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STATUTES

JURISDICTION

The Federal Trade Commission ("Commission" or "FTC"), an agency of the United States government, initiated this action in the United States District Court for the District of Massachusetts, seeking relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), for deceptive acts or practices that violated Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52. The district court's jurisdiction over this matter derived from 28 U.S.C. §§ 1331, 1337(a), and 1345; and from 15 U.S.C. § 53(b).

This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, to review 1) the July 14, 2008, Opinion and Order, Add. 1;[1] 2) the August 13, 2009, Final Order and Judgment for Permanent Injunction and Other Equitable Relief Against Defendants Direct Marketing Concepts, Inc., ITV Direct, Inc., Donald W. Barrett, and Robert

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[1] The following abbreviations are used in this brief:
Add. -- Addendum to the Brief of Appellants;
App. -- Joint Record Appendix;
Br. -- Brief of Appellants;
D. -- Items in the district court's docket.

The complaint also named as defendants Healthy Solutions, LLC; Health

[3] Section 5 of the FTC Act prohibits, *inter alia*, unfair or deceptive acts or practices, and Section 12 makes it unlawful to disseminate any false advertisement for any food, drug, device, service, or cosmetic.

In addition, the Commission alleged that three "relief defendants,

Trudeau: Is there a way for us to know whether we will or won't [get cancer]?

Barefoot: Yes, there is, and it's very simple. First off, we just review what you're eating. Are you getting the minerals? And if you're not, you will become acidic and you will get one of the major diseases. You can have heart disease, cancer, lupus, fibromyalgia, multiple sclerosis. Name the disease, they're all caused by acidosis. * * *

Trudeau: Okay. What's a good way, in your opinion, that a person can get rid of that acidity?

Barefoot: Well, they have to consume a lot more calcium. * * * [T]here are cultures all over the world that never get sick and they live to be

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substance with 100 percent absorption.

Trudeau: And this is the coral from * * * Okinawa , Japan that people add in water.

Barefoot: Yeah.

App. 94-95. The infomercial also claimed that articles in the Journal of the Ameri

From January 2002 through February 2003, DMC partnered with defendants King Media, Inc., Triad ML Marketing, Inc., and Allen Stern (who was the president of King and Triad, App. 453, 455) in connection with the marketing of Coral Calcium. Br. 9; App. 458. (King, Triad, and Stern are henceforth referred to as "Triad.") Triad was responsible for distributing the informercial to media outlets, and for fulfilling orders. Br. 9-10. DMC produced the infomercial, its telemarketers touted Coral Calcium to consumers, it received orders for the product, and forwarded those orders to Triad for fulfillment. DMC terminated its partnership with Triad at the end of February 2003. Accordingly, from March through July 2003 (when DMC stopped running the infomercial, D

Guerrero: No.

Barrett: Such as cancer, arthritis --

Guerrero: No.

Barrett: How can you say that so confidently?

Guerrero: I'm very confident in saying that, primarily because of the clinical studies we've done. I've seen it in my -- in my -- clinical practice. I've seen it every day in my clinical practice.

App. 131-132, 136-137, 139.

The infomercial also claimed that Supreme Greens would cause weight loss:

Barrett: Okay. Alex, why do so many people lose weight on the product? I know that a lot of people get on the product to either help with their diabetes or maybe their heart disease or even cancer, but they lose weight as a by-product. How come?

Guerrero: They lose weight as a by-product because, again remember, weight is the -- fat is your body's way of protecting itself from the acidic fluids. * * *

Barrett: So when you alkalize your body you don't need that fat?

Guerrero: You don't need that fat. Your body burns it actually for fuel.

Barrett: So not only will this product help people get the nutrition they need, but they can actually lose weight on this product * * *.

App. 149-150.

At several points during the infomercial, consumers were provided with an 800-number that they could call to purchase Supreme Greens. App. 146, 157. When consumers called that number, they were connected with DMC's telemarketers.

On June 23, 2004, the court entered a preliminary injunction that put a halt to DMC's ongoing marketing of Supreme Greens. D.32. The preliminary injunction, *inter alia*, enjoined DMC from making claims that Supreme Greens, or any similar product, could cure or treat any disease unless DMC possessed competent and reliable scientific evidence substantiating the claim. Although, after entry of the preliminary injunction, DMC ceased its infomercials for Supreme Greens, it remained in the dietary supplement business. On January 19, 2006, the court concluded DMC's infomercial for a product called "Flex Protex" "appeared to violate the terms of the preliminary injunction," by making claims that the court had specifically prohibited DMC from making. D.137 at 13. The court ordered DMC to cease and desist from making such claims. *Id*.

On July 14, 2008, the district court granted, in part, the Commission's summary judgment motion. Add. 1. The court held that an advertiser violates the FTC Act if it lacks substantiation (*i.e.*, a reasonable basis) for the claims it makes. "For an advertiser to have had a 'reasonable basis' for a representation, it must have had some recognizable substantiation for the representation prior to making it in an advertisement." Add. 13. The court al

Parkinson's, and heart disease * * *." Add. 16. The court then concluded that "[a]t most the defendants have shown that prior to the airing of the Coral Calcium infomercial, they *inquired* into obtaining substantiation for the claims, but the record lacks evidence that the defendants received or reviewed any scientific substantiation beyond mere summaries or conclusory assurances." Add. 19. (emphasis in original). Based on this, and on expert reports from two experts presented by the Commission (DMC presented no experts or expert reports), the court held that the Commission was entitled to summary judgment as to counts 1-3 of the complaint. Add. 19-21.

The court next addressed the Supreme Greens infomercial. It held that "[t]here can be no genuine dispute that the Supreme Greens infomercial makes representations to the effect that Supreme Greens would effectively treat, cure, or prevent cancer, heart disease, diabetes, and arthritis." Add. 21. The court noted that DMC may have possessed one study of the type that could substantiate the sorts of claims that it was making for Supreme Greens. However, that study did not substantiate the claims in the infomercial because it tested a different product that had a different composition from Supreme Greens. Moreover, that study only purported to test claims regarding arthritis, and, as the court noted, could provide no support for claims regarding cancer, heart disease, etc. Add. 22-23. The court also held that DMC (which, once again, had designated no experts and had offered no expert reports) had presented nothing to counter the report from the Commission's expert, who stated that she had been

"unable to locate any published scientific literature indicating that any clinical studies had be

[6] The Commission had urged the court to hold DMC and Triad jointly and se

court ordered that BP International disgorge all the funds that it received. App. 1181-82.[7]

DMC filed its Notice of Appeal on August 14, 2009. Triad did not appeal.

STANDARD OF REVIEW

The first two issues -- whether DMC's infomercials were deceptive, and whether Maihos was liable for monetary equitable relief as a result of DMC's violations of the FTC Act -- were resolved by the district court on a motion for summary judgment. Thus, this Court's review is *de novo*. *Pelletier v. Yellow Transp., Inc.*, 549 F.3d 578, 580 (1st Cir. 2008). The third issue -- whether the court correctly held DMC liable for $48.2 million in monetary equitable relief -- was resolved by the court after a four-day trial. This Court may overturn such an equitable remedy only if it concludes that the district court abused its discretion. *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004). This Court also reviews for abuse of discretion the evidentiary rulings that the district court made in connection with its imposition of the remedy. *Id.* at 28. A court abuses its discretion only if it fails to consider a material factor, substantially relies on an improper factor, or assesses the proper factors but clearly errs in weighing them. *Adelson v. Hananel*, 510 F.3d 43, 52 (1st Cir. 2007).

[7] The court dismissed claims against relief defendants Lisa Stern and Steven Ritchey. Add. 65; Order of Sept. 30, 2008.

SUMMARY OF ARGUMENT

DMC does not dispute that its infomercials for Coral Calcium and Supreme Greens made the health and safety claims challenged in the Commission's complaint. These included claims that both products could treat and cure cancer and heart disease. Instead, it contends that it possessed sufficient substantiation to create a genuine issue as to whether the infomercials were deceptive. But substantiation for the sorts of health and safety claims that DMC made must consist of competent and reliable scientific evidence. There was nothing competent or reliable about DMC's substantiation. With respect to its Coral Calcium claims, the only substantiation it possessed consisted of two books written by Robert Barefoot, who was the so-called guest on the infomercial. Barefoot had no particular qualifications, the books are replete with absurd cl

because, at most, it supported a claim that was not challenged by the complaint. (Part I.B, *infra*.)

DMC raises a variety of other arguments in defense of its infomercials, but there is no merit to any of them. Among these is its contention that it was not required to substantiate any of the claims it made because its infomercials were merely "puffing." But puffing consists of blustering and boasting on which no consumer would rely. In contrast, DMC presents its infomercials as scientific fact -- the infomercials repeatedly refer to various studies. Unfortunately for DMC, those studies do not exist. (Part I.C, *infra*.)

The district court correctly held Robert Maihos liable for DMC's violations because he had the authority to control DMC's practices. He was a 50% owner of DMC, he was an officer of DMC, and he received 50% of its profits. He was responsible for its day-to-day operations. Indeed, the evidence shows that he was an ultimate decision-maker for DMC. It is irrelevant that Maihos did not personally prepare the scripts of, or edit, the deceptive infomercials. Maihos also had the requisite knowledge to hold him liable for monetary equitable relief resulting from DMC's violations. This knowledge may be inferred from Maihos's day-to-day involvement with DMC's operations. There is also direct evidence of his knowledge: his girlfriend, who was a registered dietician, advised him that the claims made in the Coral Calcium infomercial were "outlandish," and that he should seek scientific

support for them. His lawyer warned him about the claims in the Supreme Greens infomercials. But he ignored those warnings, relying instead on his own "good faith belief." Given the inadequacy of the substantiation for DMC's infomercials, it is highly doubtful that Maihos's belief was, in fact, in good faith. In any event, he should have known that the claims were unsubstantiated, and that is sufficient to hold him liable for monetary equitable relief. (Part II, *infra*.)

The district court held a four-day trial with respect to the relief in this case, and did not abuse its discretion when it ordered DMC to pay $48.2 million in monetary equitable relief. The remedy is properly termed rescission because it undoes the consumers' purchase transactions, and it is a

contends the court abused its discretion when it admitted Ex. 185. But the Commission supported that exhibit with the declaration of Ilesh Sanghavi, who oversaw the creation of the records on a daily basis, and who routinely used those records. As a result of this declaration, Ex. 185 is admissible as a business record. DMC also argues that, pursuant to *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006), monetary equitable relief must be limited to the profits it received. But *Verity* imposed a limit on monetary equitable relief only in the situation where consumers made their payments to a non-defendant. In this case, consumers made payments directly to Triad, and Triad was a defendant. As a result, *Verity* is irrelevant. (Part III.A, *infra*.)

The district court did not abuse its discretion when it included $13.1 million in its award of monetary equitable relief based on Coral Calcium sales during the period of March through July 2003 (the period during which DMC was no longer collaborating with Triad). DMC raises several evidentiary objections regarding the evidence supporting this part of the award. The district court rejected these objections, and this Court should affirm the district court's holdings. (Part III.B, *infra*.)

The final component of the monetary award is $14.65 million resulting from DMC's sales of Supreme Greens. DMC's only argument with respect to this component of the award is that there were many versions of the Supreme Greens

infomercial, and that, because the Commission did not demonstrate that every version violated the FTC Act, the Commission is only entitled to relief for sales that were generated by the version of the infomercial that was attached to the complaint. But DMC's records were, in its own words, subject to "substantial confusion," and this rendered it impossible to determine whether any sales of Supreme Greens were derived from any hypothetical non-deceptive version of the infomercial. Moreover, there is no evidence that DMC ever created such a version, and even if it did, the evidence shows that it quickly returned to using the original version. ([illegible]

[8] The court in *National Urological* adopted the following definition of competent and reliable scientific evidence:

> tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

645 F. Supp. 2d at 1190, quoting the Commission's Advertising Guide for Industry regarding dietary supplements, http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm.

DMC cites *FTC v. QT, Inc.*, 448 F. Supp. 2d at 959,

question. But *QT* never states that, where, as here, a party has raised no genui

supplements were supported by scientifi

with colleagues, his own experience, and three reports of studies. App. 506-507. Dr. Wood located only one small study that evaluated the body's ability to absorb coral calcium. Dr. Wood explained that the study was seriously flawed, but that even if the study were accepted, it did not demonstrate that 100% of Coral Calcium is absorbed. App. 511. He also concluded that there was no support for the claim that coral calcium was absorbed up to 50 times faster than other forms of calcium. Indeed, the only study that tested calcium derived from marine coral suggested that it was absorbed no faster than other forms of calcium. App. 513.

In its brief, DMC claims that it created an issue of fact with respect to the substantiation for the claims it made in the Coral Calcium infomercial because DMC possessed the two books written by Barefoot (who was the "guest" on the Coral Calcium infomercial): *The Calcium Factor* (which was co-authored by Barefoot and Carl J. Reich), D.147, Ex. 10; and *Death by Diet*, D.147, Ex. 11. Br. 25. It is laughable to suggest that these books could somehow constitute the sort of "competent and reliable scientific evidence" that DMC should have possessed to make the sorts of health and safety claims that it made for Coral Calcium. The books refer to
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Barefoot as a chemist, but give no description of his educational background, or any indication that he ever graduated from college. Further, although Carl Reich is referred to as a medical doctor, his license to practice medicine was revoked nearly
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numerous citations to scientific studies and journals." Br. 26. But as the district court explained, "the books are little more than a compilation of citations, with no context or explanation." Add. 17. Moreover, those studies that are mentioned in the books are cited for propositions unrelated to the claims made in the Coral Calcium infomercial. *See, e.g.*, *The Calcium Factor* at 22 (citing a study that concluded that calcium supplementation may combat osteoporosis). Further, the books' conclusion that calcium supplementation has curative powers is based on nothing more th0000 TD(na)Tj 13.

DMC contends that it "did not [itself] make an

B. The district court correctly held that, as a matter of law, DMC lacked substantiation sufficient to support the challenged claims regarding Supreme Greens

The district court also made no error when it granted summary judgment with respect to the Supreme Green complaint counts. Again, the Commission presented declarations from two experts, and DMC presented support that completely failed to substantiate the claims it made. The first expert, Dr. King, is a medical doctor, an associate professor at the Johns Hopkins University School of Medicine, and an expert in the diagnosis and management of patients with pulmonary diseases. App. 537. He evaluated two propositions that underlie the claims made in the Supreme Greens infomercial: that chronic disease occurs when the body is too acidic, and that making the body more alkaline will prevent or cure a variety of diseases, including cancer and heart disease. Dr. King stated that the body has numerous systems to regulate its pH, and that he was aware of no scientific evidence or studies supporting the claim that any chronic disease was caused by the blood being too acidic. App. 540, 541. He also stated that he was aware of no study or other evidence supporting the proposition that increasing the body's alkalinity will prevent or cure various diseases, including cancer and heart disease. App. 542.

The Commission's second expert, Dr. Cassileth, is the chief of integrative medicine service at Memorial Sloan-Kettering Cancer Center. She is an expert in the field of complementary and alternative treatments for cancer. App. 546-47. She

evaluated whether there is any support for DMC's claims (challenged in counts 4 and 5 of the complaint) that Supreme Greens is effective as a treatment or cure for various diseases, including cancer and heart disease, and that Supreme Greens will cause significant weight loss. Dr. Cassileth stated that the most scientifically valid way to determine the efficacy of Supreme Greens would be to conduct a double-blind placebo controlled study of the product itself (or a substantially similar formula). App. 554. Dr. Cassileth indicated that she had been unable to locate any such study. *Id.* She did locate and review several studies that evaluated individual ingredients of Supreme Greens, and she stated that there was no reliable evidence that any of the ingredients could prevent, treat, or cure cancer, heart disease, diabetes, or arthritis. App. 556. Dr. Cassileth also stated that she had been unable to locate any evidence that Supreme Greens was effective for promoting weight loss. App. 557.

The support that DMC presented for the claims it made in its Supreme Greens infomercials was every bit as inadequate as the support it presented for its Coral Calcium infomercials. It offered no expert or expert report. Instead, the only support it presented was a 61-page hodgepodge of items. App. 561-621. It includes only one report of a study on any of the ingredients in Supreme Greens: a preliminary study that concluded that MSM, one of the ingredients in Supreme Greens, may help lessen pain for those suffering from degenerative arthritis. But this is not relevant to DMC's claims that Supreme Greens could *cure* cancer, heart disease, diabetes, and arthritis,

[11] DMC complains that the district court's opinion only discusses the MSM study and ignored the other substantiation it profferred. *See* Br. 27-28. But the court did not ignore the other substantiation, it simply recognized that the MSM study was the only substantiation presented by DMC that could constitute competent and reliable scientific evidence. Indeed, even a cursory review of the other items submitted by

for an eight-year period, he had conducted a study of 200 patients suffering from a variety of terminal conditions, and that, after administering Supreme Greens, only eight of them had died. App. 139-140. DMC requested that Guerrero provide substantiation for this claim, but he never did. App. 559, 1678. Again, it is abundantly clear that the meager substantiation that DMC provided for its Supreme Greens infomercials does not create a genuine issue of material fact that it possessed a reasonable basis for the claims it made.

C. None of the other arguments raised by DMC justifies reversal of the summary judgment

DMC makes a variety of other arguments regarding its liability for the claims it made, but none justifies reversal of the district court's summary judgment. First, it observes that the court held that the claims in DMC's infomercials were *likely to mislead* consumers. Based on this, it argues that the court never held that those claims were *actually misleading*. Br. 20, citing Add. 28. But this argument is based upon a misunderstanding of the FTC Act. Section 5(a) of that act prohibits, *inter alia*, deceptive acts or practices. 15 U.S.C. § 45(a). It is well settled that a representation made in an advertisement is deceptive (*i.e.*, misleading), and therefore violates the FTC Act, if that representation is *likely to mislead* consumers. *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005);

[12] The district court correctly held that "the FTC has shown that claims in the Coral Calcium and Supreme Greens infomercials are deceptive, that is, they are *likely* to mislead consumers." Add. 28 (emphasis in original). As DMC notes, however, the court then stated that proving that claims are likely to mislead consumers "falls short of proving that the infomercials are *actually misleading*." *Id.*; *see* Br. 20. Of course, as explai

Br. 20. *Pearson v. Shalala* is irrelevant. That case involved a challenge to an FDA regulation that prohibited marketers from making health claims for dietary supplements unless there was significant scientific

it made. Therefore, those claims were misleading and deceptive, not just potentially misleading.

DMC also mistakenly contends that standards of liability under the FTC Act were somehow modified by the Dietary Supplement Health and Education Act of 1994, P.L. 103-417 (

confident in saying that [if I alkalize my body I will not come up with a chronic degenerative disease] because of the clinical studies we've done"); and at App. 145-46 ("I'll give you a study that they did with grapefruit pectin * * * After 12 months the group [of pigs] that received the grapefruit pectin actually had an 88 percent decrease in arterial plaque than from when they started").

Similarly, statements in the infomercial

Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1497 (1st Cir. 1989). The transcripts of the infomercials include only one disclaimer -- that the infomercials are paid advertising. *See* App. 86, 119, 131, 164. Such a disclaimer does nothing to correct the unsubstantiated claims made in the infomercials. Moreover, even if other versions of the infomercials include the two additional disclaimers mentioned by DMC, such disclaimers are directly contradicted by repeated statements made by the "guests" (and set forth *supra*) to the effect that efficacy claims for the products are based on scientific evidence, not opinion, and that the products are intended to prevent and cure various diseases. Plainly, even if DMC did include additional disclaimers in some versions of the infomercials, this would in no way justify reversal of the district court's summary judgment.

II. THE DISTRICT COURT CORRECTLY HELD THAT ROBERT MAIHOS WAS LIABLE FOR MONETARY EQUITABLE RELIEF RESULTING FROM DMC'S LAW VIOLATIONS

The district court correctly held that DMC had failed to create a genuine issue of material fact that Maihos is liable for DMC's violations, and that he is also liable for monetary equitable relief resulting therefrom. Add. 35-36. An individual may be held liable for a corporate defendant's violations of the FTC Act if that individual "participated directly in the business entity's deceptive acts or practices, *or had the authority to control* such acts or practices." *FTC v. Freecom*, 401 F.3d at 1204

(emphasis in original); *see FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Amy Travel Serv. Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). There was ample undisputed evidence in the record demonstrating that Maihos had the authority to control DMC's acts or practices. According to Maihos's own testimony, he was a 50% owner of DMC, and served, at times, as its president and vice-president. App. 365, 370. He received 50% of DMC's profits. App. 371. He was a director of DMC. App. 378. He had the authority to, and did, sign checks and enter into contracts on behalf of DMC. App. 377. He admitted that he was responsible for the day-to-day operations of DMC. App. 444. Indeed, according to appellant Barrett, he and Maihos were the ultimate decisionmakers for DMC. D.130, Ex. 12 at Att. 3, p.7-8. Plainly, this is sufficient to hold Maihos liable for DMC's violations. *See FTC v. Publishing Clearing House*, 104 F.3d at 1170 (defendant Martin's "assumption of the role of president of PCH and her authority to sign documents on behalf of the corporation demonstrate that she had the requisite control over the corporation").

Although DMC contends that Maihos should not be held liable for DMC's violations, it bases this argument on evidence that he was not a direct participant in DMC's violations. In particular, it states that "Maihos had no involvement with the actual scripting or production of" the infomercials, that "Maihos was not responsible for obtaining any substantiation * * * for the claims they made in the infomercials,"

[13] DMC contends that *FTC v. QT, Inc.*, *supra*, and *United States v. Building Inspector of America, Inc.*, 894 F. Supp. 507 (D. Mass. 1995), support its argument that Maihos's status as an owner and officer of DMC, and the fact that he was involved in DMC's day-to-day operations, are not sufficient to hold him personally liable for DMC's law violations. *See* Br. 33. Those cases say nothing of the sort. In *QT*, the court held that the owner's wife, who was nominally a corporate officer, and who occasionally helped with shipping and handling when the office was short-staffed, was not liable for the corporation's deceptive advertising. 448 F. Supp. 2d at 973. Unlike Maihos, she was not routinely involved in day-to-day operations. In *Building Inspector*, the court refused to hold on summary judgment that Lawrence Finkelstone, who was an officer and a minority owner, was liable for corporate violations. However, unlike here, there was specific evidence that Finkelstone *lacked* authority to control corporate conduct: his attempts to put a halt to certain corporate violations had been stymied by the majority owner (upon whom liability was imposed). Thus, li suppor

Instead, he ostensibly based his faith in the infomercial on Barefoot and his books. App. 382.

Maihos also received a warning regarding the Supreme Greens infomercial. On October 3, 2003, shortly after DMC commenced the dissemination of that infomercial, Maihos received a fax from DMC's attorney. The attorney attached a copy of a transcript of a Supreme Greens infomercial that he had marked up. App. 421-436. The mark-up advised Maihos that claims regarding cancer prevention should be removed, urged Maihos to seek substantiation for certain other claims, and questioned whether several other statements were "BS." The message to Maihos in the fax was "[w]e need to talk about this." App. 421. But according to Maihos, although he recalled discussing the fax with his attorneys, he had no recollection of taking any other action in respon

[14] In *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851 (D. Mass. 1992), which is also cited by DMC, Br. 38, the court granted summary judgment, and held the individual defendant liable with respect to all but one count of the complaint. As to that count, the court concluded that the defendant's purported good

has failed to demonstrate a genuine issue of fact as to Maihos's knowledge, and the district court correctly held him personally liable for monetary equitable relief.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED DMC TO PAY $48.2 MILLION IN MONETARY EQUITABLE RELIEF

A. The district court correctly based its award of monetary equitable relief on DMC's sales

The district court correctly ordered DMC to pay $48.2 million in monetary equitable relief. This amount includes $33.6 million that resulted from deceptive sales of Coral Calcium, and $14.6 million from deceptive sales of Supreme Greens. It is well settled that, in an action brought by the Commission pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), a district court has the authority to impose monetary equitable relief. *FTC v. Pantron*, 33 F.3d at 1102; *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *FTC v. Seismic Entm't Prods., Inc.*, 441 F. Supp. 2d 349, 353 (D.N.H. 2006). Such relief encompasses disgorgement, rescission, and the monetary equivalent of rescission, but, as the district court noted, courts have used these terms with "some imprecision." Add. 56. No matter what the relief is called, however, it is clear that, where a defendant has made misrepresentations that are likely to deceive consumers, where those misrepresentations are widely disseminated, and where consumers purchased the

defendant's products, monetary relief in the amount of net sales is an appropriate award because it "furthers the FTC's ability to carry out its statutory purpose." *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (*en banc*); *see FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009); *McGregor v. Chierico*, 206 F.3d 1378, 1389 (11th Cir. 2000).

Although the district court referred to the monetary equitable remedy as "disgorgement," Add. 18, it also stated that "any distinction between restitution and disgorgement is largely irrelevant in this case * * *," *id.*; *see FTC v. Verity*, 443 F.3d at 67. The district court based its award on the price that consumers paid for the Coral Calcium and Supreme Greens. Add. 20-25. The court further ordered DMC to provide the Commission with the names and addresses of the consumers who purchased the two products so that the Commission could provide those consumers with refunds. Such a remedy is properly termed equitable rescission because it seeks to undo a transaction that has been tainted by misconduct (*i.e.*, DMC's misrepresentations). *See Scheurenbrand v. Wood Gundy Corp.*, 8 F.3d 1547, 1551 (11th Cir. 1993

cure cancer, heart disease, etc.), the monetary equivalent of rescission is equal to a refund of the purchase price. *See FTC v. Trudeau*, 579 F.3d at 773 n.16; *Arber v. Essex Wire*, *supra*; *FTC v. Nat'l Urological Gp.*, 645 F. Supp. 2d at 1212.

B. The district court did not abuse its discretion when it calculated the $48.2 million monetary equitable relief

The district court did not abuse its discretion when it imposed $48.2 million in monetary equitable relief on defendants. When the Commission seeks monetary equitable relief, it must first provide the court with a reasonable approximation of the net receipts received by the defendant as a result of consumer sales that violated the FTC Act. *FTC v. Freecom*, 401 F.3d at 1206; *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); *FTC v. Seismic Entm't*, 441 F. Supp. 2d at 353. With respect to this approximation, "'the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty.'" *FTC v. Febre*, *id.*, quoting *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989). Once the Commission has provided this approximation, the burden shifts to the defendant to show that the figures are inaccurate. *FTC v. Trudeau*, 579 F.3d at 773.

The district court's monetary equitable award is composed of three parts. First, the court determined that, from January 2002 through February 2003, Coral Calcium sales made through the 800-num

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[17] The Commission provided the court with a summation of these numbers.

charges and taxes. *See* Br. 56. Of course, as explained above, such speculation is inadequate to undermine00 TD(i)Tj3.8400 0.0000 TD(ne)Tj13.083

that he oversaw the creation of Triad's accounting records, and that, for most of the time he worked at Triad, he was the only person who entered information into those records. App. 754. In particular, he entered the records of all sales that Triad processed for DMC. App.

[18] DMC contends that the Commission did not explain the relevance of Ex. 185. In fact, however, Mr. Sanghavi's declaration fully explains that Ex. 185 contains a record of every sale of Coral Calcium that was made during the period that DMC collaborated with Triad. App. 755. Plainly, this is relevant to the monetary equitable relief imposed by the court, which is based on the amount of DMC's sales of Coral

[20] DMC is not helped by *United States v. Vigneau*, 187 F.3d 82 (1st Cir. 1999), or by *Cameron v. Otto Bock Orthopedic Ind., Inc.*, 43 F.3d 14 (1st Cir. 1994). *See* Br. 51. In *Vigneau*, the United States sought to prove that Vigneau had engaged in money laundering. It introduced Western Union money transfer records that had Vigneau's name and address on them. This Court held that these records could be used to establish that *someone* transferred money, but concluded that the records were inadmissible hearsay as to whether it was Vigneau who had actually wired the money. The problem for the United States was that it was unable to show that, when a Western Union customer fills out a form, this is part of a regularly conducted business activity, or that Western Union takes any steps to verify that customer's identity. 187 F.3d at 85; *see United States v. Vigneau*, 187 F.3d 70, 74 (1st Cir. 1999). Similarly, [illegible]

DMC complains that Mr. Sanghavi's declaration is somehow inadequate because he states that he was "told" that the Commission received Ex. 185 from Triad's attorney, and because he states that he "believed" that Triad's records are on the CD. *See* Br. 48. But there is no question that Ex. 185 was received from Triad's counsel. In fact, DMC recognizes this in its brief. *See* Br. 46 [illegible]

Otto Bock involved records that were maintained by a business but were not created as part of a business routine. This Court held that customer complaints maintained by a business are hearsay because customers who relate their experiences are not doing so as a part of a business routine in which they are regular participants. 43 F.3d at 16. Here, unlike *Vigneau* and *Otto Beck*, the records imported by Triad were made as part of a normal business routine by companies processing Coral Calcium sales on behalf of DMC and Triad.

[21] DMC also complains that the Commission did not comply with Rule 902(11) because it did not receive Mr. Sanghavi's declaration until four days prior to the start of the trial. *See* Br. 48 n.15. In fact, DMC knew, more than a month before the trial, that the Commission intended to introduce Ex. 185 into evidence. *See* D.193, Ex. 1 (list of the Commission's proposed trial exhibits). Also, although DMC did not

Mr. Ritchey's deposition testimony and Ex. 185 both demonstrate that, during the period that DMC collaborated with Triad, consumers spent at least $40.9 million on Coral Calcium. Accordingly, the district court did not abuse its discretion when it included half of that amount as a portion of the monetary equitable relief it imposed on DMC.[22]

Finally, DMC mistakenly contends that, for two reasons, the district court should have limited its award of monetary equitable relief (for sales during the Triad period) to DMC's net profits. *See* Br. 42-45. First, it seeks to limit its liability by foisting all blame on Triad, claiming that its only function was to serve as a call

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receive Mr. Sanghavi's declaration until November 12, 2008, it was not until nine days later the the court considered the admissibility of Ex. 185. DMC had ample opportunity to consider and respond to the declaration prior to that hearing, and has not shown that it was prejudiced by the timing of its receipt of Mr. Sanghavi's declaration. *See United States v. Bledsoe*, 70 Fed. Appx. 370, 372-73 (7th Cir. 2003) (four days advance notice of Rule 902(11) declaration held sufficient because challenger did not show that he had been prejudiced).

[22] DMC asks this Court to overturn the district court's order that requires BP International to pay $574,274.23 in monetary equitable relief. As explained above, defendant Barrett surreptitiously created BP International so that he could secrete funds from his partner, Maihos. DMC is concerned that if the Commission succeeds in collecting the full amount of its judgments against DMC, Triad, and BP International, it will have collected $574,274.23 more than consumers paid for Coral Calcium. *See* Br. 44 n.12. The Commission would never collect more than the amount lost by consumers. In any event, DMC has waived any challenge to the order entered against BP International. DMC did not mention this challenge in its Statement of the Issues. *See* Br. 2-4. Indeed, its only argument regarding the BP International order is set forth in a footnote on page 44 of its brief. An argument raised only in a footnote is waived. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999).

center. *See* Br. 42. But the facts clearly show otherwise. DMC orchestrated the marketing of Coral Calcium. It was DMC's idea in the first place to sell the product, and to use an infomercial to do so. It was DMC that paid Trudeau to produce that infomercial. It was DMC that entered into a partnership with Triad, pursuant to which Triad disseminated the infomercial to broadcasters, received payments for sales, and shipped orders. *See* Br. 42; App. 1599-1608. And it was DMC that processed all orders that were received through the 800-number listed in the informercial. Plainly, DMC was responsible for sales of Coral Calcium during the Triad period.

Second, DMC argues that, because payments were initially received by Triad, the court may only require DMC to pay the net profits (approximately $6.3 million) that Triad forwarded to it. DMC contends that this argument is supported by *FTC v. Verity*, *supra*, but DMC misunderstands that case. The situation in *Verity* was quite different. In *Verity*, the defendant caused consumers to be billed for unauthorized access to internet pornography. For Tra[illegible]

The court in *Verity* distinguished those two periods. With respect to the first period, when non-defendant AT&T billed consumers for the charges, monetary equitable relief was limited to amounts actually received by Verity. 443 F.3d at 68. That is, the monetary relief could not encompass amounts paid by consumers to AT&T that never came into the hands of any defendant. However, during the second period, in which defendant Ebillit billed consumers, the court held that monetary relief could include the entire amount paid by consumers. *Id.* Because consumers paid those amounts to a defendant (*i.e.*, Ebillit), the monetary equitable relief imposed on Verity could include those amounts.

The situation that existed in this case from January 2002 through February 2003 is similar to the Ebillit period in *Verity*. Consumers paid their money directly to a defendant -- Triad. Accordingly, DMC, which procured Triad's services, could be held liable for the full amount paid by consumers. Indeed, it is well settled that when, as here, more than one defendant participates in a deceptive scheme, all the defendants may be held jointly and severally liable for the full amount of the monetary equitable relief. *See, e.g.*, *FTC v. Bronson Partners*, 2009 WL 4730752 *15, *appeal docketed*, No. 10-878 (2d Cir. Mar. 8, 2010) ("it is within the court's discretion to find joint and several liability when multiple defendants collaborated in the prohibited conduct"); *FTC v. Seismic Entm't*, 441 F. Supp. 2d at 354; *see also SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997) ("[c]ourts have held that joint-and-several liability

is appropriate in securities cases when two or more individuals or entities collaborated or have close relationships in engaging in the illegal conduct"); *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (same). Thus, the district court could have made DMC and Triad jointly and severally liable for the entire $40.9 million that consumers paid from January 2002 through February 2003. *A fortiori*, the district court did not err when, instead of making DMC liable for the entire $40.9 million, it instead required it to pay only half that amount. *See* Add. 61.

2. The district court did not abuse its discretion when it imposed $13.1 million in monetary equitable relief for Coral Calcium sales made from March 2003 through July 2003

The district court did not abuse its discretion when it ordered DMC to pay $13.1 million in monetary equitable relief for Coral Calcium sales that occurred during the period in which DMC was no longer collaborating with Triad, March through July 2003 (the post-Triad period). The court based this portion of its order on Ex. 187 (App. 2226) and Ex. 209 (App. 2253). Ex. 209 consists of two spreadsheets from DMC's computer files. One of those spreadsheets shows DMC's sales, product by product, on a monthly basis (App. 2296-2335), and the other shows refunds (App. 2254-2295). Ex. 187 (App. 2226) summarizes the data in Ex. 209. The district court explained how it used the data in those exhibits to calculate the amount of DMC's Coral Calcium net infomercial sales during the post-Triad period, and it based the monetary relief it ordered on that amount. Add. 60.

The Commission introduced Ex. 187 and 209 at trial through the testimony of Karen Gorewitz, a DMC employee who was familiar with DMC's computerized records. App. 1227, 1260. She testified that she saw DMC's telemarketers entering

[23] In fact, Ex. 209 did include a separate column listing in-store sales, *see* App. 2268, and the court excluded such sales when calculating the monetary equitable relief it imposed on DMC, *see* Add. 60.

[24] DMC asks this Court to ignore Ex. 209 because, even if that exhibit provides evidence regarding DMC' on

not have been a regular part of Ms. Gorewitz's job to *print* reports, *see* Br. 59, that is irrelevant. What is relevant is that, on a regular basis, she would "run" such reports, and that such reports, even if not actually printed, were used in the course of DMC's business. Thus, Ex. 209 is an admissible business record, and the district court did not abuse its discretion when it used that exhibit to calculate a portion of the monetary equitable relief that it imposed on DMC.[25]

3. The district court did not abuse its discretion when it imposed $14.65 million in monetary equitable relief for DMC's sales of Supreme Greens

The district court did not err when it included in the monetary equitable relief $14.65 million that DMC received from sales of Supreme Greens. The court based this portion of the relief on a report prepared by DMC's accountant, Wayne Callahan. App. 2114. This report showed that DMC's net revenues from Supreme Greens totaled $14.65 million, App. 2114-16, and DMC does not dispute this amount, *see* Br. 63.

DMC raises only one argument with respect to this portion of the court's award:

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[25] *FTC v. Verity* does not help DMC. *See* Br. 62. In that case, the Second Circuit overturned an award of monetary relief that was based on Verity's total revenues because a portion of those revenues came from legitimate sales, and the Commission had not provided the court with evidence necessary to deduct legitimate revenues from the award. 443 F.3d at 69. Here, there is no evidence whatsoever that any portion of DMC's sales were legitimate (*i.e.*, not based on deceptive infomercials). Moreover, even if consumers who purchased DMC's products in retail sales outlets did not rely on the deceptive infomercials, the district court deducted in-store sale revenue from its award. Accordingly, the flaw that undermined the relief in *Verity* is not present here.

[26] This meeting minute also refutes DMC's claim that, after being informed by the Commission in October 2003 that its Supreme Greens was replete with deceptive statements, it "immediately

DMC's sales of Supreme Greens.

Finally, although DMC hints that it may have created a deception-free version of the Supreme Greens infomercial, *see* Br. 64, the evidence is to the contrary. In fact, the evidence shows that other versions of the infomercial were created merely to make cosmetic changes, or to generate greater sales. App. 1676; *see also* D.130, Ex. 7 at 135 (explaining that the Sci-Fi version of the infomercial was made merely by speeding up the original version so that, pursuant to a request from the Sci-Fi channel, it would fit in a 27 min. 55 sec. time slot). Although DMC claims that it created a version of the Supreme Greens infomercial that was approved by the Commission, Br. 15, 63, this is incorrect. DMC provided the Commission with a version of the Supreme Greens infomercial that omitted the health benefits claims that were challenged by complaint count 4. The Commission did not approve this version. Instead, its lawyers indicated that this version represented an improvement over the original version, and that the Commission would like to see it substituted for the original if DMC could obtain substantiation for the claims that remained (*i.e.*, the weight loss and safety claims challenged by complaint counts 5 and 6). *See* D.130, Ex. 19 at 3-4. But as the discussion in Part I.B, *supra*, shows, DMC never obtained such substantiation. Thus, even this version violated the FTC Act.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's orders holding DMC liable for violations of the FTC Act and requiring it to pay $48.2 million in monetary equitable reli

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2010, I electronically filed the brief of Appellee Federal Trade Commission with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that counsel for appellants, who are named below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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