a methodology to properly vett the 1,500 to determine whether or not they are entitled to that relief that they are requesting. But I would note of those 1,500 requests for refund, I believe, I believe that there was somewhere in the pleadings that not all of those requested refunds were from disgruntled customers. That some of those refunds were, indeed, from individuals who for whatever reason just no longer needed the services. Is that accurate, Mr. Saudek?

MR. SAUDEK: Your Honor, there are some who have said that they are no longer receiving services and therefore would like a refund. And then there are as you character them, disgruntled consumers. We have not done a statistical analysis of how much are in each group, but certainly those are the two primary groups. So we have not seen a market number of customers who just say they would like a refund without a reason. People have either told us that they would like a refund because they no longer have been receiving services for the past four months, or that they were

dissatisfied with the services that they did receive.

THE COURT: And let me ask you, Mr. Saudek, did the Receiver anticipate providing those refunds -- oh, okay, I note that I believe in page 15 of the proposed preliminary injunction, all refund requests would be handled before the end of Phase I. So I think -- I could be wrong and I'll wait for Mr. Barger to comment on that, but it may be that those individual requests for refunds are addressed there.

I also have another question for -- whether or not Mr. Saudek you knew this and I know it's fluid. And I haven't had the opportunity to talk to you about this, but is it anticipated that none of the refunds for those 1,500 that are possibly eligible or the 31 affiants or anyone else will be processed until there's an actual final judgment in this litigation? So in other words, there's an actual finding via jury as to whether or not the FTC is entitled to the relief it requests?

MR. SAUDEK: At this point, Your Honor, your point is well taken that these are what we deem to be liquidated claims in the sense that the amount of the claim is determinable. The validity of the claim would have to be determined. I don't believe that the mechanism that's provided in the current proposed order does that. But Your Honor, I think that the short answer to your question is that there would need to be a mechanism in this litigation or in some

other resolution to this litigation to determine which claimants have valid claims and then what amounts of those claims would be recognized. Whether that's through the litigation process that the FTC manages, whether individuals would make claims against the Defendant entities, whether there would be a class action lawsuit filed by a private attorney, I think we would have to see how those claims are made and pursued, prosecuted during the litigation.

We have in the past, of course, if there is a resolution between the parties, instituted a claims adjudication process that's far less formal than that in which the Receiver adjudicates individual claims both for their validity and their amount. That would only occur I believe in this instance if there were a settlement, a resolution agreed to between the parties. Otherwise it would have to happen through the normal litigation process with either the FTC driving that on behalf of consumers that does, or with consumers bringing claims themselves either individual or collectively.

THE COURT: And so in essence while reading this case and given the current state of affairs and how protracted this litigation is going to be, it appears as though this particular -- oh, well let me ask you this, Mr. Saudek: If this current TRO asset freeze and Receivership remains in place, do you agree that that's going to basically terminate

RagingBull? They're going to go out of business by the time--in two years, three years when this goes to the merits?

MR. SAUDEK: I think that two to three years of activity by a Temporary Receiver or by a Permanent Receiver through litigation would likely consume the assets of the estate or most of the assets that are currently in the estate and the company would not have additional revenues. I don't see how the company would continue. Of course part of the process of gathering -- of pursuing the Receivership is to gather more assets into the Receivership. We believe that would be possible. But in terms of the ongoing business of the entity, I think that would be very difficult. It's hard to imagine, Your Honor, that that could continue if the Receivership continues and assets remain frozen.

THE COURT: Right, okay. All right. Thank you very much, Mr. Saudek. Oh, by the way, with regard to the plan, I know that Ms. Robbins indicated that she is going to raise some issues regarding the proposed preliminary injunction in this case. And I note that in RagingBull's papers that they reached out to the Receiver -- the Receiver reached out to RagingBull with regard to the business plan and then RagingBull reached back out to the Receiver regarding the business plan, but then there was no communication whatsoever related to a vetting of the practicality of the business model that has been proposed by RagingBull. And I'm wondering why

that was. Because initially I was hoping that I expressed, if not implied, that I really wanted the nuts and bolts of this to be vetted a little bit more thoroughly than that. And I know the FTC had issues -- is now saying that they have issues with this and the Respondent. But I would have hoped that those responses would have been used to a magistrate instead of an outright opposition prior to even a business plan being put forth. So I want to know why it is that there was not a more robust engagement with RagingBull subsequent to their business plan being filed.

MR. SAUDEK: The magistrate engagement was that that was an engagement that all of the parties would need to participate in. And it was our understanding that the FTC was not willing to participate in an engagement with the magistrate judge to try to resolve claims or to settle the entire lawsuit. So our view was that without the participation of the FTC, it did not seem appropriate for us to move forward to try to resolve claims with the magistrate judge. We're frankly not in a position to do that.

As to the business plan, we have worked closely with our financial expert and our accounting experts to try to understand the business plan, and then to express to RagingBull where we viewed the business plan to be insufficient. I think, Your Honor, that the differences that we have as to the business plan -- and the business plan is

devised I think neatly into two sections, one is compliance, the other is the financial aspect of it. As to the financial aspect of it which I think is what Your Honor is referring to now, although I'm happy to address the compliance as well, our view of the business aspect is that we -- just based on our financial experts' views -- have different assumptions that we bring to the business plan. And so given the different basic assumptions on costs that the entity is facing currently and the projected revenues, we do not think -- and our financial expert, Your Honor, advised us that he did not see that this was a business plan that was anywhere close to viable and that the assumptions were so different and so far off from one another that we did not see that there was a possibility to try to reach a resolution on a business plan that would be viable moving forward for this entity that would lead us to profitability in the near term.

Of course, if the assumptions that RagingBull has made are correct, then the business plan will work. And so, Your Honor, we're not of the view that if RagingBull's assumptions moving forward are accurate, that this company cannot operate profitably. In fact, if RagingBull's assumptions as stated in its business plan are, in fact, accurate and we're attempting to predict the future here, if their predictions of the future are correct based on their own personal experience and the opinions of their expert, then,

Your Honor, we believe that the business plan itself is not flawed structurally in any way. It's just a difference I believe, Your Honor, in the assumptions that go into it.

So we do not take issue with the structure of the business plan, the finances of the business plan itself. If RagingBull is correct that it can operate with 15 employees, that the marketing that is compliant with all FTC rules and regulations will generate the types of revenues that it predicts it will generate and that it can, in fact, operate with the compliance staff as it says it can in a way that's compliant that satisfies the Court moving forward, then we are not of the view, Your Honor, that its business plan is structurally in some other way flawed. Does that address Your Honor's question as to that?

THE COURT: It does. Also, but is it safe to say that you have agreed that the one future predictor that the Receiver can make is that all of the assets will likely be consumed within the two-year or even three-year period of time before this case will go to the merits -- when this case would go to the merits? So in other words, we can't predict whether or not RagingBull can survive under the circumstances that they are proposing and under those assumptions, but what we can predict is that if the current status quo remains in place, it's fairly likely that there are not going to be any assets left to pay anybody.

MR. SAUDEK: Your Honor, in the current estate there is by our estimation, approximately $7 million. There are costs that have been presented to the Receiver that are costs of the company that could reduce that by as much as approximately $4 million. So that would leave roughly $3 million in the estate. And I have more specific numbers, but let's call it roughly $3 million. The question is whether that $3 million would be consumed over the course of litigation over the next two to three years. Your Honor --

THE COURT: Also there's one -- Mr. Saudek, there's one other factor too, the costs and fees of the Receiver. Because right now we're at $500,000. Three years from now that could be more than that.

MR. MALINA: We're more than $500,000 into the Receiver, Your Honor, well in excess of that.

THE COURT: I just threw out $500,000 just for the realistic figure that if this were to continue to go forward for much longer, according to the monitored projections of the Receiver itself, and of course RagingBull disputes those monetary projections, but according to those monetary projections, the company could be insolvent in a year. So another balancing of the equities aspect of this which means no claimant gets paid and the present customer -- the liabilities increase because the present consumers of the products and services are disgruntled and they rightfully

deserve -- they rightfully deserve refunds because the products that they're paying for upfront they're not receiving. And so the harm that is being caused is significant. It's unfortunate, because this TRO has basically put handcuffs behind RagingBull's back and allowed FTC to step on their throat for two years until this litigation is proceeded to the merits.

So those are the issues that I'm sort of grappling with, as opposed to a compliance monitor which is overseeing an operation of RagingBull and as opposed to a Receiver that is not engaging and assisting in the operation of RagingBull whatsoever.

So those are sort of my preliminary thoughts on that. I don't know whether or not you want to address the last point, but to my point that, you know, the costs of the Receiver, the legitimate costs of the Receiver are there. You submitted a motion for fees and costs. They're extraordinary. I didn't call them unreasonable, I haven't ruled on it yet, and I'm not suggesting that they are. But if we continue down the line of, you know, $500,000 and $600,000 every three months for compliance, those are monies that could have gone to claimants right now, putting money in the pockets of consumers right now that believe that they're disgruntled, that 1,500. Do you know an approximate amount speaking to the Receiver of the value or the amount of money that those 1,500

claimants are requesting? Even if it were approximate and I'm not going to hold you to it, Mr. Saudek, because that's digging in the details of those claims. But I did not know whether or not you investigated whether or not the -- assuming that all 1,500 claims were paid and entitled to the payment of refund, whether or not that would amount to a million dollars worth of claims or what. And I don't know whether or not -- I see Mr. Keith taking off his mask, so he might have something to say about it. I'm not putting him under oath at this point because I'm not taking testimony, but what I'm just trying to receive is information for me to digest as I navigate the merits of this particular case.

So Mr. Saudek, can you give me any insight as to that? Because I'm wondering to use a slogan by my law clerk, whether or not the juice is worth the squeeze so-to-speak.

MR. SAUDEK: Yes, Your Honor.

THE COURT: Go ahead.

MR. SAUDEK: I'll address both those points and I do think Mr. Keith would appreciate addressing the Court briefly if the Court will hear from him.

As to the two points that you've raised, one the 1,500 claims, we have not calculated the exact amount. We have calculated an approximate amount of between 4 and $5,000 per claim. We don't know whether that is a valid amount or not. We have not pursued whether that is, in fact, what people have

paid and what they would be entitled to. The simple math of that is 1,500 times 4,000 is 6 million. Again, we have not evaluated individual claims to see whether there's merit to them, but this is what people have presented to us.

And then, Your Honor, just more globally and then I will allow if Your Honor will allow Mr. Keith to speak for a moment, the question that we have attempted to answer is whether, in fact, there will be more money or less money in the estate if RagingBull is permitted to operate. That is the question that we attempted to answer to serve the Court. That's what our response to the business plan was driving at. But Your Honor, if Your Honor would hear from Mr. Keith, he would be glad to address these points.

THE COURT: By the way, I have one other comment, Mr. Keith, before you get started. And I'm sorry, this is just the way I conduct these hearing because I read all of your papers and I've got some questions. For the most part I know that there was some -- early on in this litigation, there was an assertion that one of the attorneys from RagingBull told one of the employees not to necessarily provide some information or documents to Mr. Keith. I recall reading something like that. But for the most part, Mr. Saudek, would you characterize the cooperation from RagingBull and its attorneys, the principals as being full and complete?

MR. SAUDEK: Your Honor, the issue that Your Honor

has raised we have seen and heard from more than one employee. So that remains an issue, one that we have concerns about. That would be the primary driver that would prevent me from saying it has been full and complete. But other than that, Your Honor, we have received cooperation. We have received information as requested for the most part from RagingBull and we have certainly had access to all electronic systems that RagingBull operates to the best of our knowledge.

THE COURT: And by the way, there's been complete and utter financial undress and transparency regarding RagingBull and its principals. In other words, you haven't found any secret bank accounts or anything like that that have been discovered subsequent to the Court's order of the TRO and the appointment of the Receiver?

MR. SAUDEK: We have not, Your Honor, and we have coordinated closely with primarily outside accountants to RagingBull. And the outside accountants to RagingBull have been cooperative and have provided us the financial information that our financial experts have sought. We have not found hidden bank accounts or other evidence of attempts to hide assets.

THE COURT: All right. And would the proposing of a $10 million in escrow account in your mind or -- again, I don't want to speak for Mr. Keith, but you're representing Mr. Keith -- but in your mind that seems to be a pretty good, good

faith deposit where you're not taking money out of a company, you're putting it in to safeguard and ensure that disgruntled consumers or customers and those entitled to refunds are entitled to them and paying for monitors. That's not a pittance worth of money that's being proposed by the RagingBull principals; is that correct?

MR. SAUDEK: $10 million is certainly not a pittance, Your Honor. Would you like me to address it any further?

THE COURT: No. Mr. Keith, if there's something that you wish to add, I thank you very much.

MR. KEITH: Good morning, Your Honor. Yes, I just would like us all to be on the same page with regard to the facts of what money is available. So we currently hold slightly in excess of $7 million in the Receivership account. We have employees who have not been paid wages and that number is roughly $425,000. So they are creditors of the business. We have 37 business creditors who have not been paid and they are owed approximately $325,000. We have payment processors. These are the organizations that basically handle the credit cards and there are five of those entities and that amount is about $1.8 million that they are claiming. We have Government entities that are claiming taxes owed. Those include pre-Receivership taxes for the company, as well as internet sales taxes. And those numbers are a total of about

$2.8 million. And then there's a Paycheck Protection Program loan for the Government that hopefully will be forgiven, but that's unclear. And that's another $1.2 million roughly.

So currently, if you factor in all of the creditors, all of the obligations that the company has, if you take into account the PPP loan, you're roughly about four-and-a-half million dollars left in cash for the company.

And then our concern under the TRO, you've directed us to protect the interest of consumers in the TRO and so Mr. Saudek has indicated we have 1,500 consumers that have contacted either the company or us or the FTC about a refund. And the average refund that we've calculated given the documentation that customers have given us thus far is between 4 and $5,000. So if you multiply that out, that is between 6 and $7 million just on current refund claims. So that's just the raw data there. We haven't requested that all consumers who want refunds, we haven't asked them. We haven't initiated a claims process at all. But if you add up all those numbers you're correct, Your Honor, that the current cash available within the Receivership estate is not going to be able to satisfy all of those liabilities. And then the question is whether the infusion of $10 million by the principals will be enough to operate the business forward and the speculative gamble if you will of can they make a profit? Or at the end of the day as of the date of trial would they have lost money

so that that $10 million is no longer available to satisfy either consumer redress as claimed by the FTC or the business creditors or the consumers who might want refunds. And I think that that's uncertain and you've seen conflicting expert presentation on that.

So that's where things stand if we were in a liquidation mode based upon the asset freeze. And based upon the declarations that were filed by the Defendants which appear to be accurate based upon what we know, it does appear that the Defendants had not spent the many millions of dollars in distributions that they've received over the past few years. And so my estimate is that there's currently 25 to $30 million, perhaps more in very recoverable assets that are currently available just from the principals based upon the distributions that were paid to them as profits from this company. And it's my understanding that Mr. Bond and Mr. Bishop are willing to take 10 million of what they currently hold that they took from the company in profits and put that in to try to fund operations going forward.

So that's just the raw data, Your Honor, with regard to the numbers.

THE COURT: Let me ask you, Mr. Keith, would you agree that -- you may not know the exact figure -- but would you agree that there are -- with any portion of RagingBull's argument -- that there indeed are thousands of customers that

apparently valued RagingBull's services when they were operational, or whether or not you've received any information corroborating the positive testimonials? And as Receiver, have you made -- I note that there was an estimate of disgruntled employees -- maybe not disgruntled, but employees -- customers seeking a refund. I'm not going to call them disgruntled because they're a subset of those 1,500. Have you determined that there very well could be thousands, if not tens of thousands of perfectly satisfied customers of RagingBull that are willing to engage RagingBull in the future? And indeed, since this litigation was put into the public fray, I don't know whether or not there's been a significant uptick in the tens of thousands of individuals seeking refunds because, of course, their client base, RagingBull's client base was very large. And so in the event that there was a bandwagon to be jumped on because the services were of no value, you would suspect that there would be tens of thousands of RagingBull customers that would be seeking to have a refund, especially given the fact that the viability of RagingBull is essentially in a precarious position.

So I guess my question is have you seen a run on additional customer requests for refunds other than the 1,500 and 2, can you verify to any degree of accuracy the representations of RagingBull that their customer base,

current customer base exceeded let's say 20,000 customers when it was up and operating or 30,000 when it was up and operating?

MR. KEITH: So Your Honor asked a very good question. We tried to analyze that issue in our initial status report. After the lawsuit was filed, RagingBull sent out an e-mail to its entire customer base asking for positive comments about the company. They wanted support for what they call the RagingBull family. And I'm sure that was an effort to try to generate evidence for purposes of this case and it allowed them to do that. And what we found in reviewing both those e-mails that came to the company, as well as negative e-mails that came in response to that request, as well as on our website, and we set up an e-mail account so we got a large volume, many thousands of e-mails. And it basically broke down like this, Your Honor: About 37 percent had favorable comments about the company. And as you point out, some of those people might want refunds just because the service was over, the company had gone dark and they weren't getting their money's worth.

So my sense of the e-mails and our analysis of it and reading them one by one was roughly 37 percent were positive, and then the rest either wanted refunds or were critical. And we have a large number of e-mails saying, I've been deceived. They kept moving me into different services. I

asked for my money back, I couldn't get it. I followed the gurus, I lost money trading. I want my money back, can you help me?

And so then the question becomes and I think it's speculative, if the company were to start operations in two months under the business plan, how many of their 80,000 customers would actually want to continue to do services with them? Is that number 30,000? I don't know. Is it 20? Is it 50? I don't know. But from what we could tell of the e-mail traffic that we received, both positive and negative, there was a significant group. And Your Honor is correct, it was 37 percent of the e-mails that we saw that were positive and 37 percent -- if that percentage continued throughout, that's basically 30,000 subscribers.

On the other hand, there was a large number as well who were highly critical of the company. Felt like they had either been deceived or felt like they hadn't gotten their money's worth and wanted their money back. So I think the customer base is highly polarized, Your Honor, and I think it's difficult to predict what it will look like going forward.

THE COURT: Right, and that may end up undercutting the argument that the company is permeated with fraud because if you've got a third of people who are coming to you, a third of your base that's coming to you saying hey, I like

RagingBull. I'm willing to pay money for their services, but I got -- that's just an aside. All right, thank you very much, Mr. Keith. Very much.

MR. KEITH: Thank you, Your Honor.

THE COURT: Who is next?

MR. BARGER: Your Honor, this is David Barger. If I could just ask the Court, there are a number of points raised both by Mr. Saudek and by Mr. Keith that we would like to address and it went on at some length, so I want to just ask the Court's indulgence if we could address a couple of those points. And I know Mr. Malina --

THE COURT: Well, if you don't mind, Mr. Barger, I promise you, I'm going to hear everybody. If you could table your points unless someone else had something additional to add from the preliminary standpoint, I was going to just start with Ms. Robbins and then Mr. Barger, I'm going to go right to you and then I'm going to go to Mr. Schwartz to make the various presentations. And then I'll add in, I'll ask Mr. Saudek whether or not he wishes anything else to add and then I'll go back to Ms. Robbins again for a rebuttal. And then I will probably be in a really good position to be able to decide this case and figure out which way I want to go. And I've got two very capable people off screen that are designated from my chambers to assist me in this.

MR. BARGE: Yes, Your Honor.

THE COURT: All right, very good. Ms. Robbins, there's a lot to address, but I'll be more than happy to hear from you as you make it through this.

MR. ROBBINS: Thank you, Your Honor. And I am going to -- I promise I will address all of your points, but I also would like to give some context too while I'm addressing those points and try to refocus right now. Because, Your Honor, the focus so far has been on the harm to RagingBull. And really, the reason why the FTC brought this case was on behalf of consumers. Because consumers have been harmed. And since 2017, the Defendants have made $200 million using deceptive advertising. And the law is clear that it is the fraud in the selling, not in the value of what's being sold. And these consumers, we're not talking 1,500 or 30,000. They said they have 200,000 customers. They have always used deceptive earnings claims since the very beginning.

And I'd like to -- I know Your Honor has said that you really want to address the equities, but I would like to just address briefly the likelihood to succeed because I think it's really important in the context of the equities that --

THE COURT: Why don't you hit your highlights -- why don't you hit your highlights on those, but this case was very well briefed and I want to compliment the lawyers on that. And I'm fairly confident I won't miss any of your points, but if you want to put it forward to me, I promise you I will indulge

you with regard to those three points.

MR. ROBBINS: Okay. Thank you, Your Honor.

THE COURT: All right.

MR. ROBBINS: So the earnings claims in this case were ubiquitous throughout all of their marketing. And the Defendants do not have substantiation for those claims. Regardless, you know, you cannot just substantiate a handful of claims and say that you have substantiation. They must show that their earnings are typical. They are typical earnings for their consumers. They can't show that. They've never been able to show that. They don't have that evidence. And the net impression that consumers get is that they are likely to make money using Defendants' services. Therefore, these claims are likely to mislead. And in fact, they did mislead consumers. And consumers purchased 196 million dollars worth of services. And the Defendants have not provided a single sworn consumer declaration to show anything else. And the FTC has submitted 30 sworn declarations to the Court. And these sworn declarations show a glimpse of the irreparable harm that some of these consumers have faced.

And if the Court will indulge me, I just want to go through just a few. Gary Walton, in PX 39, he spent $1,499 on subscription fees. He lost $20,000 trading using Dennis's services. He is currently unemployed. He has no income. He has no prospect of income and he pulled $10,000 out of his IRA

because Dennis told him and he believed that Dennis was successful and that if he followed him, he could make that money too.

Kenneth Babikan, he lost $6,000 trying to follow Defendants' alert and he is a retiree. That's a lot of money for him.

Robert Biello, he's another retiree. He lost $30,000 trying to follow Defendants' trade and spent another $2,700 in subscriptions.

Robert Sigler had $110,000 in his IRA. It is now down to $3,500. These are clear harms that consumers have from the Defendants, from following the Defendants. And David Wrape, he went from $184,000 in his investment account to over $1,000. He is frustrated, he's mostly broke and he says that the Defendants are masters at manipulating the investors' emotions into believing that merely following their expert will make them wealthy.

Abigail Zeviar was furloughed because of the pandemic. She wasn't receiving a paycheck. She bought their services for $2,499. She tried to cancel the first day she used it. RagingBull would refuse to give her a refund and then when she charged back, they fought the chargeback the first day she tried to use their services.

Danielle Felts, she owns a small business that's been struggling in the pandemic. She's also in a wheelchair.

She suffers from chronic pain and she does not receive disability. She lost $50,000 trying to follow the Defendants' trades and $5,000 in subscription fees. In just the 30 sworn declarations that the FTC has submitted to the Court, consumers lost $965,000 in trading losses and $140,000 in subscription fees. That's just 30 consumers. They have over 200,000 customers. And the law is clear that the public interest in preventing further consumer harm and providing redress to consumers must be accorded greater weight than the Defendants' private interest in continuing their business. And the Fourth Circuit was clear in Foodtown Stores that the public interest should be given greater weight in 13(b) proceedings and that private injuries to Defendants from injunction are not proper consideration for granting or withholding injunctive relief. And in that case there was an issue about losing personnel and personnel being laid off because of a merger. And the Court still said, that is not a proper consideration.

The equities strongly weigh against allowing these Defendants to operate even under a monitor. And the equities weigh in favor of redressing consumers and preserving these assets for redress.

The Defendants were violating the FTC Act up until the day that we filed. And Your Honor, this isn't just a company that strayed over the line once. This isn't a company

that can easily come back into compliance with a monitor. These Defendants are not starting with a blank slate and we cannot avert our eyes from the way that they have operated over the past seven years and take on faith that they're going to comply with the PI even with a monitor and be profitable. And I want to explain why. Because I think it's very important for the Court to understand it's not just an N/A situation. We have very specific facts, very specific Defendants.

In July 2017, Bishop learned that one of his gurus did not want to send out, quote, *hypey smoke and mirror sales letters I get all the time*. And his response was *well, we're just going to have that contractor work with someone else who doesn't care about hype, as long as it sells*.

Soon after this in September 2017, the BBB sent the Defendants a letter and the letter showed an ad that was currently running, currently running for Jason Bond picks, and told them that they need to possess substantiation at the time the claim was made, they must be able to produce that substantiation, and that testimonials are likely to mislead consumers if what is represented is not the typical experience. The letter also informed them that consumers were complaining that they tried to cancel, they went online or they called, thought they cancelled, then they were charged. They asked for a refund and were told, *We don't give refunds.*

You should have cancelled. Defendants never responded to that letter. That was in 2017 and Defendants were doing the exact same practices up until the date that we filed, four years later.

Between 2017 and 2020 -- and this is all in our filings and the Court has Attachment P to Exhibit 44, the Defendant -- sorry, and all the exhibits -- the Defendants received numerous complaints directly from consumers. They received complaints that consumers were losing money hand over fist in trying to follow their strategies. Strategies by the way, strategies and alerts that our expert opined would uncontested, that those strategies and alerts that they're selling are likely -- consumers are likely to lose money following them. And that's uncontested.

They received complaints also that consumers could not follow their trade alerts. They couldn't get in and out at the time that they alerted in their trade alert. Also not being able to get a refund. Consumers complained over and over again that they were not able to get a refund and that they were not able to cancel. None of these gave Defendants pause. None of them made them change.

And in 2018 and 2019, they became aware of two separate Government investigations, from the FTC and the New Hampshire Securities Bureau. And the New Hampshire Securities Bureau informed them that they were concerned about their

advertising practices, that they were using images and giving consumers the impression that these were millionaire traders. And after learning of these investigations and these very specific concerns raised, Defendants did not change anything.

In 2019 and 2020 Defendants hired two compliance lawyers. But in fact, one of the attorneys in part was actually hired to help reduce the negative statements about RagingBull that remained to the BBB. And the Temporary Receiver pointed out in his report that he has not found any evidence to date of any meaningful efforts by RagingBull employees -- I'm sorry, to review advertising or marketing to comply with Section 5 and to prevent publication of unsubstantiated earnings claims. And this is corroborated by the marketing that we presented to the Court up until the time that we filed.

But in 2020, the Defendants engaged in particularly egregious behavior that shows these Defendants' true colors. First, the Defendants engaged in active suppression of negative reviews. They hired a company called Trustpilot and it was a third-party review site. And Trustpilot warned them that they were flagging negative reviews and finally suspended them because they kept flagging negative reviews even though they were warned. And in fact, after the suspension, one of their employees wrote in an e-mail, *I know we're suspended from recording Jason on Pick Reviews for a couple of weeks,*

but we're really not. I have something worked out with our rep.

Second and extremely telling about how these Defendants operate is the Defendants lied on multiple merchant account applications regarding prior payment processing termination. Laura, could you pull up those slides, please? Sorry, I just have our paralegal.

Your Honor, in January of 2019, Discover Card Network terminated the Defendants due to consumer complaints. In July 2019, Bank of America terminated Defendants' merchant account. In September 2019, Stripe terminated Defendants' merchant account. Yet in September 2020, Defendants submitted two merchant account applications that falsely state that the company has never had a merchant account terminated. Then in September 2020, Nuvei terminated Defendants' merchant account. In October 2020, Defendant submitted another two merchant applications, falsely stating the company had never had a merchant account terminated. Finally, on October 5th 2020, WePay terminated Defendants' merchant account for a high risk of charge back.

Also, on six merchant account applications Defendants gave three different answers about their refund policy. These lies to payment processors, they were not made years ago and they were not run off. These were months before we filed this lawsuit, back to back. And why did they lie? To

get what they wanted. They need payment processors to process consumer payments, regardless of their behavior.

Despite all of these warnings and notices, Defendants chose to continue to make unsubstantiated earnings claims and profit off of consumers. And throughout all this time, they're engaged in actively suppressing reviews, aggressively fighting chargebacks, adhering to strict no refund policies, forcing consumers to switch services, upselling them. That's why some of these consumers that you'll read in their declaration, they spent $8,000, $10,000 on subscriptions that kept getting upsold because they couldn't get refunds and failing to provide a simple mechanism to cancel. And reading the internal complaints from consumers to Defendants and Defendants' reactions to the negative reviews is very telling and provides the Court a window into how these Defendants interact with their customers.

For example, Bishop responded to a negative review by saying, *Get this removed or tear his argument apart. We can't let stuff like this stand without making him look stupid*. And Jordan Rayna, at one point head of customer support frequently told consumers who left negative reviews, filed complaints with the BBB or attempted to chargeback that RagingBull would do nothing to assist them now.

Rather than trying to address consumer complaints year after year, rather than trying to address the high

chargebacks, rather than trying to address the fact that why are merchants terminating or payment processors terminating our merchant accounts, why are they doing this? They never addressed those problems. They always chose to stay the course. And they chose to deflect the press over let's try to make this better.

THE COURT: Ms. Robbins, you're not suggesting, are you, that RagingBull, they were snake oil salesmen? In other words, they never provided any service of any value? Because that even appears to be refuted by Mr. Keith who is the Receiver who received verified or verifiable reviews related to RagingBull that were quite favorable, indeed 37 percent.

MR. ROBBINS: Your Honor, value does not -- is not a defense -- providing some value to customers is not a defense to the FTC Act. It's not a defense to selling something with deception. As I said earlier, it's a fraud --

THE COURT: But it goes to net impression. I mean, doesn't it go to net impression that you're going to have to establish?

MR. ROBBINS: Your Honor, if you would indulge me I'd like to play a video clip that I think highlights the net impression that consumers received from these Defendants.

THE COURT: No, I'd like you to answer my question which is, do those 37 percent favorable e-mails that were received by Mr. Keith out of the e-mails of individuals that

are seeking refunds negate the negative impression that the FTC is trying to establish?

MR. ROBBINS: Your Honor --

THE COURT: I mean, I'm not suggesting you can't win, you know, I'm saying that this is isn't a slam dunk. They weren't reviled by every single person whom they contracted services for and I'm asking you to at least concede that there were a portion of individuals that are out there that praised RagingBull for what they did.

MR. ROBBINS: There are, there are clearly customers who enjoyed Defendants' services or who enjoyed the bullpen, enjoyed the chatrooms. But there's two things with that, though. Number one is that in this kind of situation, consumers don't always know that they've been deceived. Because what's happened is consumers get this net impression that they're likely to make money if they buy these services. That's the whole reason to buy these services is so they can make money in the stock market. And they don't -- consumers don't always know that that's not true. They don't always know that the Defendants don't have substantiation to make those claims, right? Consumers don't understand that these products may not work for them and if they're not working for them, they don't necessarily understand why. And so yes, consumers could be happy, but that --

THE COURT: But these are 37 percent of individuals

who knew about the lawsuit. So if they didn't believe that they were being deceived before or they didn't know they were being deceived before, they didn't know about the scam so-to-speak, these are the folks that wrote in after they were aware of the allegations of fraud against RagingBull and still wrote in to support them.

MR. ROBBINS: So Your Honor, like I said, there are going to be customers who enjoy their services. But it isn't a defense though to the fact that they just -- they used deception to get them in the first place. I understand that there are going to be consumers that enjoy their services, but we can't -- it doesn't -- satisfied customers just isn't a defense though, to the FTC Act.

THE COURT: No, it's a defense to the extent that it changes the net impression. You know, when this case goes to trial, undoubtedly they will have Dr. Winn or the expert Winn who is going to talk about the demographics. They are probably going to -- and you are going to in turn get your folks, including the 31 affiants. And I don't know whether or not it's going to be done by statistical sample or what, but that's years down the line. And that's why -- I mean, I understand the power of your evidence, Ms. Robbins. I really do. I mean, I get it. And if indeed that's true, you know, then the Defendants did, indeed, engage in some really deceptive activity that caused a lot of harm to others. And

that's why I didn't -- I wasn't really going to the issue of the likelihood of success on the merits. I've read all of the tales and the claims that have been made and, you know, I understand the significance of at least according to the FTC, the material and real misrepresentations and according to the FTC, the real damage that this has caused. And so, I mean, I understand that, but there's a counterpoint to this as well which there are not a small percentage of favorable reviews that were received by the Receiver related to the company's operation.

So I interrupted you. I interrupted you, but I don't want you to spend the majority of your time arguing the likelihood of success on the merits. I mean, I get it. It's a real battle of the experts so-to-speak sometimes too. I'm not suggesting that you're going to win on that, I'm not suggesting that you're going to lose, but I'm troubled by the second prong.

MR. ROBBINS: So Your Honor, I think the reason why I wanted to give you that background was because I think that is the lens through which the Court should evaluate their business plan and their business plan going forward. So that is why I wanted to give the Court that background. Because it's not just about any Defendant trying to restart this business. It's about these Defendants, their history, their facts.

THE COURT: They can't be trusted.

MR. ROBBINS: Well Your Honor, one thing I want to say just about --

THE COURT: No, I'm asking you. From your standpoint your argument is they can't be trusted, Judge. You know, they can't be trusted to do the right thing under any set of circumstances. Now I presume it would be okay if the FTC or the Government had resources that they could stick an FTC attorney inside RagingBull 24 hours a day, 7 days a week and have real-time monitoring or mirroring of their economic activity. I'm pretty sure that would satisfy the FTC. But the reality is is that the current business model that they put forth even with an independent compliance monitor, RagingBull is going to figure out a way to loop the company. It's going to figure out a way to rip off consumers. Even if they were to begin the process of attempting to make those 1,500 people whole, even if they were to begin the process of paying those 31 claimants and affiants who are by the way, not going to get paid for years to come with no guarantee that they're going to get paid now, get paid at all with a fairly strong guarantee that they're going to be receiving refunds and assets within 60 days. That's a big contrast between three years and 60 days. Especially when Mr. Keith's optimism regarding the financial viability of RagingBull is so dim.

MR. ROBBINS: So Your Honor, before I move into that

I just want to just point out one thing with the testimonials is that those testimonials were solicited by the Defendants and as we presented in our evidence, some of those were paid. So I think that that, you know, it's just something that I would like to point out to the Court.

THE COURT: You're going to sort that out in deposition. I can't imagine the litigation expenses that are going to be incurred over the course of the next six months to a year. I can't imagine. They're going to want to depose every single one of your affiants. You're going to want to depose as many of the testimonial folks as you can, not to mention the expert witnesses. I mean, the litigation expenses right now we're probably looking at $10,000 an hour just on the screen alone. That's going to be -- that bill is going to have to be footed by somebody.

Okay, go ahead, Ms. Robbins.

MR. ROBBINS: But even giving them the benefit of the doubt that they could change, that they could fundamentally change their entire business model, that they could fundamentally change the culture of their company and that they could stop using earnings claims, the Defendants haven't provided any evidence to the Court of a profitable path forward. Because either they use earnings claims which they actually say in their reply that they're going to be using earnings claims, but they fundamentally don't understand

their obligations under the law because they think that substantiating a handful of trades is substantiation. That's not. So they think they're going to be going ahead and using earnings claims in Phase II, but they don't have substantiation that a typical consumer can make those earnings. So the path forward is either we go ahead and use earnings claims and that's what they base their profitability on, based on historic profits which was all based on deceptive earnings claims, and their -- the principals' tenure at the company. And if they can't use deceptive -- so those two metrics. Their past profitability and their experience are irrelevant to an analysis in a world in which they can't use earnings claims. And they have not provided to the Court what value proposition are they going to give to consumers that are going to convince consumers to spend thousands of dollars on their services. Services that uncontested our expert has said are not likely to make consumers money. What value proposition have they put forward? None. So why --

THE COURT: Well, there are consumers, there are customers out there that are willing to pay for their services. I don't think that there's any dispute about that.

MR. ROBBINS: But Your Honor, they have only ever sold their services by telling consumers they're going to make a lot of money.

THE COURT: Right, but again, these same consumers

and customers know about this lawsuit. They know about the lawsuit and they're still promoting and praising the services that they're receiving. You seem to think that the customer is duped. I'm saying this 37 percent that Mr. Keith discovered are not duped at all. They're going in eyes wide open and they continue to pay for the services.

MR. ROBBINS: Well Your Honor, first of all we don't know from that 37 percent how many customers are even active customers or do they just get automatically renewed and not know that their service has been renewed? That number is not saying -- is not indicative that there are 30,000 people who are happy. They submitted 200 solicited testimonials, but we don't have 30,000 e-mails from customers who said we are happy, we want to stay.

And Your Honor, if the Defendants don't fundamentally understand their obligations regarding using earnings claims, then how can we expect them to move forward and do this lawfully? And if they're not using earnings claims, then, you know, maybe they keep -- maybe they keep 30,000 consumers. But what happens when they move into Phase II and they can't use earnings claims? Then what about those profits after Phase II after the 60 days? They haven't -- they haven't put forth any evidence to show that they will be profitable. Their business plan is based on their past profits, their historic profits which was based on deceptive

earnings claims. They have not shown what other value proposition they're going to put forward and why are consumers going to in the future, not the existing, but in the future, why are they going to purchase these services?

THE COURT: What is the fear in allowing them to try?

MR. ROBBINS: Well Your Honor, if the Court would like them to try, then --

THE COURT: Yes, the Court would like them to try.

MR. ROBBINS: It is the FTC --

THE COURT: Yes, I don't -- go ahead.

MR. ROBBINS: Your Honor, then none of the money that is preserved should be used to fund this business. The Defendants -- in OTA, the Court did allow a monitor, but still kept an asset freeze and preservation order in place. And in that instance and in this instance too, the Defendants can turn to MFA -- they're not a part of this case anymore -- for money. They can turn to Alan Marshall. They can turn to their spouses. They can turn to other investors. They can get a loan. They can get jobs. They can do things to fund their restart. They do not have to use money that should be preserved for consumer redress.

THE COURT: But Ms. Robbins, those monies are going to be consumed anyway. Those monies are going to be gone because the Receiver -- and this is no criticism of Mr. Keith

or Mr. Saudek, but they're clipping at half a million dollars a clip. So for the Receiver to be in place for three years, we're talking about millions of dollars.

MR. ROBBINS: Well Your Honor, the Receiver has access to the corporate funds. But the Defendants have taken $55 million out of this company and are sitting on tens of millions of dollars. So they don't need to use the Receivership funds to pay for the restart of this business.

THE COURT: And there will not be any Receivership funds in three years from now if this freeze in Receivership stays in place. The way money is being spent right now with no money coming in, there won't be any corporate assets to pay any of the claims. But if they're able to operate in some fashion, they're going to be -- your affiants will get paid. You know, there may be some other folks that are going to get paid sooner rather than waiting three years for a 4 or $5,000 payout.

MR. ROBBINS: Well, to be clear though, the Defendants have not in the order that they proposed to the Court, they have put in that order that the $10 million isn't supposed to be used for consumer redress. It's supposed to be used for compliance. And there is no mechanism in that order as it stands for a redress to consumers. In fact, they say that they're going to refund consumers only on services that have a refund option. None of their services have refund

options. So they're effectively putting in an order that they don't have to give refunds to anybody. That's not equitable for consumers.

So in this case, we have 196 million dollars of harm. They want to redress 31 consumers. That's not equitable. And the public equities outweigh the private ones. And so there has to be a way to preserve assets for consumers in this case. If the Court is going to find that we are likely to succeed on the merits because we have proven our case that we have a fair and tenable chance of success then there has to be a mechanism by which consumers are redressed. And in this situation, like I said, the Defendants have access. MFA is an owner of the company. They're not under order. Alan Marshall, their spouses. They can get a private investor. There are other ways that they can get money into this company to try to move forward and see if they can be profitable. The FTC is doubtful that they will be able to be profitable because if they use earnings claims, they're not going to have substantiation and if they don't use earnings claims, it's unclear that they have a path forward.

But in any event, the Defendants' money should be preserved and the Defendants should have to use money elsewhere to restart their company.

THE COURT: Okay.

MR. ROBBINS: A couple points just about their

order. I just want to point out to the Court that we think that the monitor should at least be familiar with advertising law and we don't believe that the one that they have put forward does have that type of expertise. The FTC case that that monitor was involved in they were not tasked with reviewing ads and earnings claims. So we think it would be certainly equitable or efficient to have the Temporary Receiver be appointed as monitor, but also we are willing to work with the Court if the Court wants a third-party to be selected. But the monitor also needs to have full power to engage in undercover purchases, to subpoena documents and otherwise engage in discovery. The monitor needs the ability to monitor the financial stability of the company going forward to determine whether or not the company is profitable going forward. And then also the FTC should have access to and ability to consult with the Monitor regarding their compliance review.

THE COURT: Wouldn't that be part of the compliance monitor's -- first, wouldn't that be part of the compliance monitor's report to the Court that would be subject to approval before they even went into Phase I? So in other words, it's my understanding it's broken into two phases, Phase I and Phase II. They don't get to advertise at all until they get out of Phase I. And they don't get out of Phase I until the compliance monitor submits to me a compliance report

detailing what they have done and how they are going to maintain a lawful business and advertising practices. And then if I'm individually satisfied -- and I presume that the FTC at some point in time is going to be a recipient of the monitor's report and be able to sort of weigh in . You know, I don't want to have little mini-trials every 60 days, but the FTC is not going to be left alone and the monitor is not the sole decider. I am the sole gatekeeper on whether or not they move to Phase II. And I'm the sole keeper on whether or not they go back to Phase I.

MR. ROBBINS: Your Honor, I was just merely pointing out that in their order they did not provide for that because they do have specific provisions of the monitor's duties. But I agree with Your Honor.

The other point I wanted to make about the order is that Sherwood Ventures and Bond, LLC are left out of the order and those are part of the common enterprise. And they have not argued that they are not part of the common enterprise. That hasn't been part of their briefing. So the FTC believes that they should be routed back into that.

THE COURT: All right, I'll have the Defendants address that collectively to the extent that Sherwood should be a part of the court order, as well as Bond Enterprises. It seems to me that that might be appropriate and would go a long way into continuing to bolster the Court's confidence that all

parties right now that are subject to this are free and that may end up avoiding any sort of potential shenanigans that the FTC may be concerned about.

MR. ROBBINS: Your Honor, my colleague, Mr. Kim, if you could just allow him to just address the Kyle Dennis Defendant.

THE COURT: Okay, sure.

MR. ROBBINS: We haven't talked about him at all, but if we could have him just address briefly points regarding the equity for him.

THE COURT: Okay.

MR. ROBBINS: Thank you.

MR. KIM: Good morning, Your Honor. Can you hear me okay?

THE COURT: Where are you? I can hear you.

MR. KIM: I'm sitting down, but I can easily get up to the podium if you'd like.

THE COURT: No, that's all right.

MR. KIM: Okay, thank you. So just quickly, Your Honor, I'd like to address the FTC's claims against the Defendant, Kyle Dennis, and why the entry of the preliminary injunction is necessary and proper as to Mr. Dennis.

I don't believe the order that you received last night from RagingBull takes into account Mr. Dennis in the order. So I'm not sure if there is going to be an order

coming from Mr. Dennis's counsel. But addressing the balance of the equities as to Mr. Dennis, I think it's also important not to lose sight of Mr. Dennis's role that he played in perpetuating the RagingBull scheme and his unclean hands in this matter. Here are the facts that cannot be disputed.

Mr. Dennis ran the BioTech Breakouts services. His name and face are featured on all the marketing to this brand. Mr. Dennis narrated his own sales videos. In the videos, Mr. Dennis claims consumers can make substantial income from trading, consistently make 100 percent or more in profits following his services and that they can just sit back and let the profits roll in.

Mr. Dennis reviewed and provided content for their sales presentations that he personally delivered in his sales webinars. I'd like to show you one of his screen captures a consumer of ours took at one of his sales seminars. Laura, can you pull up OX-1, please? Sorry, Your Honor.

THE COURT: That's all right.

MR. KIM: So here are -- this is a screen capture from Mortal Lock. In the first slide you'll see in the second bullet -- and this is Mr. Dennis's face in the lower right corner. So he's sitting there showcasing this slide and talking at the same time to consumers. And there are thousands that are attending these webinars. I guarantee you'll make more than $1,999[sic] with this one trade. I think

that's in the second bullet.

If you'll go to the second slide, these are trade examples that Mr. Dennis provided for his own presentations. You'll see that these are what appear to be his supposed wins on certain trades that he made for this particular service.

Laura, if you can go to OX-2. Let me just add -- show the entire document. Thank you. Can you scroll down to the bottom? I'm sorry, the second page of this document. So this is Mr. Dennis in an e-mail -- this is in the record, Your Honor. And he's writing to Strikepoint Media which is an outside marketing agency and he's telling them how to design these slides that he's going to be using for his presentations that he's going to deliver to consumers. And Mr. Dennis says, *I want the focus to be on what I made, that I made a killing in stocks and now options which could bring even more in profits. I'd like to break down the ignite formula in separate slides*. So here he's giving creative selection in one of his many slides that he uses in his presentations.

I think you'll hear later from counsel for Mr. Dennis that he didn't have any role in the marketing or the advertising of his product, but I think the evidence that you'll see shows exactly the opposite.

If you go to the first page, Laura, Mr. Dennis writes again to Strikepoint and to others at RagingBull, the marketing folks, he reminds them, *this launch for us is going*

to be really important so just want to make sure we kill it on the presentation.

Laura, can we play the Dollar Ace sales video? It's a short clip. It's at PX 44, Attachment C.

(Whereupon the video was played.)

MR. KIM: Thank you, Laura. So we took Mr. Dennis's deposition two weeks ago, Your Honor, and nothing he said in his deposition controverts any of the critical evidence demonstrating his unclean hands. The deposition did confirm that Mr. Dennis, like all the others at RagingBull, lack complete substantiation for his earnings claims. And Mr. Dennis's reckless and unsubstantiated earnings claims have cost substantial harm to consumers.

Just a couple of examples from the record. Ugo Diribe, he's at PX 7 said in his declaration, *Carl Dennis said that his Option Rocket service comes with what he called Mortal Lock trade alerts and he guaranteed a 400 percent return on his Mortal Lock options trade. He said that for that night only, the services would be discounted to $1,997.* Later on he says in his declaration, *I lost approximately $24,000 trying to follow Jeff Bishop and Carl Dennis's alerts.*

E.C. Wells, PX 40. *Dennis claimed that his service would find momentum stocks at biotech companies doing pandemic-related drug development. I think he called these coronavirus picks. I have incurred trading losses of at least*

$10,000 following Raging Bull's stock picks, trade alerts, and watch lists.

Gary Walton, he was mentioned earlier during my colleague's presentation. *During the webinar, Carl showed us that he made 1000 percent returns on trades and he showed clips of tweets and messages he said he received from other subscribers who were successful using his service. I lost approximately $20,000 trading using Kyle's services.*

Donnie Durham: *Kyle hyped up another service called Mobile Closer.* And this is a service that Mr. Dennis had I believe launched in August of 2020. It was a couple months before our case was filed. *Kyle said he won every day in August 2020 and started this service in September of 2020. I bought this service as well. I spent approximately $20,000 on RagingBull's subscriptions and I lost approximately $50,000 using RagingBull's services' alerts and strategies.*

And these consumer experiences, Your Honor, are not anomalies. When consumers tried to seek Mr. Dennis's -- when consumers follow these alerts, they end up losing money and when consumers try to seek Mr. Dennis to get out of the hole that he's put them in, he's nowhere to be found. He's very difficult to even track down for a consumer. He doesn't even answer e-mails if consumers are writing to him, for the most part. And Mr. Dennis's deceptive marketing of the services have caused over 45 million in consumer harm, just from the

BioTech brand of services that he runs.

THE COURT: Let me ask you, Mr. Kim, is there anything during the course of your discovery with Mr. Dennis that revealed that he is a principal? I know Mr. Dennis has indicated through his pleadings that he's just an employee of RagingBull. Is there anything that has been revealed in your discovery that contradicts that particular assertion?

MR. KIM: So Your Honor, there was a brief period of time where Mr. Dennis was earning profits not just on his own products that he was selling, but also on other products -- other newsletters that RagingBull was offering. We believe that he discontinued that arrangement because he was able to make more money from his own services. That was in late 2019 to early 2020.

In terms of his formal title, he doesn't hold a formal title except when he first started with the company he held himself out as the co-founder and director of BioTech Breakouts. Later on he's I believe changed his title to or had an employment agreement with the company and the employment agreement also does give him the right to review and approve the marketing materials that bear his image and his name, which indicates that he has the ability to control the marketing from withholding consent or disapproving of any marketing materials that uses his name or his image that contain deceptive claims. In terms of --

THE COURT: I don't know, I'm just trying to -- is it the FTC's position that he is now an employee or a principal? Or I don't --

MR. KIM: I'm not sure exactly.

THE COURT: Does he get a salary?

MR. KIM: He's not paid a salary, he's paid commissions based on his sales of his products.

THE COURT: Okay. And who pays his commissions?

MR. KIM: RagingBull does, Your Honor.

THE COURT: And does he pay himself or does RagingBull pay him? He gets a check from RagingBull and he deposits that check in the account?

MR. KIM: That's correct, Your Honor.

THE COURT: He can't sign his own check to himself for a commission?

MR. KIM: I don't believe he can.

THE COURT: Okay, because if he can sign his own check off of RagingBull, then that indicates that he might be a principal. If somebody else has to sign that check that he cashes, then that is more suggestive that he might be an independent contractor or an employee.

MR. KIM: Okay. The law does say that whether you're a principal or an owner or an executive or an employee, you're still held liable if you directly participated in the illegal acts and also --

THE COURT: I'm not contesting that. I need to know what his sort of station in life is in the pecking order over at RagingBull. And it's been suggested that it may, indeed, make a difference that he is an employee as opposed to a principal. I know that you're putting forth the legal context which would be addressed probably at some point in time when we deal with the merits in this case in the event that we go to trial or, quite frankly, in a Motion for Summary Judgment which will be at some portion of time at the conclusion of discovery when I imagine Mr. Schwartz is satisfied that he is going to be prepared to try to move for judgment in this case. Just like FTC let out MFA, presumably because MFA demonstrated satisfactorily to FTC that they should not be a party to this litigation and that FTC doing the right thing said, you're right.

So I presume at some point in time Mr. Schwartz is going to attempt to use his powers of persuasion, whether or not it's in the middle or at the end of discovery, through oral presentation to you or through pleadings that I will end up deciding, to get his client removed from this litigation prior to trial.

But I cut you off, Mr. Kim, because I had a question. So feel free to proceed.

MR. KIM: Well, I was just wrapping up the presentation. I think I just wanted to address that point

because it has been raised by Mr. Dennis's counsel that his status as an employee as a non-principal matters. I doesn't matter under the law and it shouldn't matter also under the balance of equities, Your Honor. Mr. Dennis made over $13 million and the money he made was based purely on the effectiveness of his deceptive marketing. It's not based on the trading performance or success of his students.

Now the preliminary injunction order which we haven't seen as to Mr. Dennis, we believe it's necessary in order to ensure that Mr. Dennis during the pendency of this litigation does not continue to make the same unsubstantiated earnings claims and cause further harm. We also believe that the asset preservation order is necessary to ensure that some of the money that Mr. -- or the money that Mr. Dennis has received, his ill-gotten profits, are secured so that there's some meaningful redress that could be provided to consumers at the conclusion of this litigation.

THE COURT: I think, Mr. Kim, and Mr. Barger is probably going to address this. He's probably got a 15-page list of things that he's going to end up addressing, but I'm going to add to that because, Mr. Kim, it's my understanding at least that the Court will have the ability to roll back the entire preliminary injunction, if necessary, if the monitor comes up and says well A) they can't advertise but in the event that there's any illegal advertisement by Mr. Dennis,

that to the extent that he remains with RagingBull, that that will be brought to my attention by the compliance monitor who will then in turn -- who will then in turn either recommend that I allow them to go to Phase II or not recommend. And I'm afforded the discretion either way. And I imagine I'm going to get a whole series of pleadings from individual parties. I'll probably have to put a page limit on you folks, you know, as to whether or not I should or should not approve going into Phase II. But I think that there may be some safeguards in the proposal that's made by RagingBull to address some of those issues, Mr. Kim. What do you think?

MR. KIM: Well, Your Honor, Mr. Dennis is curiously absent from the proposed order that counsel for RagingBull has submitted. Now if Mr. Dennis decides to leave RagingBull but join another outfit but continue to make the same unsubstantiated earnings claims that he has been making with RagingBull, that's a problem for us and that's why we think --

THE COURT: I am certain you will take that up. And I believe that it probably wouldn't be in Mr. Dennis's best interest to do that given the torment of litigation that has gone on over the course of the last 90 days. Basically the FTC came in and rocked everyone's world. And I'm not saying they did it inappropriately, but that would be extraordinarily foolish for an individual to come in not once, but twice, and then have a related case with me. Because

you're going to put down a related case notation in the event that that ends up occurring. And that case will come directly to me and rightfully so.

MR. KIM: Well one other thing, Your Honor, is that the injunctive -- the conduct release provisions, Section 1 and 2 of the proposed order that we've submitted or that RagingBull has submitted just requires nothing more than the person to comply with what's already the law. It doesn't require anything more than that. So we don't think that it should add any additional burden to Mr. Dennis to just have to comply with that, Your Honor, for the remainder of this litigation, especially if his intentions are not to make the substantiated earnings claims.

THE COURT: We'll see whether or not, Mr. Dennis, Mr. Schwartz, is going to say no, he doesn't want to be added to any court order. But nevertheless, I will certainly make that inquiry and make a determination as I end up seeing fit. You know, of course the downside is that -- well, never mind. I'll reserve on that.

Go ahead, Mr. Kim. Have you finished?

MR. KIM: Yes, Your Honor. I'd like to if there's any time for rebuttal later, I'd like to be able to address that based on what counsel for Mr. Dennis raises.

THE COURT: We're going to do a brief period of time for rebuttal as well for the FTC, but it is going to be brief

because I know that you guys have presented a fulsome case both on paper and today.

So all right, Mr. Barger goes first and then I'll hear from Mr. Dennis's counsel.

MR. BARGER: Yes, Your Honor, thank you. Your Honor, at the risk of being presumptuous, could we have a small sort of courtesy break?

THE COURT: Absolutely not. I'm ready to go. No, we could do -- why don't we do this? Can everyone stay on the line? Just keep the lines open. Understand that I will forewarn counsel these are hot mics during the course of the break. So we will take ten minutes and come on back.

Mr. Barger, I'm going to give you about -- we'll take about ten minutes. Mr. Barger, I'll give you until about 12:30. Then the FTC will have until about 12:45. I keep forgetting Mr. Schwartz. I just keep forgetting him. I'll give Mr. Schwartz about ten minutes after you, Mr. Barger. I don't think there's a whole lot that you need to add, Mr. Schwartz. And then I will give FTC another 15 minutes and then we'll wrap this up, all right? Okay.

MR. MALINA: Your Honor, just one question. This is Steve Malina for the RagingBull Defendants. A lot of matters have been addressed so far and the Court has asked certain questions. Just for our focusing on what it is that you might want to hear from specifically from the RagingBull Defendants'

counsel, maybe you could give me -- you know, you've spoken about the balance of equities and we'll certainly address that, but there's a whole host of other matters that have been addressed so far. Is there anything specific that the Court would like us to address?

THE COURT: Correct. I want to -- I'd like to get a little bit more granular on the details of compliance to provide assurances that the company is not going to be lewded. I'd like to make sure that we shore up the $10 million in escrow that will be provided. I'd like additional proposed recommendations about who the monitor will be, including whether or not Affiliated Monitors can fulfill the expertise required, because I think Ms. Robbins makes a very good point. And I'm not certain at this point in time given where we are that Mr. Keith -- and it's no lack of respect to Mr. Keith, but I think right now we need to get to a point where we move to another monitor because of sort of -- we need to get to a point where there seems to be in reading the pleadings, not a lack of trust, but it appears to be that Mr. Keith was proposed by the FTC. And so I'm not quite sure whether or not we may end up wanting to have somebody a little bit more from the parties from a compliance standpoint as opposed to coming in as a Receiver standpoint. Because there are a lot of -- I'd like to -- if I'm going to rule in RagingBull's favor, but tax them with a fairly significant order that they're agreeing

to that's subject to the clause and enforcement of federal law and the rules, I'd like to give them a clean look from a monitor, but I need a monitor with experience. And ideally, I'd like both sides to agree to somebody in the short term.

So those are the things that I'd like to see addressed and we'll take our ten minutes and so why don't we say we'll come back here at 11:45, all right? Thank you.

(Recess was taken.)

THE CLERK: This Honorable Court now resumes in session.

THE COURT: Okay, all right. Mr. Barger, are you prepared to proceed, sir?

MR. BARGER: Yes, Your Honor, I am. And I say we are because it is a group effort. I'm sure all of us who are litigators, we like this because we like to talk, but I'm going to save some of my time for my subject matter expertise or subject matter expert colleagues.

If I could just make two observations and then I'd like with the Court's permission for Mr. Berg to start off with the discussion of the compliance plan and all the bells and whistles that go with that that will hopefully address some of the concerns raised by the FTC and the Receiver and especially the Court.

But my two observations are one, the proposed monitor and the proposed preliminary injunction order that

we've submitted provides for extraordinary transparency and insight and overview by the monitor. We believe the one we proposed is competent and Mr. Berg can address that. And the only second point I wanted to address is while there are many factual representations and arguments that we made which we disagree, we're trying to focus our efforts on those matters that I think the Court seems to be most interested in today.

And I was struck by one of the questions the Court asked earlier of I believe the FTC. And that was, if you would ask any person who really wants and truly wants a refund whether they want it now or within 60 days or wait for three years to see if there's possibly any money leftover with a company that's shut down and involved in litigation, I have no doubt that those people wanting refunds would prefer an option that involves the business legally operating and hopefully generating significant income to help redress those who truly deserve redress.

So that is I think our focus and I hope I haven't stolen anyone else's thunder. And so with the Court's permission, if Mr. Berg could proceed.

THE COURT: Mr. Berg, during the break and I'm going to jump on you right away because I'm just really interested in figuring this out. With regard to the compliance monitor, there's a provision in the proposed injunction that RagingBull is agreeing to that the compliance monitor has the ability to

evaluate refund requests and make a determination on whether or not they are fully or partially reimbursable. However, I didn't see any language in there, but of course RagingBull has the right to deny refunds to individuals whose contract did not call for refunds. I did not know whether or not the compliance monitor would have the ability to recommend and/or give refunds to a compliance monitor -- to a consumer who sought a refund, but the contract may call for no refunds. But nevertheless, the monitor thought that there was some circumstances which required a refund, whether or not RagingBull would be obligated to turn that over according to the current proposed order.

And then with that, Mr. Berg, I'll let you do your thing and put it in whatever package you want to put it in.

MR. BERG: Thank you, Your Honor. And in fact, the refund request is going to be addressed by one of our colleagues in a subsequent presentation, but I do want to take the opportunity to go through the operation of the proposed order and the proposed business plan as it relates to the compliance issues.

Your Honor, the essential issue before the Court is whether there can be a mechanism to ensure that the Defendants will operate in a lawful manner pending resolution of this case on the merits, that preserves or enhances the availability of redress funds if the FTC were to ultimately

prevail, or whether the Defendant should be compelled by operation of the Receivership and the asset freeze currently under the TRO to suspend its business operations. We think the clear answer to the first question is yes, and that the balancing of the equities in this case strongly weighs in favor of that. The compliance portion of the proposed business plan and the proposed order have been carefully crafted to achieve that objective.

Without rehashing everything that's been set forth in the papers and our briefs that have been submitted to Your Honor, I'd like to address two issues that we believe are particularly relevant to Your Honor's consideration today.

First, I want to highlight the several aspects of the operation of the compliance portion of the proposed business plan which provides the assurances and certainty that the Defendants will operate in a lawful manner going forward.

And second, I want to explain to the Court the structure of the proposed order that we submitted yesterday and how it implements a compliance portion of the proposed business plan.

We heard this morning the criticism coming from the FTC on the proposed business plan and proposed order. The FTC criticizes the Defendants' business plan because it claims, simply stated, the Defendants aren't trustworthy. We disagree strongly with that position. But having said that, this need

not simply be a matter of trust because the Defendants' compliance with the law going forward will be verified and certified by a court-appointed monitor who has established expertise in the relevant regulatory compliance areas. And the Receiver criticizes the business plan because it claims it lacks sufficient specificity, but we're happy to provide whatever additional specificity the Receiver needs, which in fact, we offered repeatedly to do with the Receiver, but frankly he wasn't interested in hearing from us -- or whatever additional specificity that Your Honor may require.

Our submission was not a 100-page business plan that Your Honor cautioned us against filing, but we do believe it has sufficient specificity and detail to both implement and to provide a high level of confidence to the Court and to the FTC that the Defendants will operate in a lawful manner going forward. But in a sense, that specificity shouldn't matter much because unless the Defendants are in compliance and remain in compliance with the Court's order as we have proposed, the compliance monitor has absolute veto authority over both the restarting and the continuation of any of the Defendants' revenue-generating operations.

Notably, the compliance proposal that we made goes well beyond what the FTC has previously approved and put in place in numerous cases in terms of compliance monitoring, auditing, and certification. Here, the compliance monitor will

have absolute veto authority in terms of the Defendants' regulatory compliance and the Defendants' ability to continue operating through the PI compliance period which will remain in effect until trial on the merits. No prior FTC order gives a compliance monitor the ability to control the regulatory compliance conduct of the company under order that the proposed order and the compliance portion of the business plan does here.

There are four relevant features of the compliance portion of the proposed business plan and proposed order that I'd like to highlight for Your Honor's attention and consideration. First, no consumer facing communications of any type, in particular advertising and marketing materials, can be used at any time by the Defendants that have not been previously reviewed, assessed, and approved by the Court-appointed compliance monitor. In fact, every aspect of Defendants' consumer facing activities. Its refund practices, its complaint receipt and resolution activities, its sales activities must have the prior express approval by the compliance monitor before being put in place.

The compliance monitor has broad discretion to determine what is required based on the monitor's established expertise in advertising and marketing law.

Second, that the Defendants cannot engage in any revenue-generating activities unless and until their

regulatory compliance is certified by the monitor to this Court. And after restarting their revenue-generating operations following the certification of their regulatory compliance, the Defendants' continued operations are subject to ongoing certification by the compliance monitor.

Moreover, the compliance monitor at any time can suspend the Defendants' revenue-generating operations by decertifying their regulatory compliance without the need for the Court's intervention. As stated previously, the compliance monitor has a functional veto power over the continuation of revenue-generating activities by the Defendants.

Third, the operation of the compliance monitor and by extension, the revenue-generating operations of the Defendants is subject to ongoing and regular oversight by the Court through reporting and as needed, consultation with the Court. The compliance monitor is an agent of the Court and is not subject to either the control or any influence by the Defendants.

THE COURT: Let me ask you, Mr. Berg, I just want to cut you off real quick on this. This presentation that you're giving me is a sort of for lack of a better term, a client intent regarding the interpretation of the document. So in other words, if somehow, some way this document which was created by RagingBull and its principals were to somehow have some sort of vague meaning or interpretation in some

litigation, we would rely upon the representations of counsel today in the interpretation of any particular term or condition. Is that accurate?

MR. BERG: Your Honor, I think the details that are relevant to the compliance by the Defendants, their regulatory obligations, are pretty clearly and pretty specifically set forth in both the business plan and the proposed order. The two work hand in hand.

THE COURT: Fair enough.

MR. BERG: And I don't think -- you know, with all due respect, I don't think it turns on interpretation, I think it turns on an understanding of how the proposed order works in conjunction with the business plan as we proposed for the Court's consideration.

THE COURT: All right, very well. It was just a question of, you know, if in the event that I was to agree with you, I don't want any misinterpretation about well, we really didn't mean that and we really meant this. And so that is why I only raised that. And I raised that because there appears to be a fairly significant error of suspicion on behalf of the other side in this case that I'm just doing the best I can to try and clear up. And by the way, this is precisely what I wanted to have happen before the hearing.

MR. BERG: Your Honor, that point is very well taken and we were actually very anxious to have the opportunity to

sit down with the FTC and sit down with the Receiver to put forth a business plan with a proposed order that we could then respond to the issues and the requests made by the FTC and the Receiver.

THE COURT: Understood.

MR. BERG: Specifically if there was a need for greater specificity. And there may yet be need for additional specificity notwithstanding the fact that there is significant detail in both the business plan and the proposed order. But we were happy --

THE COURT: Very good.

MR. BERG: --to have that discussion, but that discussion unfortunately didn't happen.

THE COURT: Understood.

MR. BERG: The fourth point I wanted to make with regard to the business plan and the proposed order is that they require the Defendants to establish and implement significantly enhanced compliant structures and mechanisms to satisfy their regulatory compliance obligations. This encompasses every asset of their consumer facing activities. It also imposes self-monitoring, self-auditing, self-reporting, and internal assessments of compliance risk as a part of its ongoing regulatory compliance and to assist the compliance monitor in assessing and certifying the Defendants' regulatory compliance.

In addition, the proposed order requires the Defendants to fully cooperate with the compliance monitor in discharging his or her review, assessment, approval and certification responsibilities. Including providing unfettered access to all relevant documents, data, materials and personnel both within the Defendants' operations and outside relevant service providers and associated entities.

Now if I can turn to the actual proposed order in terms of its structure and content. The proposed order is based on several recently adopted commission and court orders in the relevant area. As reflected in previous submissions, there's ample authority in the OTA, in the Herbalife, in the Western Union, in Telestar FTC cases for this type of compliance monitoring and structure. We did this because we believe that it was important for Your Honor to know that there is well-established precedent supporting the proposals we've made and details that we have provided.

As previously noted, our proposed compliance monitor is the same one that the FTC selected in the Herbalife case. That compliance monitor having been selected by the FTC after reviewing the applications of more than two dozen applicants, including a number of prominent national law firms. If, in fact, it's not acceptable to the FTC and to the Court, we have in the proposed order a mechanism whereby mutual agreement of the parties, again with the approval of the Court, that an

alternative monitor could be selected. We respectfully suggest to Your Honor that Affiliated Monitors Incorporated does have very adequate expertise not only in the area of advertising and marketing law both at the FTC level and in the state level in terms of state cases where baby FTC acts are adopted at the state law level and case law follows the FTC law as well. But in the event that Affiliated Monitors is for some reason not acceptable, we're amenable to a process where with the mutual consent of the parties, an alternative monitor could be selected. We do feel strongly, however, that the Receiver, although highly competent in terms of its responsibilities over the Receivership entities does not have adequate expertise in the area of advertising and marketing law sufficient to warrant being selected as the monitor.

Turning further to the proposed order and the structure and the content, significantly, the compliance portions of the proposed business plan and the proposed order go well beyond the requirements of any of those auditors that we previously mentioned. The OTA order, the Herbalife order, the Western Union and the Telestar FTC cases go well beyond the requirements in those orders in terms of the mandated regulatory compliance efforts by the Defendants in those cases and the operations and functioning of the compliance monitor to assure the Court and the Defendants will operate in a lawful manner going forward. These compliance provisions are

far more rigorous and far more demanding than what the auditors in those cases require.

In summary, Your Honor, we believe that the compliance portion of the proposed business plan and the corresponding portions of the proposed order provide a very high level of assurance that the Defendants can and will operate in a lawful manner going forward pending resolution of the trial on the merits of this case.

THE COURT: Mr. Berg, did you finish your presentation?

MR. BERG: Yes. I am happy to entertain any questions Your Honor has with regard to --

THE COURT: Yes, I do. With regard to this particular order, there seems to be some dispute regarding Affiliated Monitors having appropriate expertise. So as a result, it seems to me that it may be best in the event that I do rule -- if I rule in favor of the FTC and there's an asset freeze in the continued Receivership, then the appointment of the monitor is moot. However, if I agree with RagingBull that the balancing of the equities dictate to denial of the preliminary injunction motion and an adoption of this preliminary injunction that has been proposed, I'll need an opportunity to vett and I don't want to vett 12 monitors and 12 law firms. You know, I'd like each side to pick one or two to be put forward along with the appropriate credentials. The

question of it is whether or not it's timing. I don't know whether or not Ms. Robbins -- and I don't believe Mr. Keith with no offense to him, would be an appropriate person to monitor this case over the protracted litigation period of time. So I don't know whether or not Ms. Robbins, I know that she believed Affiliated Monitors might not be -- might not have an expertise. You know, quite frankly I'm not familiar with them, but it may be that maybe the parties could work collaboratively together to come up with one. I'm optimistic, but it could be that the parties could agree on a monitor in the event that I disagreed with the FTC in this case. I'm hopeful that that's the case.

Ms. Robbins, is there any -- I take it you have some familiarity with Affiliated Monitors; is that correct?

MR. ROBBINS: Your Honor, my understanding from the person from Affiliated Monitors that they referenced that had worked on Herbalife was not focused on the specific ads. So it was focused more on the structure of the company. And so we don't think that that person necessarily would have the expertise in this case, but we are happy to provide and work with defense counsel to come up with a suitable monitor.

THE COURT: I would really like to have some consensus on it in the event that I disagree. I would really like that. Because you are the experts in this particular field, I am not. I'm not an expert in advertising. And it

seems to me that you should be able to come up with an objective person that both of you can trust to have the expertise necessary to oversee this case for the next two or three years. So that would be my expectation. Otherwise, you're both going to get what you get when I scrutinize the submissions. And so don't complain if I pick somebody that you didn't like.

But I may end up making that request very shortly after I -- if I rule in RagingBull's favor or rule against FTC, I may put in a very short time table or window of maybe a week for that kind of turnaround. If we conclude today, there will be a week ahead of time before my Court ruling. As a prophylactic matter that shouldn't waste too much time, in the event that I rule in FTC's favor and there's no need for a monitor, I would request that the parties sort of work together over the next week to see whether or not you can throw around some agencies or some names that have the capability of handling that.

Is that okay, Ms. Robbins?

MR. ROBBINS: Yes, that's fine.

THE COURT: Is that okay with you, Mr. Berg?

MR. BERG: Yes, Your Honor. I'm quite confident that we can putting our heads together, come up with a mutually agreeable recommendation in terms of the monitor. I should note that there was no one individual in Affiliated

Monitors, Inc. who we had suggested or recommended. It's actually the equivalent of a small law firm that specializes --

THE COURT: Right.

MR. BERG: --exclusively in monitorships like this and they do have several individuals within their organization that do have extensive expertise in both advertising and marketing law. Frankly, we suggested Affiliated Monitors because they were the monitors that had been selected previously in the FTC's case in Herbalife. And we thought by doing so, that removed one area of discord and disagreement between us and the FTC. But I'm quite confident that putting our heads together we can come up with a joint recommendation.

It is, of course, Your Honor, in our best interest to make sure that there's someone selected as a monitor who does have sufficient expertise in the area of advertising and marketing law in order to make sure that this works as smoothly as possible going forward.

THE COURT: Thank you. Who is next?

MR. BARGER: Your Honor, I'm sorry. This is David Barger again. I was on mute. My understanding is Mimi Bahcall was going to go next for RagingBull. And Mimi if I'm wrong, if it was Mr. Malina or Mr. Doran that needed to address a couple of factual issues then I apologize, but I think Ms. Bahcall was going to go next, Judge, with the Court's

permission.

THE COURT: Thank you very much.

MS. BAHCALL: Good afternoon, Your Honor. This is Mimi Bahcall. And the first thing I would like to address is your question on refunds and how they're going to be handled under the order. I think what's clear is the 31 that supplied affidavits that have made complaints that we can see what the complaints are. We've agreed that those will be refunded, to the extent they haven't already been.

It's interesting to note that when we did some research on them, it turns out about almost half of them had already been refunded in whole or in part, because that has been the company's practice where people do raise claims if they can be verified.

Then that leaves us with the 1,400 and where we stand on those. As I think you heard the Receiver's counsel represent, they weren't sure how these broke down, most of those refund requests whether they were complaints, et cetera. And when we look at the 1,400 and we did ask for the backup for the number and we asked about four times and we weren't able to get the exact how they came up with the 1,400. But what we did get was we were given 1,150, 1,150 e-mails and then we did break them down. And what we found was of that number that we actually received, 310 were cancellation requests with negative comments. The rest, including 305 made

the request but with no comment and there were 30 that made positive comments about RagingBull. And 175 didn't even make a refund or cancellation request.

So the problem with saying we're just going to give them their money back is we don't even know what they are. And some of them, the vast majority don't even make requests. However, what we have in the order is that the ultimate responsibility -- and we will work out the process for going through those with the monitor and we see it there. It does say in paragraph 2 which might cause the ambiguity, that as a general rule, only subscribers who seek a refund based on their terms will get it.

And to answer the FTC, we have different types of products. And the -- I'll call them the front-end products I think you've heard about which are most of the products that we actually sell, are the subject of ads. They, in fact, do have refund parameters. People can request refunds.

So there are products with those terms. We will look through them. We'll make, you know, we'll work with the monitor, but ultimately it's his decision. And those decisions will be made and presumably people will be paid in Phase I. That's what it provides for.

THE COURT: Of course I will know in Phase I through the monitoring status submission, the extent to which that RagingBull has been compliant with the refund obligations and

precisely how many of these customers who sought refunds have now been made whole.

MS. BAHCALL: Correct.

THE COURT: And I will be able to make a determination on whether RagingBull has put its best foot forward in an effort to be able to provide refunds to individual customers who have sought them out and who no longer want the services, but for whatever reason was not able to cancel the services whether or not it is because FTC expressly -- because RagingBull expressly prevented them from -- and deceitfully prevented them from initialing the cancellation of services so RagingBull could bill them for an additional month's worth of credit card payments for which they didn't want to incur, or for whatever reason the cancellation that they put forward didn't go through; is that correct?

MS. BAHCALL: That is absolutely correct.

THE COURT: Okay.

MS. BAHCALL: So the next topic I'd like to address is the balancing of the equities. And it is RagingBull's position that the balancing of the equities does not favor further injunctive relief against RagingBull and its owners. They've agreed -- RagingBull has agreed from the outset as you notice and we're agreeing in the proposed order, to be enjoined from making any misleading claims in its advertising

and going forward. And they put in a compliance plan that will ensure that in the future. And again, we are not conceding and do not believe that you've seen from what we've submitted so far that there has been issues in the past. We think we're going to be able to defend this case and we have. But I guess that the FTC has said they don't trust us. And, you know, there may have been issues however with, you know, some of the ads, but you're not depending on us as you've heard. We're putting--

THE COURT: Did you say there may have been issues with some of the ads?

MS. BAHCALL: What I'm saying is --

THE COURT: That's more than fair.

MS. BAHCALL: Okay. So all I'm saying is going forward, they don't trust us and we are putting in a plan and somebody is going to review before we send out any ads and they are going to be compliant. And if we don't have a plan for it, we're not going to move forward. We get that.

THE COURT: Maybe the balancing of the equities are not really about RagingBull and the company itself, but to make sure that the individual customers and consumers that are trying to get refunds and cancel their service contracts and be made whole or made whole sooner rather than three years or four years from now in the event that FTC is successful in the litigation.

MS. BAHCALL: Yeah, I do think that the balancing of the equities is about balancing the public interest.

THE COURT: Correct.

MS. BAHCALL: And what we do think, I think we've put it in our papers is a couple of things. One, I think allowing this business to go forward does two things. It allows consumers who like this product to continue using it. You've heard the number of 37 percent from the Receiver who has said based on what he has received after frankly the lawsuit, still 37 people still like it, which is pretty remarkable -- 37 percent, not people -- 37 percent still enjoy the product, are still supporting us even though they're not even getting it. I find that pretty remarkable because frankly, I would have thought everybody would want a refund. And hearing what you heard, they would be inclined, you know, to see us negatively.

Our numbers based on looking at what they're looking at actually and you've seen our papers, are more like 50 percent are satisfied. So the deal is that it will allow consumers to continue enjoying a product they like if we are allowed to continue in business.

In addition, what we also know and it's not disputed, that the product teaching people how to trade which is at bottom what this product is and what we're selling, it's something consumers want. The FTC in fact acknowledges in

their papers that there's a strong market for trading education. We regularly see in the news, retail consumers want to trade in the markets. And they want to have as much knowledge as they can, probably a good bit about how to do that.

And what we also see is RagingBull has competitors who operate similar businesses in the space, demonstrating there's a need for the services and presumably can be done and we've showed you we believe RagingBull can as well in a compliant and profitable manner.

We presented numerous examples of this with a business plan. If you look at Exhibit 7 and 8, RagingBull at the time of the shutdown had 80,000 customers. RagingBull's clients as we've said, overwhelmingly enjoyed them over time. And even when this happened, you know, we still had a good number supporting us, a good percentage. And we presented evidence. You've heard the FTC go through, you know, a number of e-mails and people that were dissatisfied. But we represented evidence of the support we have from customer e-mails, positive reviews, and repeat customers, part of Dr. Winn's report in opining in terms of whether or not clients were actually deceived. But if we shut down, not only will current customers not be able to enjoy the services, but also the public at large, other people who may want to -- who obviously are interested -- we've seen the need, everyone

admits it -- in learning about trading won't be able to learn from us either.

And then to answer your question, isn't it also about being in a position to provide more redress? We do think based on the business plan we've provided not only will it allow us going forward to service our clients who have contracted for it and also ones who will want it in the future, but in this time period, as we've shown in our business plan, we believe we will be in a positive economic situation. We will make money in the business based upon the assumptions you've seen and assuming only the 37 percent keeps going, et cetera.

So we do believe that it's part of the solution. Because as Your Honor pointed out, what we know is if we shut -- first of all, we are shut down because the way the Receiver and the asset freezes work, we couldn't pay employees. We couldn't pay to have --our ability to pay the people who take in the credit card processing, it was impossible to move forward. We had no choice but to furlough.

THE COURT: By the way, even if -- by the way, I didn't mean to cut you off, but by the way, even if Mr. Bishop or Mr. Bond were to borrow or use their own funds to restart the business, the freeze puts that in place anyway. You can't restart a business that's effectively shut down unless you open the business up.

MS. BAHCALL: Well, that's exactly it. That's exactly it. So you know, I do think it will be part of the solution. What we do know is if we can't restart because of -- and that's why I said the equities are whether we shut down or not because it's a given. If we don't eliminate the Receivers and the freezes, we're gone. And I think the Receiver -- and we won't ever be able to restart. So that's why I phrased it that way, but I do think it becomes we know what it looks like if we aren't relieved from these burdens and we know that everybody is going to want a refund, et cetera, and there's going to be so more demand to get repaid even if they love the service. And otherwise they wouldn't even have paid us more money. And we're going to have less to pay it with. So I agree with you that ultimately the consumers, past, future, present. And we'll be able to have more in the kitty to pay them should a judgment come down and we'll be able to provide the service.

So the negatives we hear from them are again, that somehow we're adding to the problem by staying in business. And the only way that would be is if people were deceived in the future. And again, that's what the plan and the monitor are for. And you, Your Honor, you're going to make sure that we have a process in place so it doesn't happen.

They admit that the product is good. At least today they admit that. Maybe not when we started. So then their

answer is well, less available if we use the money to pay past. I think we've all shown that, you know, it will actually be the opposite.

And then we hear that, you know, we can't be trusted and the business, you know, there were complaints and complaints we ignored to begin with. Well, let me give you some numbers on that. And again, this has been our pleadings and it's based on their filings as well.

So over time, we had 200,000 subscribers. And again, this business goes back for like a decade. And in the FTC's filing they identify we had 240 complaints before they filed. And that's with the FTC, the Better Business Bureau, State's Attorney, all in in a decade. I'm not diminishing any one individual complaint. I wouldn't do that. However, when you look at the numbers for a business in this space and this large, it's pretty small.

THE COURT: Indeed I think I read something where the number of Better Business Bureau complaints was a relatively very small amount until about 2019, and then 2020 and there was a representation that there was an exponential growth within the company which caused growing pains related to the cancellation. And that's I think put forth by RagingBull. And then of course 2020 with the pandemic.

But what I thought which stood out was that the Better Business Bureau, it was a relatively good rating early

on. It went to a rating of F, but then I think as of 2020 or even 2021 it's now at a B; is that correct?

MS. BAHCALL: It is. And in fact, I think we were told that it would have been an A before this happened.

THE COURT: Okay. And of course the Better Business Bureau complaints were the basis, one of the bases, one, not the sole one and certainly not the majority one, but a basis for determining the customer dissatisfaction and the fraud especially with regard to the cancellations.

MS. BAHCALL: Right. And I think what we've said and the reason we've gotten it back up is we had two things happening. And I'm sure we're not the only business, although unexpectedly we had an increase in people wanting our service during the furlough. And again, we thought it would be the exact opposite, that people wouldn't want to. So we had that. And then at the same time, we sent people home because people had to work remotely. So admittedly -- and we put in our papers that when it came to, you know, customer service and being able to handle the refunds and just talk to people -- and a lot of times people just had questions. We didn't do a very good job of doing that. And again, we make no excuses, but those are the facts on how that happened.

So again, that's sort of the negative that we see from them is, you know, we've had these issues in the past. And I will say this too, so you'd have a relatively I would

say, most major broker dealers or other people in the financial industry would kind of be thrilled with those percentages. But again, not saying it's a good thing. We'd rather have no complaints. But it is what happens with business.

But up until, again, for a decade, up until maybe the New Hampshire claim and whatever in 2019 -- maybe I'm getting my dates mixed up -- for almost a decade, this company had virtually -- well, it had no -- it had involuntary inquiry from the FTC in 2018 that we never heard about again. It wasn't a subpoena, not even a formal order. And then New Hampshire in 2019. Prior to that, nothing in terms of any litigation. We've never had a judgment. Nobody has filed for bankruptcy. And it's been a pretty steady business.

So again, I hear the don't trust us and again, we're not relying on trust. We have a third-party, but those are the facts.

So as you pointed out, if we don't stay in business and we continue with the Receiver and the freezes which make it impossible, I don't need -- you already touched on this, but as it stands now, if we have a Receiver as he stands, his fees are up to -- he's running at a clip of about $400,000 a month. I mean, the last we saw was 850 before even now. And again, I'm not questioning, you know, those are the fees, but it's expensive.

So, you know, we don't think any order going forward should have a Receiver that the company can't go forward. It's not necessary if we have a compliance manager and it adds to the expense.

And again, in terms of the freezes that you said, I mean, what we've committed to do -- I mean, the company needs to be able to manage itself. And again, there's no evidence out there to suggest the Receiver didn't say they haven't been able to, you know, that they've been sending, you know, money has been disappearing or they can't run a profitable business. And they've agreed.

So you have the money in the business and we've also agreed to put -- and you said you wanted to hear about this -- $10 million into an escrow account that can be used for any shortfall. Because the way it works with the two prongs, in the beginning, Phase I, we are going to be -- we are not going to be doing any advertising. We're going to work on the compliance plan. We're going to service the business we have, but we're not going to generate new income and we know we're going to make a big investment in compliance, et cetera. So although the business plan doesn't suggest that the monies in the business already that the Receiver has collected won't be sufficient during this phase to pay the expenses, the owners offered -- agreed to put up 10 million of their own money in order to make sure that the business is sustained during this

period.

You've asked, suggested we might want to put that in an escrow account that can be drawn upon and that's what we're going to do. And it can be used to make up for any shortfall in the business. So the monies will be there for the business to continue. And if, for example, it's decided that well, for whatever period of time, 60 days before we go to Phase II that we need to pay the refund request including the 31, the 10 million is available for that.

THE COURT: Right, that's precisely what my inquiry was.

MS. BAHCALL: I thought it might be.

THE COURT: That was exactly what I was saying because that goes directly to addressing consumer harm and serving the public interest. Thank you.

MS. BAHCALL: So at the end of the day, we do believe that the equities favor allowing RagingBull to continue in business with a compliance monitor and an approved plan as set forth in our orders and to eliminate the freezes and the Receivers so that we can do that effectively.

THE COURT: All right.

MS. BAHCALL: Any questions?

THE COURT: No. You know, I think I've asked a lot of questions. Okay, well thank you. And believe me, if I've got some more questions, I will not hesitate to ask them.

MS. BAHCALL: And I will try to answer them.

THE COURT: Okay, very good. All right, who is next? Who wants to speak on behalf --

MR. BARGER: Your Honor, this is David Barger again. I think that concludes our RagingBull presentation, subject to Court questions. And I will note that Mimi actually finished ahead of the Court's schedule, so we will -- I forget the word now -- we'll donate our time to Mr. Schwartz who I think is next.

THE COURT: You don't need to donate anything to Mr. Schwartz. I keep overlooking him.

MR. BARGER: He might be even more succinct.

THE COURT: All right, Mr. Schwartz, I'll hear from you, sir.

MR. SCHWARTZ: I suspect we will be more succinct. I'm mindful of the fact that the discussion thus far has been about a business plan and, you know, in many respects Mr. Dennis is the tail on the dog here, but I'd be remiss if I didn't make a few comments about him, given how differently situated he is from everyone else. But I will endeavor to hit the under on the 10 minutes that have been allotted to us.

I want to respond to a few things that the FTC said and then with Your Honor's permission, I'd like to allow my associate, Ms. Mariella, to respond to some of the specific evidence that the FTC put forward.

But the FTC began its presentation this morning with what I presume they believe is the most powerful evidence of liability that they have. They talked about the New Hampshire Consumer Protection Bureau, they talked about letters from the Better Business Bureau. So let me be clear about one thing because in the FTC's presentation, there was a lot of talk about the Defendants. Mr. Dennis did not receive any letter from the Better Business Bureau. Mr. Dennis was not involved in any New Hampshire Consumer Protection Bureau investigation. Mr. Dennis was not involved in hiring Trustpilot, whatever that was and he was not warned by them and he did not know that they were suspended. They accused to quote "the Defendants" of lying on multiple merchant account applications. Mr. Dennis had nothing to do with merchant account applications. He had nothing to do with fighting chargebacks or refunds which are the things the FTC accused, quote, "the Defendants" of doing. And that's because it is ultimately undisputed. I think you got an equivocal response from the FTC, but ultimately it's undisputed that Mr. Dennis was only an employee of RagingBull. He was not an officer. He was not an owner. He was not an executive and he was not even an employee that had managerial responsibility. He is the only employee that's been sued here, even though numerous other so-called gurus had effectively the same job. And the FTC has never explained what makes Kyle Dennis different from anyone

else or why Mr. Dennis alone among the company's 160 employees was sued. Nor have they explained why they didn't sue any of those other people, including the people that were actually responsible for the ads that they allege are deceptive. That's not to say that they should sue those people. Like all of the other employees, Mr. Dennis relied upon the policies and procedures that the company had in place, including the review by compliance personnel of the advertising. And he was entitled to rely on it. And that fact --

THE COURT: Let me ask you -- let me stop you, Mr. Schwartz. I do have a question for you. To the extent that the Federal Trade Commission -- to the extent that the Federal Trade Commission Act was violated by Mr. Dennis during the course of his employment with RagingBull, it would be your contention that RagingBull was Mr. Dennis's employer and not Mr. Dennis himself individually would be responsible for the damages caused by the violation of RagingBull's employees; is that correct?

MR. SCHWARTZ: Well, that's correct. And that's especially true in the facts here where the FTC is attempting to hold Mr. Dennis responsible for every single allegedly deceptive act that occurred at the company, including things that had nothing to do even arguably with the BioTech Breakout brand that Mr. Dennis was providing content for to paid subscribers, to people who had already purchased the service.

And that's why this question of whether Mr. Dennis is an employee or not is a material one. The FTC sort of waves their hands at it, but it's actually deeply relevant both to the law, to the likelihood of success on the merits, because to hold him individually liable they must show that he participated directly in the conduct or had the ability to control the conduct and that he knew that it was deceptive, that he knew about the deceptive practices. And they cannot provide this as best to have sort of cherry picked, taken out of context examples where they don't show the disclaimers. Ms. Mariella can talk about that.

And, of course, it's also really relevant to the balance of the equities because it is grossly inequitable to hold Mr. Dennis who never had an ownership in this company, never had the ability to control this company, liable for what they say is $137 million when, you know, he was paid salary. I mean, it was a commission-based salary, but it was salary, a paycheck from RagingBull for the work that he performed. And it was, of course, much, much, much less than the amount of money that you're talking about. And that has both equitable aspects to it and legal aspects.

And I won't go back over the briefing, but of course the Supreme Court in the SEC versus Liu case held even where you can hold someone liable under principles of equity, they can only be held liable for their individual ill-gotten

profits. And that's not what the FTC is doing here and they haven't even attempted to isolate what the ill-gotten profits are. I mean, Mr. Kim made a remark saying every dollar that Mr. Dennis earned was based on deception. There's no evidence of that in the record. And in fact, I think what you have is evidence that a lot of RagingBull's customers were quite happy. Mr. Dennis was by all accounts the most successful guru and that's because he was the most successful trader, presumably because his advice and educational content was the most valuable of all the gurus. And so it would be truly inequitable to hold him, an unquestionably great trader who was providing a real service to the company's customers, liable for every penny that the company received from consumers.

And look, you have a rich factual record. You have a declaration from Mr. Dennis on these points. The FTC took his deposition for three hours. They did not evidence any indicia of ownership or control. The best they could do is show you a stray e-mail where he may have commented on something. Mr. Kim said there was a period where Mr. Dennis's commissions were based on not just the profits of BioTech Breakouts, but other brands. That's true. There was a three-month period in late '19, early '20, but it was still commission. It was just a different way that his commissions were calculated. Whereas before his commission was based

entirely on a percentage of BioTech Breakouts, they tried on a trial basis to make it a half BioTech Breakouts and half profits across all of the product that the company had. That didn't work out for anyone and they want back to commissions based purely on Mr. Dennis's content. But he never had an ownership interest, he never had a profit participation in the business.

And look, we asked for an opportunity for Mr. Dennis to testify here. I'm not sure that that's necessary, but if Your Honor has any questions on the facts, he is more than happy to answer them. Because Mr. Dennis is an accomplished trader who was focused on providing educational content to RagingBull's customers. That's what he likes doing. He likes to be a trader and it would not be right to hold him liable for marketing that he had nothing to do with.

THE COURT: I was going to only comment that Mr. Dennis, the presence of Mr. Dennis in this litigation I know it's always been his position, the FTC's position regarding Mr. Dennis's involvement is different. If investigation reveals and maybe the investigation has revealed, I don't know. I don't have his testimony in front of me, but the disposition of the case with regard to Mr. Dennis would probably be most appropriate and the proper vehicle would be either a dismissal by the FTC or favorable resolution by me in a Summary Judgment stage. And if indeed there were some

genuine disputes in the material facts that needed to be vetted by a finder of fact, then this case would be held over with Mr. Dennis for a jury to determine the extent of Mr. Dennis's involvement.

So it seems like there are three avenues for Mr. Dennis: The short run, the medium run and the long run. And right now I don't know where Mr. Dennis stands because I'm not privy to any of that information. But I'm not certain at least at this juncture that Mr. Dennis should be the specific subject of the proposed preliminary injunction until such time as it's pretty conclusively demonstrated that he is something other than an employee of RagingBull, which of course are locked into the proposed order to begin with. So thank you, Mr. Schwartz.

MR. SCHWARTZ: Thank you, Your Honor. And this may be a case where it's appropriate if the FTC does not see the light to move for early Summary Judgment and if that becomes something that's tenable, we'll certainly let Your Honor know.

THE COURT: All right. Well, you know, I appreciate you not shooting off the bow too early because that just gives me more things to look through just to tell you no. So I would prefer that you shoot when you think you're ready and then I will address the motion in due course.

All right, thank you. All right, Ms. Robbins, I think you're up for the last word, right?

MR. ROBBINS: Yes, Your Honor, thank you. Your Honor, I want to just address a few things that Ms. Bahcall said just for the record, that the BBB received numerous complaints about the Defendants. And, in fact, from December 2017 to October 2020, they had an F rating for 27 of those 34 months. So it's not a case where oh, they had an F rating for a month and then they're bumped up. 27 of 34 months they had an F rating for a large number of unanswered complaints.

THE COURT: And how much weight should I give that rating, Ms. Robbins?

MR. ROBBINS: Well --

THE COURT: Is it just one small factor that I consider or is it something that the FTC believes to be pretty significant?

MR. ROBBINS: Well, I think -- so it's significant for two reasons: One is that the Defendants had that F rating so they didn't bother to answer those complaints. And again, it shows their callousness toward their consumers and that they don't care about trying to rectify the problem.

The second thing that it shows is that -- so that number of complaints, in the FTC's experience that is the tip of the iceberg. So what happens is consumers don't always know to complain to us and they don't always complain, right? And it's not just the BBB complaints we have, it's the complaints

to the FTC and it's their very high rated chargebacks that they had over and over again to the point where they even passed the 1 percent mark, which is indicative to credit card companies of fraud. And Discover Card Network in fact terminated them.

THE COURT: So yeah, I didn't want you to -- so given the weight that I'm to give the F rating for the 27 months, do I give the B rating the same amount of weight? In other words, do I say all right, well they did improve. They actually did change their act and their attitude because their rating went up. Their rating didn't remain an F. So how much weight do I give the B rating?

MR. ROBBINS: Your Honor, I think you would give it the weight that -- you need to look at it as a whole. It's not just -- we're not asking you to just look at the F rating or just look at the B rating.

THE COURT: Right, but the B rating was after the F rating. So that means that they improved according to the Better Business Bureau, pretty significantly. Like kids in school, he gets an F the first quarter, but then he gets a B the second quarter, I'm patting him on the back like way to go, you really buckled down. You did what you're supposed to do. Isn't the same analogy applicable here?

MR. ROBBINS: Your Honor, you know, they did make an effort to answer consumer complaints, yes. But did they --

THE COURT: But then you're condemning them. You condemn them to say oh my God, they're horrible. They don't care about their customers, but now you're saying they got a B rating from the Better Business Bureau after an F grade. That's pretty good, right? It's okay, you can say yeah, that's pretty good.

MR. ROBBINS: Yes, it is. I mean, it's good that they increased their rating.

Your Honor, I want to just address the point -- I want to bring back to the 37 percent that we keep talking about. Because there's a flip side to that. There's the two-thirds that were not happy.

And one thing struck me when Ms. Bahcall just spoke about how they don't even think that their ads were deceptive to begin with. And if they don't understand what their obligations are under the law, then it is very difficult to conceive that they will be able to move forward. But we understand that the Court is mindful and wants them to be able to have a second try. And we think that it's very critical in the public interest in preserving money for consumer redress.

And I want to make this distinction that right now there's an asset freeze in asset preservation. And the asset freeze, if the asset freeze is lifted, they can use that money to run the business. The asset preservation only counts -- covers the Defendants' individual assets, Bond, Bishop and

Dennis. And they have tens of millions of dollars. And that money should be preserved for consumer redress at the end of the day.

THE COURT: Where is it going to go? Where is it going to go? They're not going to eat it. You know, that's so much money that they're going to -- the assets that are out there. I mean, you know, are you suggesting that they're going to be sent overseas someplace, or hidden, or Bond and Bishop aren't going to be around?

MR. ROBBINS: They're going to use it to fund the business. And if the business fails, then that money is gone for consumers. So what we're asking is for the Court to preserve that money.

THE COURT: Go ahead.

MR. ROBBINS: So Your Honor, what we're asking is that if the Court lifts the asset freeze and appoints a monitor, that at the very least, that the Defendants' assets are preserved for final consumer redress.

THE COURT: Okay, all right. Thank you very much.

All right, Mr. Saudek, is there anything that the monitor would like to add? You're on mute again.

MR. ROBBINS: Your Honor, if I may, Mr. Kim would like to also address just --

THE COURT: I'm sorry, Mr. Kim, I apologize. Mr. Saudek, you can get your audio fixed and the Court's going to

hear from Mr. Kim. I apologize, Mr. Kim. I didn't know that you wanted to speak up.

MR. KIM: Thank you, Your Honor. And this will be just very quick, just to address a couple of points Mr. Schwartz had raised in his arguments. We're only trying to hold or seeking to hold Mr. Dennis liable for the direct participation in the deceptive marketing here. Under Mr. Schwartz's theory, it seems that there can be no individual liability or personal liability at all for any individuals and that that just would go against decades of case law. It's not that there's a violation of the FTC Act, only that companies can be held liable. Individuals who directly participated or who had authority to control those activities can also be held liable and that's very clear from the law.

The other question he asked was what makes Mr. Dennis different from the other employees. Well, Mr. Dennis runs the BioTech Breakouts services. He said so in his deposition.

THE COURT: Is that like a -- I mean, that strikes me as just like a department within RagingBull. So in other words, I can be the head of the IT department of some company and the company is still paying me as an employee, but I'm just running that department. I mean, the best example is like maybe the Department of Justice. I mean, there are all sorts of branches in the Department of Justice, but all are

employees and all get a paycheck that is signed by the treasurer. None of them are operating independently.

MR. KIM: Well, he's not just a figure, he's also the one that helps pulling himself out as the one delivering these services. He's the one that's in the best position to know whether the claims he's making in these videos that you saw, Your Honor, and in the marketing materials are true and accurate. So that's the point about his involvement. And why his connection with the BioTech Breakouts services which attributes for about a third of the company's overall income in the last four years is significant.

THE COURT: Okay. All right, well thank you. There's quite a bit to digest. The authority vested in the monitor and the oversight by the monitor and reporting exclusively to me is something that's very critical. I look forward to receiving a joint submission for a monitor. Certainly I'd like the parties to get together.

Oh, Mr. Saudek, you had something that you wished to say or wished to add? I didn't know, it looked like you were saying Your Honor, I have nothing further to say. So I read your lips and that's what you were saying.

MR. SAUDEK: Your Honor, if I may indulge you for one minute, Your Honor.

THE COURT: Absolutely. Go ahead, Mr. Saudek. That's fine.

MR. SAUDEK: Section 14(k) of the Temporary Restraining Order requires that the Temporary Receiver protect the interest of consumers. What we would propose is that if it is helpful to the Court and to the parties, we would certainly endeavor to prepare a list of the 1,500 consumers whom we have logged as having contact with the company and the monitor to request a refund so that the company and any monitor, if that is where we are headed, could make a determination on the validity of those claims and the amount of those claims. So we are happy to work with the parties to provide that list to them if that is helpful to the Court and to the parties.

THE COURT: Well, I think that anything to assist in getting funds in the hands of individual consumers who potentially would like to have refunds meets the goals of the Court. But that is certainly duly noted. We've got to figure out who the monitor is first if I decide to go down that path and hopefully that won't resolve in another mini-litigation. But if the parties submit to me something that they would -- a proposal, I'll be more than happy to consider it as part of the package related to my ruling. And that's assuming that I rule against the FTC at least on their proposed request for preliminary injunctive relief and side in favor of the consent preliminary injunction that is before me that that has been proposed.

So all right. Well, I want to thank you all very

much. Let's see.

MR. ROBBINS: Your Honor, may I just ask one thing of the Court?

THE COURT: Right, the hearing -- also just for your information, it's going to be a ruling. I'm not going to entertain any argument. I'm going to issue my ruling on Friday, March 26th at 9:30 a.m. We don't need all of the lawyers present. If there was a representative from each one of the parties that would be present, that's fine with me and then I will issue a subsequent order related to the case as well. But I wanted to give everyone a heads up that that will be March 26th at 9:30. Hopefully by maybe next Wednesday I can get a consensus on who a potential monitor would be in the event that I sided with RagingBull or didn't agree with FTC. So I wanted to advise you of that. And there will be the same call-in instructions that you ended up receiving prior to this particular hearing. Okay?

MR. ROBBINS: Your Honor, if I may, would the Court be amenable if the FTC submitted and working with the other side a proposed PI that met some of the requirements that I discussed earlier that were left out, like Sherwood Ventures and Bond, LLC or some other provisions for the monitor? If we worked with the other side, we'd like to present a post PI to the Court.

THE COURT: Well, I think that that ship has already

sailed. I asked you to engage regarding the business plan. You didn't want it. You opposed it and so right now I've taken the argument that I need. I've received the submissions that I have and I'm going to end up issuing a ruling with what I have. All right?

All right, is there anything else? Thank you.

THE CLERK: This Honorable Court now stands adjourned.

(Proceeding concluded at 1:02 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

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Dated this 5th day of April, 2021.

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