
Appeal from the United States District Court
for the Middle District of Florida

(January 16, 2013)

Before HULL, WILSON and JORDAN, Circuit Judges.

PER CURIAM:

Appellants and codefendants Richard Bishop, Brent McDaniel, and Tyna Caldwell appeal the district court's order awarding damages to Plaintiff-Appellee Federal Trade Commission (FTC) for engaging in deceptive marketing practices, in violation of section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule (TSR), 16 C.F.R. §§ 310.1–9. Specifically, Appellants argue that the district court abused its discretion when it calculated damages based on the net revenue, rather than the profits, Appellants received during the time they controlled the offending enterprise. For the reasons that follow, we affirm.

I.

The facts leading up to this appeal are detailed in full in the district court's April 23, 2012 order. *FTC v. Wash. Data Res.*, 856 F. Supp. 2d 1247 (M.D. Fla. 2012). We recount only those facts pertinent to this appeal.

Appellants were each

The Enterprise caught the eye of the FTC and in 2009, the FTC filed a complaint against Appellants, three other individual defendants, and three corporate defendants. The complaint alleged that Appellants violated section 5(a) of the FTC Act and the TSR, §§ 310.1–.9

III.

Appellants first argue that the district court improperly awarded damages based on consumer losses. Appellants are correct that here, a damages award based

(net revenue minus expenses) when it calculated damages. Appellants are incorrect.

Other circuits have been presented with this issue and have found a damages award based on net revenue rather than profit proper under Section 13(b). *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011) (holding that defendant was “not entitled to deduct its expenses from the restitutionary baseline”); *FTC v. Direct Mkg. Concepts Inc.*, 624 F.3d 1, 14–16 (1st Cir. 2010) (finding no error when district court “rest[ed] its damages determination on Defendants’ gross receipts rather than their net profits”); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (upholding district court’s acceptance of magistrate’s finding the appropriate measure of restitution was consumers’ net payments to defendants rather than defendants’ profits.).

We agree with our sister circuits and today hold that the amount of net revenue (gross receipts minus refunds), rather than the amount of profit (net revenue minus expenses), is the correct measure of unjust gains under section 13(b). We echo the Second Circuit’s sentiment that “defendants in a disgorgement action are not entitled to deduct costs associated with committing their illegal acts.” *Bronson Partners, LLC*, 654 F.3d at 375. Accordingly, the district court did not err when it considered Appellants’ net revenues, instead of their profits, in its calculation for damages.

The district court's order is **AFFIRMED**.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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Atlanta, Georgia 30303

John Ley
Clerk of Court

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January 16, 2013

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 12-13392FF
Case Style: Federal Trade Commission v. Brent McDaniel, et al
District Court Docket No: 09-cv-02309-SDM-TBM

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if ~~redem~~ filed in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Sup Court of a petition for a writ of certiorari (whichever is later).

Pursuant to Fed.R.App.P. 39, costs taxed against appellants

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Janet K. Spradlin, FF at (404) 335-6178.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161