No. 11-3319

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FEDERAL TRADE COMMISSION, *et al.*,
Plaintiffs-Appellees

v.

MEGGIE CHAPMAN,
Defendant-Appellant

On Appeal from the United States District Court
for the District of Kansas
The Honorable Judge Julie A. Robinson
D.C. No. 5:09-cv-04104-JAR

1W5 0O5 2DY JOINT RESPONSE BRIEF 0 TD .01 Tc 2.0

CLIFFORD W. BERLOW
Assistant Attorney General
Office of the Attorney General
for the State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-7122
cberlow@atg.state.il.us
Attorney for Plaintiff-Appellee
State of Illinois

JOCELYN F. OLSON
Assistant Attorney General
Office of the Attorney General
for the State of Minnesota
1400 Bremer Tower
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 757-1287 (Voice)
(651) 296-1410 (TTY)
jocelyn.olson@ag.state.mn.us
Attorney for Plaintiff -Appellee
State of Minnesota

STEVE R. FABERT
Assistant Attorney General
Office of the Attorney General
for the State of Kansas
120 SW 10th Ave., 2d Floor
Topeka, Kansas 66612
(785) 368-8420
steve.fabert@ksag.org
Attorney for Plaintiff-Appellee
State of Kansas

DAVID N. KIRKMAN
Assistant Attorney General
Office of the Attorney General
for the State of North Carolina
P.O. Box 629
Raleigh, NC 27602-0000
(919) 716-6033
dkirkman@ncdoj.gov
Attorney for Plaintiff-Appellee
State of North Carolina

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATE STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF JURISDICTION

The Federal Trade Commission ("Commission" or "FTC") and four States asserted claims under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108, for deceptive acts or practices that violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the FTC's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, and various state consumer protection laws. The district court had subject matter jurisdiction under 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), 6105(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345, and had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the state law claims.

This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, to review the district court's September 26, 2011, final judgment. Defendant-appellant Meggie Chapman filed a timely post-judgment motion under Fed. R. Civ. P. 59(e), which was denied on November 16, 2011. Chapman filed a notice of appeal on October 26, 2011, which became effective upon the district court's disposition of the Rule 59(e) motion pursuant to Fed. R. App. P. 4(a)(4).

STATEMENT OF THE ISSUES

In this case, a number of corporations and individuals engaged in an extensive illegal telemarketing scheme, in which consumers were deceptively

induced to purchase costly services that would supposedly enable them to obtain "grants." The sole appellant is defendant Meggie Chapman, who provided extensive services to the other defendants, who made the sales in question. The issues presented are:

1. Whether defendant Chapman – who supplied nearly all of the grant-related services in supposed fulfillment of the sellers' promises to consumers, as well as providing other assistance to those sellers – was properly found to have provided "substantial assistance" to them, in violation of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(b).

2. Whether the district court clearly erred in finding that Chapman knew or consciously avoided knowing that the sellers and telemarketers were deceptively marketing their grant-related scheme.

3. Whether the district court abused its discretion when it denied Chapman's post-judgment motion seeking a reduction in damages.

STATEMENT OF THE CASE

The FTC and three States initiated this action in July 2009 to halt a wide-spread scheme in which defendants deceptively promised individual consumers the means to obtain grant money, including "guaranteed" government grants of up to $25,000. D.1.[1] Plaintiffs alleged that the defendants had engaged in deceptive

[1] Record items included in the Appendix are referred to as "App.xx."
(continued...)

telemarketing practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the TSR, 16 C.F.R. Part 310, and various state consumer protection laws. The Commission and the States of Kansas, Minnesota, North Carolina, and Illinois subsequently filed an 18-count amended complaint against 16 corporate and individual defendants (located in Kansas, North Carolina, Utah, and Arizona), including appellant Meggie Chapman. D.216 (App. __). Chapman was charged in one count with assisting and facilitating the Kansas defendants' TSR violations in violation of 16 C.F.R. § 310.3(b) by providing grant-related services to the sellers. D.216 ¶¶78-79 (App.__).

The district court issued a temporary restraining order ("TRO") and preliminary injunction enjoining the deceptive scheme by the Kansas defendants. D.28, D.78. All defendants – except for Chapman – either defaulted, settled with the plaintiffs, or were found liable on summary judgment. On July 26, 2011, the court denied the parties' cross-motions for summary judgment regarding Chapman's liability. D.390 (App. __).

The court held a two-day bench trial in August 2011 to resolve the claims against Chapman, during which Chapman testified. On September 16, 2011, the court issued its Findings of Fact and Conclusions of Law holding that Chapman

---

[1](...continued)
Docket items are referred herein by their district court docket number (*i.e.*, "D.xx."). "Tr." refers to the transcript of the trial on August 22 and 23, 2011. "PX" refers to plaintiffs' trial exhibits. "DX" refers to defendant's trial exhibits.

violated Section 310.3(b) of the TSR. D.422 (App.__-__). The court held that Chapman provided substantial assistance to the Kansas defendants' deceptive telemarketing scheme by fulfilling nearly all the grant research, writing, and coaching services, and providing other assistance to them. *Id.* at 17-20 (App.__-__). The court held that defendants' egregious scheme could not have succeeded without Chapman's work. *Id.* at 17, 19 (App. __, __). The court also held that Chapman either knew or consciously avoided knowing that the Kansas defendants engaged in deceptive practices that violated the TSR. *Id.* at 20-23 (App. __-__). On September 26, 2011, the court ordered a permanent injunction and $1,682,950 in monetary relief against Chapman based on her assistance to the Kansas defendants from January 2008 to July 2009. D.423 (App. __); D.424 (App. __). On October 10, 2011, Chapman filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), or alternatively, for remittitur, seeking a reduction in damages. D.425 (App. __). The court denied that motion on November 16, 2011. D.443 (App. __). This appeal followed. D.433 (App. __).

STATEMENT OF FACTS

1. Defendants' deceptive grant-related telemarketing scheme

Beginning in 2007, the defendants based in Kansas began selling grant-related services through telemarketers to consumers throughout the United States. D.296 ¶¶4.a.1-9, 18 (App. __-__, __). They initiated the scheme by mailing to

consumers millions of direct marketing pieces, including postcards, that touted the availability of government grants to individuals, including statements such as that the consumer was "Guaranteed a $25,000 Grant from the U.S. Government." *See*, *e.g.*, PX 70 ¶¶ 5-6, 8, 14, 17, Att. A, B, I, L (App.__-__, __, __-__, __-__, __-__); PX 72 ¶15, Att. J (App.__, __-__); D.296 ¶¶4.a.20-22 (App.__); PX 28 ¶2, Exh. A (App.__, __).

Custoing pee9

Paeno, the author of the Grant Guide, through her independent work obtaining grant funding for school districts and non-profit organizations, not individuals. PX 103 ¶¶4, 5, 9 (App. __-__, __).[2] The Kansas defendants provided no evidence that any individual received grant money by purchasing their grant-related products, including the Grant Guide. *See* D.296 ¶31(App.__).

The Kansas defendants enticed consumers who purchased the Grant Guide to purchase grant research services, the second phase of their scheme, by misrepresenting that consumers who purchased this service were likely to receive grant money. D.296 ¶32 (App.__); PX 33 ¶5-6 (App.__). For example, GWI's telemarketers represented that "Grant Writers Institute has achieved a 70% success rate with their past customers totaling more than $80 million in grant funds for their clients." D.296 ¶38 (App.__); PX 12 at 2 (App.__); PX 72 ¶17, Att. L p.80 (App.__, __). To promote their research services, the Kansas defendants touted their expertise in this area and their customers' likelihood of receiving a grant with the defendants' help. PX 72 ¶ 17, Att. L p.75 (App.__, __). Consumers were charged between $800 and $1200 for defendants' grant research services. *See,*

[2] Paeno performed grant-related work for the Kansas defendants until around June 2008, when she quit. PX 103 ¶6 (App.__); Tr. 144, 149 (App.__, __). Paeno repudiated the Kansas defendants' use of the Grant Guide because it was primarily intended for use by non-profit organizations and school districts, not individual consumers. PX 103 ¶¶4-6, 8, 10 (App.__-__)

e.g., Tr. 69-70 (App.__-__); PX 30 ¶3, Ex.2 p.5 (App.__, __); PX 32 ¶2 (App.__); PX 33 ¶7 (App. __-__).[3]

Consumers who purchased the Kansas defendants' Grant Guide and grant research services were further solicited to purchase defendants' grant writing and grant coaching services. D.296 ¶¶33, 35 (App. __); PX 12 (App.__-__); PX 28 ¶4 (App.__-__); PX 72 ¶¶16, 17, Att. K ¶4 p.73, Att. L pp.79-80 (App.__, __, __-__). The Kansas defendants misrepresented to consumers that they were guaranteed or likely to receive grant money if they purchased these services. PX 72 ¶17, Att. L, pp.79-80 (App.__-__); PX 24 ¶¶5-6 (App. __-__).

Consumers who purchased the Kansas defendants' grant research, writing, or coaching services failed to receive any grant money as a result of purchasing those services. *See, e.g.*, PX 24, p.2-3 (App. __-__); PX 29, p.2-3 (App. __-__); PX 35, p.2-4 (App.__-__). The Kansas defendants were unable to substantiate the grant success results for individuals, as they did not track whether any of their customers ever received a grant. D.296 ¶31 (App.__); PX 70 ¶8, Att. D, p.53, ¶26 (App.__, __); PX 72 ¶¶16, 19, Att. K, ¶4 (p.73), Att. N, ¶2 (p.85) (App. __, __, __). No defendant (including Meggie Chapman) could identify any customer who

[3] The Kansas defendants also provided customer leads to the North Carolina and Utah defendants who engaged in similar deceptive solicitations. D.296 ¶¶34, 40-60, 63-64, 69-83, 90 (App.__-__, __-__); PX 72 ¶¶13, 16, Att. H, K, L (App.__-__, __, __-__); PX 24 pp.2-3 (App. __-__); PX 37 (App.__-__); PX 158 at 31, 36-37, 53-56, 61 (App.__, __-__, __-__, __).

had actually received a grant as a result of purchasing any of the defendants' grant-related services. *See, e.g.*, PX 150 at 153 (App.__); PX 154 at 143-44 (App.__-__). Consumers paid the Kansas defendants more than $27 million from 2007 through July 2009 for their grant-related goods and services. *See* D.390 at 17 (App.__)

2. Chapman provided grant research, grant writing and grant coaching services to the other defendants

Having promised their customers a means of obtaining grant money, the defendants needed to deliver something to those customers, even if – as it turned

Chapman received her first research request for grants for individuals from the Kansas defendants through Lynne Paeno in November 2007,[4] and the volume of requests steadily increased. Tr. 110-14 (App.__-__); DX 720 (App.__); PX 150 at 47-48 (App.__-__). By approximately August 2008 – after Paeno quit the scheme – Chapman was hired directly by the Kansas defendants to provide grant research services, and subsequently provided grant writing and grant coaching services, for the telemarketing scheme. Tr. 146, 319-21 (App.__, __-__); PX 150 at 43-45, 141-42 (App.__-__, __-__); D.338 ¶110 (App.__); D.296 ¶¶ 17, 98, 102, 109 (App.__, __-__); D.234 ¶¶51, 53 (App.__). Chapman's grant-related work on behalf of the Kansas defendants amounted to approximately 80-90% of her entire business by July 2009. D.338 ¶128 (App. __); PX 150 at 235 (App.__).

Chapman and her employees at MCA compiled lists of money sources (referred to as "funding research request responses") ostensibly available to consumers who purchased defendants' services. Tr. 122-123, 317 (App.__-__, __); PX 150 at 49 (App.__); PX 58 (App.__-__); D.338 ¶112 (App.__). Chapman and MCA provided to the Kansas defendants many such lists of sources – often hundreds per month – to which she claimed individual customers could apply for

[4] Chapman began working with Paeno on grants for educational institutions and nonprofit organizations in 2006. Tr. 106 (App. __). Paeno subcontracted with Chapman to write portions of the Grant Guide in September 2007, and provided a chapter focusing on grants to individuals for a later printing of the Guide. Tr. 108-09, 285 (App.__-__, __); PX 150 at 28-29, 31-32, 197 (App. __-__, __-__, __); D.296 ¶¶92, 93 (App.__-__).

grants. Tr. 143, 247, 280-82, 297-99 (App. __, __, __-__, __-__); D.338 ¶112 (App.__); PX 28 ¶4, Ex. C (p.16-29) (App.__-__, __-__); PX 111 (App.__-__). The Kansas defendants then provided those research results to the purchasing customers. Tr. 143, 298 (App.__, __).

A number of the entities included as grant sources in Chapman's research results, however, either did not exist, did not provide funding at all, did not provide funding to individuals, or only provided funding to individuals within a very limited geographical area for which the applicant was ineligible. Tr. 253-56, 297-99 (App.__-__, __-__); PX 28 ¶¶7-8 (App.__-__); PX 60 (App.__); PX 112 (App.__); PX 113 (App. __); PX 114 (App.__); PX 115 (App.__); PX 35 ¶5 (App.__); PX 150 at 83-84 (App.__-__); PX 151 at 126-27 (App.__-__). Chapman learned about two funders who asked the Kansas defendants to remove their names from lists provided to consumers after the funders complained about the large number of requests from individuals who did not qualify for their grants. Tr. 255-56, 302 (App.__-__, __); PX 114 (App.__); PX 115 (App.__).

Chapman often included non-grant sources of funding – such as loans, sweepstakes, contests, entitlement programs, and "assistance programs" – in the research results, even though the customer only requested grants. There is no evidence that any customer received funds from these other sources. Tr. 132-34, 138-41, 199-93, 195-98, 202-04 (App.__-__, __-__. __-__, __-__, __-___); PX

150 at 61, 146-47 (App.__, __-__); D.338 ¶264 (App.__); PX 100 ¶¶158-159 (App.__); PX 24 ¶5 (App.__); PX 24, Ex. 3 (App.__-__); PX 28 ¶4 (App.__-__); PX 28 Ex. C, p.16-29 (App.__-__); PX 29 Ex. 2, p.10-27 (App.__-__); PX 35 ¶6, Ex. 4, p.10-20 (App.__-__); PX 58 at 8-22 (App.__-__); PX 60 at 3-11 (App.__-__); PX 61 at 8-19 (App.__-__); PX 102 (App.__); DX 704 at 3-22 (App.__-__); D.156 at 41-42 (App.__-__). Chapman developed the idea to include contests, sweepstakes, and other non-grant sources in the research results, and she prepared an explanation to the Kansas defendants about why these other sources should be included, understanding that they would provide that information to their customers. Tr. 221-22, 266-67 (App.__-__, __-__); PX 121 (App.__-__); D.338 ¶123 (App.__-__); PX 150 at 178-79 (App.__-__); PX 100 ¶¶160-61 (App.__). For example, Chapman proposed informing customers that the "new trend" is that contests and sweepstakes "are all considered grants!" PX 121 (App.__).

Chapman's research regarding the supposed availability of grants for individuals typically consisted of looking at the funder's website or the IRS Form 990 filed by private foundations. Tr. 177-179, 249-50, 302-06 (App.__-__, __-__, __-__); DX 711 (App.__-__); DX 712 (App.__-__); DX 713 (App.__-__). Chapman acknowledged, however, that information included on the Form 990 could be out-of-date when it became publicly available for grant research over a year later. Tr. 305, 325-26 (App.__, __-__). By April 2008 she began occasionally contacting funders directly to determine if there were additional grant

Consumers were initially charged $805, and later up to $1200, by the Kansas defendants for Chapman's services. Tr. 69-70, 318 (App.__-__, __). Consumers paid between $6.7 million and $9.7 million to receive Chapman's work. Tr. 70–71 (App.__-__).

Chapman also provided grant writing and coaching services for the Kansas defendants. Beginning in approximately October 2008, Chapman or her employees provided proposals and applications on behalf of customers to the ostensible funding sources previously identified. Tr. 287, 309-10 (App.__, __-__); PX 150 at 141-43 (App.__-__); D.338 ¶¶117, 118 (App.__-__); D.296 ¶¶17, 91, 98, 102 (App.__, __-__). She provided to the Kansas defendants a bullet point list of the purported benefits of using a grant writer, which was used to induce customers to hire them as grant writers. Tr. 223-24, 263 (App.__-__, __); D.338 ¶125 (App.__); PX 150 at 182-83 (App.__-__); PX 122 (App.__). Chapman received $300 for the first 5 pages of grant writing and $35 for each additional page. Tr. 147 (App.__); PX 150 at 211 (App.__); D.234 ¶54 (App.__). Chapman also created a grant coaching workshop and program for the Kansas defendants beginning in the summer of 2008. Tr. 147-48, 245-46 (App.__-__, __-__); PX 150 at 43-46, 87 (App.__-__, __); D.296 ¶¶ 98, 102 (App.__-__); D.338 ¶¶27, 117, 119 (App.__-__, __-__); PX 100 ¶¶176-177, 181-182 (App.__-__); PX 149 (App.__-__).

(either directly or through MCA) received $1,682,950 from the Kansas defendants for providing grant-related services to individual customers of the Kansas, North Carolina, or Utah defendants from January 2008 through July 2009. D.338 at ¶¶38, 275 (App.__, __); PX 110 (App.__-__); PX 111 (App.__-__).

3. Chapman knew or consciously avoided knowing that the Kansas defendants deceptively sold their grant-related services

Chapman knew that the Kansas defendants engaged in telemarketing, and knew that their sales force represented to customers that they were likely to receive grant money as a result of purchasing defendants' grant-related services. D.296 ¶103 (App.__); PX 150 at 28 (App.__); PX 100 ¶13 (App.__); D.216 ¶47 (App.__); D.234 ¶47 (App.__-__). Chapman also knew by 2008 that the Kansas defendants were selling the Grant Guide to individuals and that the Grant Guide represented that "historically the grant writers have been able to produce a 70 percent success rate in receiving grant funding" for their customers. Tr. 263-64, 284-87 (App.__-__, __-__); PX 7 at 3 (App.__); PX 150 at 184 (App.__). Chapman acknowledged, however, that grants cannot be guaranteed. D.338 ¶250 (App.__); PX 100 ¶23 (App.__).

Prior to performing services for the Kansas defendants in late 2007, Chapman had not researched grants for individuals as her previous experience was limited to grant research and writing for schools and non-profit organizations.

Tr. 238-40, 262 (App.__-__, __); D.338 ¶253 (App.__); PX 150 at 35-36 (App.__-__). She believed that no more than 2% of grants are available to individuals even though she had no personal success obtaining grants for individuals and could not independently verify that statistic. Tr. 226-27, 262 (App.__-__, __); PX 150 at 78-79, 82-83 (App.__-__, __-__); PX 108 (App.__-__).

Chapman also knew about inquiries by several state attorneys general regarding the Kansas defendants' business practices from the beginning of her working relationship with them. PX 150 at 173-74, 194-96 (App.__-__, __-__); PX 100 ¶¶29-31 (App. __-__); D.296 ¶104 (App.__); PX 113 (App.__). She assisted the Kansas defendants by responding to inquiries from the North Carolina Attorney General and the Alaska Attorney

more even though she knew many of the customers had large debts and that government websites provided information about the availability of grants for free. Tr. 302, 311-12, 318 (App.__, __-__, __); DX 736 (App.__); DX 737 (App.__).

Paeno decided in the summer of 2008 to quit working for the Kansas defendants because she found the business of providing grant research for individuals to be too difficult compared to that for school and nonprofit grants. PX 160 at 67-68 (App.__-__). When Chapman told Paeno she would continue, Paeno told Chapman that she was sure the Kansas defendants would want her to continue, but warned her to "keep on them [the Kansas defendants], make sure they're not marketing, you know, in a way that you're getting these requests that are not viable, ..." PX 160 at 68 (App.__).

Chapman claimed she never reviewed the marketing materials, telemarketing scripts, or recordings used by the Kansas defendants to induce consumers to purchase her grant-related services. Tr. 230-31, 288, 290-91 (App.__-__, __, __-__); D.296 ¶¶106, 107 (App.__); PX 150 at 58-59, 112-113 (App. __-__, __-__). She could have received the Kansas defendants' marketing materials pursuant to their mutual nondisclosure agreement if she had simply asked, but she did not. Tr. 278, 287 (App.__, __); PX 107 (App.__-__). Chapman even claimed that, although she received a telemarketing script from Lynn Paeno "in the very beginning" of her work with the Kansas defendants, she forwarded it

to her business partner and then returned it to Paeno, without ever looking at the script. Tr. 230-31, 282 (App.__-__, __); PX 150 at 58-59 (App.__-__).

Chapman did not track whether any of the customers who purchased her grant-related services ever received a grant. D.296 at ¶108 (App.__); PX 150 at 151 (App.__); PX 100 ¶183 (App.__). Chapman knew that the Kansas defendants did not track whether any of their customers ever received a grant. PX 150 at 153 (App.__). Chapman was unaware of any of the 8,361 customers, for whom she or MCA provided grant-related services, who received a grant. Tr. 262-63, 310-11 (App.__-__, __-__).

4. Chapman continued to assist the telemarketing scheme even after knowing that the Kansas defendants' business had been shut down

Although Chapman was not named a defendant in the originally filed complaint in July 2009, she received notice of the filed complaint and the TRO that was entered against the Kansas defendants and that closed their business. D.338 ¶276 (App.__); D.1; D.28. Nonetheless, she failed to make any changes to her business practices and continued to provide the same services for the Utah defendants. Tr. 184-87, 313-15 (App.__-__, __-__); PX 150 at 207-11, 213, 242 (App.__-__, __, __); D.338 ¶277-79 (App.__-__); D.296 ¶¶113, 114 (App.__). She did not review the marketing materials for the Utah defendants, and for at least a year she did not track if any of their customers received a grant. D.338 ¶¶292-97

(App.__-__); D.296 ¶¶115, 116 (App. __); PX 150 at 230-31, 246 (App.__-__, __). After the Utah defendants were added as defendants, Chapman began providing the same services on behalf of EMS, a company she knew was controlled by the owners of a Utah defendant. Tr. 316-17 (App.__-__); D.150 at 246-48 (App.__-__); D.338 ¶¶ 301, 302, 305 (App.__-__). Chapman did not review EMS's marketing materials. Tr. 316, 322 (App.__, __); D.338 ¶¶303, 304 (App.__); PX 150 at 247-48 (App.__-__).

5. Proceedings below

On July 20, 2009, plaintiffs the Commission, and the States of Kansas, North Carolina, and Minnesota filed a 14-count complaint against defendants Affiliate Strategies, Inc., Apex Holdings, International L.L.C., Answer Customers, L.L.C., GWI, Landmark Publishing Group, L.L.C., Brett Blackman, Jordan Sevy, and James Rulison (collectively, "the Kansas defendants"), and Real Estate Buyers Financial Network, L.L.C. ("REBFN"), Martin Nossov, and Alicia Nossov (collectively, "the North Carolina defendants"). D.1. The FTC initiated this action under Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing Act, 15 U.S.C. §§ 6101-6108, for deceptive acts or practices that violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the TSR, 16 C.F.R. Part 310. The states brought this action pursuant to the Telemarketing Act, 15

U.S.C. § 6101, *et seq*., and various state consumer protection and trade practices laws. D.1.[5]

On July 24, 2009, the district court issued a TRO against the Kansas defendants which, *inter alia*, prohibited their on-going misrepresentations, appointed a Receiver, and imposed an asset freeze. D.28. On September 1, 2009, the court entered a stipulated preliminary injunction. D.78.

On December 9, 2009, plaintiffs filed an amended complaint adding the State of Illinois as plaintiff (alleging claims pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 *et seq*.), adding Wealth Power Systems, L.L.C. ("WPS"), Aria Financial L.L.C. ("Aria"), Direct Marketing Systems, Inc., and Justin Ely (collectively, "the Utah defendants"), and Chapman as defendants, and adding several new counts. D.118 (App.__). Chapman was charged with assisting and facilitating the Kansas defendants' TSR violations under 16 C.F.R. 310.3(b). *Id*. ¶¶75-76 (App.__). Plaintiffs filed a second amended complaint on June 21, 2010. D.216 (App.__).

---

[5] The State of Kansas brought this suit under the Kansas Consumer Protection Act, K.S.A. § 50-623, *et seq*. The State of Minnesota brought this suit under Minn. Stat. §§ 8.01 & 8.31, the Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-325D.48, Minn. Stat. § 325F.67, the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. §§ 325F.68-325F.70, and Minn. Stat. § 325F.71, subd. 2 (2008). The State of North Carolina brought this suit under the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1.1, *et seq*.

Defaults were entered against the Kansas corporate defendants on August 12, 2010, and a default judgment and permanent injunction were entered against those defendants and Direct Marketing Systems, Inc. on July 26, 2011. D.391, D.392. On December 10, 2010, the plaintiffs sought summary judgment against several remaining defendants including Chapman, and Chapman, WPS, and Aria cross-moved for summary judgment. D.301-02, D.308-309, D.310-316.

On July 26, 2011, the district court granted summary judgment in favor of the plaintiffs on their claims against REBFN and Martin Nossov, and ordered permanent injunctions and monetary relief. D.390, D.395, D.419. Defendants Blackman, Sevy, Rulison, Ely, WPS, Aria, and Alicia Nossov settled with the

14 (App.__-__), the district court held there was "no question" that the Kansas defendants violated Section 310.3(a)(2)(iii) of the TSR, 16 C.F.R. § 310.3(a)(2)(iii), by making false claims that consumers would receive "guaranteed" government grants or were likely to receive grant money if they purchased defendants' services. *Id.* at 16 (App.__).

The court then held that Chapman provided substantial assistance to the Kansas defendants by providing the vast majority of the grant-related services which "formed the basis of the Kansas Defendants' misrepresentations." The court

Chapman's work was "based on shaky statistics and superficial research." *Id.* at 19–20 (App.__-__).

The court next held that Chapman knew or consciously avoided knowing that the Kansas defendants engaged in activities that violated the TSR. *Id.* at 20-23 (App.__-__). The court found that Chapman "had provided a list of individual grants for the Alaska Attorney General," "knew that the Kansas Attorney General had requested that [the Kansas defendants] change their marketing practices," had received a request from one of the Kansas Defendants' attorneys for the names of her researchers to verify that "actual people" were conducting the research, and had received an inquiry from the North Carolina Attorney General in April 2009. *Id*. at 20-21 (App.__-__). The court concluded that "by wholly ignoring these inquiries and assisting the Kansas defendants in responding to them, Chapman consciously avoided knowing that the Kansas defendants engaged in deceptive acts or practices under the TSR." *Id*. at 21 (App.__).

The court also found Chapman's claimed ignorance of the Kansas defendants' marketing activities not credible based on her familiarity with the Grant Guide and its 70% success representation, her knowledge that the Kansas defendants could not substantiate a success rate, and the lack of evidence that consumers received any grant money. *Id.* at 21 (App.__). The court also found persuasive Lynn Paeno's testimony that Chapman should remain "vigilant" in

monitoring the Kansas defendants' marketing activities, as well as Chapman's awareness of cover letters indicating it was "rare" for a customer not to qualify for a grant. *Id.* at 22 (App.__). Further, it noted that Chapman's research results included grant sources that did not exist or for which individuals did not qualify, that she was aware of consumer and funder complaints, and that she could not substantiate her statement that 2% of grants are awarded to individuals. *Id.* at 22-23 (App.__-__).

The court awarded $1,682,950 in damages against Chapman based on the gross revenue she received from the Kansas defendants. *Id*. (App.__). The court also imposed a permanent injunction barring Chapman from engaging (or assisting others in engaging) in the sale of "Money-Making Opportunities" (including grant-

which time her earlier-filed notice of appeal became effective under Fed. R. App. 4(a)(4).[6]

SUMMARY OF ARGUMENT

This Court should affirm the judgment below that Chapman violated the Telemarketing Sales Rule by providing

[6] Chapman also filed an "amended" notice of appeal on November 16, 2011, D.444, but that filing was unnecessary as the disposition of the Rule 59(e) motion triggered the effectiveness of her originally-filed notice. Chapman filed for a voluntary petition under Chapter 7 of the Bankruptcy Code in federal bankruptcy court in Arizona on November 17, 2011, and filed a notice of automatic bankruptcy stay in this Court on November 21, 2011. This Court initially abated the appeal pending termination of Chapman's bankruptcy proceedings, but vacated the abatement on January 6, 2012.

which would not have succeeded without her assistance. Her reports contributed to the customers' lack of succena7fs' lack o Tj-14uding sourack d not di succeexHer or di succ

she knew was responding to a state inquiry. She knew that the Kansas Attorney General had requested that the Kansas defendants change their marketing materials. She also received a cover letter sent to consumers from the Kansas defendants in which they represented that it was "rare" for a customer not to "meet the criteria" for a grant application. Chapman was warned by Lynn Paeno, who wrote the Grant Guide, to be vigilant about the Kansas defendants' marketing.

Further, Chapman knew that the Kansas defendants' sales representatives told customers that they were likely to receive grant money, and she knew they represented in the Grant Guide sold to individuals that defendants had "a 70% success rate in receiving grant funding." However, neither Chapman nor the Kansas defendants tracked the success rate for customers in receiving grants, nor could they identify a single customer who received a grant.

Yet despite the many "red flags" that the Kansas defendants deceptively marketed their grant-related services, Chapman refused to look at their marketing materials. She even sent back one of their telemarketing scripts without looking at it. The court's conclusion that Chapman consciously avoided knowing that the Kansas defendants were violating the TSR is fully supported by the record, and was based on assessing Chapman's credibility at trial. (Part I.B.)

Finally, the district court did not abuse its discretion in denying Chapman's post-judgment motions seeking a reduction in the damage award. The court

properly assessed damages based on record evidence that Chapman assisted and facilitated the Kansas defendants while she consciously avoided knowing of their TSR violations from at least January 2008 through July 2009. (Part II)

ARGUMENT

I. CHAPMAN VIOLATED THE TELEMARKETING SALES RULE BY PROVIDING SUBSTANTIAL ASSISTANCE TO THE KANSAS DEFENDANTS WHILE KNOWING OR CONSCIOUSLY AVOIDING KNOWLEDGE OF THEIR DECEPTION

A. This Court Reviews the District Court's Factual Findings for Clear Error and Legal Conclusions *De Novo*

The district court's factual findings supporting its judgment are reviewed for clear error and its legal determinations reviewed *de novo*. *Thompson v. Rockwell Intern. Corp.*, 811 F.2d 1345, 1346-47, 1350 (10th Cir. 1987); *see also r and Legal ConcagaoIh*

Cir. 2002) (applying standard because the "district court is 'better positioned' than we are to decide this primarily factual issue") (citations omitted); *see also United States v. Banashefski*, 928 F.2d 349, 351 (10th Cir. 1991) (reviewing application of the Sentencing Guidelines to the facts under a "due deference" standard).

Chapman thus errs when she asserts that the heightened *de novo* standard of review applies to whether she provided substantial assistance to the Kansas defendants. *See* Appellant's Brief ("App. Br.") at 2, 20-21. While a challenge that "the facts found by the district court are insufficient as a matter of law" may be reviewed *de novo*, *see, e.g.*, *United States v. Alexander*, 292 F.3d 1226, 1229 (10th Cir. 2002) (citation omitted), this is simply not the case here. Apart from Chapman's argument that "substantial assistance" under the Rule is strictly limited to certain specified marketing activities – which, as discussed below, is wholly without merit – the district court's conclusion that there was indeed substantial assistance here is a factual or mixed question on which this Court should defer to the lower court's factfinding.

B. Chapman Assisted and Facilitated the Kansas Defendants' Deceptive Grant-Related Scheme

The Telemarketing Act directs the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or

practices." 15 U.S.C. § 6102(a)(1). Those rules "may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing . . ." *Id.* § 6102(a)(2). Pursuant to this authority, the FTC issued the Telemarketing Sales Rule to prevent telemarketing fraud and prohibit deceptive sales calls. *See, e.g.*, *Mainstream Mkt'ng Serv. Inc. v. FTC*, 358 F.3d 1228, 1235, 1250 (10th Cir. 2004). The TSR prohibits any seller or telemarketer from, among other things, "misrepresenting, directly or by implication, in the sale of goods or services . . . (iii) [a]ny material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer." 16 C.F.R. § 310.3(a)(2)(iii).

Chapman was charged with assisting and facilitating the Kansas defendants' TSR violation under 16 C.F.R. § 310.3(b). Section 310.3(b) provides:

> It is a deceptive telemarketing act or practice and a violation of [the TSR] for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c), or (d), or §310.4 of this Rule.

The evidence in the record clearly shows that: (1) the Kansas, Utah, and North Carolina defendants were sellers or telemarketers that deceptively marketed their grant-related services in violation of Section 310.3(a) of the TSR; (2) Chapman provided "substantial assistance or support" by providing grant-related services to

those defendants; and (3) Chapman knew or consciously avoided knowing that those defendants were violating the TSR. 16 C.F.R. § 310.3(b).

1. The Kansas defendants violated the Telemarketing Sales Rule by misrepresenting that consumers were guaranteed or were more likely to receive grants if they purchased their services

As the district court held, "[t]here is no question" that the Kansas defendants, who were sellers under the TSR, violated the TSR by falsely claiming to consumers that they would receive "guaranteed" government grants of at least $25,000, and that consumers were likely to receive grant money, if they bought the defendants' goods or services. *See* D.422 at 16 (App.__); D.390 at 44-45 (App.__-___. These claims were false, as there was no evidence that any consumer received grant money, let alone the "guaranteed" $25,000 in grants that defendants promised. *See, e.g.*, D.296 ¶31 (App.__); PX 150 at 153 (App.__); PX 154 at 143-44 (App.__); Tr. 262-63, 310-11 (App.__-__, __-__); PX 24 (App.__-__); PX 29 (App.__-__); PX 35 (App.__-__). Thus, the evidence is uncontroverted – and Chapman does not contest, *see* App. Br. 22 – that the Kansas defendants misrepresented the material aspects of the performance, efficacy, nature, or central characteristics of their grant-related goods or services in violation of 16 C.F.R. § 310.3(a)(2)(iii).

2. Chapman provided substantial assistance to the Kansas defendants

The evidence also clearly showed that Chapman "provide[d] substantial assistance or support to" the Kansas defendants' deceptive telemarketing scheme in violation of 16 C.F.R. § 310.3(b). The FTC has long made clear, since the TSR was enacted in 1995, that this provision requires that the person aid the seller or telemarketer engaged in deceptive telemarketing activities, but does not require the person to have engaged or assisted in the deceptive activities that violate the Rule.

The originally proposed provision that became Section 310.3(b) imposed liability for assisting and facilitating only where "such substantial assistance is related to the commission or furtherance of that act or practice." *See* Revised Notice of Proposed Rulemaking, TSR, 60 Fed. Reg. 30,406, 30,414 (June 8, 1995). The Commission, after considering comments on this proposal, rejected that requirement because it could result in assisters evading liability if their assistance

example, the Commission noted that knowledge of, and substantial assistance to, another's wrongdoing are a sufficient basis for liability in tort, and in earlier cases brought under the Securities and Exchange Act of 1934 for aiding and abetting liability, without a requirement that the aider and abettor assisted in the acts or practices that violated the law. 60 Fed. Reg. at 43,851 & nn. 96-97. The TSR's "substantial assistance" requirement is also analogous to the criminal aiding and abetting statute, 18 U.S.C. § 2(a), which requires that the "defendant must 'willfully associate [herself] with the criminal venture and seek to make it succeed through some action on [her] part,'" but does not require direct involvement in the underlying crime. *See United States v. Phillips*, 543 F.3d 1197, 1209 (10th Cir. 2008) (citation omitted); *see also FTC v. Consumer Health Benefits Ass'n*., No. 10-CV-3551, 2011 WL 3652248, at *10 (E.D.N.Y. Aug. 18, 2011) ("party who did not engage directly in deceptive acts" may still be liable for "substantial assistance" under the TSR).

At the same time, the requirement that there be "substantial" assistance or support prevents Section 310.3(b) from imposing liability on those who have only a peripheral connection to the primary wrongdoers. In adopting the TSR, the FTC observed that ". . . the requisite assistance must consist of more than mere casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the Rule." 60 Fed. Reg. at 43,852.

The FTC listed several examples of services to telemarketers or sellers that illustrated "substantial assistance," including "[p]roviding lists of contacts to a seller or telemarketer that identify persons" who are vulnerable to deceptive telemarketing, providing coupons which may be exchanged for travel related services, providing promotional materials used in telemarketing, or "providing an appraisal or valuation of a good or service sold through telemarketing when such an appraisal or valuation has no reasonable basis in fact or cannot be substantiated at the time it is rendered." 60 Fed. Reg. at 43,852. The FTC recognized that the cited examples described activities that "in and of themselves, are not injurious to consumers or unlawful," but may nonetheless support liability. 60 Fed. Reg. at 30,414.

Likewise, in the FTC's 2003 rulemaking amending the TSR, it cited as an example of "substantial assistance" that liability would attach to "a fulfillment house that ships only inexpensive prizes on behalf of a telemarketer about whom it receives numerous complaints." Final Amended Rule, TSR, 68 Fed. Reg. 4580, 4612 (Jan. 29, 2003). There was no suggestion that "substantial assistance" would exist only if the defendant fulfillment house its

[7] Chapman is wrong when she asserts that the Compliance Guide was issued "long after" she provided substantial assistance to the Kansas defendants. App. Br. 24. The Guide's discussion regarding assisting and facilitating liability has been substantially identical since the Guide was first issued in April 1996. *See* FTC, "Complying with the Telemarketing Sales Rule" (April 1996), http://web.archive.org/web/19970614044811/

provision as attaching liability to a person who provides services that substantially assist the telemarketer or seller who engages in misconduct. There is simply no requirement, as Chapman asserts, App. Br

to succeed. D.422 at 17-20 (App.__-__). Indeed, for a substantial part of the Kansas defendants' operation, Chapman was undisputably the sole supplier of the grant-related services that the Kansas defendants promised would make consumers likely to receive grants. *See*, *e.g.*, Tr. 122-123, 143, 146, 247, 280-82, 297-99, 317-21 (App.__-__, __, __, __, __-__, __-__, __-__); PX 150 at 43-45, 49, 141-42 (App.__-__, __, __-__); D.338 ¶¶110, 112 (App.__-__); D.296 ¶¶17, 98, 102, 109 (App.__, __-__); D.234 ¶¶51, 53 (App.__); PX 58 (App.__-__); PX 28 Ex. C (pg. 16-29) (App.__-__); PX 111 (App.__-__).

Further, Chapman's grant research reports – the product consumers purchased from the Kansas defendants – were often faulty, and included sources that either did not exist, did not provide monetary funding or did not fund individuals, or provided only very limited funding for which the customer was ineligible. Tr. 253-56, 297-99 (App.__-__, __-__); PX 28 ¶¶7-8 (App.__-__); PX 60 pg. 1 (App.__); PX 112 (App.__); PX 113 (App.__); PX 114 (App.__); PX 115 (App.__); PX 35 ¶5 (App.__); PX 150 at 83-84 (App.__-__). She often y.fw1the often fG[__); F

not request and for which customers were similarly unsuccessful. *See, e.g.*, Tr. 132-34, 138-41, 193-98, 202-04 (App.__-__, __-__. __-__, __-__); PX 150 at 61, 146-47 (App.__, __-__); D.338 ¶264 (App.__); PX 100 ¶¶158-159 (App.__); PX 24 ¶ 5, Ex. 3 (pp.12-21) (App.__, __-__); PX 28 ¶ 4, Ex. C (pp.16-29) (App.__-__, __-__); PX 29 Ex. 2 (pp.10-27) (App.__-__); PX 58 at 8-22 (App. __-__); PX 60 at 3-11 (App.__-__); PX 102 (App.__). She provided an explanation for the Kansas defendants for complaining customers about why these programs were included in the research results. Tr. 221-22, 266-67 (App.__-__, __-__); PX 121 (App.__-__); D.338 ¶123 (App.__-__); PX 150 at 178-79 (App.__-__); PX 100 ¶¶160-61 (App.__); PX 121 (App.__). As the district court recognized, Chapman's fulfillment services "cannot be considered incidental," but rather "were essential to the Kansas defendants' scheme," and "formed the basis of the Kansas defendants' misrepresentations." D.422 at 17-18 (App.__-__). Indeed, as the court noted, Chapman's grant research was very similar to the TSR commentary example of an "appraisal or valuation [that] has no reasonable basis in fact or cannot be substantiated at the time it is rendered." *Id*. Chapman is liable for assisting and facilitating under the TSR – even if she was not directly responsible for marketing – because her grant-related work was "necessary in order

the basis for the Kansas defendants' fraud, while providing essentially no success to the grant-seeking individuals. *Id*

(App.__-__, __-__, __-__); PX 150 at 195 (App.__); PX 124 (App.__); PX 125 (App.__); D.296 ¶105 (App.__). She provided a list of her researchers to an attorney for the Kansas defendants who she knew was responding to a state inquiry. Tr. 227-28, 279-80, 288-89 (App.__-__,__-__, __-__); PX 150 at 195-96 (App.__-__). She also provided customer testimonials for the Kansas defendants' website (even though she had no evidence that any customer actually received a grant), provided content for their website, and proposed to write a newsletter for them. Tr. 219-23, 264-65, 267 (App.__-__, __-__, __); PX 123 (App.__-__); PX 100 ¶¶185-186 (App.__); PX 156 at 83-84, 281 (App.__-__, __); PX 118 (App.__-__); PX 150 at 167-68 (App.__-__); D.338 ¶¶120, 121 (App.__).

Chapman also proposed to assist the Kansas defendants to expand their operations to international customers, Tr. 218-19 (App.__-__); D.338 ¶116 (App.__); PX 150 at 164-65 (App.__-__), and she suggested that the Kansas defendants develop a quarterly grant contest to generate more customer leads. Tr. 221, 265, 320 (App.__, __, __); PX 120 (App.__); D.338 ¶122 (App.__); PX 100 ¶150 (App.__); PX 150 at 174-75 (App.__-__). She sent to the Kansas defendants "talking points" about "brainstorming ways that *we* can expand as well as repackage what *we* are currently doing to appeal to all parties" relating to the defendants' proposed expansion of their business to nonprofits and schools. PX 119 (App.__) (emphasis added); Tr. 224-25, 267-68, 320 (App.__-__, __-__, ___);

PX 150 at 168 (App. __). Chapman researched potential payment processing companies for the Kansas defendants to use for customer billing. Tr. 225-26 (App.__-__); PX 150 at 165-66 (App.__-__); D.338 ¶127 (App.__).

Chapman thus provided a wide range of material assistance to the Kansas defendants – including fulfillment and non-fulfillment aid – that permitted their scheme to succeed. Even if some of her proposals and plans were ultimately not implemented by the Kansas defendants, they provide strong additional evidence that Chapman's efforts were not casual or incidental, but rather were central to the Kansas defendants' scheme.

Case law supports the district court's conclusion that activities of this sort constitute substantial assistance, and no authority cited by Chapman is to the contrary. *See* App. Br. 27-28. For example, in connection with denying a motion to dismiss in *United States v. Dish Network, L.L.C.*, 667 F. Supp.2d 952, 961 (C.D. Ill. 2009), the court held that the plaintiffs' allegation that a seller's mere payment to a telemarketer that allegedly abandoned calls in violation of 16 C.F.R. § 310.4(b)(1) of the TSR stated a claim for substantial assistance. There was no allegation that the seller had anything to do with the actual abandoned call violations. Like a payment, Chapman's substantial grant fulfillment work (and non-fulfillment assistance) provided the key input that allowed the Kansas defendants' telemarketing scheme to succeed.

Further, it is irrelevant that Chapman's supporting activities here differed from those addressed in other "substantial assistance" cases. *See* App. Br. 27-28 (citing *FTC v. Medical Billers Network, Inc.*, 543 F. Supp.2d 283, 318 (S.D.N.Y. 2008) and *FTC v. Global Marketing Group, Inc*., 594 F. Supp.2d 1281 (M.D. Fla. 2008)). Whether a defendant engages in "substantial assistance" is not based on any predetermined list of criteria. *See* 60 Fed. Reg. at 43,852. Chapman in fact performed at least one of the activities engaged in by the *Global Marketing* defendant – handling law enforcement inquiries – found to have constituted "substantial assistance" in that case.[8] Indeed, the *Global Marketing* court relied on several activities by the defendant to find "substantial assistance" – including processing payments, handling law enforcement inquiries, and receiving reports of the telemarketers' returns – that had nothing to do with the telemarketers' deceptive marketing. 594 F. Supp.2d at 1288. Courts have found substantial assistance under the TSR based on a variety of factors, including the fulfillment of services as here. *See, e.g., FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-

[8] Chapman argues that her responses to the law enforcement inquiries from the Alaska and North Carolina Attorney General offices did not constitute "substantial assistance" because she did not have direct contact with those offices. App. Br. 28-29. Chapman provides no authority that such work fails to qualify as "substantial assistance" and she does not dispute evidence that she provided (or "handled") the responses to these law enforcement inquiries even if they were transmitted through the Kansas defendants who received the inquiries in the first place.

21050, 2004 WL 5149998, at *21-23, *41-42 (S.D. Fla. Feb. 20, 2004) (obtaining leads, approving scripts, and fulfilling sales constituted substantial assistance).

At bottom, Chapman's assertion that she did not substantially assist the Kansas defendants because her work was not directly related to "what the telemarketers were representing to consumers," App. Br. 29, misses the mark. The language of the TSR, the Rule commentary, the Compliance Guide, and case law authority all support the district court's ruling that Chapman's significant grant fulfillment work and her other related aid constituted "substantial assistance" to the Kansas defendants.

3. Chapman knew or consciously avoided knowing that the Kansas defendants engaged in TSR violations

The district court also concluded properly that Chapman had the requisite knowledge of the Kansas defendants' deceptive scheme to be found liable under the TSR. D.422 at 20-23 (App.__-__). Liability for assisting and facilitating requires proof that the defendant "* * * knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c), or (d), or §310.4 of [the TSR]." 16 C.F.R. § 310.3(b). Chapman's claim that she did not review the Kansas defendants' marketing materials does not exculpate her from liability.

As the FTC noted in its TSR commentary, the "conscious avoidance" standard is "intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance on the part of a person that the seller or telemarketer is engaged in an act or practice that violates" the TSR. 60 Fed. Reg. at 43,852 (footnote omitted); *see also* 68 Fed. Reg. at 4612. In evaluating whether this standard is met, the Court must consider the relationship between the person charged with "conscious avoidance" and the telemarketer or seller, and circumstances that indicate the telemarketer or seller might be engaged in wrongdoing – even if those circumstances fall short of knowledge of actual wrongdoing.

The FTC observed that the "knowing or consciously avoiding knowing" standard is similar to the knowledge standard applicable in actions under Section 13(b) of the FTC Act governing individual liability for monetary equitable relief for law violations of a corporation controlled by the individual. 60 Fed. Reg. at 30,414. "Under these cases, the knowledge requirement is well-established and can be fulfilled by showing either actual knowledge, reckless indifference to the truth or falsity of the representation, or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth." *Id.* at n.68 (*citing, inter alia, FTC v. Amy Travel Serv.,* 875 F.2d 564, 573-74 (7th Cir. 1989)); *see also FTC v.*

Freecom Comm., Inc., 401 F.3d 1192, 1207 (10th Cir. 2005); 60 Fed. Reg. at 43,852 n.102.

The FTC also noted that proof of conscious avoidance is widely accepted in criminal cases as fulfilling the knowledge requirement. 60 Fed. Reg. at 43,852 n.105 (*citing, inter alia, United States v. Manriquez Arbizo*, 833 F.2d 244, 248-49 (10th Cir. 1987) (discussing jury instruction that "deliberate ignorance" or "willful blindness" constitute knowledge of illegal conduct); *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060, 2068-71 (2011) (approving application of "willful blindness" standard from criminal law for civil liability, and defining standard as "one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts"). Further, as noted above, the FTC has long explained in its Compliance Guide that "taking deliberate steps to ensure one's own ignorance of a seller or telemarketer's Rule violations is an ineffective strategy to avoid liability . . ." FTC, "Complying with the Telemarketing Sales Rule," http://business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#assisting (last visited June 5, 2012).

The district court here properly concluded that Chapman consciously avoided knowing details of the Kansas defendants' deceptive marketing that fueled the sales of her grant-related services. Chapman's relationship with her co-

defendants was not fleeting or short-lived; she provided extensive services over a period of years and continued providing these services as the scheme migrated from the Kansas defendants to the Utah defendants and finally to the Utah defendants' affiliate.

The record is replete with evidence supporting the district court's finding. For example, Chapman knew about, and responded to, several law enforcement inquiries investigating the Kansas defendants' business practices. PX 150 at 173-74, 194-96, 292-93 (App.__-__, __-__, __-__); PX 100 ¶¶29-31 (App.__-__); D.296 ¶104 (App.__); PX 113 (App.__). She provided a list of individual grants in response to inquiries from the Alaska and North Carolina Attorneys General. Tr. 229-30, 240-42, 290-92 (App.__-__, __-__, __-__); PX 150 at 195 (App.__); PX 124 (App.__); PX 125 (App.__); D.296 ¶105 (App. __). She knew that the Kansas Attorney General's office had requested that the Kansas defendants change their postcard solicitations, their primary marketing tool. Tr. 228-29, 289-90 (App.__-___, __-__); D.234 ¶47 (App.__). She also provided a list of her researchers to an attorney for the Kansas defendants who she knew was responding to a state attorney general inquiry. Tr. 227-28, 279-80, 288-89 (App.__-__,__-__, __-__); PX 150 at 195-96 (App.__-__). Chapman's argument that these inquiries were not problematic because she did in fact provide lists of individual grants, App. Br. 30, misses the point, because such grants are relatively rare and because these multiple

law enforcement inquiries should have alerted her to the possibility that the Kansas defendants were deceptively marketing her grant products. As the district court held: "by wholly ignoring these inquiries and assisting the Kansas Defendants in responding to them, Chapman consciously avoided knowing that the Kansas defendants engaged in deceptive acts or practices under the TSR." D.422 at 21 (App.__).

The record contains other indicia of knowledge or conscious avoidance. Chapman knew that the Kansas defendants' telemarketers told customers that they were likely to obtain grant money by purchasing the defendants' grant research services. D.216 ¶47 (App.__); D.234 ¶47 (App.__-__). Chapman did not ask the Kansas defendants what they told consumers to induce them to buy their grant-related services for $1000 or more even though she knew the consumers had large debts and that government websites provided certain grant information for free. Tr. 302, 311-12, 318 (App.__, __-__, __); DX 736 (App.__); DX 737 (App.__).

Chapman also knew by 2008 that the Kansas defendants were selling the Grant Guide to individuals, and that the Guide touted that the Kansas defendants had a "70 percent success rate in receiving grant funding" for their customers. Tr. 263-64, 284-87 (App.__-__, __-__); PX 7 at 3 (App.__). Chapman knew, however, that the Kansas defendants could not substantiate such claims because they did not track their customers' success, and she also did not track customer

success. D.296 ¶108 (App.__); PX 150 at 151, 153 (App.__, __); PX 100 ¶183 (App.__). In fact, Chapman knew of no customers who actually received a grant based on her research results. Tr. 262-63, 310-11 (App.__-__, __-__); PX 150 at 153 (App.__). The fact that the 70% success claim might have been correct with respect to Lynn Paeno's earlier success with nonprofits and schools, *see* App. Br. 31, is irrelevant, because Chapman knew that the 70% claim was made in the Grant Guide without qualification and that the Guide was being marketed to individuals. Tr. 263-64, 284-87 (App.__-__, __-__); PX 7 at 3 (App. __); PX 150 at 184 (App.__). After observing Chapman's testimony, the district court squarely held that it "d[id] not find credible Chapman's claimed ignorance of the Kansas defendants' activities." D.422 at 21 (App.__).

Further, although Chapman and Paeno received a large number of grant requests for personal debt relief during a portion of their work for the Kansas defendants, Chapman never asked the Kansas defendants what they told customers to encourage them to request such grants. Tr. 151-52, 282-84 (App.__-__, __-__); PX 116 (App.__-__). Chapman also learned from a discussion with Lynn Paeno during the summer of 2008 – when Paeno chose to quit working for the Kansas defendants – that Chapman should be careful to make sure that they were not improperly marketing their grant-related services. PX 160 at 68 (App.__).

In addition, Chapman had seen the cover letter the Kansas defendants sent to customers along with the research requests which stated that it was "rare" for the customer not to qualify for grants, and that the results "will contain a list of grants you are eligible for . . ." Tr. 259, 279 (App.__, __); PX 58, p.1 (App. __); PX 60 at 2 (App.__); PX 61 at 2 (App.__). Chapman continued to represent that 2% of grants went to individuals even though she had never obtained a grant for an individual and had not independently verified the accuracy of that statistic. Tr. 226-27, 262 (App.__-__, __); PX 150 at 78-79, 82-83 (App.__-__, __-__); PX 108 (App.__-__).

Moreover, numerous customers complained that they did not qualify for the grants reflected in Chapman's research results, *see, e.g.*, PX 24 (App.__-__); PX 29 (App.__-__); PX 35 (App.__-__), and Chapman was aware of consumer complaints. Tr. 211, 235-36 (App.__, __-__). Chapman is wrong that funder complaints were irrelevant to her knowledge of wrongdoing, App. Br. 32-33, because she knew those funders complained about the large number of applications from customers referred to them by the Kansas defendants who were ineligible for the grants. Tr. 255-56, 302 (App.__-__, __); PX 114 (App.__); PX 115 (App.__).

complaints about existing entities, and a cease and desist notice and lawsuit filed by law enforcement authorities. Chapman also relies on *FTC v. World Media Brokers*, 415 F.3d 758 (7th Cir. 2005), where the court found an individual monetarily liable for corporate misdeeds based on notice from a state attorney general, consumer complaints, and a Postal Service cease and desist order naming the individual personally. *Id.* at 764-66. Chapman then extrapolates from these cases to argue that a defendant is liable under Section 310.3(b) only where he too knows of a large number of consumer complaints or has been personally notified by law enforcement authorities. App. Br. 34-35. Her argument is meritless.

Evidence of sufficient knowledge to impose assistor and facilitator liability under the TSR must be evaluated on a case-by-case basis, and is not based on any preset list of criteria. There is simply no requirement that a defendant know of a particular volume of consumer complaints or be personally notified by law enforcement authorities before she may be liable under Section 310.3(b). As shown above, the evidence firmly supports the lower court's conclusion that Chapman consciously avoided knowing about the Kansas defendants' deceptive marketing of their grant-related products. D.422 at 20-23 (App.__-__).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CHAPMAN'S RULE 59(e) MOTION AND DENYING REMITTITUR

A. Standard of Review

This Court reviews a lower court's denial of a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) for abuse of discretion. *Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 312 F.3d 1292, 1296 n.3 (10th Cir. 2002). This Court similarly reviews the denial of a motion for remittitur for abuse of discretion. *Therrien v. Target Corp*., 617 F.3d 1242, 1257 (10th Cir. 2010) (citation omitted).

B. The District Court did not Abuse its Discretion Denying Chapman's Motions under Rule 59(e) to Amend the Judgment or for Remittitur

Chapman also argues that the court below improperly denied her post-judgment motions to alter or amend the judgment under Fed. R. Civ. P. 59(e), or for remittitur, to reduce the amount of damages. App. Br. 35-41. She asserts that the lower court erred by failing to reduce damages to the period it found that Chapman knew or consciously avoided knowing about the Kansas defendants' violative conduct. App. Br. 36. She requests that this Court either reduce the monetary judgment to the period after which she had the requisite knowledge, or

remand this determination to the lower court for a new damages calculation. App. Br. 38, 41. Chapman's arguments should be rejected.[9]

Amendment of a district court's judgment under Fed. R. Civ. 59(e) is only appropriate where there has been: (1) an intervening change in the controlling law, (2) newly available evidence, or (3) a need to correct clear error or to prevent manifest injustice. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Brumark Corp. v. Samson Res. Corp*., 57 F.3d 941, 948 (10th Cir. 1995). Remittitur to reduce damages is only appropriate where the award is "so excessive that it shocks the judicial conscience and raises an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial." *Therrien*, 617 F.3d at 1257 (quoting *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 766 (10th Cir. 2009)). The district court properly recognized that Chapman failed to satisfy her burden of showing the existence of any of the circumstances justifying amendment or remittitur.

---

[9] Chapman does not challenge the district court's authority to impose a permanent injunction or monetary relief as a general matter. Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), "in proper cases the Commission may seek and, after proper proof, the court may issue, a permanent injunction." Further, a court may award monetary damages under Section 19 of the FTC Act, 15 U.S.C. § 57b, to redress consumer injury for TSR violations, and may order monetary equitable relief (including disgorgement) pursuant to Section 13(b) of the FTC Act for violations of the TSR. *See Freecom Comm.*, 401 F.3d at 1203 and n.6; 15 U.S.C. § 6105.

First, Chapman is wrong that the district court made no "definitive finding" as to when she had the requisite knowledge. App. Br. 36, 38. The district court found that Chapman's knowledge of, and assistance in responding to, the state Attorney General inquiries started "early in her business relationship with the Kansas Defendants." *See* D.422 at 20 (App.__); *see also* D.443 at 5 (App.__) ("evidence dat[ed] back to the beginning of Chapman's business relationship with the Kansas defendants.") The record fully supports this conclusion: Chapman admitted that "in the beginning of [her] work with" the Kansas defendants she provided a list of her researchers to an attorney for the Kansas defendants who Chapman knew was responding to an attorney general's inquiry to ensure that actual people were conducting the research. Tr. 227-28, 279-80, 288-89 (App.__-__,__-__, __-__); PX 150 at 195-96 (App.__-__). The district court properly held that the attorney general inquiries' "started in the early part of her business relationship with the Kansas Defendants," and that "helping the Kansas defendants respond to those inquiries, constitute[d] evidence of the knowledge element of the TSR claim." D.443 at 5 (App.__).

Other record evidence further shows that as of January 2008 Chapman was consciously disregarding the Kansas defendants' misrepresentations about the likelihood of individuals receiving grants. Chapman received "many more research requests" for individual grants when she "began doing work with the

Kansas defendants" than requests for nonprofit and school grants she had received in her prior independent work, and was processing hundreds of individual grant requests monthly by January 2008, even though she knew that grants for individuals were less "feasible" or "viable" than grants for schools and nonprofits. PX 111 at 1 (App.__); DX 720 (App.__); Tr. 110-11, 317-18 (App.__-__, __-__); D.338 ¶263 (App.__-__); PX 108 (App.__); PX 150 at 78 (App.__).

At the same time, Chapman had an easy opportunity early in her work for the Kansas defendants to review their deceptive marketing materials but deliberately avoided doing so. For example, she admitted that she received a script used by the Kansas defendants' telemarketers from Lynn Paeno "in the very beginning" of her working relationship with them, but claimed she sent it back to Paeno without looking at it. Tr. 230-31, 282 (App.__-__, __); PX 150 at 58-59 (App.__-__).

After carefully analyzing the evidence, the district court properly held that Chapman knew or consciously avoided knowing of the Kansas defendants' TSR violations by January 2008. D.422 at 20 (App.__); D.443 at 5 (App.__). Case law cited by Chapman is entirely irrelevant and does not support her case.[10] Based on

[10] Chapman relies on lower court cases that have reduced damages either pursuant to Rule 59(e), or through remittitur, *see* App. Br. 36-37, based on facts not present here. For example, in *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2009 WL 435111, at *8-9 (D. Kan. Feb. 20, 2009),

(continued...)

[10](...continued)
aff'd, 619 F.3d 1188 (10th Cir. 2010), the court granted the defendant's motion to reduce damages because the jury failed to comply with the court's damages instruction. Similarly, Chapman may not rely on *Reed v. Phillip Roy Financial Servs., LLC*, No. 05-2153-JAR, 2008 WL 2556692 (D. Kan. June 23, 2008), in which the court reduced a damages award as contrary to the relevant lease provision and the time period in which the breach occurred. Here, the court's damages award was not inconsistent with any relevant contract provision.

[11] Indeed, the court had the authority under FTC Act Sections 13(b) and 19 to order monetary relief equal to the gross revenue (less any refunds) consumers paid the Kansas defendants in order to fully redress consumer injury caused by Chapman's TSR violations. *See, e.g., Freecom Comm.*, 401 F.3d at 1206-07; *FTC v. Kuykendall*, 371 F.3d 745, 764-66 (10th Cir. 2004); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993); *FTC v. Security Rare Coin*

CONCLUSION

For the above reasons, Government Appellees respectfully request that this Court affirm the judgment of the district court.

Respectfully submitted,

Of Counsel
GARY L. IVENS
JANICE KOPEC
MICHAEL TANKERSLEY

Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C.

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

s/ *Michael D. Bergman*
MICHAEL D. BERGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3184
Attorneys for Plaintiff-Appellee
Federal Trade Commission

Date: June 28, 2012

s/ *Clifford W. Berlow*
CLIFFORD W. BERLOW
Assistant Attorney General
Office of the Attorney General
for the State of Illinois
100 West Randolph Street,
12th Floor
Chicago, Illinois 60601
(312) 814-7122
cberlow@atg.state.il.us
Attorney for Plaintiff-Appellee State of Illinois

s/ *Jocelyn F. Olson*
JOCELYN F. OLSON
Assistant Attorney General
Office of the Attorney General
for the State of Minnesota
1400 Bremer Tower
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 757-1287 (Voice)
(651) 296-1410 (TTY)
jocelyn.olson@ag.state.mn.us
Attorney for Plaintiff -Appellee State of Minnesota

s/ *Steve R. Fabert*
STEVE R. FABERT
Assistant Attorney General
Office of the Attorney General
for the State of Kansas
120 SW 10th Ave., 2d Floor
Topeka, Kansas 66612
(785) 368-8420
steve.fabert@ksag.org
Attorney for Plaintiff-Appellee State of Kansas

s/ *David Kirkman*
DAVID N. KIRKMAN
Assistant Attorney General
Office of the Attorney General
for the State of North Carolina
P.O. Box 629
Raleigh, NC 27602-0000
(919) 716-6033
dkirkman@ncdoj.gov
Attorney for Plaintiff-Appellee State of North Carolina

STATEMENT OF COUNSEL REGARDING ORAL ARGUMENT

Government Appellees do not believe that oral argument is necessary given the straightforward application of the facts in this case to the relevant Telemarketing Sales Rule provision, 16 C.F.R. § 310.3(b), and the deferential standard of review governing the relevant issues on appeal.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection version 12.1.671.4971, and according to the program are free of viruses.

Date: June 28, 2012

/s/ Michael D. Bergman
Michael D. Bergman

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2012, I electronically filed the foregoing Appellees' Preliminary Joint Response Brief using the court's CM/ECF system which will send notification of such filing to the following:

Steve R. Fabert, steve.fabert@ksag.org
Meghan E. Stoppel, meghan.stoppel@ksag.org
Shannon M. Harmon, shannon.harmon@ag.state.mn.us
Jocelyn F. Olson, jocelyn.olson@ag.state.mn.us
Clifford W. Berlow, cberlow@atg.state.il.us
Philip Heimlich, pheimlich@atg.state.il.us
David Neil Kirkman, dkirkman@ncdoj.gov
Jocelyn Furtwangler Olson, jocelyn.olson@ag.state.mn.us
M. Courtney Koger, courtney.koger@kutakrock.com
Daniel T. Blue, danblue@tbsf-law.com
Dhamian A. Blue, dhamian@tbsf-law.com
Joseph M. Weiler, jweiler@aldersonlaw.com
Micah R. Bruner, micah@mbrunerlaw.com
James Phillip Gragson, jpgragson@hensonlawoffice.com
John H. Hutton, jhutton@hensonlawoffice.com
Wm. Kelly Nash, wmkelly@aol.com
Stephen E. Quesenberry, jbquesenberry@hjslaw.com
Evan A. Schmutz, kima@hjslaw.com

Date: June 28, 2012

/s/ Michael D. Bergman

Michael D. Bergman
Attorney for Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3184
mbergman@ftc.gov