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

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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 Joint 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. (App.99-146). 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. (App.117).

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. (App.399-455).

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

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[1](...continued)
items in the Supplemental Appendix as "Supp. App.," and district court docket entries not included in the appendices by the docket number ("D.xx.").

violated Section 310.3(b) of the TSR. (App.456-481). 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. (App.472-475). The court held that defendants' egregious scheme could not have succeeded without Chapman's work. (App.472, 474). The court also held that Chapman either knew or consciously avoided knowing that the Kansas defendants engaged in deceptive practices that violated the TSR. (App.475-478). 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. (App.482-499). 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. (App.500-502). The court denied that motion on

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.*, (App.176, 583, 587, 805-806, 808-809, 823-824, 872-876, 886-891, 904, 971-972).

Customers who called a toll-free number heard recorded messages promising grants, such as: "Congratulations, you have just taken your first step to receive $25,000 or more in free government grant money, guaranteed * * *" (App.177, 532, 547). Consumers enticed by defendants' promises could purchase a book entitled the "*Professional Grant Writer: The Definitive Guide to Grant Writing Success*" (the "Grant Guide") for $69. (App.176-177, 533, 549). Some individuals were guaranteed success in obtaining grants if they purchased the Grant Guide. (App.533, 548).

The Grant Guide claimed that defendant Grant Writers Institute's ("GWI") "grant writers have been able to produce a 70% success rate in receiving grant funding" and encouraged consumers to contact GWI. (App.178, 514). The 70% success rate was not related to the work of the Kansas defendants, but rather was the personal success rate achieved by Lynne Paeno, the author of the Grant Guide, through her independent work obtaining grant funding for school districts and non-profit organizations, not individuals. (App.1026-1027, 1029).[2] The

[2] Paeno performed grant-related work for the Kansas defendants until (continued...)

Kansas defendants provided no evidence that any individual received grant money by purchasing their grant-related products, including the Grant Guide. *See* (App.178).

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. (App.178, 697). 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." (App.179, 527, 905, 980). 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. (App.905, 975). Consumers were charged between $800 and $1200 for defendants' grant research services. *See*, *e.g.*, (App.654, 657, 669, 697-698, 2461-2462).[3]

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[2](...continued)
around June 2008, when she quit. (App.1027, 2536, 2541). 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. (App.1026-1029)

[3] The Kansas defendants also provided customer leads to the North Carolina and Utah defendants who engaged in similar deceptive solicitations. (App.178-185, 558-559, 722-727, 904-905, 969, 973-980, 1908, 1913-1914, 1930-1933, 1938).

Consumers who purchased the Kansas defendants' Grant Guide and grant research services were further solicited to purchase defendants' grant writing and grant coaching services. (App.178, 526-527, 583-584, 905, 973, 979-980). The Kansas defendants misrepresented to consumers that they were guaranteed or likely to receive grant money if they purchased these services. (App.558-559, 905, 979-980).

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.,* (App.558-559, 617-618, 702-704). 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. (App.178, 806, 856, 905, 973, 985). No defendant (including Meggie Chapman) could identify any customer who had actually received a grant as a result of purchasing any of the defendants' grant-related services. *See, e.g.*, (App.1332, 1571-1572). Consumers paid the Kansas defendants more than $27 million from 2007 through July 2009 for their grant-related goods and services. *See* (App.415).

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 out – the delivered materials would not ultimately fulfill defendants' promises. To

prepare such materials, defendants turned to grant researchers and writers, including Meggie Chapman. Chapman did business as Meggie Chapman & Associates ("MCA"). (App.155, 175, 185, 187, 989-990, 1261-1263, 1328-1329,

[4] Chapman began working with Paeno on grants for educational institutions and nonprofit organizations in 2006. (App.2498). 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. (App.185-186, 1264-1267, 1355 2500-2501, 2677).

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. (App.313, 558, 568-577, 583-584, 596-609, 625-642, 703, 710-720, 736-750, 764-772, 784-795, 1008, 1022-1024, 1284, 1328-1329, 1635-1636, 2266-2285, 2524-2526, 2530-2533, 2584-2585, 2587-2590, 2594-2596). 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. (App.280-281, 1009, 1108-1110, 1346-1347, 2613-2614, 2658-2659). For example, Chapman proposed informing customers that the "new trend" is that contests and sweepstakes "are all considered grants!" (App.1108-1110).

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. (App.2286-2359, 2569-2571, 2641-2642, 2694-2698). 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. (App.2697, 2717-2718). By April 2008 she began occasionally

contacting funders directly to determine if there were additional grant criteria for individuals. (App.1035, 2640, 2697). Chapman did not report the likelihood that the customer would receive a grant from the sources indicated in her research results. (App.2643, 2691).

Chapman eventually created a "No Funders" list when faced with evidence that supposed grant sources did not, in fact, fund individuals. (App.1079, 2694-2696, 2698). She sometimes provided "replacement results" to a consumer if she learned that a funder did not exist or had eligibility requirements of which she had previously been unaware. (App.2535-2536, 2627, 2642). However, she did not go back to identify all customers who had been provided grant sources that were later found not to fund individuals. (App.2700).

Chapman also helped to develop, in late 2007, the questionnaire the Kansas defendants' telemarketers used to collect information from customers who purchased their services. (App.279, 730-734, 779-783, 1268-1270, 2508-2513). Chapman provided training for the North Carolina defendants' sales force on information needed to process the grant research requests. (App.1011, 2610)

Chapman received between $125 and $160 for each grant research order she or an MCA employee fulfilled on behalf of the Kansas defendants. (App.314, 1289-1290, 1380-1381, 2539). Consumers were initially charged $805, and later up to $1200, by the Kansas defendants for Chapman's services. (App.2461-2462,

2710). Consumers paid between $6.7 million and $9.7 million to receive Chapman's work. (App.2462-2463).

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. (App.175, 185-187, 279-280, 1323-1325, 2679, 2701-2702). 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. (App.281, 1111, 1348-1349, 2615-2616, 2655). Chapman received $300 for the first 5 pages of grant writing and $35 for each additional page. (App.156, 1361, 2539). Chapman also created a grant coaching workshop and program for the Kansas defendants beginning in the summer of 2008. (App.186-187, 254-255, 279-280, 1011-1012, 1117-1253, 1272-1275, 1300, 2539-2540, 2637-2638).

In addition to fulfillment services, Chapman provided other forms of assistance to the Kansas defendants. For example, she:

- provided materials, including customer testimonials, for the Kansas defendants' website. (App.280, 1013, 1098-1105, 1112-1113, 1339-1340, 1677-1678, 1875, 2611-2615, 2656-2659);
- suggested the idea for the Kansas defendants to sponsor a quarterly grant contest to generate further customer leads. (App.280, 1007, 1107, 1344-1345, 2613, 2657, 2712);

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represented that "historically the grant writers have been able to produce a 70 percent success rate in receiving grant funding" for their customers. (App.514,

Kansas or Missouri state law enforcement inquiry. (App.1353-1354, 2619-2620, 2671-2672, 2680). Chapman knew that the Kansas Attorney General's office asked the Kansas defendants to change the postcard used in their marketing, but she did not ask to see the postcard. (App.154-155, 2620-2621, 2681-2682). Chapman was aware of customer complaints about defendants' business activities. (App.2603, 2627-2628).

Chapman also occasionally received the cover letter sent by the Kansas defendants to their customers along with the customers' research request. (App.2651, 2671). The cover letter stated, in part, that:

> The Grant Search service offer is not a guarantee of receiving a grant and does not include writing the grant applications or educational training. However, *in the rare event that you don't meet the criteria for any grant applications*, based on your profile, we will refund $790 and retain $205.00 as a processing fee. To obtain this $790.00 refund, *in the rare event that you don't meet the criteria for a single grant application or assistance program or low/no interest rate loan*, based on your profile . . . The results of your search will be delivered to you via certified mail and *will contain a list of grants you are eligible for* with names of institutions, addresses, contact info, and final due dates for submissions.

(App.729 (emphasis added); 763, 778).

Chapman and Paeno initially received many requests from individuals for grants to pay off personal debts. (App.1083-1097, 2543-2544, 2674-2676). By approximately May 2008, they decided not to accept applications for such grants because they determined that such grants did not exist. (App.2544, 2675-2676).

Chapman never asked the Kansas defendants, however, what they told consumers to encourage them to apply for personal debt reduction grants. (App.2676). Chapman also never asked the Kansas defendants what they told consumers to induce them to purchase her grant research services for $1000 or 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. (App.2369-2370, 2694, 2703-2704, 2710).

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. (Supp. App. at 2752-2753). 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, ..." (Supp. App. at 2753).

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. (App.188, 1281-1282, 1309-1310, 2622-2623, 2680, 2682-2683). She could have received the Kansas defendants' marketing materials pursuant to their mutual nondisclosure agreement

if she had simply asked, but she did not. (App.1030-1032, 2670, 2679). 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. (App.1281-1282, 2622-2623, 2674).

Chapman did not track whether any of the customers who purchased her grant-related services ever received a grant. (App.188, 1013, 1330). Chapman knew that the Kansas defendants did not track whether any of their customers ever received a grant. (App.1332). Chapman was unaware of any of the 8,361 customers, for whom she or MCA provided grant-related services, who received a grant. (App.2654-2655, 2702-2703).

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. (App.315); 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. (App.189, 315-316, 1357-1361, 1362, 1366, 2576-2579, 2705-2707). She did not review the marketing materials for the Utah defendants, and for at least a year she

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. (App.54-85). Chapman was charged with assisting and facilitating the Kansas defendants' TSR violations under 16 C.F.R. 310.3(b). (App.71-72). Plaintiffs filed a second amended complaint on June 21, 2010. (App.99-133).

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[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 plaintiffs pursuant to which permanent injunctions and monetary judgments were entered. D.373, D.374, D.375, D.412, D.416.

The court denied both plaintiffs' and Chapman's cross-motions for summary judgment, concluding that there were disputed issues of material facts as to whether Chapman was liable. (App.441-448, 455). The court subsequently held a two-day bench trial in August 2011 to resolve this claim.

On September 16, 2011, the district court issued its Findings of Fact and Conclusions of Law holding that Chapman violated Section 310.3(b) of the TSR by assisting and facilitating the Kansas defendants' deceptive telemarketing scheme. (App.456-481). After first making extensive findings of fact, (App.456-

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. (App.477). 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. (App.477-478).

The court awarded $1,682,950 in damages against Chapman based on the gross revenue she received from the Kansas defendants. (App.478). The court also imposed a permanent injunction barring Chapman from engaging (or assisting others in engaging) in the sale of "M

denied Chapman's Rule 59(e) motion, (App.506-511), at 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 substantial assistance to the Kansas defendants while knowing or consciously avoiding knowing that they were engaged in a deceptive scheme. Defendants falsely represented to thousands of consumers that they were guaranteed or likely to receive grants, including government grants of up to $25,000, and yet were unable to identify a single customer who actually received a grant. The court's findings, reviewed for clear error, are fully supported by the record. (Part I.A.)

Chapman provided substantial assistance to the Kansas defendants, most importantly because she provided nearly all of the services delivered to consumers in supposed fulfillment of the Kansas defendants' promises during much of their scheme. As the district court held, Chapman was an integral part of that operation,

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[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 success by including sources which did not exist or did not fund individuals, and were often based on outdated or incomplete information. She included other programs in her results – such as contests and sweepstakes – for which customers were also unsuccessful.

Chapman assisted the Kansas defendants in numerous other ways. For example, she assisted in drafting the Grant Guide used to induce further grant-related sales. She responded to several inquiries from state attorneys general investigating defendants' business practices. She developed the questionnaire used to collect customers' information and she helped to train the defendants' sales force to process customer requests. She provided content and customer testimonials for the Kansas defendants' website and discussed with the Kansas defendants how "*we* can expand" their joint business. Chapman provided substantial assistance because she aided the Kansas defendants who engaged in deceptive telemarketing even if she was not directly involved in that marketing.

Chapman provided that assistance knowing or consciously avoiding knowing that the Kansas defendants were violating the TSR. Chapman knew of – and helped to respond to – law enforcement inquiries from the Alaska and North Carolina Attorneys General investigating the Kansas defendants' business practices. She provided information to an attorney for the Kansas defendants who

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 Jal85NoY9. (Part II)

ARGUMENT

I. CHAPMAN VIOLATED THE TELEMARKETING SALES RULE BY

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 telema

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

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

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

afforded considerable deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Nor is there any merit to her related argument that her activities did not constitute substantial assistance because those activities were not listed as examples in the TSR commentary or in the Compliance Guide. App. Br. 23-24. The examples provided in the TSR commentary and the Compliance Guide, however, were merely illustrative and did not constitute an exhaustive list of activities that establish substantial assistance. *See, e.g., Pension Ben. Guar. Corp. v. LTV Corp*. 496 U.S. 633, 649 (1990) (no showing that statutory examples intended to be exhaustive).

Chapman nonetheless contends that she is not liable under the TSR, because she fulfilled, but did not market, the deceptive grant-related services, App. Br. 24-25, and because her other activities for the Kansas defendants did not constitute substantial assistance. App. Br. 25-27. Chapman's arguments are without merit.

1062-1078, 1272-1274, 1278, 1323-1324, 2514-2515, 2535, 2538, 2639, 2672-2674, 2689-2691, 2709-2713).

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. (App.584-585, 703, 762, 1079-1082, 1297-1298, 2645-2648, 2689-2691). She often based her research results on grant information contained in the funders' websites and their IRS Form 990 even though she knew such information was up to two years old. (App.2286-2308, 2309-2326, 2569-2571, 2641-2642, 2694-2698, 2717-2718). Chapman also included in her research results many non-grant sources – such as sweepstakes and contests – which customers did not request and for which customers were similarly unsuccessful. *See, e.g.*, (App.313, 558, 568-577, 583-584, 596-609, 625-642, 732-750, 764-772, 1008, 1022-1024, 1284, 1328-1329, 2524-2526, 2530-2533, 2585-2590, 2594-2596). She provided an explanation for the Kansas defendants for complaining customers about why these programs were included in the research results. (App.280-281, 1009, 1108-1110, 1346-1347, 2613-2614, 2658-2659). 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." (App.472-473). 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." (App.472-473). 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 for the Kansas defendants' scheme to continue," by fulfilling the orders that were the basis for the Kansas defendants' fraud, while providing essentially no success to the grant-seeking individuals. (App.474).

Chapman also assisted the Kansas defendants in many ways beyond fulfillment, including efforts to enhance and expand their deceptive business. For example, Chapman co-authored the Grant Guide – including drafting a section focusing on grants to individuals – which was used to induce consumers to purchase defendants' other grant-related services. (App.185-186, 1264-1267, 1355, 2500-2501, 2677). She helped to develop the questionnaire that the Kansas defendants' telemarketers used to obtain information from the grant-seeking customers, (App.279, 730-734, 779-783, 1268-1270, 2508-2513), and she trained the defendants' sales force on how to process the customers' grant research requests. (App.1011, 2610). Chapman provided to the Kansas defendants a list of

the benefits to using a grant writer that was used to induce customers to purchase their grant writing services. (App.281, 1111, 1348-1349, 2615-2616, 2655).

Chapman also assisted the Kansas defendants in their response to law enforcement inquiries from the Alaska and North Carolina Attorneys General by providing information relating to individual grants. (App.187, 1114-1115, 1353, 2621-2622, 2632-2634, 2682-2684). She provided a list of her researchers to an

[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 author

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).

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. (App.187, 993-994, 1080, 1343-1344, 1352-1354). She provided a list of individual grants in response to inquiries from the Alaska and North Carolina Attorneys General. (App.187, 1114-1115, 1353, 2621-2622, 2632-2634, 2682-2684). She knew that the Kansas Attorney General's office had requested that the Kansas defendants change their postcard solicitations, their primary marketing tool. (App.180, 2620-2621, 2681-2682). 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. (App.1353-1354, 2619-2620, 2671-2672, 2680-2681). 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." (App.476).

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. (App.111, 154-155). 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. (App.2369-2370, 2694, 2703-2704, 2710).

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. (App.514, 2655-2656, 2676-2679). 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. (App.188, 1013, 1330, 1332). In fact, Chapman knew of no customers who actually received a grant based on her research results. (App.1332, 2654-2655, 2702-2703). 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

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. (App.475-478).

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

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.

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[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.

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.

First, Chapman is wrong that the district court made no "definitive finding"

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." (App.510).

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. (App.312-313, 1033-1034, 1062, 1292, 2360-2362, 2502-2503, 2709-2710).

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' tele

[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), *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

CONCLUSION

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

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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.

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Date: August 3, 2012

/s/ Michael D. Bergman
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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, I electronically filed the foregoing Appellees' Joint Response Brief using the court's CM/ECF system which will send notification of such filing to the following:

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