FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

COMMERCE PLANET, INC., a

Argued and Submitted
February 9, 2015—Pasadena, California

Filed March 3, 2016

Before: Consuelo M. Callahan, Paul J. Watford, and John B. Owens, Circuit Judges.

Opinion by Judge Watford

SUMMARY*

Restitution

The panel affirmed in part, and vacated in part, the district court's order finding that Commerce Planet, Inc. violated § 5 of the Federal Trade Commission ("FTC") Act; holding Charles Gugliuzza, the former President of Commerce Planet, Inc., personally liable for the company's unlawful conduct; and ordering him to pay $18.2 million in restitution.

The panel held that the district court had the authority to award restitution under § 13(b) of the FTC Act. The panel rejected Gugliuzza's contention that any such award must be limited to the unjust gains each defendant personally received. The panel held that because joint and several liability was permissible, restitution awards need not be limited to the funds each defendant personally received from the wrongful conduct. The panel noted that the judgment

* This summary constitutes no part of the opinion of the court. It has

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against Gugliuzza did not actually hold him jointly and severally liable for Commerce Planet's restitution obligations, and this appeared to be an oversight by the district court which the panel did not have the power to correct. The panel vacated the judgment and remanded. The panel concluded that on remand the district court may reinstate the $18.2 million restitution award if it holds Gugliuzza jointly and severally liable; otherwise the award must be limited to the unjust gains Gugliuzza himself received.

The panel held that the district court did not abuse its discretion in calculating the amount of the restitution award. The panel held that the district court properly followed, and applied, the two-step burden-shifting framework for calculating restitution awards under § 13(b) of the FTC Act, which other circuits have adopted and which the panel adopted as the law of this circuit. Under the first step, the FTC bore the burden of proving that the amount it sought in restitution reasonably approximated the defendant's unjust gains; and at the second step, the burden c A Ð

COUNSEL

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enjoined Gugliuzza from engaging in similar misconduct and ordered him to pay $18.2 million in restitution.

In a memorandum disposition

Commerce Planet sold OnlineSupplier through its website. The landing page for the website, however, said nothing about OnlineSupplier. What consumers saw instead was

In addition to enjoining future unlawful conduct, the district court ordered Gugliuzza to pay $18.2 million in restitution. The court arrived at that figure by determining that Commerce Planet's net revenues from the sale of OnlineSupplier during the relevant period totaled $36.4 million. The court credited Gugliuzza's assertion that it would be unfair to assume that *all* consumers who purchased OnlineSupplier were deceived by the company's inadequate

under the circumstances." *Id.* That is especially true in cases involving the public interest, the Court held, such as actions brought by the government to enforce a regulatory statute. In those cases the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* Moreover, limitations on the court's equitable jurisdiction are not to be casually inferred. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.*

In light of these principles, the Court had little difficulty concluding that ordering a defendant to pay restitution fell comfortably within the scope of the broad equitable authority conferred by § 205(a). "Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* at 399. Indeed, ordering a defendant to return unjust gains, the Court noted, is "within the highest tradition of a court of equity." *Id.* at 402.

Under *Porter* and our cases applying it, district courts have the power to order payment of restitution under § 13(b) of the FTC Act. The equitable jurisdiction to enjoin future violations of § 5(a) carries with it the inherent power to deprive defendants of their unjust gains from past violations, unless the Act restricts that authority. We see nothing in the Act that does.

Gugliuzza contends that § 19(b) of the FTC Act, 15 U.S.C. § 57b(b), eliminates a court's power to award restitution under § 13(b), but we have refused to read § 19(b)

in that manner.[2] For one thing, §

Unjust Enrichment § 1 cmt. a (2011). But the relevant question in a case like this one—in which an individual defendant violates the FTC Act by acting in concert with a corporate entity—is whether the individual may be held personally liable for restitution of the corporation's unjust gains. The answer is yes—provided the requirements for imposing joint and several liability are satisfied, and here they are.

We have established a two-pronged test for determining when an individual may be held personally liable for corporate violations of the FTC Act. That test requires the FTC to prove that the individual: (1) participated directly in, or had the authority to control, the unlawful acts or practices at issue; and (2) had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth. *FTC v. Network Services Depot, Inc.*, 617 F.3d 1127, 1138–39 (9th Cir. 2010); *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). The district court found that the FTC's proof satisfied both prongs of this test and, as explained in the accompanying memorandum disposition, those findings are adequately supported by the record.

If an individual may be held personally liable for corporate violations of the FTC Act under this test, nothing more need be shown to justify imposition of joint and several liability for the corporation's restitution obligations. Satisfaction of the test establishes the degree of collaboration between co-defendants necessary to justify joint and several liability in analogous contexts, by precedent as well as logic. Because they we

Pacific Bancorp, 142 F.3d 1186, 1191–92 (9th Cir. 1998); *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993). For that reason, in actions brought by the FTC, we have repeatedly held individuals jointly and severally liable for a corporation's restitution obligations without requiring an evidentiary showing beyond the findings needed to satisfy the two-pronged test described above. *See Network Services Depot*, 617 F.3d at 1138–39; *Stefanchik*, 559 F.3d at 927, 930–32; *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170–71 (9th Cir. 1997); *cf. FTC v. Gill*, 265 F.3d 944, 954, 958–59 (9th Cir. 2001) (joint and several liability for two individual co-defendants).

Notwithstanding the cases just cited, Gugliuzza contends that a court exercising its inherent equitable powers under § 13(b) lacks authority to impose joint and several liability because that is a form of liability only the law courts could impose. Gugliuzza is wrong. Equity courts have long exercised the power to impose joint and several liability, most notably in cases involving breach of the duties imposed by trust law. *See, e.g.*, *Jackson v. Smith*, 254 U.S. 586, 589 (1921); Restatement of Trusts § 258 cmt. a (1935); 4 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 1081, at 231–32 (5th ed. 1941). We therefore see no basis for holding that courts are categorically precluded from imposing joint and several liability in actions brought under § 13(b).

Because joint and several liability is permissible, restitution awards need not be limited to the funds each defendant personally received from the wrongful conduct, as Gugliuzza urges. Defendants held jointly and severally liable for payment of restitution are liable for the unjust gains the defendants *collectively* received, even if that amount exceeds (as it usually will) what any one defendant pocketed from the

unlawful scheme. Indeed, we have previously upheld joint and several liability for payment of restitution even though the award exceeded the unjust gains any individual defendant personally received. *See Network Services Depot*, 617 F.3d at 1137–38; *Stefanchik*, 559 F.3d at 931–32; *Gill*, 265 F.3d at 954, 959. The same is true in disgorgement actions brought by the SEC, cases in which courts also exercise the broad equitable powers described in *Porter*. There, too, courts have upheld disgorgement orders imposed jointly and severally that exceeded the unjust gains any one defendant personally received. *See, e.g.*, *SEC v. Platforms Wireless International Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010); *SEC v. Clark*, 915 F.2d 439, 453–54 (9th Cir. 1990).

Gugliuzza's argument against joint and several liability rests primarily on *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), but we do not think that decision has any bearing on the analysis here. In *Great-West*, the Court interpreted the meaning of the phrase "other appropriate equitable relief" in § 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(3), a provision that authorizes suits by private parties alleging violations of ERISA-imposed duties. The

Gugliuzza concedes (correctly) that the tracing requirements for "equitable" restitution do not apply in § 13(b) actions. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373–74 (2d Cir. 2011). Adopting those tracing requirements would greatly hamper the FTC's enforcement efforts by, among other things, precluding restitution of any funds the defendant has wrongfully obtained but already managed to spend on non-traceable items. *See Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 136 S. Ct. 651, 657–62 (2016). We have never applied that rule in § 13(b) cases.

Given Gugliuzza's concession that tracing requirements do not apply, it is far from clear what relevance he contends *Great-West* has to this case. He appears to argue (contrary to his concession) that courts proceeding under § 13(b) must make the same "fine distinction" between legal and equitable restitution required under ERISA § 502(a)(3). *Great-West*, 534 U.S. at 214. We take a different view.

The Court's holding in *Great-West* relied heavily on *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), where the Court stated that the phrase "other appropriate equitable relief" could be construed to mean one of two things: either "whatever relief a court of equity is empowered to grant."

whatever relief a court of equity could provide "would limit the relief *not at all*." *Id.* at 257.

The interpretive constraints facing the Court in *Great-West* and *Mertens* are wholly absent here. We do not have before us a statute that limits the court to providing "equitable relief." Section 13(b) invokes a court's equity jurisdiction by authorizing issuance of injunctive relief, so absent a clear limitation expressed in the statute, Congress is deemed to have authorized issuance of "whatever relief a court of equity is empowered to provide in the particular case at issue." *Mertens*, 508 U.S. at 256. That includes the power "to award complete relief even though the decree includes that which might be conferred by a court of law," *Porter*, 328 U.S. at 399, such as monetary relief that would t[illegible]

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$18.2 million restitution award. Otherwise, the award must be limited to the unjust gains Gugliuzza himself received.[3]

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Gugliuzza also contests the amount of the restitution award, on the ground that the district court arbitrarily determined that Commerce Planet's unjust gains totaled $18.2 million. The district court did not abuse its discretion in calculating the amount of the award. The court followed, and properly applied, the two-step burden-shifting framework that other circuits have adopted for calculating restitution awards under § 13(b). *See, e.g.*, *Bronson Partners*, 654 F.3d at 368–69; *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (en banc); *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997). We have not yet had occasion to adopt that framework as the law of our circuit in § 13(b) cases, but we do so now. *Cf. Platforms Wireless*, 617 F.3d at 1096 (adopting essentially the same burden-shifting framework for SEC disgorgement cases).

Under the first step, the FTC bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains, since the purpose of such an award is "to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction." 1 Dobbs, Law of Remedies § 4.1(1), at 552.

[3] Commerce Planet and the other individual co-defendants settled with the FTC before trial for a total of $522,000. The only argument Gugliuzza makes with respect to the impact of these settlements is that any award against him should be offset by what his co-defendants have already paid. We agree that the FTC is not entitled to a double recovery. On remand the district court should ensure that Gugliuzza receives a credit for any sums the FTC has collected from the other defendants.

Unjust gains in a case like this one are measured by the defendant's net revenues (typically the amount consumers paid for the product or service minus refunds and chargebacks), not by the defendant's net profits. *Bronson Partners*, 654 F.3d at 374–75; *accord FTC v. Washington Data Resources, Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013) (per curiam); *Febre*, 128 F.3d at 536. Nor are unjust gains measured by the consumers' total losses; that would amount to an award of damages, a remedy available under § 19(b) but precluded under § 13(b). *See Porter*, 328 U.S. at 401–02; *Bronson Partners*, 654 F.3d at 366–68. In many cases, however, the defendant's unjust gain "will be equal to the consumer's loss because the consumer buys goods or services directly from the defendant." *Verity*, 443 F.3d at 68. The defendant's unjust gains and consumers' losses may diverge in cases where "some middleman not party to the lawsuit takes some of the consumer's money before it reaches a defendant's hands." *Id.* But that is not a concern in this case; consumers purchased OnlineSupplier directly from Commerce Planet.

If the FTC makes the required threshold showing, the burden then shifts to the defendant to show that the FTC's figures overstate the amount of the defendant's unjust gains. Any risk of uncertainty at this second step "fall[s] on the wrongdoer whose illegal conduct created the uncertainty." *Bronson Partners*, 654 F.3d at 368 (quoting *Verity*, 443 F.3d at 69).

The FTC carried its initial burden at step one. It presented undisputed evidence that Commerce Planet received $36.4 million in net revenues from the sale of OnlineSupplier during the relevant period. The FTC proved that Commerce Planet made material misrepresentations—by

not adequately disclosing the negative option—and that the misrepresentations were widely disseminated. As a result, the FTC was entitled to a presumption that all consumers who purchased OnlineSupplier did so in reliance on the misrepresentations. *See FTC v. Figgie International, Inc.*, 994 F.2d 595, 605–06 (9th Cir. 1993) (per curiam). The FTC having proved that all of the $36.4 million in net revenues represented presumptively unjust gains, the burden shifted to Gugliuzza to show that the FTC's figure overstated Commerce Planet's restitution obligations.

Gugliuzza attempted to meet his burden by asserting that not all of the consumers who purchased OnlineSupplier were deceived by Commerce Planet's misrepresentations. Had Gugliuzza offered a reliable method of quantifying what portion of the consumers who purchased OnlineSupplier did so free from deception, he might well have succeeded in showing that not all of the $36.4 million in revenues represented unjust gains. But he failed to do so. He did attempt to introduce the testimony of an expert, Dr. Kenneth Deal, who opined, based on the results of a consumer survey conducted by a third party, that not many of Commerce Planet's consumers were actually deceived. The district court properly refused to consider that testimony because Dr. Deal did not conduct the survey himself, and neither he nor Gugliuzza could demonstrate that the survey was "conducted according to accepted principles." *M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1087 (9th Cir. 2005) (internal quotation marks omitted); *see Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997).

Gugliuzza attempted to support his contention that not all consumers were deceived by pointing out that 45% of consumers cancelled within the trial period, which indicated

that those consumers, at least, must have known about the negative option. That fact, however, sheds no light on what portion of the $36.4 million in net revenues represents unjust gains. Consumers who cancelled within the trial period may indeed not have been deceived, but the payments made by