IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17270

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

PUBLISHERS BUSINESS SERVICES, INC. et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Nevada
No. 2:08-cv-00620-PMP-PAL

REPLY BRIEF OF PLAINTIFF-APPELLANT FEDERAL TRADE COMMISSION

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INTRODUCTION

This appeal concerns the appropriate remedy for undisputed violations of the FTC Act, 15 U.S.C. § 45(a) and "

[1] Corporate and individual defendants are collectively referred to as PBS. Corporate defendants' brief is designated "PBS Br."; individual defendants' brief is called "Dantuma Br.". The Commission's opening brief is designated "FTC Br.". The Commission's Excerpts of Record are designated "ER" and the supplemental excerpts are called "FTC SER".

recognize that deception and misrepresentations permeated PBS's ongoing relationship with its consumers. Indeed, PBS's tactics of "verifying" consumers' initial "agreements," and attempts to collect on the burdensome terms hidden in the verbiage of the initial sales pitches, merely confirmed and extended the scope of the initial deception. PBS's "verification" calls were themselves, as the district court concluded, "self-evidently" deceptive. And PBS's additional collections practices, based largely on taped excerpts selectively harvested from these calls, only made matters worse, compounding the initial deceptive conduct and giving rise to yet further violations of the FTC Act and the TSR.

Under controlling precedent, the district court's summary judgment ruling presumptively entitled the Commission to full disgorgement of PBS's ill-gotten revenues, unless PBS could demonstrate, at trial, that its revenues were not the fruit of its violations of the law. PBS fails to offer any demonstration, in its brief to this Court, that it met this burden. On the contrary, none of PBS's proposed indicia of customer satisfaction have been endorsed by this Court because none demonstrate that payment was not induced by deception. Even the four purportedly "satisfied" customers that PBS presented as witnesses were still, when testifying, unaware of exactly how much they were paying PBS, and for what.

Whatever the bounds of the district court's equitable discretion, it does not go

so far as to permit adoption of redress based on an admittedly myopic analysis that contradicts the law, the facts, and the district court's own findings on PBS's liability. As this Court's precedents establish, the district court's equitable discretion extends only to "permissible choices."

Finally, in contesting individual liability, PBS again avoids the elephant in the room – that PBS's initial sales pitch undisputedly violated both the FTC Act and the TSR. z3.4he pr ta , enua, B, tr a (P)Tj20.0000d0y0000 TDe(cr)Tj10.9200 0.00

to these deceptive practices purchased PBS's products. Such facts more than justify the monetary relief requested by the Commission. *See, e.g., FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993); *see also United States v. Prochnow*, 2007 WL 3082139 (11th Cir. 2007) (awarding both disgorgement *and* civil penalties as monetary relief in a strikingly similar magazine subscription scam). Consumer harm – as measured by the amount paid by consumers whose purchase was induced by deception – is presumed. "The FTC is not required ... to show any particular purchaser actually relied on *or was injured by* the unlawful misrepresentations." *Freecom*, 401 F.3d at 1205 (emphasis added). It thus was legal error for the district court to have demanded proof of some additional "link" between PBS's wrongdoing and the revenues received before awarding full relief.

PBS's assertion that, to establish its entitlement to equitable relief in the amount of net sales, the "FTC bore the burden to prove that every last customer purchased the magazines because of the deception," PBS Br. at 25, is flatly wrong. "Just as the FTC is not required to prove individual customer reliance on the defendant's misrepresentations, the FTC is not required to prove individual customer dissatisfaction." *FTC v. Trudeau*, 579 F.3d 754, 774 n.15 (7th Cir. 2009) (internal

citations omitted).[2] As the FTC argued in its opening brief, and defendants fail to address, the FTC is not required to prove particularized injury because

[2] PBS's insistence that the FTC needed to establish that its Section 5 violations "*caused* widespread consumer harm," PBS Br. at 30, n.8 (emphasis added), likewise misses the point. The harm is presumed because PBS engaged in widespread acts of deception and consumers purchased its products. *Figgie*, 994 F.2d at 605.

[3] PBS's appellate strategy of focusing only on selected aspects of its sales processes, moreover, is particularly puzzling when, prior to summary judgment, PBS advocated for an analysis that considered the "net impression" of all of PBS's sales materials and was critical of the FTC for purportedly "fragment[ing] PBS's sales process[.]" D.131at 6:10-13.

[4] Contrary to PBS's suggestion, PBS Br. at 4, n.2, the record demonstrates that PBS's deceptive calls were targeted at individual consumers, easily distracted at their work place – not the businesses they worked for. The district cocct

[6] PBS ignores that, with respect to the initial sales approach, the district court granted summary judgment not only on Count I of the complaint, the Section 5 violation, but also on complaint counts III and IV, corresponding to violations of the TSR, for failure to disclose the actual purpose of the calls, 16 C.F.R. § 310.4(d), and misrepresentation of the total cost that consumers had to pay, 16 C.F.R. §§ 310.3(a)(2) & 310.3(a)(4).

PBS's statement of facts does

in suggesting that the district court found only three Section 5 violations. PBS Br. at 44. In fact, after detailing a wide range of abusive collections practices, *see* ER.36-37; 43-44, the district court observed that there were "*at least* two undisputed misleading representations to induce payment" and noted an additional misrepresentation. ER.56 (emphasis added). The court later concluded that PBS was liable also for specific TSR violations: misrepresenting that consumers had entered into contracts to purchase magazines (Count V, 16 C.F.R. § 310.3(a)(4)) and engaging consumers in repeated phone calls with the intent to harass (Count VI, 16 C.F.R. § 310.4(b)(1)(i)). ER.57*;* *see also* ER.419.

Overall PBS attempts to downplay, before this Court, the initial sales pitch and the "self-evidently" deceptive verification calls, and to separate these practices from the monies eventually obtained from consumers. But such an approach misrepresents the nature of PBS's operation, because the deceptively-obtained "agreement" to pay is inextricably intertwined with the eventual payment.[9] Moreover, PBS attempts here,

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[9] As for the written materials, PBS has changed its tune. Prior to summary judgment, PBS argued that the mailings served as a *confirmation* of terms that had already been disclosed, not a means of cleansing the taint of the initial deception. *See* D.99 at 7; D.131 at 12; D.144 at 7. The district court rejected this argument. The record does not support PBS's argument, appearing for the first time *after* entry of summary judgment, that the written materials had any "clarifying effect." PBS Br. at 44. On the contrary, the mailing was usually the first notice to consumers that PBS was holding them to a contract that they had never entered into. *See* FTC Br. at 9-10. The FTC presented evidence that the majority of PBS payments were received not

as it did at the evidentiary hearing, to relitigate its underlying liability;0.0000 T 0000 cm1.00000 0

after receipt of PBS's written materials and invoice, but only after consumers had also received at least two collections letters. *See* D.222 at 10-11.

[10] The district court repeatedly assured counsel that it would not relitigate or revisit issues already decided at summary judgment. *See* FTC Br. at 43 & n.24.

assumed the very result that it purported to prove–that consumers knew what they were purchasing and were satisfied with their purchases.[11]

Nor did any other evidence offered by PBS rebut the presumption. Because *every* transaction was tainted by PBS's deceptive practices, payment does not prove customer satisfaction. It proves the effectiveness of the deceptio

[11] Dr. Duncan did not even link the tapes in his sample to the PBS customer database, so there was no way to ascertain whether the customers on the "good" verification calls were, in fact, satisfied. *See* ER.162, n.16.

[12] Nor are PBS's other purported indicia of customer satisfaction probative. *See generally* FTC Br. at 20-22.

redress only if *fully informed* consumers "decid[ed], *after advertising which corrects the deceptions* by which Figgie sold them the heat directors, that nevertheless the heat detectors serve[d] their needs, [and could] *then make the informed choice* to keep their heat detectors instead of returning them for refunds." *Figgie,* 994 F.3d at 606 (emphases added). Applying this standard, in *McGregor v. Chierico,* the Eleventh Circuit ordered full compensatory relief in a contempt action involving the deceptive telemarketing of printer toners, because the defendant had "failed to offer any evidence to rebut the presumption that the vast majority of his customers had no need for the toner they received." 206 F.3d at 1389, n.13. So too here. PBS failed to demonstrate that *any* of its consumers ever made a fully informed choice to knowingly and willingly contract to purchase long-term magazine subscriptions on the terms offered by PBS, without deception or coercion.

[13] PBS selectively cites the first panel decision in *Trudeau* to suggest that the court endorsed the propriety of net profits as a measure of relief. PBS Br. at 34 (citing 579 F.3d at 771-72). But that court also recognized that consumer loss is a "common measure," and often "more appropriate." 579 F.3d at 771-72. On remand, the district court in fact awarded the presumptive measure – gross revenues less refunds – an award that was affirmed by the Seventh Circuit. *See FTC v. Trudeau*, 662 F

Duncan's unsupported opinion, was not a permissible choice.

As the FTC demonstrated in its opening brief, Dr. Duncan's opinion was based on assumptions and reasoning that were fundamentally at odds with FTC law, the facts, and the district court's summary judgment ruling. *See* FTC Br. at 38-43.

consumer research study (which was arguably more robust than Dr. Duncan's, because it at least involved interviews of real consumers) sto

[15] That the Commission chose to discredit the worth of Dr. Duncan's opinion, rather than seek to exclude it, is of no moment. It was through cross-examination that the Commission (and the court below) elicited key concessions from Dr. Duncan, including the recognition that his survey focused solely on checking off terms in the verification tapes and "ignored everything else," ER.78:5, and clarifying the fundamental assumption underpinning his analysis, that "a meeting of the minds" occurred after "verification," ER.76:15-19 – an assumption squarely contradicted both by the district court's summary judgment ruling and evidence from every consumer witness, including PBS's purportedly satisfied customers, *see* FTC Br. at 20-21 & n.12.

[16] The suggestion by the individual defendants that the district court, sua sponte and sub silentio, modified or overruled its order on sum

[17] PBS errs in arguing that the FTC adopted an all-or-nothing approach below. Although the Commission has m

a very similar magazine subscription scam. *See FTC v. Magazine Solutions, LLC*, 2011 WL 2439916,*2 (3d Cir. 2011); *but see Kuykendall*, 371 F.3d at 766-67 (rejecting defendants' arguments that the value of magazines should be offset). If the district court had adopted such an approach, the measure of relief awarded would have been roughly $30 million – more than 150 times the remedy below – because of the tremendous m

[18] The wholesale costs of PBS's magazine subscriptions, over the period covered by the complaint, was $4,019,922.62. *See* D.91 at 42, D.132-2 at 30-31.

In sum, even assuming that the district court might have had equitable discretion to award some amount of monetary relief other than the presumptive measure, it nonetheless abused such discretion by uncritically adopting Dr. Duncan's estimate, which derived from an analysis that was irreconcilable with the law, the facts, and the summary judgment ruling in this case. On this record, moreover, because PBS failed to rebut the presumptive measure, the district court's refusal to award net revenues was reversible error.

IV. Based on the "Entire Evidence," the District Court Clearly Erred By ion

willingness to flagrantly disregard the law, there is ample record evidence to demonstrate that each individual defendant knew, or should have known, of PBS's widespread deceptive practices.

In contesting individual liability, defendants once again attempt to avoid the undeniable reality that PBS made 25 million calls that violated both the FTC Act and the TSR, contending that the Commission has no warrant for describing PBS's acts of deception as "widespread and pervasive." Id.

FTC's evidence that Jeff and Dirk (together with Ed) had authority to make changes to PBS's scripts.[23] *See* ER.258 at 128:22-25. These facts alone are sufficient to demonstrate the requisite knowledge of each of these defendants. *See*, *e.g.*, *FTC v. Stefanchik*, 559 F.3d 924, 930 (9th Cir. 2009).

Moreover, Brenda and Jeff both were in charge of PBS sales offices (Brenda, the Miami office, and Jeff, offices in St. Paul, Toledo, and Altamonte Springs), responsible for making the important decisions and supervising employees. *See* FTC Br. at 48-50. During the relevant time period, Dirk was ostensibly responsible for reviewing sales scripts[24]

[23] Defendants likewise admit that Jeff was "in charge of ... the 'renew/add-on' department" and wrote the renewal scripts. Dantuma Br. at 13. The script for renewals contains misrepresentations that mirror those of the initial sales script found to violate Section 5. *See* FTC SER.13 ("I was not calling to collect any money or anything like that, OK. I was just calling to thank you for the fine way you have handled your account with us here, and to also let you know that since you are a good customer with us, we are going to send you some bonus magazines."); *see also* FTC SER.14.

[24] *See* ER.393-95 (describing Dirk's communications with law enforcement officials and external counsel on behalf of PBS throughout the 2004-2008 period, including discussions with the Florida Attorney General's office about the contents of PBS's scripts.)

covered by the complaint, Dirk himself testified that he was still on the payroll of Ed Dantuma Enterprises in June 2008. FTC SER.1:20-2:17.

Nor does the mere fact that Brenda, Jeff, and Dirk were not always present in PBS's boiler rooms defeat a finding of knowledge sufficient to establish individual liability. In *FTC v. Bay Area Business Council*, for example, a defendant's stay in Canada did not "diminish the evidence that he knew about the corporations' deceptive practices" in the United States. 423 F.3d 627, 637 (7th Cir. 2005). [25]

[25] Once the requisite knowledge is established, under this Court's precedents, each defendant is jointly and severally liable for the full amount of equitable relief. *See, e.g., Stefanchik*, 559 F.3d at 927 (affirming joint and several liability for equitable restitution in the amount of net revenues); *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1138, 1140 (9th Cir. 2010) (same). Tracing is not required once

With respect to Persis, this Court's decision in *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1169 (9th Cir. 1997), held that service as a puppet corporate officer, along with "performing routine office duties," even if only for one week, sufficed to hold the defendant jointly and severally liable for full monetary relief. The Court easily concluded that defendant's involvement in the scheme, like Persis's in PBS, was enough to establish that she was "at least recklessly indifferent with regard to the truth or falsity of the misrepresentations made by the PCH employees." *Id.* at 1171. Here, the Commission surpassed this showing, as Persis worked for years in PBS's offices, was in charge of PBS's clerical department and, together with Brenda, paid the bills and was responsible for managing the finances. *See* FTC Br. at 50-51; *see also* ER.377 at 159:7-9; ER.375 at 18:10-17; ER.400 at ¶8. When Dirk and Ed were not there, Persis authorized consumer refunds, ER.379 at 182:11-23, and thus had actual knowledge of consumer complaints. Persis, too, had oversight over the company's mailings, *see* FTC Br. at 51, a further factor that this Court has deemed relevant in establishing individual liability for monetary relief. *See Cyberspace.com*, 453 F.3d at 1202.

In sum, the "entire evidence" of record, extending beyond the self-serving

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personal monetary liability has been established for violations of the FTC Act and the equitable relief sought is, as here, in service of the public interest. *Bronson Partners*, 654 F.3d at 372-375.

testimony culled by defendants, is more than sufficient to demonstrate that Brenda, Jeff, Dirk, and Persis each could not have failed to know of PBS's violations unless he or she intentionally avoided the truth. The district court clearly erred in concluding otherwise. *See FTC v. Pantron I. Corp.*, 33 F.3d 1088, 1103-04 (9th Cir. 1994).

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court vacate the district court's judgment on equitable monetary relief, and remand to the district court with instructions to enter an order finding all defendants jointly and severally liable for $34,419,630.00.

Respectfully submitted,

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Dated: May 11, 2012

COMBINED CERTIFICATIONS

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